COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of: An Electronic Application of Kenergy Corp. for a Declaratory Order	: : :	Case No. 2020-00095

JOINT RESPONSE OF KENTUCKY ATTORNEY GENERAL AND KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC. TO APPLICATION FOR DECLARATORY ORDER

Come now the intervenors, the Attorney General of the Commonwealth of Kentucky, by and through his office of Rate Intervention ("the Attorney General") and the Kentucky Industrial Utility Customers, Inc. ("KIUC") (hereinafter jointly referred to as "the Joint Intervenors"), jointly by counsel, and state as follows for their Response to Kenergy Corporation ("Kenergy")'s Application for a Declaratory Order.

On March 25, 2020, Kenergy Corp. ("Kenergy") filed an application requesting a declaratory order that its proposed method of allocating a rate change by its wholesale Generation and Transmission ("G&T") supplier, Big Rivers Electric Corporation ("Big Rivers"), is consistent with the requirements of KRS 278.455. Kenergy proposes to allocate the rate changes from Big Rivers "*based on the ratio of cost of service of each class*." Kenergy has eight rate classes. According to Kenergy, *"[a]llocating based on any other method results in a flow through allocation that potentially leaves one class subsidizing another class.*" Specifically, Kenergy requested a declaration from the Commission that the "*proportional basis*" required by KRS 278.455 should be "*gauged by the cost of service among each class*."

The Big Rivers Application that is the subject of Kenergy's declaratory order request is Case No. 2020-00064. That Big Rivers Application is not a base rate case pursuant to KRS 278.180 (changes in rates) and/or 278.190 (procedure when new schedule of rates filed). Instead, it is an application to modify its existing Member Rate Stability Mechanism ("MRSM") tariff, to cease deferring depreciation expenses

on plants Wilson and Coleman, to establish regulatory assets and a cost recovery process for the remaining net book costs of retired plants Coleman, Reid and Station Two, and to begin amortizing previously approved regulatory assets for deferred Wilson depreciation and deferred Coleman depreciation. Big Rivers' Application was made pursuant to KRS 278.040 (general Commission jurisdiction) and KRS 278.220 (uniform system of accounts).

Kenergy recognizes that Big Rivers' MRSM/regulatory asset filing may only "*theoretically*" involve KRS 278.455. "*Big Rivers has filed an application in Case No. 2020-00064 with the Commission that theoretically could result in a flow through adjustment of rates among Kenergy members pursuant to KRS 278.455."*

By Order entered April 13, 2020, the Commission determined that clarification is needed regarding the exact nature of Kenergy's proposed allocation method and required Kenergy to the following request for information. "*Explain whether Kenergy requests that proportional be defined as allocating any increase or decrease from the Generation and Transmission proportionally based upon the most recently approved revenue allocation, and then upon the approved revenue allocation from each rate class component. If this is not Kenergy's intent in the instant case, explain what Kenergy's intent is."*

On April 17, 2020, Kenergy answered the Commission's request for information, stating,

"*. . . in order to accomplish a proper flow through of wholesale rates, the formula for the flow through must inherently be based on cost of service. Yet, there appears to be no order or holding to cite for this proposition. As such, Kenergy's application seeks to establish this statutory interpretation. . . Kenergy does not have an application for a change in base rates planned. Absent such a filing, Kenergy will not be performing a cost of service study*." [1] Kenergy also emphasizes that the ruling it seeks is advisory and is only for "*future reference*."

[1] *In The Matter Of: Electronic Application Of Kenergy Corp. For A Declaratory Order*, Case No. 2020-00095, Kenergy's response to Staff Data Request (April 17, 2020).

Kenergy's request for a declaratory order is based upon an erroneous premise. Because Big Rivers' Application does not seek a change in base rates, there is nothing to flow through. Kenergy is therefore requesting an improper and premature advisory opinion from the Commission regarding a theoretical interpretation of KRS 278.455. As explained below, if Kenergy was facing the flow through of a wholesale base rate increase or decrease, then the Joint Intervenors would agree with the logic and reasoning behind the Commission's question. But because there is not a rate case on either the wholesale or retail level, the Commission should decline to issue an advisory opinion on Kenergy's Application.

The Commission has declined to issue such advisory opinions in the past. For instance, in a prior Kenergy/Big Rivers proceeding, the Commission found that it was unable to render an opinion regarding the scope of its jurisdiction under an electric service contract because there was no actual contractual dispute at the time.[2] The Commission explained: *"[w]e may be presented in the future with a controversy that requires our determination as to whether or not we have jurisdiction to resolve that particular dispute under the [contract]. Now, however, in the absence of an actual controversy involving the [contract], the Commission is unable to render what would amount to an advisory opinion as to whether our jurisdiction under KRS Chapter 278 will exist to enable us to review such a dispute or whether such a dispute rightly belongs before the FERC or any other appropriate forum."*[3] In a subsequent Kenergy/Big Rivers case, the Commission reiterated this finding, declining to render a decision on jurisdiction because *"there is no actual controversy before us and we are unable to render an advisory opinion on this jurisdictional issue."*[4]

The Commission's rationale in these proceedings was consistent with Kentucky Supreme Court precedent, which holds that *"Our courts do not function to give advisory opinions, even on important*

[2] *In the Matter of Joint Application of Kenergy Corp. and Big Rivers Electric Corporation for Approval of Contracts and for a Declaratory Order*, Case No. 2013-00413 (January 30, 2014) at 19.
[3] Id. (emphasis added).
[4] *In the Matter of Joint Filing by Big Rivers Electric Corporation and Kenergy Corp. of a Load Curtailment Agreement with Century Hawesville*, Case No. 2014-00046 (February 14, 2014) at 3.

public issues, unless there is an actual case in controversy."[5] As the Supreme Court has found, it does not have authority to settle *"arguments or differences of opinion…As we often say, we do not render purely advisory opinions."*[6]

Further, the Kentucky Court of Appeals has cautioned against issuance of premature declaratory orders, citing the Declaratory Judgment Act, KRS 418.040, which provides *"[i]n any action in a court of record of this Commonwealth having general jurisdiction* ***wherein it is made to appear that an actual controversy exists****, the plaintiff may ask for a declaration of rights, either alone or with other relief; and the court may make a binding declaration of rights, whether or not consequential relief is or could be asked."*[7] The Court of Appeals explained that *"[a]n essential element of any justiciable claim is ripeness. Ripeness is a threshold issue: 'Because an unripe claim is not justiciable, the circuit court has no subject matter jurisdiction over it.'"*[8] Expounding further on this point, the Court of Appeals stated that "*'[t]he basic rationale of the ripeness requirement is 'to prevent the courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements,'"*[9] and added that *"[a] court is precluded from deciding '[q]uestions which may never arise or which are merely advisory, academic, hypothetical, incidental or remote, or which will not be decisive of a present controversy.'"* [10]

Joint Intervenors agree with the reasoning underlying the Commission's April 13, 2020 question. But because Big Rivers' MRSM/regulatory asset filing does not involve either a wholesale or retail rate case, this is not the proper place to address that question. KRS 278.455 is a practical statute that addressed a real-world problem. East Kentucky Power Cooperative ("EKPC") has 16 member owners. Before the enactment of KRS 278.455, each EKPC wholesale G&T rate case triggered 16 retail rate cases, even if

[5] *Philpot v. Patton*, 837 S.W.2d 491, 493 (Ky. 1992).
[6] *Commonwealth v. Terrell*, 464 S.W.3d 495, 499 (Ky. 2015); *See also Newkirk v. Commonwealth*, 505 S.W.3d 770, 774 (Ky. 2016); *Commonwealth v. Hughes*, 873 S.W. 2d 828, 829-30 (Ky. 1994).
[7] *Berger Family Real Estate, LLC v. City of Covington*, 464 S.W.3d 160,165 (Ky. App. 2015) (emphasis added).
[8] Id. at 166 (citing *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 270 (Ky.App. 2005)*(citations omitted).*
[9] Id. at 166 (citing *W.B. v. Commonwealth, Cabinet for Health and Family Services*, 388 S.W.3d 108, 114 (Ky. 2012) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967))
[10] Id. (citing *Interactive Gaming Council*, 425 S.W.3d at 112 *(quoting Hughes v. Welch*, 664 S.W.2d 205, 208 (Ky.App. 1984)).

the distribution portion of the distribution cooperative's rates did not need to be changed. KRS 278.455 was intended to apply to base rate cases and it created a solution that is both simple and elegant.

If there is a wholesale G&T base rate increase of $5 million to a distribution cooperative that has $100 million of test year revenue, then each component of the distribution cooperative's base rates (customer charge, demand charge and energy charge) would be increased by 5%. As required by the statute, this would flow through the wholesale rate increase "*to each class and within each tariff on a proportional basis that will result in no change in the rate design currently in effect."* The 5% across the board rate increase would maintain the most recent Commission-approved wholesale revenue allocation and rate design.

This definition of "proportional basis" would specifically not address any perceived cost of service disparities in existing rates, including but not limited to any existing subsidies. Defining "*proportional basis"* as one that is gauged on cost of service, as Kenergy proposes, would create more work, not less. It could turn a simple flow-through case into a litigation regarding whose cost of service study (and NARUC recognizes dozens of different cost of service methodologies) is most appropriate. If perceived cost of service disparities in existing rates is a concern, then the flow through process should not be used.

Alternatively, if the Commission should decide in Kenergy's favor, then Joint Intervenors urge the Commission to require Kenergy to file a cost of service study including recommended allocations. Until then, the Commission should retain the current allocations resulting from the most recent Commission rate case order. Regardless of how the Commission rules, it should continue to adhere to its existing policy of *gradually* eliminating subsidies,[11] in accord with the proven ratemaking principle of gradualism. Future

[11] *See, e.g., In the Matter of Application Of Big Sandy Water District For An Adjustment In Rates Pursuant To The Alternative Rate Filing Procedure For Small Utilities*, Case No. 2012-00152, Order dated March 8, 2013, at 3 (*citing, In the Matter of Adjustment of the Gas and Electric Rates of the Louisville Gas and Electric Company*, Case No. 10064, Order dated Aug. 10, 1988, at 12.

rate case decisions should also consider residential rate affordability and industrial economic development.

Respectfully submitted,

/s/ Michael L. Kurtz
Michael L. Kurtz, Esq.
Kurt J. Boehm, Esq.
Jody Kyler Cohn, Esq.
BOEHM, KURTZ & LOWRY
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202
Ph: 513.421.2255 Fax: 513.421.2764
mkurtz@bkllawfirm.com
kboehm@BKLlawfirm.com
jkylercohn@BKLlawfirm.com

COUNSEL FOR KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC.

-and-

DANIEL CAMERON
ATTORNEY GENERAL

JOHN G. HORNE, II
LAWRENCE W. COOK
J. MICHAEL WEST
ASSISTANT ATTORNEYS GENERAL
700 CAPITAL AVE., STE. 20
FRANKFORT KY 40601-8204
(502) 696-5453
Larry.Cook@ky.gov
Michael.West@ky.gov
John.Horne@ky.gov

COUNSEL FOR ATTORNEY GENERAL

April 20, 2020