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 Response Brief

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I. INTRODUCTION

Riverside Generating Company, L.L.C. asks to be *served at retail* for 90 percent of the hours in any given year while denying Kentucky Power Company the ability to receive Commission-approved *retail rates* for such service. Its initial brief bottoms Riverside Generating's extraordinary request on three legs. None is sufficient to support its effort.

Riverside Generating first argues that the three Zelda units and two Foothills units constitute separate and remote sites as required by Tariff N.U.G., and that it is entitled to remote self-supply. But the Zelda and Foothills units are operated as, laid out as, and linked together by means of a common infrastructure as, a single site. As such, the units are neither separate nor remote and Riverside Generating is not eligible to remote self-supply.

For the first time in this proceeding Riverside Generating also argues that Kentucky Power failed to follow its own tariff in billing Riverside Generating. Riverside Generating's newly-minted argument unfairly denies Kentucky Power the ability to build the required record and is irrelevant to the question of whether Riverside Generating is eligible to remote self-supply.

Finally, Riverside Generating urges the Commission to permit Riverside Generating to remote self-supply "in spite of" the requirements of Tariff N.U.G. Its argument not only is without support in Kentucky law, but the relief it requests contravenes KRS 278.160 and essentially would authorize Riverside Generating to take service at wholesale while shifting $1.1 of the Company's annual revenue requirement onto Kentucky Power's remaining industrial and commercial customer. Such "free-riding" is neither required nor reasonable.

Riverside Generating's complaint must be dismissed with prejudice.

II. RESPONSE

A. The Record And Riverside Generating's Brief Demonstrate That The Riverside Facility Is A Single Site.

It is uncommon for the parties to a complaint case to agree on the principal facts underlying the dispute. Yet, the briefs filed by Kentucky Power and Riverside Generating largely conform with respect to the facts concerning the physical layout of, the operation of, and the unitary nature of the utility infrastructure supporting the operation of, the three Zelda units and the two Foothills units. These undisputed facts lead to but one conclusion: what Riverside Generating designates as the Zelda site and Foothills site are but two halves of the single Riverside Facility.

Because Riverside Generating, which bears the burden of proof, has not and cannot demonstrate that the Zelda units "are not located on the site of"[1] of the Foothills units, and conversely, that the Foothills units "are not located on the site of" he Zelda units, Riverside Generating is not eligible to remote self-supply under the terms of Kentucky Power Tariff N.U.G. Its complaint must be dismissed with prejudice.

1. The Facts Admitted By Riverside Generating Demonstrate That The Three Zelda Units And The Two Foothills Units Are Located On A Single Site.

Kentucky Power's initial brief describes in detail at pages 6-8 and 23-25 the unitary nature of the site on which the three Zelda units and two Foothills units are located. It similarly describes at pages 8-10 and 25 the common facilities and utilities shared by the Zelda and Foothills units. Finally, the Company's initial brief describes at pages 11-13 and 25-26 how the five units are operated by Riverside Generating as a single site.

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[1] Tariff Sheet 26-3 ("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* ....") (emphasis supplied).

Riverside Generating nowhere disputes in its initial brief the facts presented by Kentucky Power in the sections of the Company's initial brief identified above. In fact, many of the same facts can be found in Riverside Generating's initial brief:

- The Zelda units and Foothills units share a common entrance and railway crossing;[2]
- What Riverside Generating describes as the Zelda site and the Foothills site physically abut one another;[3]
- What Riverside Generating contends are two separate sites are separated only by a chain link fence;[4]
- The Zelda units and Foothills units share a common administrative building;[5]
- The Zelda units and Foothills units share a common warehouse;[6]
- The Zelda units and Foothills units share common utilities including a common gas lateral to the Riverside Facility, a common water line to the Riverside Facility, a common waste water outfall into the Big Sandy River, and a common septic system;[7]
- The Zelda units and Foothills units share a common street address;[8]
- The same workforce serves the Zelda units and Foothills units;[9]

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[2] Initial Brief of Riverside Generating Company, LLC, *In the Matter of: Riverside Generating Company, L.L.C. v. Kentucky Power Company*, Case No. 2017-00472 at 6, 27 (Ky. P.S.C. Filed November 5, 2018) ("Riverside Generating Initial Brief").

[3] *Id.* at 28 ("the sites do share a common fence line.")

[4] *Id.*

[5] *Id.*

[6] *Id.* at 27 n. 73.

[7] *Id.*

[8] *Id.*

[9] *Id.* at 26.

- "Back office operations" for the Zelda units and the Foothills units are provided by the same workforce;[10] and
- The three Zelda units and the two Foothills units typically are operated from the same control room.[11]

Other facts recited by Kentucky Power in its initial brief, such as the single continuous fence enclosing the perimeter of the facilities associated with the Zelda units and Foothills units, the location of the controlled access to the Foothills units on what Riverside Generating contends is the separate Zelda site, as well as the fact the two sections of the Riverside Facility form a single continuous tract with no intervening parcels separating the two, although unaddressed by Riverside Generating in its brief, are not disputed and may be found in or discerned from Riverside Generating's responses to data requests or its hearing exhibit 1.[12]

Riverside Generating's confirmation of these facts in its brief and by the evidence Riverside Generating itself presented puts paid – at least consistent with common usage of the English language – to its argument that the Zelda units and the Foothills units constitute separate sites. The adjective "separate" means "not connected; disjointed; detached"[13] and "detached, disconnected, or disjoined."[14] Adjoining parcels that are enclosed in a single continuous fence, that are knitted together by common facilities and utilities, and that are operated as a unity are

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[10] *Id.*

[11] *Id.*

[12] *See e.g.* Riverside Generating Response to KPSC 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 KPSC 1-__"); Riverside Hearing Exhibit 1.

[13] AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE at 1181 (1976).

[14] https://www.dictionary.com/browse/separate (last visited November 10, 2018). Other definitions of separate include "unconnected; distinct; unique;" "being or standing apart; distant or dispersed;" "existing or maintained independently;" and "not shared; individual or private."

anything but "not connected," "disconnected," or "detached." The point is made even more forcefully by an antonym of the term "separate": "adjacent."[15] Riverside Generating describes the Zelda and Foothills units throughout its brief as adjacent.[16]

2. Riverside Generating's Efforts To Explain Away The Record On Brief Are Unavailing.

Riverside Generating offers three arguments why these undisputed facts – and its acknowledgement of them – should not matter. It first contends that the common infrastructure and joint operation exist as a matter of its "convenience" and "efficiency."[17] It next argues that the Zelda units and the Foothills units should be deemed separate sites because – with sufficient modifications or agreements – the Zelda units and the Foothills units could be separately sold.[18] Finally, it points to the fact that although it claims it is "the real party in interest"[19] with respect to the Zelda units and the Foothills units, the Zelda and Foothills units are the subject to separate interconnection agreements in the names of two Riverside Generating entities.[20] These arguments are neither persuasive nor satisfy Riverside Generating's burden of proof.

Riverside Generating's convenience argument reverses cause and effect. It is the existence of the common facilities and utilities, as well as the physical layout of the Riverside Facility, all of which are emblematic of a single site, that give rise to the operational convenience and efficiencies. Indeed, the fact that the Zelda units and Foothills units are able to achieve

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[15] https://www.merriam-webster.com/thesaurus/separate (last visited November 10, 2018).

[16] Riverside Generating Initial Brief at 4, 6, 26, 27, 27 n.77, 28; Direct Testimony of Anthony Hammond, *In the Matter of: Riverside Generating Company, L.L.C. v. Kentucky Power Company*, Case No. 2017-00472 at 5 (Ky. P.S.C. Filed March 23, 2018) ("Hammond Direct"); *See also* Rebuttal Testimony of Anthony Hammond, *In the Matter of: Riverside Generating Company, L.L.C. v. Kentucky Power Company*, Case No. 2017-00472 at 5 (Ky. P.S.C. Filed June 14, 2018) ("Hammond Rebuttal").

[17] Riverside Generating Initial Brief at 26, 27, 28.

[18] *Id.* at 25-26.

[19] Hammond Rebuttal at 3-5.

[20] Riverside Generating Initial Brief at 7.

efficiencies from the shared facilities and utilities located at the Riverside Facility only further underscores the unitary nature of the site. Two truly separate sites –located at Lockwood in Boyd County and Zelda in Lawrence County (as posited by the Chairman for example)[21] – would not share, and would not derive any efficiency from, common water and gas laterals, a common septic system, a common wastewater outfall into the Big Sandy River. Nor would they share a common street address, a common entrance and driveway, or be enclosed by a continuous fence. They would – in fact – be what the Riverside Facility is not: separate sites.

Riverside Generating's argument that it could – with certain modifications, easements, and agreements – sell the Zelda units while retaining the Foothills units[22] also falls far short of carrying its burden of demonstrating that the Foothills units and Zelda units are separate sites. Riverside Generating is the master of its complaint in this case, and the facts it pled and proved, and the issue it presented is not the ownership of the Zelda and Foothills units by two separate entities that are subject to hypothetical agreements and easements. The facts pled and proved, and the issue presented, is whether the Zelda units and Foothills units, which are knitted together by common facilities and utilities without any such agreements or modifications, and which are operated as a unity, are separate sites. Certainly, the Commission has made clear that it is chary of resolving such hypotheticals as Riverside Generating presents.[23]

More fundamentally, the fact that Riverside Generating concedes that the Foothills units and Zelda units, if owned by separate entities, would require agreements to share "certain

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[21] VR 2:39:51.

[22] Riverside Generating Initial Brief at 28.

[23] Order, *In the Matter of: AT&T Communications Of The South Central States, Inc. And TCG Ohio For Arbitration Of Certain Terms And Conditions Of A Proposed Agreement With BellSouth Telecommunications, Inc. Pursuant To 47 U.S.C. Section 252*, Case No. 2000-00465 (Ky. P.S.C. May 16, 2001) ("This issue appears to be more hypothetical than actual. The Commission declines to address the issue....")

support facilities … for efficiency, convenience or *necessity* …"[24] again underscores that the Zelda units and Foothills units in fact exist as a single site. Truly separate sites would not require such shared use agreements upon the sale of one.

Finally, Riverside Generating points to the fact that the Zelda units and the Foothills units are the subject of separate interconnection agreements with Kentucky Power.[25] But these agreements simply reflect the difference in timing of the interconnections to Kentucky Power's system (November 2000 and August 2001),[26] as well as "the engineering and operational decisions made in connection with the Company's interconnection with the two portions of the Riverside Station."[27] At the time the interconnection agreements were executed separate legal entities, both of which were then subsidiaries of LS Power, controlled the Zelda units and the Foothills units and thus required separate agreements in different names. Riverside Generating now contends, as it must to qualify to remote self-supply under Tariff N.U.G., that a single entity – Riverside Generating – is the real party in interest.[28] The separate agreements thus *now* are probative of little if anything. They simply are a historical, but irrelevant, artifact of the legal entities LS Power employed in developing the Riverside Facility.

In addition, the agreement for the interconnection of the two Foothills units to Kentucky Power's system, like many other aspects of the relationship between the Zelda and Foothills

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[24] Riverside Generating Initial Brief at 28 (emphasis supplied).

[25] Riverside Generating's other arguments concerning the separate PJM identification numbers, the separate meters and the electrical isolation of the Zelda units and Foothills units were addressed at pages 28-29 of Kentucky Power's initial brief.

[26] *See* Kentucky Power Company's Response to KPSC PHDR-4 at Attachment 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 KPSC PHDR-__"); Kentucky Power Response to KPSC PHDR-4 at Attachment 2.

[27] 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 14 (Ky. P.S.C. Filed June 14, 2018) ("Wohnhas Direct").

[28] Hammond Rebuttal at 3-5.

units, provides for sharing and joint use of certain (albeit limited) aspects of the Zelda units' interconnection with the Company's system. The agreement thus provides for the Foothills units to use the "existing OPGW" [optical ground wire] between the Zelda units and Kentucky Power's Baker 345 kV Substation.[29] The agreement also provides for the Foothills units to use "the existing fiber pair" between the Zelda units and the Baker 345 kV Substation for telemetering.[30]

Whatever their evidentiary weight, and it is little if any, the separate interconnection agreements are insufficient to overcome the countervailing weight of the multiple shared and common facilities linking the Zelda units and the Foothills units, and the fact that Riverside Generating operates the Zelda units and the Foothills units as a single site.

3. Riverside Generating Fails To Carry Its Burden Of Proof.

Riverside Generating bears the burden of demonstrating that the three Zelda units "are not located on the site of the customer's"[31] Foothills units, and that the two Foothills units "are not located on the site of the customer's" Zelda units.[32] The record is consistently and overwhelmingly to the contrary. The three principal arguments it raises in its brief in an effort to overcome the record, do not, as discussed above, aid Riverside Generating's efforts to meet its burden of proof.

Nor can Riverside Generating meet its burden of proof – as it also attempts in its initial brief – by hypothesizing non-existent attributes.[33] Riverside Generating argues that it *could*

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[29] *See* Kentucky Power Company's Response to KPSC PHDR-4 at Attachment 2, page 52.

[30] *Id.* at 53.

[31] Tariff Sheet 26-3.

[32] *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.").

[33] Riverside Generating Initial Brief at 26-27.

operate the three Zelda units and the two Foothills units separately;[34] that it *could* staff the units separately;[35] that it *could* provide separate entrances and rail road crossings;[36] and that it *could* provide separate utility facilities,[37] but for reasons of convenience and efficiency Riverside Generating elects not to do so. But the fact that it is more efficient and convenient to operate a single site as a single site hardly assists Riverside Generating in demonstrating that the three Zelda units and the two Foothills units constitute separate sites. They are not.

The Riverside Facility looks like,[38] is operated as, and is physically configured as what it is: a single site. Riverside Generating is not entitled to remote self-supply under Tariff N.U.G.

B. Riverside Generating Has Not And Cannot Demonstrate That the Zelda Units And The Foothills Units Are Remote.

Riverside Generating in its initial brief ignores almost entirely the independent requirement under Tariff N.U.G. that separate sites be remote. Instead, apparently recognizing the futility of arguing the Zelda units and the Foothills units are remote, Riverside Generating limits its brief to its contention that the phrase "remote self-supply" must be elided from the tariff because it is irrational. Its argument is of two pieces.

First, Riverside Generating argues the term "remote," or at least Kentucky Power's construction of the term, is vague.[39] Second, Riverside Generating urges the Commission to

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[34] *Id.* at 26.

[35] *Id.*

[36] *Id.* at 27.

[37] *Id.*

[38] Riverside Generating Hearing Exhibit 1.

[39] Riverside Generating Initial Brief at 36 ("Kentucky Power's decision to place fervent (yet vague) on the physical proximity of the 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 ....") Riverside Generating's continued reliance in its initial brief on the electrical isolation of the Zelda units and the Foothills units and their separate PJM identification numbers to argue the units constitute separate sites is particularly untenable in light of the record evidence that the two Mitchell units share, and the two Big Sandy units shared prior to the 2015 retirement of Big

ignore the plain language of the tariff because, Riverside Generating contends, the language could lead to an unreasonable outcome.[40] Both arguments fail.

1. The Term "Remote" Is Not Vague.

There is nothing vague about the term "remote" as used in the phrase "remote self-supply." As the Chairman observed:

> But here is a Black's Law Dictionary of some ancient vintage. "Remote: far removed or separated in time, space or relation." And then a Merriam Webster that I've got off the Internet on my I-Pad – "Remote: separated by an interval or space greater than usual. Far removed in space, time or relation."[41]

More fundamentally, the term is far (even remote) from vague as applied by Kentucky Power to the three Zelda units and the two Foothills units. The Zelda units and Foothills units are by Riverside Generating's own admission "adjacent."[42] They are woven together by their shared infrastructure and physical layout, and are operated as a unity. In short, they are not remote.

Black letter law requires that the tariff be interpreted to give effect to all of its provisions.[43] "Remote self-supply" is an express provision of the tariff. The term "remote" makes clear that it is not sufficient that the generators be located on separate sites; the inclusion of "remote" as part of the plain language of the tariff also requires that the sites be not proximate to each other. Moreover, the relevant provision of Tariff N.U.G. includes the phrase "remote self-supply" in parentheses immediately following "not located on the site of the customer's

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Sandy Unit 2, the same characteristics. *See* VR 3:52:28; Kentucky Power Response to Riverside Generating PHDR 1-1. The Big Sandy units and the Mitchell units each constitute a single site.

[40] *Id.* at 36-37.

[41] VR 3:41:00.

[42] Riverside Generating Initial Brief at 4, 6, 26, 27, 27 n.77, 28.

[43] *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.")

generator." The proximity of the phrase to,[44] and inclusion as parenthetical, indicates the phrase was intended to further describe and modify the phrase ("not located on the site of the customer's generator") that immediately precedes it. The term "remote" is not simply a gratuitous restatement of the separate site requirement and must be given its plain effect.

The phrase "remote self-supply" has been a part of the Tariff N.U.G. since it was first approved by the Commission in 2001. Riverside Generating (at least until the first quarter of 2017) and Kentucky Power did not struggle its meaning or application during the intervening 15 years; instead both applied the phrase "remote self-supply" to render the Riverside Facility ineligible to self-supply in the fashion it seeks here. Riverside Generating's vagueness argument is too little and too late.

2. Tariff N.U.G. Does Not Lead To Unreasonable Outcomes.

Riverside Generating also argues that the Commission should discard the remoteness requirement because:

> 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, simply by intersecting its generation sites with U.S. Route 23 rather than building both sites alongside it. A tariff interpretation that requires such an outcome is unreasonable...."[45]

Riverside Generating's argument twice fails. Nothing in the record indicates that two generating units located across U.S. 23 from each other would be deemed remote (assuming, as Riverside Generating does, that they comprise separate sites) and qualify to remote self-supply. Riverside

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[44] *See e.g. Citizens Tel. Co. v. Newport*, 224 S.W. 187 (Ky. 1920) ("'By what is known as the doctrine of the 'last antecedent' relative and qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding....'"); *King Drugs, Inc. v. Commonwealth*, 250 S.W.3d 643, 646 (Ky. 2008) (applying the "last antecedent rule.")

[45] Riverside Generating Initial Brief at 36-37.

Generating's "unreasonableness" argument thus is premised upon its own unsubstantiated application of the tariff language to a hypothetical situation.

Second, the fact that the Zelda units and Foothills units are adjacent to each other at the Riverside Facility is not the only reason the units are not remote. Although the units' physical proximity in itself is sufficient to resolve the question against Riverside Generating, it is far from the sole basis. Two generating units separated only by U.S. 23 but sharing common utility laterals and infrastructure, and operated as a single site, as the Zelda units and the Foothills units are, could hardly be deemed "remote."

C. The 15-Minute Interval Provision In Kentucky Power's Tariffs I.G.S. Is The Company's Filed Rate, And Its Application Is Consistent with Riverside Generating's Course Of Performance, And The Parties' Course Of Dealing.

Riverside Generating argues for the first time in its initial brief that Kentucky Power's implementation of the 15-minute interval provisions in the Company's Tariff I.G.S. "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."[46] Riverside Generating errs.

1. Tariff I.G.S. Provides For A Fifteen Minute Billing Interval.

Riverside Generating first argues that the 15-minute billing interval is nowhere to be found in the Company's tariffs.[47] That argument overlooks the "Monthly Billing Demand" section of Kentucky Power's Tariff I.G.S. as made applicable by Tariff N.U.G.

Tariff N.U.G. provides that "[s]ervice to any load that is electrically isolated from the Customer's generator shall be separately metered *and provided in accordance with the generally*

[46] *Id.* at 2.

[47] Riverside Generating Initial Brief at 30-35.

available demand-metered tariff appropriate for such service to the Customer."[48] The demand-metered tariff appropriate to large industrial customers such as Riverside Generating is Tariff I.G.S.[49] That tariff in turn provides:

> **MONTHLY BILLING DEMAND**
>
> The monthly on-peak and off-peak billing demands in KW shall be taken each month as the highest single 15-minute integrated peak in KW as registered by a demand meter during the on-peak and off-peak billing periods, respectively.[50]

Demand (kW) and energy usage (kWh) are measured by and calculated from, respectively, readings taken from the same meter. As specified in the "Monthly Billing Demand" section of the tariff these readings, including those used to bill kWh consumed by the Riverside Generating, are taken using15-minute intervals.

2. Riverside Generating's Eleventh Hour Argument Concerning Kentucky Power's Calculation Of Riverside Generating's *Retail* Bill Is Untimely And Irrelevant To Any Issues Presented By Its Complaint.

Nearly eleven months after it filed its complaint to initiate this proceeding, Riverside Generating raises for the first time its claim that Kentucky Power is not calculating Riverside Generating's retail bill in accordance with the 15-minute billing provision of Tariff I.G.S. for an *unspecified number*[51] of the 15-minute billing increments.[52] Riverside Generating's delay in raising the claim is particularly problematic because the data upon which it purports to construct

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[48] Tariff Sheet 26-1 (emphasis supplied).

[49] Wohnhas Direct at 7.

[50] Tariff Sheet 10-2.

[51] Riverside Generating's argument appears to be limited to those 15-minute "shoulder" increments when it is relying on Kentucky Power's generation and ramping up or ramping down its own generation, or, when only one or more of the Zelda units, or only one or more of the Foothills units, but not both sets of units, are generating. As evidenced by both its brief and the Company's response to KPSC 1-2, Attachment 1, the argument is inapplicable to the other 15-minute billing increments.

[52] *See* Riverside Generating Initial Brief at 20-24.

its argument, Kentucky Power's response to KPSC 1-2,[53] was available for more than five months prior to Riverside Generating raising the claim for the first time. The argument also is missing from Mr. Hammond's rebuttal testimony, which was filed two weeks after the Company's response to KPSC 1-2. Riverside Generating likewise failed to raise its claim concerning the manner in which it is billed under Tariff I.G.S. at the September 27, 2018 hearing in this matter.

Riverside Generating's delay prejudices both the Commission and Kentucky Power. Neither was provided an opportunity to develop the issue on the record. Moreover, the argument is little more than an effort at rhetorical jujitsu. Tellingly, even in its brief, where it raises the issue for the first time, Riverside Generating does not expressly seek relief that would "correct" the claimed erroneous billings. Instead, Riverside Generating asks the Commission to use the alleged billing errors as a crow bar whereby it – unique among all of Kentucky Power's customers – could rely on Kentucky Power's generation and transmission facilities to receive retail electric service (energy for consumption and not resale)[54] during 90 percent of the hours in any year without paying retail electric rates to Kentucky Power for that energy:

> 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.[55]

Further, the Federal authorities cited by Riverside Generating[56] relate to the settlement of transactions in the wholesale market and are inapposite. These authorities do not purport to

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[53] Riverside Generating Initial Brief at 21. Kentucky Power's response to KPSC 1-2 was filed June 1, 2018.

[54] KRS 278.010(7).

[55] VR 9:18:44.

[56] See, *e.g.*, *id.* at 23 (citing *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)).

negate or diminish the authority of states and their regulatory commissions to establish and apply rules pertaining to the retail electric service. This Commission, and not FERC, retains exclusive jurisdiction to establish rules governing electric service furnished to a consumer in the Commonwealth for ultimate consumption. Suffice it to highlight Riverside Generating's own recognition that FERC has acknowledged that it lacks "a jurisdictional basis to determine when the provision of station power constitutes a retail sale," and that FERC's, and in this case PJM's, rules concerning wholesale market transactions govern only FERC-jurisdictional transactions, and not retail electric service rates or billing.[57]

Equally important, Riverside Generating's newly-minted billing argument is irrelevant to the issue it raises in its complaint. Riverside Generating's complaint seeks an order from the Commission allowing Riverside Generating to take retail service under the terms of the PJM OATT. Riverside Generating argues (albeit erroneously) it is entitled to do so under the remote self-supply provision of Tariff N.U.G. Whether Kentucky Power is properly billing Riverside Generating pursuant to the terms of Tariff I.G.S. is irrelevant to that issue.

In sum, the question of whether Riverside Generating was billed correctly pursuant to Kentucky Power's applicable tariffs is a question that can and should be resolved at another time. The Company will gladly discuss with Riverside Generating, as a matter of customer service, how those 15-minute intervals affect, in practice, the amounts that Kentucky Power bills to Riverside Generating for the retail electric service Riverside Generating actually receives. This is not a question presently before the Commission,[58] and it is a question the Company has not

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[57] *See* Riverside Generating Initial Brief at 18-19 (acknowledging that based on federal decisional and FERC precedent the "[Kentucky Public Service] Commission is not required by federal law to embrace FERC's positions with respect to station power").

[58] In reviewing Riverside Generating's allegation regarding how the Company applies the 15-minute interval provisions in Tariff I.G.S., the Company identified a discrepancy between the 15-minute intervals metered at the Riverside Facility, and the method by which its's generation output is reported by Kentucky Power to PJM for

had an opportunity to address, either on the record in this case or directly with Riverside Generating.[59]

3. Riverside's Generating's Position Regarding Netting In This Case is Incompatible With Riverside Generating's Course of Performance And The Parties' Course of Dealing.

Riverside Generating's efforts to avoid the plain terms of the tariffs under which it receives retail service, including the provisions regarding billing calculated by integrating the 15-minute intervals described in Tariff I.G.S., is underlined by Riverside Generating's repeated, and incorrect, assertion that there are no incremental costs to Kentucky Power to serve Riverside Generating.[60] Riverside Generating's premise cannot be reconciled with Riverside Generating's admission that it "require[s] energy in order to function while not generating," and that it has "historically purchased that energy from Kentucky Power at retail rates under the [I.G.S. and N.U.G.] tariff schedules."[61]

The discrepancy between these two statements hinges on the undisputed fact that Riverside Generating has been a retail customer of Kentucky Power for nearly two decades. The construction and maintenance of Kentucky Power's integrated generation resources, transmission

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settlements purposes. While the effect of this discrepancy is miniscule (in comparison to the undue harm that would result from allowing Riverside Generating to piggyback on Kentucky Power's other customers to receive free electric service from Kentucky Power the 90% of the time Riverside Generating is *not* generating), the Company intends to adjust its reporting calculations provided to PJM to resolve this discrepancy. In any case, this adjustment is also irrelevant to the present case before the Commission, as it is a matter related exclusively to the Federally-regulated contractual relationship between PJM, Kentucky Power, and Riverside Generating. The adjustment does not affect the amounts that Riverside Generating has been billed for retail service (which has been done correctly to the best knowledge of the Company), but only the PJM market settlements among PJM, Kentucky Power, and Riverside Generating pursuant to their FERC-regulated transactions.

[59] The Commission has explicitly declined to entertain matters first presented in post-hearing briefs to prevent a violation of due process. *See, e.g.*, Order, *In the Matter of: Joint Application of Louisville Gas And Electric Company For The Establishment Of A Home Energy Assistance Program*, Case No. 2001-00323 at 9 (Ky. P.S.C. Dec. 27, 2001).

[60] *See, e.g.*, Riverside Generating Initial Brief at 37-38.

[61] *Id.* at 10.

facilities, and other infrastructure have been scaled by taking into consideration the fact that Riverside Generating's requirements for electric service are part of the electric load that Kentucky Power is required to serve. Kentucky Power has incurred considerable costs to serve the load required by the customers in its service territory, including Riverside Generating during the 90 percent of the time it is not generating, over the course of the decades that Riverside Generating has been a retail customer of Kentucky Power. To allow Riverside Generating to receive service from Kentucky Power for 90 percent of the hours in any year at little or no cost, while requiring the Company's remaining industrial and commercial customers to pick up the tab for its free-ride is unreasonable and unfair.

Moreover, it is a cornerstone of Kentucky Power's obligation to provide reliable and safe electric service as a regulated Kentucky utility that the Company's filed retail rates, which the Commission has determined are just and reasonable, have been designed to reflect and support cost of providing service to *all* customers, and not just the incremental cost imposed by any single customer. Riverside Generating should not be allowed to piggyback on Kentucky Power's other customers. The theory that there is no incremental cost to serve Riverside Generating has no basis and should be rejected.

4. The 15-minute Interval Is Reasonably Necessary To Prevent Riverside Generating From Gaming the System.

The 15-minute interval provision of Tariff I.G.S. is fully compatible with the "peaking unit"[62] nature of Riverside Generating's operations. This billing interval reflects the fact that Kentucky Power supplies energy to Riverside for approximately 90 percent of the hours in any

[62] VR 9:35:20.

year.[63] Without it, Riverside Generating's installed capacity of 836 MW would enable it,[64] under its preferred monthly netting interval, to operate all five Riverside Facility units for only one hour out each month (or 0.14 percent of each month),[65] receive service from Kentucky Power for the remaining 99.87 percent of the month, and yet pay no or minimal retail rates.

Riverside Generating also is mistaken in arguing that the Company is seeking additional revenues from it.[66] Kentucky Power's current rates, which are regulated by the Commission, reflect Riverside Generating's contribution of $1.1 million annually to the Company's revenue requirement. The amounts that Riverside Generating seeks to avoid paying are not "additional revenue," but rather a foundational component of Kentucky Power Commission-regulated rates. The retail rates Riverside Generating seeks to avoid reflect the fact that Riverside Generating has been a retail customer of Kentucky Power contributing a share of Kentucky Power's revenue requirement for nearly two decades. They also form a portion of the resources required to permit Kentucky Power to fulfill its fundamental obligation under Kentucky law as the sole retail electric supplier in the Company's service territory[67] to provide "adequate, efficient and reasonable service"[68] to Riverside Generating and other customers. Billing Riverside Generating for the retail service it receives from Kentucky Power is consistent with the terms of Kentucky Power's retail tariffs filed with the Commission, with Riverside Generating's course of

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[63] VR 9:43:03; Wohnhas Direct, Exhibit RKW-1.

[64] Mr. Hammond testified that on average the Zelda units and Foothills units consume approximately 800 MWh in a month. VR 9:32:00

[65] 1 ÷ 720 = 0.0013888.

[66] *See, e.g.,* Riverside Generating Initial Brief at 39-40.

[67] *See* KRS 278.016 to KRS 278.018.

[68] KRS 278.030(1).

performance during the many years it has been a retail customer of Kentucky Power,[69] and with the parties' course of dealing during that lengthy period of time.

Like the drinking companion who sneaks out the back door while leaving his four acquaintances to pay his bar bill, Riverside Generating hopes to shift $1.1 million of the Company's revenue requirement to the remaining Tariff I.G.S. customers. There is nothing unfair, unjust, or unreasonable in preventing Riverside Generating from doing so.

D. Kentucky Power is Not Forcing Riverside Generating to Take Retail Service; Retail Service is the Only Service Available to Riverside Generating Under Kentucky Law.

Contrary to Riverside Generating's assertion,[70] Kentucky Power is not forcing Riverside Generating to take service at retail or "creat[ing] wholesale and retail transactions when neither need occur...."[71] The purely retail relationship between Kentucky Power and Riverside Generating is a function of Kentucky law, not the Company's whim, as the Company explained in its initial brief.[72] By statute, Riverside Generating takes "retail electric service"[73] during 90 percent of the hours in any year.[74] And Riverside Generating may only take retail electric service from Kentucky Power.[75] It is not permitted to take wholesale service from the Company.[76] Indeed, as the Commission held just last year, "[n]o retail electric customer is

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[69] *See* Kentucky Power's Initial Brief at 13-14, 31-33.

[70] *See, e.g.*, Riverside Generating Initial Brief at 3, 38.

[71] *Id.* at 3.

[72] Kentucky Power Initial Brief at 17-22.

[73] KRS 278.010(7).

[74] Kentucky Power Initial Brief at 18; Wohnhas Direct, Exhibit RKW-1.

[75] KRS 278.018(1); Kentucky Power Initial Brief at 17-18.

[76] Kentucky Power Initial Brief at 20-22.

authorized to participate directly or indirectly in any PJM wholesale market"[77] because the General Assembly "has not enacted any statute that allows retail electric customers … to participate in any fashion in wholesale electric markets."[78] Yet, at the hearing, Mr. Hammond conceded that what Riverside Generating is requesting in this case is that the Commission allow Riverside Generating to take wholesale service.[79] As set forth above and in the Company's initial brief, such a result would be unreasonable and is unsupported by the law and the record before the Commission.[80]

E. Riverside Generating's Argument That The Commission Should Allow It To Remote Self-Supply "In Spite Of" Kentucky Power's Tariffs Is Fundamentally At Odds With The Requirements Of Kentucky Law.

Riverside Generating's argument that the Commission should ignore the tariff's provisions rests on three new arguments.[81] None of the arguments offered by Riverside Generating support its efforts to rewrite the tariff or Kentucky law.

1. Service Is Available To Riverside Generating Only In Strict Conformity With The Provisions Of Kentucky Power's Tariffs.

Riverside Generating first contends, as its own argument heading makes explicit,[82] that the Commission should allow the Riverside Facility to remote self-supply notwithstanding the express language of Tariff N.U.G. KRS 278.160(2) unambiguously provides to the contrary:

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[77] *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, *13 (Ky. P.S.C. June 8, 2017).

[78] *Id.* at *7.

[79] VR 9:18:44.

[80] *See* Kentucky Power Initial Brief at 17-22.

[81] Other arguments, such as its erroneous contention that furnishing Riverside Generating's energy needs during 90 percent of the hours in any year when its units are not generating (an amount equal to almost 9.8 GWh in 2017), imposes no or immaterial incremental costs on Kentucky Power were previously addressed. Those discussions will not be repeated here.

[82] "If Riverside's requested relief cannot be granted under Kentucky Power's Tariff, ***then relief should be granted in spite of it***." Riverside Generating Initial Brief at 35 (emphasis supplied).

"no person shall receive service from any utility for a compensation greater or less than prescribed in such schedules." This statute represents "'a hard and fast rule that must be applied in all cases.'"[83] The statute, and the Filed Rate Doctrine that it codifies, require that Kentucky Power and Riverside Generating "strictly adhere" to the terms of the tariffs and not deviate from their plain terms by agreement or in fact.[84] Both KRS 278.160(2) and this Commission's decisions make clear that Riverside Generating must take retail electric service in strict conformity with the plain language of Kentucky Power's Commission-approved tariffs (Tariff N.U.G. and Tariff I.G.S.) during the 90 percent of the hours in any year in which its Zelda units and Foothills units are not generating.

Perhaps recognizing the obstacle KRS 278.160(2) and the plain language of the tariff pose to its efforts to remote self-supply, Riverside Generating also couches its argument as one of fact and implores the Commission to "reject[] Kentucky Power's unreasonable conclusion that the Zelda site and the Foothills site are a single site, and are therefore ineligible for remote self-supply as described in Tariff N.U.G.'s Special Terms and Conditions...."[85] Accepting Riverside Generating's arguments in support of its contention that the Zelda units and the Foothills units are separate sites based on a few characteristics (such as the units electrical isolation and unique PJM identification numbers) that they share with indisputably single site facilities such as Big

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[83] *In the Matter of: Hart Cnty. Bank & Trust Co. v. Kentucky Utilities Co.*, Case No. 2014-00331(Ky. P.S.C. February 2, 2015) (emphasis in cited case).

[84] *In the Matter of: Americonnect, Inc.; Investigation Into The Alleged Violations Of KRS 278.020 and KRS 278.160*, Case No. 1995-00220 (Ky. P.S.C. June 26, 1996) ("utilities must strictly adhere to their published rate schedules and may not, either by agreement or conduct, depart from them.")

[85] Riverside Generating Initial Brief at 35.

Sandy and Mitchell,[86] would be tantamount to reading the separate and remote site requirements out of the tariff.

Even less defensible is Riverside Generating's argument that the Commission "reject[] Kentucky Power's unfounded choice to implement its station power protocol utilizing an extremely short (or non-existent) netting interval."[87] The 15-minute netting interval is neither unfounded nor a choice. It is founded on the 15-minute interval explicitly required by the "Monthly Billing Demand" provision of the Company's Tariff I.G.S.[88] that is applicable to all similarly situated industrial and commercial customers taking service under the tariff.

2. Riverside Generating's Professed Capabilities And Enjoyment Do Not Permit It To Take Service At Wholesale In Contravention Of Kentucky Law For The Ninety Percent Of The Hours In A Year That It Relies On Kentucky Power For Its Electric Energy.

The second new arrow in Riverside Generating's quiver is its desire to be treated differently than every other retail electric service customer in Kentucky Power's service territory. It thus writes:

> 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 station power needs utilizing the protocol available under PJM's OATT.* 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*

[86] VR 3:52:28; Kentucky Power Company's Response to Riverside Generating PHDR 1-1.

[87] Riverside Generating Initial Brief at 35.

[88] Tariff Sheet 10-2.

protocol and require Riverside to satisfy its station power needs with retail purchases.[89]

This single paragraph, more than anything else in this proceeding, captures both the impetus for and effect of Riverside Generating's complaint. Riverside Generating demands that it be treated differently than every other retail electric service customer in Kentucky Power's service territory, and that it be permitted to take service ***at wholesale*** and ***not retail*** for the 90 percent of the hours in any year it relies on Kentucky Power to meet its station power needs.[90]

Whatever Riverside Generating's "perfect[] capabil[ity]," and its desired "enjoyment of the PJM station power protocol," this Commission has made clear that the General Assembly "has not enacted any statute that allows retail electric customers ... to participate in any fashion in wholesale electric markets."[91] Thus, "[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."[92] These two sentences serve as a complete and final "no" to Riverside Generating's claim.

3. Tariff N.U.G Does Not Unreasonably Discriminate Against Riverside Generating By Treating It Like Other Large Consumers Of Electric Energy.

Riverside Generating's final basis for urging the Commission to disregard the plain language of Tariff N.U.G. is its claim the tariff unreasonably discriminates against Riverside Generating by treating it *like* other large consumers of electric energy during the 90 percent of the hours in any year that it relies upon Kentucky Power for its electric energy needs.

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[89] Riverside Generating Initial Brief at 39-40 (emphasis supplied).

[90] VR 9:18:44.

[91] *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).

[92] *Id.* at *13.

Specifically, it argues that "Tariff N.U.G. is not reasonable as applied against Riverside as it treats Riverside's *consumption of power as a retail sale similar to that made to a large industrial customer*, but fails to adequately account – both in theory and implementation – for the fact that Riverside is offsetting its consumption against greater self-supply and remote generation."[93] In support of its argument it cites both KRS 278.170 and the Supreme Court's decision in *Pub. Serv. Com'n v. Commonwealth of Kentucky*.[94] Neither the statute nor the decision aid Riverside Generating's efforts to avoid the plain language of the tariff.

During the 90 percent of the hours in each year that Riverside Generating relies on Kentucky Power for its electric energy it is treated like every other large industrial or commercial customer receiving service from Kentucky Power for ultimate consumption. That is, it is charged in accordance with the appropriate retail tariff for the "retail electric service"[95] Kentucky Power provides. Significantly, nowhere in its brief does Riverside Generating argue that it is not receiving "electric service furnished to a consumer for ultimate consumption"[96] during the period its Zelda units and Foothill units are not generating.

KRS 278.170(1) prohibits "subject[ing] any person to any unreasonable prejudice or disadvantage." Treating Riverside Generating like every other large industrial or commercial customer during the 90 percent of the hours in a year its units are not generating is hardly a prejudice or disadvantage, much less an unreasonable one. Nor is it unreasonable for Kentucky Power to use the same 15-minute billing period it uses for all other I.G.S. customers. Finally,

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[93] Riverside Generating Initial Brief at 35-36 (emphasis supplied).

[94] 330 S.W.3d 660 (Ky. 2010).

[95] KRS 278.010(7) (defining "retail electric service" as "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.")

[96] *Id.*

nothing in KRS 278.170(1) compels Kentucky Power to apply a netting interval that FERC permits (but does not require) for wholesale transactions to Kentucky Power's retail electric service to Riverside Generating.

Pub. Serv. Com'n v. Commonwealth of Kentucky is inapposite. There, the Court held that KRS 278.170(1) did not prohibit the Commission from authorizing reduced economic development rates based upon reasonable classifications.[97] Nothing in the decision prohibits applying like rates to like service, or requires that utilities incorporate permissible (but not required) provisions with respect to wholesale transactions into their retail rates.

III. 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:

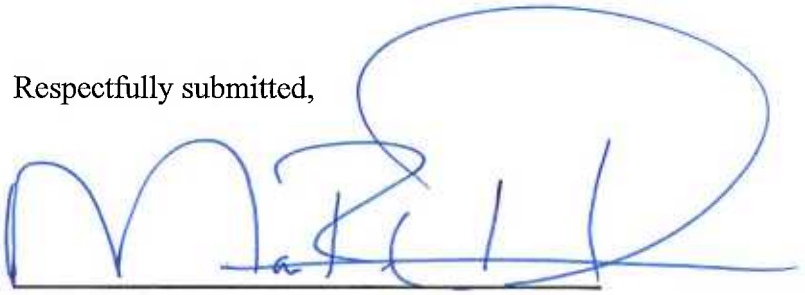
(a) Dismissing Riverside Generating Company, L.L.C.'s complaint with prejudice;

(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.

[97] 320 S.W.2d at 668.

Respectfully submitted,



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