

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

THE APPLICATION OF DUKE ENERGY)	
KENTUCKY, INC. FOR AN ORDER)	
APPROVING THE ESTABLISHMENT OF A)	CASE NO.
REGULATORY ASSET FOR THE)	2020-00031
LIABILITIES ASSOCIATED WITH THE)	
PJM EXPENSES RELATED TO THE)	
GREENHAT ENERGY, LLC DEFAULT)	

MOTION FOR REHEARING

Comes now Duke Energy Kentucky, Inc. (Duke Energy Kentucky or the Company), by counsel, pursuant to KRS 278.400 and other applicable law, and does hereby respectfully request the Commission to grant rehearing and vacate and amend its September 30, 2020 Order in this proceeding to authorize Duke Energy Kentucky to establish a regulatory asset, respectfully stating as follows:

I. BACKGROUND

Duke Energy Kentucky filed an application to establish a regulatory asset arising from the June 21, 2018 declaration by PJM Interconnection, LLC (PJM) that GreenHat Energy, LLC (GreenHat), a PJM member and Financial Transmission Rights (FTR) market participant, was in default in the approximate amount of \$1.2 million.¹ Following a process lasting just over eighteen months, GreenHat’s default resulted in a negotiated settlement that was approved by the Federal

¹ See Application, ¶ 4. GreenHat’s total mark to auction losses were approximately \$122.8 million.

Energy Regulatory Commission (FERC) on December 30, 2019.² The settlement required Duke Energy Kentucky to pay \$391,173.32 through February 2020 with an additional estimated \$71,031.22 due and owing from March 2020 through June 2021.³

Duke Energy Kentucky began collecting the cost of the GreenHat settlement through its Fuel Adjustment Clause (FAC) in July 2018. However, during the first six-month FAC review encompassing the settlement recovery period, the Commission determined that recovery should be accomplished via an alternative method, including a base rate case, rather than through the FAC:

While the Commission notes that FTR costs are associated with the cost of generation, the Commission finds that Duke Kentucky should not utilize the FAC to pass through the costs of the GreenHat default under Billing Line Item 1999 as the Item code is not listed in Duke Kentucky's FAC tariff for acceptable fuel-related costs charged to the Company by PJM.

....

Should Duke Kentucky want to recover fuel-related costs such as the GreenHat default costs that are not passed through the FAC tariff via listed PJM billing line Items, *it has a number of options* such as seeking recovery through base rates in a base rate case or requesting to update its FAC Tariff in a base rate case.⁴

Importantly, the Commission's FAC Order in Case No. 2019-00006 recognized that the GreenHat default costs were fuel-related and could be recovered from customers. Nonetheless, the Commission directed Duke Energy Kentucky to commence refunding the amounts associated with the GreenHat default that were previously collected through the Company's FAC over a three-

² See *id.*, ¶ 5.

³ A revised estimate for amounts due from March 2020 through June 2021 indicates that the estimated payment will be \$35,606.08 rather than the original estimate of \$71,031.22.

⁴ *In the Matter of the Electronic Examination of the Application of the Fuel Adjustment Clause of Duke Energy Kentucky, Inc. from November 1, 2016 through October 31, 2018*, Order, Case No. 2019-00006, pp. 4, 5 (Ky. P.S.C. Dec. 26, 2019) (emphasis added). Although the Company's FAC tariff plainly indicated that Duke Energy Kentucky could recover fuel-related expenses even if they were not specifically tied to enumerated PJM Billing Line Items (BLIs), the Commission nevertheless chose not to allow recovery of the GreenHat settlement expense under that provision of the tariff.

month period commencing in February 2020.⁵ Nothing in the Commission's Order in that case indicated that the magnitude of the costs was an issue affecting recovery.

Quite unfortunately, the seven-month delay between the date the record closed in Case No. 2019-00006 (May 17, 2019) and the date of entry of the Commission's FAC Order (December 26, 2019) effectively precluded Duke Energy Kentucky from including the costs of the GreenHat settlement or seeking to amend its FAC tariff in the electric base rate case filed on September 3, 2019 and docketed as Case No. 2019-00271.⁶ Accordingly, on February 14, 2020, Duke Energy Kentucky filed its Application in the present case seeking authority to establish a regulatory asset for the total amount of the sums paid by the Company as part of the GreenHat settlement. The Attorney General did not intervene and the Commission conducted two rounds of written discovery.

In the Commission's September 30, 2020 Order, the Commission summarized Duke Energy Kentucky's argument as follows:

As described above, Duke Kentucky argues that the GreenHat default expenses should be treated as a regulatory asset because they are 1) extraordinary or nonrecurring expenses which could not have reasonably been anticipated or included in the utility's planning; or 2) expenses resulting from a statutory or administrative directive. Duke Kentucky also argues that the GreenHat default charges are fuel related and that the magnitude of the GreenHat default charges is not a reasonable basis for disallowance. Duke Kentucky's total allocated default charges, which span 36 months, are estimated to be \$462,205.⁷

⁵ See *id.*, p. 5 ("Beginning with the expense month for February 2020, Duke Kentucky should credit an amount equal to \$37,079.84 for three months until May 2020.").

⁶ See *In the Matter of the Electronic Application of Duke Energy Kentucky, Inc. for (1) An Adjustment of the Electric Rates; (2) Approval of New Tariffs; (3) Approval of Accounting Practices to Establish Regulatory Assets and Liabilities; and (4) All Other Required Approvals and Relief*, Application, Case No. 2019-00271 (filed Sept. 3, 2019).

⁷ Order, Case No. 2020-00031, p. 6 (Ky. P.S.C. Sept. 30, 2020).

Before making specific findings, the Commission listed several reasons why – historically speaking – it would not approve the establishment of a regulatory asset:

The Commission has historically not allowed a utility to establish a regulatory asset after a cost has been recorded as an expense and the utility has closed its books for the relevant fiscal year. The Commission has also historically denied regulatory asset treatment for expenses deemed immaterial. Furthermore, an expense resulting from a statutory or administrative directive is incurred in pursuit of complying with those directives. If a tariff that governs the recovery of a particular cost were a statutory or administrative directive that justified the treatment of that expense as a regulatory asset, then any of Duke Energy Kentucky's PJM expenses could fit within that standard, which would be unreasonable.⁸

The Commission then made five specific factual findings to support its conclusion that Duke Energy's request for authority to establish a regulatory asset should not be approved. The first finding states that the Company's request for a deferral is untimely as its books have already been closed. The second finding essentially boils down to the Commission concluding that the Company failed to establish that the GreenHat default expenses are material to Duke Energy Kentucky's financial position.⁹ The third and fourth findings both arise from the Commission's negative perception of the PJM-administered FTR market that gave rise to GreenHat's default. In this regard, the Commission's Order finds that Duke Energy Kentucky failed to establish that GreenHat's default could not have been anticipated based upon a prior default by another market participant noted in PJM's Independent Consultant's Report that was commissioned in the wake of GreenHat's default;¹⁰ and that PJM's members – including Duke Energy Kentucky – allegedly failed to ensure adequate and appropriate market and credit rules in the PJM FTR market.¹¹ The

⁸ Order, pp. 6-7.

⁹ *See id.*, p. 7.

¹⁰ *See id.*

¹¹ *See id.*

fifth finding in the Commission’s September 30, 2020 Order is essentially a policy statement that Duke Energy Kentucky’s customers should not bear the burden of ensuring PJM’s rules (credit and otherwise) are adequate because they pay the costs of the Company’s participation in PJM.¹² The Company respectfully contends that the foregoing conclusions are misplaced and that rehearing is necessary.

II. ARGUMENT

Underlying each argument asserted herein is the fundamental and undisputed fact that the expenses in question are fuel-related and were eligible for recovery. Such was the Commission’s express finding in Case No. 2019-00006 and nothing in the Commission’s September 30, 2020 Order in this case suggests otherwise. The GreenHat expense is a legitimate expense incurred as a result of Duke Energy Kentucky’s participation in PJM’s FTR market under credit guidelines, tariffs and the settlement agreement approved by FERC.

A. Duke Energy Kentucky Timely Submitted its Request to Establish the Regulatory Asset

The Commission notes in its Order that it has “historically not allowed a utility to establish a regulatory asset after a cost has been recorded as an expense and the utility has closed its books for the relevant fiscal year.”¹³ Duke Energy Kentucky respectfully submits that the Order is in error to the extent that it categorizes the GreenHat expense as not being incurred in 2020. Since all refunds have been issued to customers in 2020, it is in fact a current expense. Likewise, Commission precedent supports the establishment of a regulatory asset due to the date upon which the Commission’s Order in Case No. 2019-00006 was entered.

¹² See *id.*, p. 8.

¹³ See Order, Case No. 2020-00031 p. 6 (Ky. P.S.C. Sept. 30, 2020) citing *In the Matter of the Application of Duke Energy Kentucky, Inc. for an Order Approving the Establishment of a Regulatory Asset Related to Voluntary Opportunity and Other Post-Retirement Expenses*, Order, Case No. 2010-00523 (Ky. P.S.C. July 14, 2011).

1. Because the Commission Directed the Company to Credit the Fuel-Related Expenses Related to the GreenHat Default Charges in 2020, Such Costs are Current and Eligible for Deferral

As previously explained in the Company’s Application in these proceedings, the Company had included these fuel-related costs attributable to the GreenHat default for recovery in its FAC, as the Company believed its tariff permitted such recovery. The Company’s FAC tariff expressly authorizes recovery of fuel costs “including but not limited to” those expenses charged to enumerated PJM Billing Line Items (BLIs). The Commission issued its decision in Case No. 2019-00006 on December 26, 2019, where it only permitted fuel-related costs from PJM that were assigned to the BLIs specifically enumerated in the tariff. At the time of that FAC proceeding, which encompassed the period ending October 31, 2018, the Company had included approximately \$111,239.52 in GreenHat-default related costs in its FAC.¹⁴ With the Commission’s December 26, 2019 Order, the Company was directed to commence crediting those funds back to customers through its FAC commencing in February 2020 – this year. Similarly, on February 4, 2020, in Case No. 2019-00230, the Commission issued a companion Order related to the FAC period ending April 30, 2019, directing the Company to credit back an additional \$159,257.97 of fuel-related costs attributable to the GreenHat default beginning in May 2020.¹⁵

The Commission’s two FAC Orders directed the Company to incur an expense by crediting these costs back through its FAC in calendar year 2020 (February through July 2020 expense months). Although these fuel-related costs may have been billed by PJM in prior periods, such costs had been included in the FAC as recoverable expenses until the Commission issued its Orders stating otherwise, five calendar days (three business days) prior to the end of 2019, and again in

¹⁴ *Id.* pg. 3.

¹⁵ *In the Matter of the Electronic Examination of the Application of The Fuel Adjustment Clause of Duke Energy Kentucky, Inc., from November 1, 2018 Through April 30, 2019*, Order, Case No. 2019-00230, p. 2-3. (Ky. P.S.C. February 4, 2020).

February 2020. As these two Orders both directed the Company to commence the crediting of these costs back through its FAC beginning in 2020, these costs are current expenses for accounting purposes. Therefore, the Commission's finding that the deferral should be denied on the basis they were expenses incurred in prior periods is inaccurate. The Company's books remain open for 2020, and the Company's Application in this proceeding was timely filed. These fuel-related costs are eligible for deferral now. Moreover, the Commission has routinely adjusted a utility's FAC for periods crossing over from one year to the next.

2. Commission Precedent Supports Authorizing a Regulatory Asset for Late Year Expenses

Furthermore, if the Commission's September 30, 2020 Order is correct that the GreenHat expense was incurred in 2019, the corresponding notion that a regulatory asset cannot be established for a such an asset in the next year is merely a rule of convenience rather than a rule of law.¹⁶ In fact, the Commission previously established a procedure to provide for the creation of regulatory assets in the context of storm-related restoration expenses incurred late in a calendar year.¹⁷ It is not uncommon for utilities – or other corporations – to sometimes have to restate financial results based upon subsequent events that were undecided at the time of a fiscal year's end. In Case No. 2010-00523, which the Commission relies upon, the Commission denied the Company's 2010 request to establish a regulatory asset because it was filed on December 29, 2010, a mere two days before the calendar year closed.

¹⁶ See *In the Matter of the Application of East Kentucky Power Cooperative, Inc. for an Order Approving the Establishment of a Regulatory Asset for the Depreciation and Accretion Expenses Associated with the Smith Station Landfill Asset Retirement Obligation*, Order, Case No. 2018-00027 (Ky. P.S.C. Mar. 8, 2018).

¹⁷ See, e.g., *In the Matter of the Electronic Application of Louisville Gas and Electric Company for an Order Approving the Establishment of a Regulatory Asset*, Order, Case No. 2019-00017 (Ky. P.S.C. Mar. 25, 2019); *In the Matter of the Application of Kentucky Power Company for an Order Approving Accounting Practices to Establish Regulatory Assets and Liabilities Related to the Extraordinary Expenses Incurred by Kentucky Power Company in Connection with the Two 2015 Major Storm Events*, Order, Case No. 2016-0018 (Ky. P.S.C. Dec.12, 2015).

This case is clearly different. Duke Energy Kentucky was not on notice that it even needed to seek permission to establish a regulatory asset until December 26, 2019. Duke Energy Kentucky filed the request to establish the regulatory asset before its 2019 books were fully audited and closed.¹⁸ By seeking the relief as quickly as possible, the Company sought to most accurately state its true financial condition based upon the dictates of the Commission in its December 26, 2019 FAC Order in Case No. 2019-00006. Nothing in the Commission's FAC Order contradicted the requirement of ASC-980-340-25-1 that future cost recovery of the GreenHat expense was probable. Due to the seven-month delay in receiving the FAC Order, it was simply impossible to seek and obtain approval to establish a regulatory asset prior to the completion of the fiscal year on December 31, 2019. Indeed, counting the date the Commission's Order was entered, there were only three business days remaining in the year. Duke Energy Kentucky diligently sought approval to establish a regulatory asset – as the December 26th Order in Case No. 2019-00006 contemplated. By not issuing the Order in Case No. 2019-00006 sooner, the Commission effectively denied the Company future cost recovery. There is no reason that this type of expense should be treated differently than storm recovery expenses that occur within the fourth quarter of a calendar year. In such incidents, the Commission has an established procedure to allow regulatory assets to be created.¹⁹ To discriminate based upon the nature of the cost lacks any rational basis. The plain effect of the December 26, 2019 Order is unfairly, unjustly and unreasonably punitive and confiscatory.

¹⁸ Duke Energy closed its books and issued its 2019 10-K on February 20, 2020.

¹⁹ See, e.g., *In the Matter of the Electronic Application of Louisville Gas and Electric Company for an Order Approving the Establishment of a Regulatory Asset*, Order, Case No. 2019-00017 (Ky. P.S.C. Mar. 25, 2019); *In the Matter of the Application of Kentucky Power Company for an Order Approving Accounting Practices to Establish Regulatory Assets and Liabilities Related to the Extraordinary Expenses Incurred by Kentucky Power Company in Connection with the Two 2015 Major Storm Events*, Order, Case No. 2016-0018 (Ky. P.S.C. Dec.12, 2015).

It is unfair and unreasonable to now punish the Company for not acting sooner, particularly when the effect of such a decision is to permanently preclude the Company's recovery of what are acknowledged to be legitimate expenses. By contrast, granting Duke Energy Kentucky's request to establish a regulatory asset preserves the Company's records in a more factually accurate manner and allows the Company to seek recovery of the expenses in a future rate proceeding where the merits of cost recovery may be considered within the broader context of the utility's revenues and expenses. Ratepayers are not harmed by allowing the Company to establish a regulatory asset and Duke Energy Kentucky's ability to seek future cost recovery of what is acknowledged to be a legitimate expense is preserved. This alternative is far superior to permanently precluding the Company from recording the regulatory asset without the merit of cost recovery ever being considered.

B. The Commission's Precedent Does Not Require a "Materiality" Requirement for Establishing a Regulatory Asset

The Commission rejected the Company's request to establish a regulatory asset in this case based, in part, upon the conclusion that the expense in question was immaterial. It must be noted that the alleged immateriality of the GreenHat default expenses is due to Duke Energy Kentucky negotiating a lower settlement, which FERC approved. The Commission's Order creates a perverse economic incentive by punishing Duke Energy Kentucky for acting in its customers' best interests in negotiating a lower settlement for the defaulted FTRs. Confronted with the GreenHat default, Duke Energy Kentucky acted consistently with prior Commission's directives and undertook efforts to mitigate the exposure its customers would face.²⁰ The reality is that the

²⁰ See *In the Matter of: Application of Duke Energy Kentucky, Inc. for (1) A Certificate of Pub. Convenience & Necessity Authorizing the Constr. of an Advanced Metering Infrastructure; (2) Request for Accounting Treatment; & (3) All Other Necessary Waivers, Approvals, & Relief*, Case No. 2016-00152 (Ky. P.S.C. May 25, 2017) ("The Commission finds that Duke Kentucky should make all reasonable efforts to mitigate the amount of the regulatory asset due to the stranded meter costs.").

magnitude of the default allocated to Duke Energy Kentucky, approximately \$414,773 in total to date, is precisely because it saved its customers millions of dollars in the settlement negotiation process. It is unfair, unjust and unreasonable to punish Duke Energy Kentucky by not allowing it to record a regulatory asset on the basis that it negotiated too favorable of a settlement for its customers.

Additionally, the Company disagrees with the Commission's conclusion that the expenses at issue are immaterial based upon a comparison to the Company's rate base in 2019 or forecasted in 2021.²¹ The Company's rate base is an inappropriate comparison to this fuel-related expense. For example, as reported in the Company's FERC Form 1, for 2019, the Company's fuel expense for 2019 was \$69.5 million versus the 2019 rate base comparison used by the Commission of \$741.4 million.²²

As it relates to a fuel-related expense, the materiality threshold should have no bearing on recoverability. The Commission previously determined that if the Company wants to "recover fuel-related costs such as the GreenHat default costs that are not passed through the FAC tariff via listed PJM billing line items, it has a number of options *such as* seeking recovery through base rates in a base rate case or requesting to update its FAC tariff in a base rate case."²³ The Commission's Order did not state that a base rate proceeding and updating the FAC tariff in a base rate case were the only avenues for potential recovery. The Commission stated that there are a number of options "such as" the two items enumerated in the Commission's Order. Indeed, the Company's deferral Application in this proceeding is exactly the vehicle to effectuate the first "option" identified by the Commission, namely the recovery through base rates. Absent a deferral,

²¹ Order, pg. 6.

²² See Duke Energy Kentucky FERC Form 1, 2019, pg. 320.

²³ Order, p. 5. (emphasis added).

the only way for the Company to recover such costs would be to include such costs within a rate case test period that coincides with when such costs are being incurred. The timing of the Commission's Order precluded the Company from doing just that. The Company had filed its rate case, which would have included such costs in its test year, in September 2019, nearly three months before the Commission issued its Order in Case No. 2019-0006, and five months after the Commission held its evidentiary hearing in the case.

Finally, the Commission has previously authorized deferrals for the Company for amounts smaller than those at issue in this proceeding. In Case No. 2008-00308, the Commission authorized deferral for Duke Energy Kentucky of \$200,000 of conditional funding per year for carbon capture and sequestration research by The Carbon Management Research Group.²⁴ This conditional funding was for a period of up to 10 years, with no guarantee after the first year of funding. Although Duke Energy Kentucky ultimately provided funding for the full term, the fact that the Company was only committing to the first year was made clear to the Commission. And yet, the Commission authorized the deferral, without regard to materiality based upon an arbitrary comparison to the Company's rate base. Similarly, in Case No. 2016-00152, the Commission, among other things, authorized the creation of a regulatory asset for incremental operations and maintenance expense to create an AMI meter Opt-Out program estimated as an additional \$140,000.²⁵

²⁴ See *In the Matter of the Joint Application of Duke Energy Kentucky, Inc., Kentucky Power Company, Kentucky Utilities Company, and Louisville Gas and Electric Company for an Order Approving Accounting Practices to Establish Regulatory Assets and Liabilities Related to Certain Payments Made to Carbon Management Research Group and the Kentucky Consortium for Carbon Storage*, Order, Case No. 2008-00308, p. 2 (Ky. P.S.C. Oct. 30, 2008).

²⁵ See *In the Matter of the Application of Duke Energy Kentucky, Inc., for (1) A Certificate of Public Convenience and Necessity Authorizing the Construction of an Advanced Metering Infrastructure; (2) Request for Accounting Treatment; and (3) All Other necessary Waivers, Approvals, and Relief*, Order, Case No. 2016-00152, p. 16 (Ky. P.S.C. May 25, 2017); referencing Stipulation and Recommendation, Appendix A to the Order pg. 8.

C. The Commission’s Denial of a Request to Establish a Regulatory Asset Based upon Failures in PJM’s Market Operations is Inappropriate and Violates Due Process

The Commission’s September 30th Order in this case signals an unprecedented attack upon the value of PJM as a market operator and significantly overstates the role of Duke Energy Kentucky (or any other PJM member) in the series of events that gave rise to GreenHat’s default. The Order offends notions of due process by singularly relying upon a report that was never within the administrative record. Moreover, the Commission’s characterization of the report fails to properly note that it was the repeated lapses of PJM’s management, not PJM’s stakeholders, that created the conditions for GreenHat’s default.

1. Reliance Upon PJM’s Independent Consultant’s Report is a Violation of Due Process

It bears emphasis that a significant portion of the Commission’s Order relies upon a single comment published in an independent review of the GreenHat situation by a consultant commissioned by PJM’s Board. That report was never included in the administrative record of this case, yet it somehow became a key component of the Commission’s Order. It is a fundamental violation of due process to base a decision upon a report for which Duke Energy Kentucky had no awareness of its significance to the Commission. When Duke Energy Kentucky agreed to submit the case for a decision, it was expressly based upon the existing administrative record, which did not include PJM’s Independent Consultant’s Report.²⁶ It is well-established that due process requires the opportunity to know what evidence is being considered and having a meaningful opportunity to test, explain or refute that evidence.²⁷ Duke Energy Kentucky was deprived of the

²⁶ See Letter from Rocco D’Ascenzo to Kent Chandler, Case No. 2020-00321 (filed May 18, 2020) (“Duke Energy Kentucky, Inc. respectfully requests that the matter be submitted for decision *based upon the existing evidentiary record.*”) (emphasis added).

²⁷ See *Kentucky American Water Co. v. Com. ex rel. Cowan*, 847 S.W.2d 737, 741 (Ky. 1993) (“Under due process, the AG and the City were entitled to know what evidence is being considered and are entitled to an opportunity to test, explain and/or refute that evidence.”) citing *Utility Regulatory Commission v. Kentucky Water Service, Inc.*, 642

opportunity to be heard on the evidence which was not in the record. Accordingly, if the role of stakeholders in the GreenHat default is a critical element of the Commission's analysis as to whether to grant or deny the request for a regulatory asset, then Duke Energy Kentucky must be afforded the opportunity to present (and likely subpoena) witnesses with knowledge that would tend to support or disclaim the conclusions of the Independent Consultant's Report.

2. The Commission's Order Ignores the Most Critical Findings From PJM's Independent Consultant's Report

The Commission's Order suggests that the GreenHat default was somehow primarily the fault of the PJM stakeholders. Nothing in the Independent Consultant's Report supports this conclusion, however. The Commission's statement in its Order that, "Duke Kentucky and other members failed to fulfill these [market and credit] requirements in the case of the rules that led to the GreenHat default,"²⁸ is based upon a previous incident that occurred twelve years earlier within PJM and that was noted by PJM's Independent Consultant. However, a full reading of the relevant text of the Independent Consultant's Report reveals that the alleged failure to anticipate future market defaults and prospectively prevent them was based upon the inactions of PJM's management. As PJM's own consultant concluded:

"In reviewing the materials that PJM presented to its stakeholders, we noted the absence of management recommendations to implement the first three major Market Reform proposals as referred to above. In any case, we find that PJM management did not go far enough to emphasize these critical policy advances to its stakeholders or its Board."²⁹ (emphasis in original).

S.W.2d 591 (Ky. App. 1982); *Ohio Bell Telephone Company v. Public Utility Commission of Ohio*, 301 U.S. 292 (1937).

²⁸ Order, Case No. 2020-00031, p. 7 (Ky. P.S.C. Sept. 30, 2020).

²⁹ *Report of the Independent Consultants on the GreenHat Default*, PJM, p. 16 (March 26, 2019).

It is a misreading of the Independent Consultant's Report to claim that PJM's stakeholders, which includes both the Commission through the long-established Organization of PJM States (OSPSI) and the Attorney General through the Consumer Advocates of the PJM States (CAPS), were complicit in failing to adopt the previously noted market reforms when PJM's own management failed to emphasize their importance.

Looking beyond the narrow point in the Independent Consultant's Report cited by the Commission, a full reading of the Report further illustrates that it was market participants, such as Duke Energy Kentucky, that first raised concerns about GreenHat's credit position. Indeed, the Independent Consultant noted that it was an FTR market participant – not PJM's internal analysis – that first raised concerns with GreenHat's credit risk with PJM's senior management.³⁰ The Independent Consultant further explained:

We found that at least four different experts from FTR market participants had alerted PJM management that, based on the publicly posted data they had analyzed, GreenHat's open positions had grown significantly and merited attention and action. Unfortunately, these warnings were given insufficient weight, and did not prompt action by PJM.³¹

The Independent Consultant's Report concludes by stating, "That no one at PJM showed sufficient skepticism, or reached outside the organization for help and advice, or forced the organization to focus greater attention and resources on the problem and question its strategy, reflects the unfounded sense of confidence we speak to here."³² PJM's management had far

³⁰ See *id.*, p. 18 ("On February 13, 2017, executives from [FP1] met in Washington, D.C. with PJM's CFO and SVP for Market Operations to discuss PJM's credit policy and [FP1]'s concerns about the GreenHat portfolio. [FP1] asserted its view that GreenHat's portfolio would lose between \$35 and \$40 million by the time the positions settled in two to three years. PJM's system, in contrast, showed a potential loss of less than \$2 million because PJM did not consider the effect of planned grid improvements on portfolio valuation." The identity of [FP1], the market participant, is purposefully withheld in the Report.

³¹ *Id.*, p. 26.

³² *Id.*, p. 29.

superior access to information as to GreenHat's position in the FTR market and credit profile, yet even when market participants with lesser knowledge raised concerns, PJM's management took no decisive action. It is wholly unfair to cite and rely upon the Independent Consultant's Report to suggest that Duke Energy Kentucky – or any PJM stakeholder – somehow failed to assure that PJM's credit and market rules were sufficient when the unambiguous conclusion of the PJM Board's open expert placed the blame exclusively upon PJM's management for not following its own tariffs or acting upon others' tips. The Commission's September 30, 2020 Order is deficient to the extent that it relies upon an incomplete and inaccurate assessment of a report that was never part of the formal administrative record.

Ultimately, Duke Energy Kentucky served the best interests of its customers by entering into the GreenHat settlement that FERC approved as this reduced customers' total exposure for GreenHat's default. The financial impact to the Company, and ultimately its customers, would have been far greater if Duke Energy Kentucky had done nothing. Yet rather than acknowledge the Company's efforts to mitigate exposure to GreenHat's default, the Order unfairly and inaccurately blames Duke Energy Kentucky for GreenHat's default.

D. Duke Energy Kentucky's Customers Cannot Share in the Benefits of PJM Without Shouldering Some Risk for Third-Party Defaults

Finally, the fact that OPSI and CAPS both have significant influence over the PJM stakeholder process suggests that the opportunity still exists for Duke Energy Kentucky to advance a strategic partnership with the Commission and the Attorney General to assure that the interests of all market participants are fairly protected. But the fact remains that Duke Energy Kentucky, OPSI and CAPS cannot unilaterally dictate the terms of PJM's credit arrangements. The final arbitrator of those arrangements is PJM's Board, which must itself act within the parameters established by FERC. The prevailing credit arrangements at the time of GreenHat's default were

deemed reasonable and prudent by both PJM and FERC. Second guessing them now to deny Duke Energy Kentucky the ability to establish a regulatory asset flies in the face of established regulatory precedent which holds that prudence is determined as of the time that a decision is made, not with the benefit of hindsight.³³

Likewise, the assumption underlying the September 30, 2020 Order is that Duke Energy Kentucky's customers only shoulder risks by virtue of the Company's participation in PJM's markets and do not enjoy any benefits. This, of course, is a faulty assumption. In the context of Duke Energy Kentucky's Rider PSM, customers have progressively received a greater and greater share of the benefits of the Company's participation in PJM. When the Commission last revisited this issue in Case No. 2017-00321, the result was a 90/10 split favoring the Company's customers.³⁴ It is a fundamental maxim of economics that some risks are incurred in order to achieve benefits. While the GreenHat default has caused Duke Energy Kentucky to incur certain fuel-related expense that it would not have incurred if it was not a member of PJM, history shows that the benefit of the Company's participation in PJM has bestowed an extraordinary benefit upon the Company's customers. It is unfair, unjust and unreasonable for the Commission to allow Duke Energy Kentucky's customers to only share in the benefits of the Company's participation in PJM without also facing exposure for the quite rare instance where a third-party's default causes the Company to incur some incremental expense.

³³ See, e.g., *People's State Bank & Tr. Co. v. Wade*, 106 S.W.2d 74, 76 (1937) ("In testing his obligation, we must measure his judgment in the light of the information available to him at the time when he made the investment and, so far as possible, place ourselves in his position at the time, in order to determine whether or not, under all the circumstances, he exercised the judgment of a prudent businessman. We cannot apply 'hindsight' as a criterion."); see also *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 309 (1989) ("Under the prudent investment rule, the utility is compensated for all prudent investments at their actual cost when made (their "historical" cost), irrespective of whether individual investments are deemed necessary or beneficial in hindsight.").

³⁴ See *In the Matter of the Electronic Application of Duke Energy Kentucky, Inc. for: 1) an Adjustment of the Electric Rates; 2) Approval an Environmental Compliance Plan and Surcharge Mechanism; 3) Approval of New Tariffs; 4) Approval of Accounting Practices to establish Regulatory Assets and Liabilities; and 5) All Other Required Approvals and Relief*, Order, Case No. 2017-00321, p. 51 (Ky. P.S.C. Apr. 23, 2018).

Rehearing should also be granted for the simple reason that the Commission's Order needlessly opens up a Pandora's Box of questions and issues related to what level of market insulation Duke Energy Kentucky should take to assure that its customers are not at risk for future market failures in PJM. The Commission's Order implies that Duke Energy Kentucky must somehow guarantee its customers that no possible negative outcomes could ever be realized by virtue of its participation in PJM. This, of course, is simply unrealistic. Duke Energy Kentucky could withdraw from the FTR market, but history also proves that its customers have significantly benefitted from its participation over the years.³⁵ However, even if the Company were to withdraw, it would still be allocated a portion of the default because every PJM current market participant (at the time of the default) was allocated a portion of the costs of the GreenHat default. To mitigate future risk, Duke Energy Kentucky could simply exit the PJM markets, but that would impose all manner of unnecessary incremental costs upon its consumers. It is theoretically possible that Duke Energy Kentucky could assume the mantle of monitoring every other market participants' credit risk in each of PJM's markets. Ostensibly, this would appear to be duplicative of the role of PJM's management or PJM's Independent Market Monitor (IMM). The cost of undertaking this level of analysis would be substantial and would, no doubt, invite close scrutiny from intervenors in future base rate cases. If the Commission is discontent with allowing Duke Energy Kentucky to rely upon PJM's management and IMM to provide adequate surveillance of PJM's markets in the future, rehearing should be granted so that Duke Energy Kentucky's obligation to do so should be clearly articulated and defined.

³⁵ Financial Transmission Rights or FTRs allow market participants to offset potential losses (hedge) related to the price risk of delivering energy to the grid. The FTR market allows holders to optimize their FTR portfolio to meet the changing requirements of the customers they serve. Customers are exposed to congestion price uncertainty in PJM. FTRs provide hedging mechanism to offset the risk. Thus, the participation in the FTR market benefits the customers by reducing the congestion uncertainty risks.

III. CONCLUSION

The Commission's September 30, 2020 Order in this case prevents Duke Energy Kentucky from having even an opportunity to recover what have been recognized to be legitimate fuel-related expenses. Ironically, the two lines of precedent upon which the Order relies ostensibly require the Company's request to be denied because Duke Energy Kentucky succeeded in negotiating a favorable settlement on behalf of its customers and waited over seven months for the Commission's determination that the expense was not recoverable through the FAC before proceeding to file this application. The only other basis for denying the request to establish the regulatory asset is based upon an incomplete and inaccurate statement in a PJM document that was never included in the record. The punitive nature of the Commission's Order manifests itself in the fact that the Company's shareholders will be forced to absorb nearly a half million dollars in expense. Granting the regulatory asset and deferring a decision as to whether the costs are ultimately recovered in a future rate case would in no way prejudice the rights of Duke Energy Kentucky's customers, yet that is the path not yet chosen.

WHEREFORE, on the basis of the foregoing, Duke Energy Kentucky respectfully requests the Commission to grant rehearing, vacate its Order and grant the relief requested in the Company's Application.

Done this 20th day of October 2020.

Respectfully submitted,

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