

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

The Matter Of:

Electronic Application Of Kentucky Power )  
Company For An Order Approving Accounting )  
Practices To Establish A Regulatory Asset )  
Related To The Extraordinary Expenses ) Case No. 2020-00034  
Incurred By Kentucky Power Company )  
In Connection With Charges Related To )  
GreenHat Energy, LLC Default )

**MOTION OF KENTUCKY POWER COMPANY FOR REHEARING**

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## **MOTION OF KENTUCKY POWER COMPANY FOR REHEARING**

### **Introduction**

Kentucky Power Company (“Kentucky Power” or the “Company”) moves the Public Service Commission of Kentucky (“Commission”) pursuant to KRS 278.400 for rehearing of the Commission’s September 30, 2020 Order in this proceeding (“Order”). In the Order, the Commission denied the Company’s Application for authority to establish a regulatory asset for the Company’s extraordinary expenses incurred in connection with charges related to the GreenHat Energy, LLC (“GreenHat”) default.

Kentucky Power respectfully submits that the Commission’s Order is based upon incorrect assumptions, analyses, or understandings and therefore arrives at certain factual and legal conclusions that are inconsistent with the record in this case, the Commission’s prior orders that led the Company to initiate these proceedings, and relevant legal authorities. Specifically:

1. The Commission erred in finding that Kentucky Power and other PJM members failed to diligently participate in the PJM stakeholder process to protect customers’ interests;
2. The Commission erred in finding that Kentucky Power and other PJM members should have been able to anticipate the GreenHat default;
3. The Commission erred in relying upon a “materiality” threshold as a condition to approving the Company’s requested accounting authority;
4. The Order’s discussion regarding mitigation of GreenHat default charges is incorrect; and
5. Allowing the establishment of a regulatory asset after a cost has been recorded as an expense and the Company has closed its books for the fiscal year is appropriate in this case.

The Commission, therefore, should grant rehearing for the reasons set forth herein.

## Law and Argument

### A. Standard for Rehearing.

KRS 278.400 authorizes “any party to the proceedings” to apply for rehearing of a Commission order within 20 days of service of the order. The Commission interprets the statute as “provid[ing] closure to Commission proceedings by limiting rehearing to new evidence not readily discoverable at the time of the original hearings.”<sup>1</sup> The statute requires and the Commission expects “the parties to Commission proceedings to use reasonable diligence in the preparation and presentation of their cases and serves to prevent piecemeal litigation of issues.”<sup>2</sup> Rehearing is not a vehicle for a party to reargue or re-litigate an issue fully addressed by the parties in the proceedings leading to the original order.<sup>3</sup>

The Commission nevertheless enjoys the discretion to grant rehearing to consider new arguments,<sup>4</sup> particularly where the argument could not reasonably have been raised before. In addition, rehearing will be granted when required to address any errors or omissions in the Commission’s orders.<sup>5</sup> Each of these bases supports rehearing here.

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<sup>1</sup> Order, *In the Matter of: Application Of Kentucky-American Water Company For A Certificate Of Public Convenience And Necessity Authorizing Construction Of The Northern Division Connection*, Case No. 2012-00096 at 4 (Ky. P.S.C. January 23, 2014).

<sup>2</sup> *Id.*

<sup>3</sup> Order, *In the Matter of: D.P.I. Teleconnection, L.L.C. v. BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky*, Case No. 2009-00127 at 3 (Ky. P.S.C. March 2, 2012) (rejecting motion for rehearing where movant failed to raise new arguments and arguments raised were fully considered in original order).

<sup>4</sup> Order, *In the Matter of: America’s Tele-Network Corp.’s Alleged Violation of KRS 278.535*, Case No. 2000-00421 at 2 (Ky. P.S.C. March 23, 2001) (limiting scope of rehearing to new arguments raised in petition).

<sup>5</sup> Order, *In the Matter of: Application of Jessamine-South Elkhorn Water District For A Certificate Of Public Convenience And Necessity To Construct And Finance A Waterworks Improvement Project Pursuant To KRS 278.020 And 278.300*, Case No. 2012-00470 at 11 (Ky. P.S.C. January 3, 2014).

**B. Relevant Procedural and Factual Background.**

**1. Case No. 2017-00179**

In the Company's last base rate case, Case No. 2017-00179, the Company proposed to amend its Tariff F.A.C. to add fuel-related PJM billing line items ("BLIs") to the tariff.<sup>6</sup>

Specifically, Company Witness John A. Rogness testified that certain congestion service BLIs were fuel costs properly recoverable through the fuel adjustment clause:

Congestion arises when one or more constraints inhibit the economic dispatch of energy from serving load. To relieve congestion on the transmission system, generating units are dispatched out of economic order.... The increased energy costs due to the re-dispatch to relieve congestion are reflected in the congestion price component of the locational marginal price ("LMP") and assessed to market participants such as Kentucky Power. These increased energy expenses, like energy purchased to serve Kentucky Power's native load, reflect fuel expenses....<sup>7</sup>

The Company thus proposed that the following new language be added in Tariff F.A.C. to the section comprising "Fuel costs":

The fuel-related costs charged to the Company by PJM Interconnection LLC ***including but not limited to*** those costs identified in the following Billing Line Items, as may amended from time to time by PJM Interconnection LLC: Billing Line Items 1210, 2210, 1215, 1218, 2217, 2218, 1230, 1250, 1260, 2260, 1370, 2370, 1375, 2375, 1400, 1410, 1420, 1430, 1478, 1340, 2340, 1460, 1350, 2350, 1360, 2360, 1470, 1377, 2377, 1480, 1378, 2378, 1490, 1500, 2420, 2220, 1200, 1205, 1220, 1225, 2500, 2510, 1930, and 2930.<sup>8</sup>

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<sup>6</sup> Application Section III, Volume 4, Direct Testimony of John A. Rogness, *In the Matter of: Electronic Application Of Kentucky Power Company For (1) A General Adjustment Of Its Rates For Electric Service; (2) An Order Approving Its 2017 Environmental Compliance Plan; (3) An Order Approving Its Tariffs And Riders; (4) An Order Approving Accounting Practices To Establish Regulatory Assets Or Liabilities; And (5) An Order Granting All Other Required Approvals And Relief*, Case No. 2017-00179, at 22:20-21 (June 28, 2017).

<sup>7</sup> *Id.* at 16.

<sup>8</sup> Application, Section II, Volume 2, Exhibit D, *In the Matter of: Electronic Application Of Kentucky Power Company For (1) A General Adjustment Of Its Rates For Electric Service; (2) An Order Approving Its 2017 Environmental Compliance Plan; (3) An Order Approving Its Tariffs And Riders; (4) An Order Approving Accounting Practices To Establish Regulatory Assets Or Liabilities; And (5) An Order Granting All Other Required Approvals And Relief*, Case No. 2017-00179, at 34 (June 28, 2017) (emphasis supplied).

Among the listed fuel-related BLIs were two related to Financial Transmission Rights (“FTR”): FTR market charges (PJM BLI 1500) and FTR credits (PJM BLI 2500).<sup>9</sup> FTRs allow market participants to protect against price risks related to congestion charges associated with PJM’s LMP.

The Commission granted the Company’s request to amend Tariff F.A.C. to recover PJM fuel-related BLIs as fuel costs through the fuel adjustment clause, explaining that the “BLIs represent charges and credits that relate to fuel consumed by resources that are running and online.”<sup>10</sup> Thus, the Commission recognized the fuel-related nature of FTR market charges and credits in its January 18, 2018 order in Case No. 2017-00179, wherein it authorized Kentucky Power to recover PJM BLI 1500 and PJM BLI 2500.

In conformity with the Commission’s Order, the Company filed the Commission-approved amendment to Tariff F.A.C. The amended provision remains in effect.

## **2. The GreenHat Default**

PJM on June 21, 2018 declared that GreenHat defaulted on its FTR market financial obligations for the 2018/2019, 2019/2020, and 2020/2021 planning periods. PJM then initiated the process of closing out and liquidating GreenHat’s FTR positions. The net loss or gain on these positions is allocated among PJM members, including Kentucky Power, in accordance with the default allocation assessment provisions of sections 15.1.2A(1) and 15.2.2 of the PJM Operating Agreement. Any charges related to the liquidation of GreenHat’s position in the FTR market were allocated to Kentucky Power through PJM billing line item 1999A.

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<sup>9</sup> See *Id.*

<sup>10</sup> Order, *In the Matter of: Electronic Application Of Kentucky Power Company For (1) A General Adjustment Of Its Rates For Electric Service; (2) An Order Approving Its 2017 Environmental Compliance Plan; (3) An Order Approving Its Tariffs And Riders; (4) An Order Approving Accounting Practices To Establish Regulatory Assets Or Liabilities; And (5) An Order Granting All Other Required Approvals And Relief*, Case No. 2017-00179, at 44 (Ky. P.S.C. January 18, 2018).



**3. Case No. 2019-00002**

On February 11, 2019, the Commission established Case No. 2019-00002 to review and evaluate the operation of Kentucky Power’s FAC for the period November 1, 2016 through October 31, 2018, and to determine the amount of fuel costs that should be included in its base rates.<sup>11</sup>

During the hearing in that case, the issue regarding the GreenHat default charges arose and was addressed by Company Witness Ranie K. Wohnhas.<sup>12</sup> Company Witness Wohnhas later testified via affidavit that:

Beginning in August 2018, Kentucky Power began booking GreenHat FTR market default charges as allocated to Kentucky Power from PJM. The FTR market default charges were billed monthly to Kentucky Power through PJM billing line item 1999A. The GreenHat FTR market default charges allocated to Kentucky Power through April 2019 totaled \$233,508.86. Through the same period the fuel-related portion of the billing line item 1999A charges related to the GreenHat default were \$161,986.73:

Month/Year	Aug-18	Sep-18	Oct-18	Nov-18	Dec-18	Jan-19	Feb-19	Mar-19	Apr-19	Total
Amount	\$27,515.03	\$43,046.29	\$0.00	\$11,689.35	\$32,605.98	\$2,228.04	\$11,217.98	\$28,254.38	\$5,429.68	\$161,986.73

The fuel-related billing line item 1999A amounts paid by Kentucky Power within this two-year review period (August through October 2018) totaled \$70,561.32:<sup>13</sup>

Month/Year	Aug-18	Sep-18	Oct-18	Total
Amount	\$27,515.03	\$43,046.29	\$0.00	\$70,561.32

Although the Company understood the charges to be properly recoverable as a fuel-related PJM BLI, the Company elected not to flow the costs through at that time, and instead presented the question to the Commission in the two-year FAC review.<sup>14</sup>

<sup>11</sup> See Order, *In the Matter of: Electronic Examination Of The Application Of The Fuel Adjustment Clause Of Kentucky Power Company From November 1, 2016 Through October 31, 2018*, Case No. 2019-00002 at 1 (Ky. P.S.C. December 26, 2019).

<sup>12</sup> See Affidavit of Ranie K. Wohnhas To Correct And To Supplement Testimony, *In the Matter Of: An Examination Of The Application Of The Fuel Adjustment Clause Of Kentucky Power Company From November 1, 2016 Through October 31, 2018*, Case No. 2019-00002, at 1 (May 8, 2019).

<sup>13</sup> *Id.* at 2-3.

<sup>14</sup> *Id.* at 4.

The Company explained in that proceeding through a supplemental response to

**Commission Staff Data Request 1-33:**

Kentucky Power's fuel adjustment clause tariff defines fuel costs recoverable through the Company fuel adjustment clause to include "fuel-related costs charged to the Company by PJM Interconnection LLC including but not limited those costs identified in the following Billing Line Items, as may be amended from time to time by PJM Interconnection LLC...." Among the listed PJM billing line items are FTR market charges (PJM BLI 1500) and credits (PJM BLI 2500). The fuel-related portion of the GreenHat FTR market default charges allocated to Kentucky Power through PJM billing line item 1999A, like the other FTR market charges and credits enumerated in the Company's tariff, are properly recoverable through Kentucky Power's fuel adjustment clause.<sup>15</sup>

The Company thus proposed to recover the fuel-related portion of the GreenHat FTR market default charges allocated to Kentucky Power through PJM billing line item 1999A not billed to customers during the review period by billing one-third of the total \$70,561.32 over a three-month period (\$23,520.44 per month) beginning the first day of the billing cycle beginning after the Commission's order in that case.<sup>16</sup> The Company's proposal would have increased the bill of the average residential customer using 1,300 kWh per month for the three-month period by approximately \$0.06 per month.<sup>17</sup>

The Commission by Order dated December 26, 2019 denied Kentucky Power's proposal to recover the fuel related portion of the GreenHat FTR market default charges through the fuel adjustment clause.<sup>18</sup> In its December 26, 2019 Order in Case No. 2019-00002, the Commission held that while "FTR costs are associated with the cost of generation...Kentucky Power should not pass through the costs of the GreenHat default under Billing Line Item 1999[a] as the [i]tem

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<sup>15</sup> May 8, 2019 Supplemental Response, *In the Matter Of: An Examination Of The Application Of The Fuel Adjustment Clause Of Kentucky Power Company From November 1, 2016 Through October 31, 2018*, Case No. 2019-00002, at 2 (May 8, 2019).

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

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



code is not listed in its FAC tariff for acceptable fuel-related costs charged to the Company by PJM.”<sup>19</sup> The Commission further held that the Company was required to seek Commission approval “to pass through unlisted items [in] the FAC rate” notwithstanding that the Company’s Tariff F.A.C. includes language to that effect in the definition of “fuel costs.”<sup>20</sup>

#### 4. Case No. 2020-00034

##### a. The Company’s Application.

Following the Commission’s final order in Case No. 2019-00002, Kentucky Power filed on February 14, 2020 its Application in this case seeking “authority to accumulate and defer for consideration in its next base rate proceeding those GreenHat default charges allocated to Kentucky Power by PJM beginning July 2018 through the anticipated liquidation of the GreenHat portfolio in June 2021.”<sup>21</sup> Further, the Company informed the Commission that subject to Commission approval, Kentucky Power recorded a regulatory deferral in FERC account 1823571 and an offsetting provision in FERC account 1823000 in December 2019 business for GreenHat default charges allocated to the Company by PJM.<sup>22</sup> The Company filed the direct testimony of Ranie K. Wohnhas with its Application.<sup>23</sup>

Company Witness Wohnhas provided a timeline for the liquidation of the GreenHat related losses by PJM:

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<sup>18</sup> Order, *In the Matter Of: An Examination Of The Application Of The Fuel Adjustment Clause Of Kentucky Power Company From November 1, 2016 Through October 31, 2018*, Case No. 2019-00002 (Ky. P.S.C. December 26, 2019).

<sup>19</sup> *Id.* at 4.

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

<sup>21</sup> Application, *In the Matter Of: Electronic Application Of Kentucky Power Company For An Order Approving Accounting Practices To Establish A Regulatory Asset Related To The Extraordinary Expenses Incurred By Kentucky Power Company In Connection With Charges Related To GreenHat Energy, LLC Default*, Case No. 2020-00034, at 4 (February 14, 2020).

<sup>22</sup> *Id.*

<sup>23</sup> Direct Testimony of Ranie K. Wohnhas, *In the Matter Of: Electronic Application Of Kentucky Power Company For An Order Approving Accounting Practices To Establish A Regulatory Asset Related To The Extraordinary*

In June 2018, GreenHat defaulted on its financial obligations when its revenues failed to exceed its costs and GreenHat owed significant additional funds to PJM to cover its FTR portfolio. PJM was then forced to begin the process of closing out and liquidating GreenHat's portfolio. The process is expected to continue through May 10, 2021 when PJM will liquidate the final GreenHat FTR position. Kentucky Power anticipates being billed (or credited) in connection with the May 2021 liquidation in June 2021.<sup>24</sup>

He also explained that “[t]he total amount [of the GreenHat default] allocated to Kentucky Power through December 2019 [was] \$268,517” and “[t]he total cost to Kentucky Power [was] estimated to be \$335,261.<sup>25</sup> Of this amount, it is estimated that \$47,383 will be associated with off-system sales margins.”<sup>26</sup> Kentucky Power submitted again evidence demonstrating that the GreenHat default charges were properly recoverable through the fuel adjustment clause.<sup>27</sup>

The Company's Application identified the factors under the Financial Accounting Standards Board Accounting Standards Codification 980-340-25-1 for creation of a regulatory asset, as well as the factors used by the Commission when exercising its discretion to approve a regulatory asset.<sup>28</sup> Those factors are:

(1) an extraordinary nonrecurring expenses which could not have reasonably been anticipated or included in the utility's planning; (2) an expense resulting from a statutory or administrative directive; (3) an expense in relation to an industry sponsored initiative; or (4) an extraordinary nonrecurring expense that over time will result in a savings that fully offsets the costs.<sup>29</sup>

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*Expenses Incurred By Kentucky Power Company In Connection With Charges Related To GreenHat Energy, LLC Default*, Case No. 2020-00034 (February 14, 2020) (“Wohnhas Direct Testimony”).

<sup>24</sup> *Id.* at 4:5-12.

<sup>25</sup> *Id.* at 4:21-22, 5:4.

<sup>26</sup> *Id.* at 5:4-5.

<sup>27</sup> *Id.* at 5-6.

<sup>28</sup> Application, *In the Matter Of: Electronic Application Of Kentucky Power Company For An Order Approving Accounting Practices To Establish A Regulatory Asset Related To The Extraordinary Expenses Incurred By Kentucky Power Company In Connection With Charges Related To GreenHat Energy, LLC Default*, Case No. 2020-00034, at 4-5 (February 14, 2020).

<sup>29</sup> *Id.* at 5 (citing Order, *In The Matter Of The Application of East Kentucky Power Cooperative, Inc. For An Order Approving Accounting Practices To Establish A Regulatory Asset Related To Certain Replacement Power Costs Resulting From Generation Forced Outages*, Case No. 2008-00436 at 4 (Ky. P.S.C. December 23, 2012)).

The Company demonstrated that the GreenHat default charges were “nonrecurring and extraordinary in their causes, scope, and amount,” thus permitting the creation of a regulatory asset and to “defer for review and recovery in its next base rate proceeding its extraordinary and non-recurring expenses related to the GreenHat default.”<sup>30</sup>

Specifically, Company Witness Wohnhas testified to the following:

- According to the March 26, 2019 Report of the Independent Consultants on the GreenHat Default, GreenHat amassed one of the largest portfolios of FTRs in PJM history.<sup>31</sup>
- From January 2017 until its June 2018 default, GreenHat maintained the largest open volume FTR portfolio.<sup>32</sup>
- In fact, its portfolio was nearly twice the size of the next largest portfolio over that period.<sup>33</sup>
- By the time of its default, GreenHat had amassed approximately \$123 million in unrealized mark-to-auction losses.<sup>34</sup>
- The Independent Consultants’ report also noted several complications that contributed to the GreenHat default.<sup>35</sup>
- Kentucky Power could not have anticipated nor planned for the default and the resulting default charges.<sup>36</sup>
- The Company’s tariffs provided a reasonable and good faith basis for the Company’s conclusion that the GreenHat default charges were recoverable through Kentucky Power’s fuel adjustment clause and system sales clause.<sup>37</sup>
- Unlike traditional operations and maintenance and fuel expenses, the GreenHat default charges will be incurred over a finite period, anticipated to be June 2018 through May 2021.<sup>38</sup>

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<sup>30</sup> *Id.* at 5; *see also* Wohnhas Direct Testimony at 7-10.

<sup>31</sup> Wohnhas Direct Testimony at 7:24, 8:1-4 (*citing* Robert Anderson & Neal Wolkoff, REPORT OF THE INDEPENDENT CONSULTANTS ON THE GREENHAT DEFAULT at 11 (March 26, 2020), <https://www.pjm.com/-/media/library/reports-notices/special-reports/2019/report-of-the-independent-consultants-on-the-greenhat-default.pdf> (last accessed Oct. 19, 2020)).

<sup>32</sup> *Id.* at 8:4-5 (*citing Id.* at Appendix Chart A4).

<sup>33</sup> *Id.* at 8:5-6 (*citing Id.*).

<sup>34</sup> *Id.* at 8:6-8 (*citing Id.* at 12).

<sup>35</sup> *Id.* at 8:9-10.

<sup>36</sup> *Id.* at 8:10-11.

<sup>37</sup> *Id.* at 8:12-15.

<sup>38</sup> *Id.* at 9:1-3.

Subsequently, in Commission Staff Data Request 2-1(a), Staff asked the Company to confirm that it had recorded the GreenHat default charges as an expense in 2018 and 2019, and if confirmed, explain why regulatory asset treatment was appropriate for amounts recorded as an expense in a fiscal year which with Kentucky Power had already closed its books.<sup>39</sup> The Company responded by explaining the procedural history and timing involved with the GreenHat default charges, and that Kentucky Power initially began booking the charges beginning in August 2018, understanding that the fuel-related portion of the default charges were to be recovered through the fuel adjustment clause.<sup>40</sup> However, while

interpreting its Tariff F.A.C. to authorize the recovery of the Greenhat charges, [the Company] recognized the novelty of the issue pending before the Commission and awaited a Commission Order in Case No. 2019-00002 to resolve the issue of the appropriateness of the deferral in lieu of filing a separate application for deferral prior to closing its 2019 books.<sup>41</sup>

In response to the Commission's December 26, 2019 Order in Case No. 2019-00002, "the Company set up the accounting treatment in December 2019 business as described in its response to KPSC 1-4 in this case," and then filed its Application herein.<sup>42</sup> The Company further explained that the reason regulatory asset treatment was appropriate here was "anchored in the GAAP definition of a regulatory asset."<sup>43</sup> Under the GAAP definition, "A cost that does not meet these asset recognition criteria [here, the GreenHat default charges did not meet the

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<sup>39</sup> Commission Staff's Second Request for Information to Kentucky Power Company, *In the Matter Of: Electronic Application Of Kentucky Power Company For An Order Approving Accounting Practices To Establish A Regulatory Asset Related To The Extraordinary Expenses Incurred By Kentucky Power Company In Connection With Charges Related To GreenHat Energy, LLC Default*, Case No. 2020-00034, at 3 (April 16, 2020).

<sup>40</sup> Kentucky Power Company's Responses to Commission Staff's Second Request for Information to Kentucky Power Company, *In the Matter Of: Electronic Application Of Kentucky Power Company For An Order Approving Accounting Practices To Establish A Regulatory Asset Related To The Extraordinary Expenses Incurred By Kentucky Power Company In Connection With Charges Related To GreenHat Energy, LLC Default*, Case No. 2020-00034, at 1-2 (April 30, 2020).

<sup>41</sup> *Id.* at 2.

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

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



definition's preceding criteria] at the date the cost is incurred shall be recognized as a regulatory asset *when it does meet those criteria at a later date.*"<sup>44</sup>

In Commission Staff Data Request 2-2(d), Commission Staff also asked the Company to "[c]onfirm that the GreenHat default charges represent less than 1 percent of Kentucky Power's transmission expenses in 2018 or 2019. If confirmed, explain why Kentucky Power does not believe these expenses are de minimis."<sup>45</sup> The Company responded:

While total estimated GreenHat default charges represent less than 1 percent of Kentucky Power's transmission expenses in 2018 or 2019, these costs were outside of the Company's control, could not be reasonably anticipated, and were not estimable prior to GreenHat's June 2018 default. Moreover, Kentucky Power does not believe, on an absolute basis, that \$335,261.25 in charges can fairly be characterized as de minimis.<sup>46</sup>

Commission Staff Data Request 2-2(d) represents the only inquiry made by the Commission or Commission Staff in this case concerning the amount of the GreenHat default charges.

No parties requested intervention, and on May 5, 2020, the Company requested that the Commission take the matter under submission based on the record and without a hearing.<sup>47</sup>

b. The Commission's September 30, 2020 Order.

The Commission took the case under submission on the record and issued its Order denying Kentucky Power the relief requested on September 30, 2020.<sup>48</sup> The Commission denied

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<sup>44</sup> *Id.* at 3 (quoting Financial Accounting Standards Board Accounting Standards Codification 980-340-25-1(b) (emphasis supplied)).

<sup>45</sup> Commission Staff's Second Request for Information to Kentucky Power Company, *In the Matter Of: Electronic Application Of Kentucky Power Company For An Order Approving Accounting Practices To Establish A Regulatory Asset Related To The Extraordinary Expenses Incurred By Kentucky Power Company In Connection With Charges Related To GreenHat Energy, LLC Default*, Case No. 2020-00034, at 4 (April 16, 2020).

<sup>46</sup> Kentucky Power Company's Responses to Commission Staff's Second Request for Information to Kentucky Power Company, *In the Matter Of: Electronic Application Of Kentucky Power Company For An Order Approving Accounting Practices To Establish A Regulatory Asset Related To The Extraordinary Expenses Incurred By Kentucky Power Company In Connection With Charges Related To GreenHat Energy, LLC Default*, Case No. 2020-00034, at 2 (April 30, 2020).

<sup>47</sup> Kentucky Power Company's Motion to Submit On The Record, *In the Matter Of: Electronic Application Of Kentucky Power Company For An Order Approving Accounting Practices To Establish A Regulatory Asset Related To The Extraordinary Expenses Incurred By Kentucky Power Company In Connection With Charges Related To GreenHat Energy, LLC Default*, Case No. 2020-00034 (May 5, 2020).

the Company's Application on three grounds: (a) 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;<sup>49</sup> (b) the Company failed to demonstrate that the expenses at issue are material to Kentucky Power's financial position;<sup>50</sup> and (c) Kentucky Power and other PJM Interconnection, LLC ("PJM") members failed to anticipate the GreenHat default and mitigate the charges associated with the same.<sup>51</sup>

As to the third ground for denial, the Commission noted that the Report of the Independent Consultants on the GreenHat Default identified a participant default in PJM's FTR market 12 years earlier that the Commission believed was similar to the GreenHat default.<sup>52</sup> The Commission further held that "Kentucky Power's membership in PJM requires diligent participation, including ensuring adequate and appropriate market and credit rules," and that "Kentucky Power and other members [of PJM] failed to fulfill these requirements in the case of the rules that led to the GreenHat default."<sup>53</sup>

**C. Kentucky Power's Motion For Rehearing.**

Because the Commission's denial of Kentucky Power's Application was based on grounds in addition to the four traditional bases for establishing a regulatory asset, the Company respectfully submits it lacked a reasonable opportunity to fully address through testimony and otherwise the grounds relied upon by the Commission. Moreover, the Company avers that the

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<sup>48</sup> Order, *In the Matter Of: Electronic Application Of Kentucky Power Company For An Order Approving Accounting Practices To Establish A Regulatory Asset Related To The Extraordinary Expenses Incurred By Kentucky Power Company In Connection With Charges Related To GreenHat Energy, LLC Default*, Case No. 2020-00034 (Ky. P.S.C. September 30, 2020).

<sup>49</sup> *Id.* at 5.

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

<sup>51</sup> *Id.* at 5-6.

<sup>52</sup> *Id.* at 6 (*citing* Report of the Independent Consultants on the GreenHat Default at 15. This report can be accessed via the following link: <https://www.pjm.com/-/media/library/reports-notices/special-reports/2019/report-of-the-independent-consultants-on-the-greenhat-default.pdf>).



Commission erred in certain of its findings, as described below, which were based upon incorrect assumptions, analyses, or understandings and therefore resulted in factual and legal conclusions that are inconsistent with the record in this case, the Commission's prior orders that led the Company to initiate these proceedings, and relevant legal authorities. At bottom, it is undisputed that the expenses at issue are fuel-related and were eligible for recovery, as the Commission found in Case No. 2019-00002. The GreenHat default charges are legitimate costs incurred as a result of Kentucky Power's participation in PJM's FTR market under FERC-approved tariffs, and the Commission should authorize their deferral and, in the future, their recovery.

For the reasons set forth below, the Commission should grant rehearing and approve Kentucky Power's request to establish a regulatory asset associated with the GreenHat default charges based upon the record developed to date. At a minimum, Kentucky Power respectfully requests the opportunity to present evidence regarding the additional factors relied upon by the Commission in denying the Application, as further discussed herein.

**1. The Commission erred in finding that Kentucky Power and other PJM members failed to diligently participate in the PJM stakeholder process to protect customers' interests.**

Respectfully, the Commission's conclusion that Kentucky Power and other PJM members "failed to fulfill" requirements to diligently participate in ensuring adequate and appropriate market and credit rules within PJM "that led to the GreenHat default"<sup>54</sup> is without evidentiary support. To the contrary, Kentucky Power and AEP participate in the stakeholder process to the fullest extent allowable under the PJM Operating Agreement ("OA"). Further, even if AEP reasonably could have been aware of the potential for the GreenHat default, it

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<sup>53</sup> *Id.* at 6.

<sup>54</sup> *Id.*

would have lacked the individual voting power within PJM to effect any change that could have prevented the GreenHat default or mitigated its consequences.

Kentucky Power's participation in the stakeholder process, specifically in relation to tariff changes, is governed by the PJM OA.<sup>55</sup> Under the OA, any changes to PJM tariffs are required to be carried out through the process of "sector weighted voting." Sector weighted voting functions by dividing PJM members into five sectors.<sup>56</sup> When a company joins PJM, the company chooses one of five sectors that most aligns with their business practice:<sup>57</sup> Generation Owners, Transmission Owners, Electric Distributors, End-Use Customers, and Other Suppliers.<sup>58</sup> Each sector must have at least five members in order to cast a vote.<sup>59</sup> AEP is part of the Transmission sector.

For voting purposes, each sector is allotted one of five available votes (or 20% of the vote).<sup>60</sup> This allocation is independent of asset ownership, customer base, or trading volumes. Within the sector, each voting member is given an equal share of the 20% allotment.<sup>61</sup> The percentage allocation to each member therefore depends on the number of members within the sector. Percentage allocation within the sector also is independent of asset ownership, customer base, or trading volumes.<sup>62</sup> Further, affiliates are not considered when determining vote

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<sup>55</sup> See <https://www.pjm.com/directory/merged-tariffs/oa.pdf>

<sup>56</sup> *Id.* at Section 8.1.1.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at Section 8.4(b).

<sup>61</sup> *Id.*

<sup>62</sup> See generally *id.* at Section 8.1.1.

allocation.<sup>63</sup> Therefore, AEP, as a whole, is allocated only one vote despite having 20 subsidiaries in PJM.

AEP represents one out of 14 members comprising the Transmission sector. The Transmission sector as a whole is allocated 20% of the available votes, and the 14 members within the Transmission sector are allocated an equal share of that 20%. Thus, AEP ultimately is allocated only about 1.4% of the voting power ( $20\% \times 1/14 = 1.4\%$ ).<sup>64</sup> This small percentage compares to AEP's approximately 30% of transmission investment, 11,500 MWs of load, and approximately 13,500 MWs of capacity in PJM. However because a member's asset investment is not considered when determining the percentage allocation of voting power to members, small municipals, co-operatives, and single industrial customers have similar voting power to AEP for items that are submitted for sector voting.

It is further unlikely that the voting percentage allocation process could have been (or will be) changed. The process has been in place since before AEP joined PJM in 2004, and it is embedded within the PJM Tariff. Under the OA, a two-thirds majority (using the same weighted sector voting process) is required to make substantial changes to the Tariff, which would include the voting percentage allocation process.<sup>65</sup> It is unlikely that members who hold the disproportionate share of voting power (such as small municipals, co-operatives, and single industrial customers) would embrace such a change. If the Commission continues to question, in light of the foregoing, the extent to which AEP or Kentucky Power participate in PJM stakeholder processes or the extent to which AEP or Kentucky Power can control the outcome of

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

<sup>64</sup> Moreover, AEP could only ever be allocated a maximum of 4% of the voting power in any sector, because a sector must have at least five members in order to cast a vote ( $20\% \times 20\% = 4\%$ ).

<sup>65</sup> *Id.* at Section 8.4(c).

those processes through their participation, the Commission should grant rehearing to allow the Company the opportunity to present additional evidence regarding those issues.

Moreover, the Commission predicated its denial of the Company's Application in this case, in part, on the Commission's view that Kentucky Power's customers should not "bear the burden of ensuring PJM rules ... are adequate."<sup>66</sup> That statement was in error for the reasons set forth above, and also because it completely disregards the fact that customers benefit significantly from Kentucky Power's membership in PJM.<sup>67</sup> PJM estimates that its operations, markets, and planning result in annual cost savings of \$3.2-4 billion.<sup>68</sup> It is unreasonable for the Commission to allow Kentucky Power's customers to share in those substantial benefits of the Company's membership in PJM without also sharing in the rare instance where a third-party's default causes the Company to incur incremental expense. Rehearing, therefore, is warranted on this basis as well.

**2. The Commission erred in finding that Kentucky Power and other PJM members should have been able to anticipate the GreenHat default.**

The Commission also suggested that Kentucky Power and other PJM members should have anticipated the GreenHat default because the Report of the Independent Consultants on the GreenHat Default "identified a participant default in PJM's FTR market 12 years earlier that had similarities to GreenHat."<sup>69</sup> The Commission's finding again is unsupported by the record

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<sup>66</sup> Order at 6.

<sup>67</sup> See, e.g., PJM Value Proposition (2019), <https://www.pjm.com/about-pjm/~media/about-pjm/pjm-value-proposition.ashx> (last accessed Oct. 19, 2020).

<sup>68</sup> *Id.*

<sup>69</sup> Order, *In the Matter Of: Electronic Application Of Kentucky Power Company For An Order Approving Accounting Practices To Establish A Regulatory Asset Related To The Extraordinary Expenses Incurred By Kentucky Power Company In Connection With Charges Related To GreenHat Energy, LLC Default*, Case No. 2020-00034, at 6 (Ky. P.S.C. September 30, 2020) (citing Report of the Independent Consultants on the GreenHat Default at 15).

evidence. To the contrary, the record indicates the Company could not have anticipated or planned for the GreenHat default or the resulting charges.<sup>70</sup>

The Independent Consultants' Report itself made no finding of lack of diligence or reasonable efforts on the part of Kentucky Power or AEP (or any other PJM member). Rather, the Independent Consultants noted that PJM previously commissioned a consultant's report regarding a 2007 default involving affiliates of Tower Research Capital (the "Tower Default") and the consultant made a number of recommendations regarding risk management policies and market surveillance.<sup>71</sup> PJM presented those recommendations to stakeholders, but not all were adopted.<sup>72</sup> The Independent Consultants reviewing the GreenHat default found that "*PJM management did not go far enough to emphasize these critical policy advances to its stakeholders or its Board*" when presenting the post-Tower Default market reform proposals.<sup>73</sup> In other words, the Independent Consultants found that PJM's presentation to stakeholders was insufficient to adequately apprise stakeholders of the need for the reforms that were not adopted. It is not reasonable to expect stakeholders to be able to anticipate market risks in 2018 that were not fully or completely presented to them in 2007. Moreover, and importantly, the Independent Consultants did not find that implementing any of the unadopted market reform proposals after the Tower Default would have prevented the GreenHat default or mitigated its financial impact on PJM members.

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<sup>70</sup> Wohnhas Direct Testimony at 8; Kentucky Power Response to Staff's Second Data Request, Item 2(d)(explaining that the GreenHat default charges "could not be reasonably anticipated, and were not estimable prior to GreenHat's June 2018 default"). Indeed, as the Independent Consultants found, not even PJM's Independent Market Monitor ("IMM") was expected to monitor individual participant trading behavior for financial risk exposure purposes. Report of Independent Consultants on the GreenHat Default at Appendix page 16 (Appendix E). It is unreasonable to assume that Kentucky Power could do that which even the IMM did not. Clearly, this responsibility rested with PJM itself.

<sup>71</sup> Report of the Independent Consultants on the GreenHat Default at 15.

<sup>72</sup> *Id.*

<sup>73</sup> Report of the Independent Consultants on the GreenHat Default at 15 (emphasis in original).



In its cursory discussion of the Tower Default, the Independent Consultants' Report does not explain what "similarities," if any, it found between the Tower Default and "the GreenHat situation."<sup>74</sup> There is no evidence in the record in this case regarding the extent to which the two defaults were similar or dissimilar. To the extent the Commission considers the Tower Default relevant to whether Kentucky Power could have reasonably anticipated the GreenHat default and resulting charges, the Commission should grant rehearing to allow Kentucky Power to present evidence to fully address that issue.

**3. The Commission erred in relying upon a "materiality" threshold as a condition to approving the Company's requested accounting authority.**

As set forth above, Kentucky Power requested accounting authority in this proceeding on the well-established basis that the GreenHat default charges it seeks to defer are "an extraordinary nonrecurring expenses which could not have reasonably been anticipated or included in the utility's planning." In its Order, the Commission cites two Kentucky-American Water Company cases to read a "materiality" threshold into this inquiry. They appear to be the only two Commission decisions to have addressed the concept of materiality in the context of utility expense deferrals.<sup>75</sup> Respectfully, neither case is apposite.

In the first case, concerning a 2000 Kentucky-American application to increase its rates using a forecasted test period, the Commission found Kentucky-American's practice of deferral of expenses as regulatory assets prior to seeking Commission approval was inappropriate.<sup>76</sup> The Commission further found that the deferred expenses at issue in the rate case, incurred

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<sup>74</sup> *Id.*

<sup>75</sup> Order at 5 ("The Commission has also historically denied regulatory asset treatment for expenses deemed immaterial.") (citing Case No. 2000-00120, *Application of Kentucky-American Water Company to Increase Its Rates* (Ky. PSC Nov. 27, 2000), final Order at 20-22 and Case No. 2008-00440, *Request of Kentucky-American Water Company for Approval to Defer Certain Expenses as Regulatory Assets* (Ky. PSC Aug. 26, 2009)).

<sup>76</sup> Case No. 2000-00120, *Application of Kentucky-American Water Company to Increase Its Rates* (Ky. PSC Nov. 27, 2000), Order at 23.



historically, “should have no bearing on the rates for a forecasted test year.”<sup>77</sup> Finally, the Commission found that none of the items accrued as regulatory assets “warrant[ed] deferred treatment under FASB 71 due to their immateriality.”<sup>78</sup>

The second case addressed a 2008 request by Kentucky-American to defer certain expenses as regulatory assets. There, the Commission noted those costs’ immateriality, referencing the portion of its 2000 Kentucky-American order quoted above, but denied the utility’s request because the expense did not fit within one of the four well-established categories for deferral.<sup>79</sup>

None of the considerations discussed in either Kentucky-American Water case applies or is relevant to Kentucky Power’s present request to establish a regulatory asset associated with GreenHat default charges. The Company did not establish a regulatory asset prior to formally applying for Commission approval to do so. Kentucky Power is not seeking to defer historic costs while asking for an increase in rates based upon a forecasted test period.<sup>80</sup> Although referred to in the Kentucky-American Water cases discussed above, FASB 71 does not contain an applicable materiality standard.<sup>81</sup> Finally, Kentucky Power’s regulatory asset request falls within the first of the four deferral categories traditionally authorized by the Commission, as the Company demonstrated in its Application, the Direct Testimony of Company Witness Wohnhas, and above.

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 22.

<sup>79</sup> Case No. 2008-00440, *Request of Kentucky-American Water Company for Approval to Defer Certain Expenses as Regulatory Assets*, Order at 3-4 (Ky. PSC Aug. 26, 2009)

<sup>80</sup> The Company’s pending rate case, Case No. 2020-00174, relies upon a historic test period comprising the twelve months ended March 31, 2020.

<sup>81</sup> *See*

[https://www.fasb.org/jsp/FASB/Document\\_C/DocumentPage?cid=1218220127481&acceptedDisclaimer=true](https://www.fasb.org/jsp/FASB/Document_C/DocumentPage?cid=1218220127481&acceptedDisclaimer=true).

Kentucky Power respectfully submits that the Commission erred in applying a materiality standard in evaluating the Company's request to defer GreenHat default charges. At a minimum, the Commission should grant rehearing to allow Kentucky Power the opportunity to present evidence addressing this requirement.

**4. The Order's discussion regarding mitigation of GreenHat default charges is incorrect.**

The Commission's conclusion that Kentucky Power contended that the Company "had no ability to mitigate the [GreenHat] default charges" is incorrect and unsupported by the record before the Commission.<sup>82</sup> First, AEP worked with PJM staff and the other PJM stakeholders to mitigate the effect of then-existing PJM Tariff requirements. Ultimately, PJM stakeholders including AEP approved, and FERC accepted, PJM Tariff revisions that allowed PJM the flexibility to settle the GreenHat portfolio on a daily basis.<sup>83</sup> Second, AEP (on behalf of Kentucky Power and its other subsidiaries) and numerous other parties actively participated in negotiations, and reached a settlement, with two parties who protested PJM's initial handling of the GreenHat portfolio during the July 2018 FTR auction.<sup>84</sup> That settlement limited PJM members' total financial exposure from the July 2018 FTR auction to no more than \$17.5 million in increased default charges.<sup>85</sup> This compares favorably to PJM's initial estimate of an increase of \$250-\$300 million.<sup>86</sup> Thus, contrary to the Order, the Company and AEP worked to

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<sup>82</sup> September 30, 2020 Order at 5-6.

<sup>83</sup> *PJM Interconnection, L.L.C.*, 165 FERC ¶ 61,188 (2018) (authorizing tariff change to allow defaulted FTR positions to go directly to settlement).

<sup>84</sup> See *PJM Interconnection, L.L.C.*, FERC Docket Nos. ER18-2068-000 and ER18-2068-001, Submission of Settlement Agreement and Offer of Settlement at §5.1, 6.7 (Oct. 9, 2019); *PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,260, Letter Order (Dec. 30, 2019) (approving settlement).

<sup>85</sup> *Id.*

<sup>86</sup> PJM Market Implementation Committee, Presentation regarding FERC Order Denying PJM's Request for Waiver re: Liquidating FTR Positions of Defaulted Member, at 5 (Feb. 6, 2019) (initially estimating, prior to settlement, a potential increase in default charges of \$250-300 million resulting from FERC's denial of PJM's waiver request to liquidate the GreenHat portfolio), available at <https://pjm.com/-/media/committees-groups/committees/mic/20190206/20190206-item-01a-informational-update-ferc-order-denying-waiver->

significantly mitigate the amount of GreenHat default charges. Kentucky Power seeks approval to defer in this proceeding its allocated share of the mitigated level of default charges. In this regard, the Commission's articulated "materiality" threshold, in addition to being flawed for the reasons set forth above, also creates a disincentive for utilities to act, as the Company did, to mitigate and minimize the impact of extraordinary and unanticipated costs like the GreenHat default charges. The Commission should grant rehearing to remove this disincentive.

**5. Allowing the establishment of a regulatory asset after a cost has been recorded as an expense and the Company has closed its books for the fiscal year is appropriate in this case.**

Although the Commission's September 30, 2020 Order stated that the Commission historically has 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, such treatment is fair and appropriate here given the procedural history and timing of the GreenHat default, the holdings in Case No. 2019-00002, and this case. It would also be consistent with other Commission precedent authorizing regulatory assets for expenses incurred late in the prior year. Moreover, not providing the relief requested by Kentucky Power in this case will likely create administrative inefficiency if similar situations arise in the future.

Kentucky Power maintained throughout this and prior proceedings that it understood the fuel-related GreenHat default charges to be properly recoverable through the fuel adjustment clause. It promptly sought approval to recover the amounts through the fuel adjustment clause in Case No. 2019-00002, well before the books for that fiscal year had closed. However, in its December 26, 2019 Order in that case, the Commission held that fuel-related GreenHat default charges were, in fact, not recoverable through the current Tariff F.A.C. and recognized that

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[request.ashx](#) (last accessed Oct. 19, 2020). *See also*, 2018 PJM STATE OF THE MARKET REPORT, SECTION 13, at 618, 655 (March 14, 2019), [https://www.monitoringanalytics.com/reports/PJM\\_State\\_of\\_the\\_Market/2018/2018-som-](https://www.monitoringanalytics.com/reports/PJM_State_of_the_Market/2018/2018-som-)

Kentucky Power may seek recovery of those charges through, among other things, base rates or an update to Tariff F.A.C.

The timing of the Commission's December 26, 2019 order in Case No. 2019-00002 did not provide the Company with sufficient time to obtain approval to defer the GreenHat default charges. Therefore, in December 2019, the Company booked the GreenHat default charges as an expense in accordance with Financial Accounting Standards Board Accounting Standards Codification (ASC) 980-340-25-1, Regulated Operations.<sup>87</sup>

The Company promptly thereafter filed its Application in this proceeding, requesting approval to accumulate and defer the charges for review and recovery in its next base rate proceeding. The Company followed all applicable accounting guidelines when it recorded as expenses the GreenHat default charges billed to Kentucky Power in August through December 2018 and January through December 2019. Kentucky Power closed its books for the fiscal year as part of its usual practice and sought to establish a regulatory asset as suggested by the Commission thereafter. Given the unique circumstances regarding the Company's understanding of its ability to recover the GreenHat default charges through the fuel adjustment clause and the procedural timing of the Company's subsequent requests to establish a regulatory asset, the Commission should grant rehearing on this issue.

Moreover, permitting the Company to establish a regulatory asset after the issuance of the Commission's Order in Case No. 2019-00002 late in December 2019 is consistent with prior Commission precedent authorizing deferral of costs (such as storm expenses) incurred late in a calendar year in the year following the expense-causing event.<sup>88</sup> As set forth above, Kentucky

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[pjm-sec13.pdf](#) (last accessed Oct. 19, 2020).

<sup>87</sup> See Kentucky Power Response to Staff's First Data Request, Item 4(a).

<sup>88</sup> 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*, Case No. 2019-00017, Order (Ky. P.S.C. Mar. 25, 2019); *In the*

Power sought to establish a regulatory asset as soon as possible after the Commission issued its December 26, 2019 order in the Company's fuel adjustment clause proceeding. There is no reason for the Commission to treat GreenHat default charges that Kentucky Power did not understand to be ineligible for recovery through Tariff F.A.C. until the end of December 2019 differently than the Commission has traditionally treated fourth quarter storm expenses.

In addition, if the Company's requested relief is denied because the Company cannot 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 potential for administrative inefficiency and/or burden will arise. Each time the Company is presented with a fuel-related charge not specifically enumerated in one of the BLIs currently contained in Tariff F.A.C. (or with a similar situation involving other charges and/or other recovery mechanisms), and its ability to recover the charge through the mechanism has not previously been expressly approved by the Commission, the Company will have no choice but to file deferral applications while it asks the Commission to determine whether the cost is properly recoverable through the mechanism, as it has done here. Such a result would unnecessarily burden both the Company and Commission. The Commission therefore should reconsider its September 30, 2020 Order on rehearing and grant the Company's requested accounting authority.

### **Conclusion**

For the foregoing reasons, Kentucky Power respectfully requests that the Commission enter an Order granting rehearing:

(1) Granting the requested regulatory approval to accumulate and defer the GreenHat default charges for review and recovery in its next base rate proceeding;

(2) Permitting the Company to present evidence and provide argument on the issues identified above; and

(3) Granting all further relief to which Kentucky Power may be entitled.

Respectfully submitted,



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