

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

3
4 In the Matter of:

5
6 ELECTRONIC TARIFF FILING OF BIG)
7 RIVERS ELECTRIC CORPORATION) Case No.
8 AND KENERGY CORP. TO IMPLEMENT) 2021-00289
9 A NEW STANDBY SERVICE TARIFF)
10

11 **BIG RIVERS ELECTRIC CORPORATION’S RESPONSE TO KIMBERLY-**
12 **CLARK CORPORATION’S PETITION FOR REHEARING**

13
14 Big Rivers Electric Corporation (“*Big Rivers*”) submits this response to the
15 Petition for Rehearing filed by Kimberly-Clark Corporation (“*Kimberly-Clark*”), and
16 respectfully requests that the Kentucky Public Service Commission (“*Commission*”)
17 deny rehearing for the reasons stated below.

18 **I. Introduction**

19 The Commission has explained the standard of review when presented with a
20 motion for rehearing:

21 KRS 278.400, which establishes the standard of review for motions for
22 rehearing, limits rehearing to new evidence not readily discoverable at
23 the time of the original hearings, to correct any material errors or
24 omissions, or to correct findings that are unreasonable or unlawful. A
25 Commission Order is deemed unreasonable only when “the evidence
26 presented leaves no room for difference of opinion among reasonable
27 minds.” An Order can only be unlawful if it violates a state or federal
28 statute or constitutional provision.

29 By limiting rehearing to correct material errors or omissions, and
30 findings that are unreasonable or unlawful, or to weigh new evidence
31 not readily discoverable at the time of the original hearings, KRS
32 278.400 is intended to provide closure to Commission proceedings.

1 Rehearing does not present parties with the opportunity to relitigate a
2 matter fully addressed in the original Order.¹

3 Here, Kimberly-Clark has not offered new evidence or shown that the
4 Commission made any material error or omission or that the Commission’s March
5 3, 2022, Order (the “Order”) is unreasonable or unlawful. As such, Kimberly-Clark’s
6 Petition for Rehearing should be denied.

7 **II. Argument**

8 A. The Commission did not improperly shift the burden of proof.

9 Kimberly-Clark first argues that the Commission “improperly shifted the
10 burden of proof from the utility to the customer in violation of KRS 278.190(3).”²
11 However, nowhere in the Order does the Commission state that it is shifting the
12 burden of proof from Big Rivers to Kimberly-Clark.

13 The Commission found that Big Rivers’ proposed rates for Supplemental
14 Power Service were both uncontested and reasonable, and that Big Rivers’ proposed
15 rates for Backup Power Service were more appropriate than Kimberly-Clark’s
16 proposal.³ The Commission noting that Kimberly-Clark did not oppose the proposed
17 Supplemental Power Service rates or the proposed energy rates for Maintenance
18 and Backup Power Service is not an improper shifting of the burden of proof.⁴ Nor

¹ *In the Matter of: Electronic Application of Delta Natural Gas Company, Inc. for an Adjustment of its Rates and a Certificate of Public Convenience and Necessity*, P.S.C. Case No. 2021-00185 (Jan. 27, 2022), at pp. 1-2 (footnotes omitted).

² Petition for Rehearing at p. 1.

³ Order at pp. 16, 20, 22.

⁴ *In the Matter of: Electronic Application of Kentucky Power Company for (1) a General Adjustment of Its Rates for Electric Service; (2) Approval of Tariffs and Riders; (3) Approval of*

1 is the Commission weighing the evidence and finding Big Rivers’ proposal to be
2 more appropriate than Kimberly-Clark’s proposal an improper shifting of the
3 burden of proof.⁵ Instead, the Commission weighing the evidence and concluding
4 that the proposed Supplemental Power Service rates were reasonable and that the
5 proposed Maintenance and Backup Power Service rates were reasonable on an
6 interim basis, are essentially findings that Big Rivers met its burden of proof to that
7 extent.⁶

8 Moreover, the Commission did not simply accept Big Rivers’ proposed rates.
9 To the contrary, the Commission rejected Big Rivers’ proposed rates for
10 Maintenance Power Service and Backup Power Service on a permanent basis,
11 reasoning that “there is not sufficient information in the record to determine an
12 appropriate Maintenance Power Service rate separately.”⁷

13 On the other hand, the Commission found that “continuing the current
14 arrangement of Kimberly-Clark paying the LIC tariff rate is also not fair, just and

Accounting Practices to Establish Regulatory Assets and Liabilities; (4) Approval of a Certificate of Public Convenience and Necessity; and (5) All Other Required Approvals and Relief, P.S.C. Case No. 2020-00174, Order (May 14, 2021), a p. 22, n. 70 (“As we have said in previous Orders, noting an intervening party’s failure to provide evidence regarding an issue does not equate to a shifting of the burden of proof, nor is it the case that a utility has met its burden of proof when the utility’s evidence is the only evidence in the record”).

⁵ See *In the Matter of: An Investigation of Louisville Gas and Electric Company’s Prepaid Gas and Electric Service*, P.S.C. No. 2002-00232, Order (May 7, 2003), at pp. 4-5.

⁶ See *id.*

⁷ Order at p. 23. The Commission further found that anticipated changes in wholesale markets (such as the expected penetration of customer-owned generation and the potential MISO seasonal construct) could cause the need for additional changes to Big Rivers’ standby tariff offerings, and that Big Rivers “should evaluate the various incremental effects of behind-the-meter generation and, to the extent applicable, account for them appropriately in future rate filings.” Order at pp. 22, 25.

1 reasonable.”⁸ And because, as the Commission noted in the Order, “Kentucky law
2 provides that a utility may demand, collect and receive fair, just and reasonable
3 rates,”⁹ the Commission had to adopt rates for Maintenance and Backup Power
4 Service that were fair, just, and reasonable. So, while the Commission rejected Big
5 Rivers’ proposed Maintenance and Backup Power Service rates on a permanent
6 basis, the Commission weighed the evidence and determined that Big Rivers’
7 proposed rates were “a fair, just and reasonable initial arrangement for providing
8 Maintenance Power Service and Backup Power Service, until a better alternative is
9 supported and developed.”¹⁰

10 Kimberly-Clark alleges that the LICSS tariff will cost it “more than \$1
11 million per year,”¹¹ compared against Big Rivers’ LIC tariff, which contains no rate
12 at all for Maintenance or Backup Power Service. Kimberly-Clark ignores the fact
13 that it received Backup Power Service for free from July 1, 2021, through March 3,
14 2022.¹² Kimberly-Clark also ignores that it will be compensated for the value its
15 self-generation provides to the Big Rivers system through the \$3.80 per kW-month
16 demand credit. In fact, while Kimberly-Clark is correct that, under the LICSS
17 tariff, its annual Maintenance/Backup demand charges will be a little over \$ 1
18 million, those charges come with a savings on its power bill of nearly \$10 million

⁸ Order at p. 21.

⁹ Order at p. 3 (footnote omitted).

¹⁰ Order at p. 16 (emphasis added).

¹¹ Petition for Rehearing at p. 4.

¹² July 1, 2021, is the date Kimberly-Clark’s generator was placed into service. *See* Direct Testimony of Justin Bieber at p. 5, lines 92-93. March 3, 2022 is the date of the Commission’s Order approving the LICSS tariff on a pilot basis.

1 annually, including about \$1.8 million¹³ in reduced demand charges and almost \$8
2 million in reduced energy costs.¹⁴ And because a substantial portion of Big Rivers’
3 fixed costs are recovered through its energy charge,¹⁵ a significant portion of the lost
4 energy revenues, and all of the net loss to Big Rivers of about \$600,000¹⁶ in lost
5 demand revenues, will be made up for by increased bills to other retail customers.

6 Kimberly-Clark argues, “If the utility has not provided sufficient evidence to
7 support its proposal, as the Commission found, the utility’s proposal should be
8 adjusted by the Commission or rejected entirely.”¹⁷ But contrary to Kimberly-
9 Clark’s argument, the Commission did just as Kimberly-Clark requested and
10 adjusted Big Rivers’ proposal – weighing the evidence presented and finding that
11 adopting the proposed rates on only an interim basis was fair, just and reasonable.
12 Kimberly-Clark has therefore not shown that the Order contained a material error
13 or omission or was unreasonable or unlawful, and rehearing should be denied on
14 this issue.

¹³ $\$10.715/\text{MW} * 14 \text{ MW} * 12 \text{ months} = \$1,800,120.00$.

¹⁴ This reduction in energy revenues was calculated by annualizing the average of the energy volumes from Kimberly-Clark’s self-generation times the average of the \$/MWH column presented on page 7 of Kimberly-Clark’s Petition for Rehearing.

¹⁵ See Direct Testimony of Justin Bieber at p. 17, lines 328-331 (noting that the demand rate in Big Rivers’ LIC tariff is substantially less than Big Rivers’ actual cost of service).

¹⁶ The annual Maintenance/Backup demand charge under the LICSS tariff for Kimberly-Clark is \$1,161,720.00 ($\$6.915/\text{MW} * 14 \text{ MW} * 12 \text{ months}$), resulting in a net reduction in demand revenues of \$638,400 ($\$1,800,120.00 - \$1,161,720.00$).

¹⁷ Petition for Rehearing at p. 3.

1 B. The LICSS tariff rates are not more onerous than the LIC tariff rates.

2 Kimberly-Clark’s second argument is that the Order “is discriminatory
3 because it approved more onerous terms for backup and maintenance service than
4 for LIC service.”¹⁸ This was an issue first raised in Kimberly-Clark’s post-hearing
5 brief, and is simply not supported by Big Rivers’ tariffs or any evidence in this
6 case.¹⁹ As Big Rivers explained in its response brief, both LIC customers and
7 LICSS customers are able to demand Big Rivers serve a customer’s full load (up to
8 the customer’s maximum demand) at any time, subject to outages.²⁰ Thus, both
9 tariffs provide for the same firm service; the standby service set forth in the LICSS
10 tariff is not a “lower quality service”²¹ or a “non-firm”²² service as Kimberly-Clark
11 incorrectly asserts.

12 Kimberly-Clark’s argument is simply a re-hashing of arguments Kimberly-
13 Clark made in its post-hearing brief and response brief.²³ The Commission has
14 repeatedly held that a party cannot obtain rehearing through mere “recitation of
15 the arguments that it presented in its complaint, in filed testimony, at oral
16 argument and in its post-hearing briefs.”²⁴ As such, the Commission should deny
17 rehearing on this issue.

¹⁸ Petition for Rehearing at p. 1.

¹⁹ See Response Brief of Big Rivers Electric Corporation at pp. 5-6.

²⁰ Response Brief of Big Rivers Electric Corporation at p. 6.

²¹ Petition for Rehearing at p. 5.

²² *Id.*

²³ See Petition for Rehearing at pp. 5-6.

²⁴ *In the Matter of: DPI Teleconnect, L.L.C. v. BellSouth Telecommunications, Inc.*, P.S.C. Case No. 2009-00127, Order (March 2, 2012); see also *In the Matter of: Complaint of Sprint*

1 C. The Commission's Order does not require Kimberly-Clark to pay for 34 MW
2 of demand every month.

3 Kimberly-Clark's third argument is that "[t]he Commission's Order erred by
4 requiring Kimberly-Clark to pay for 34 MW of demand every month with no ability
5 for a downward adjustment based on actual usage."²⁵

6 Kimberly-Clark is again simply and improperly re-hashing an argument that
7 it made in its briefs.²⁶ And again, Kimberly-Clark's argument is contrary to the
8 record. The Commission made no such finding. Kimberly-Clark's minimum
9 demand obligation is not a requirement imposed by the LICSS tariff, rather it is
10 imposed by Kimberly-Clark's retail electric service contract. Kimberly-Clark offers
11 no justification for concluding that the minimum demand obligation in its contract
12 does not operate the way Big Rivers explained in its response brief.²⁷ For these
13 reasons, the Commission should deny rehearing on this issue.

Communications Company LP against Brandenburg Telephone Company and Request for Expedited Relief, P.S.C. Case No. 2008-00135, Order (Dec. 15, 2009) (denying motion for rehearing after finding that the moving party's arguments for rehearing were "merely a rehash of its old arguments"); *In the Matter of: Petition of Bellsouth Telecommunications, Inc. to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, P.S.C. Case No. 2004-00427, Order (Jan. 18, 2008) (denying motion for rehearing because it presented no "new evidence or arguments which were not previously considered by the Commission"); *In the Matter of: Joint Application for Approval of the Indirect Transfer of Control Relating to the Merger of AT&T Inc. and Bellsouth Corp.*, P.S.C. Case No. 2006-00136, Order (Aug. 21, 2006) ("Intervenors have raised no evidence or arguments not previously considered by the Commission. Thus, the Commission will not grant rehearing"); *In the Matter of: An Adjustment of The Rates of Delta Natural Gas Company, Inc.*, P.S.C. Case No. 99-176, Order (Feb. 7, 2000) ("As the AG merely reargues this point in his motion and has not presented any new evidence or argument on this point, we find no basis for rehearing and deny his motion on this issue").

²⁵ Petition for Rehearing at p. 6.

²⁶ Response Brief of Big Rivers Electric Corporation at p. 8.

²⁷ *See id.*

1 D. The Commission properly rejected Kimberly-Clark’s proposal to base standby
2 service rates on Big Rivers’ QFS tariff.

3 Kimberly-Clark’s final argument is that the Order “rejected Kimberly-Clark’s
4 proposal to implement a standby tariff based on Big Rivers’ existing QFs due to
5 factual[] inaccuracies.”²⁸ The alleged factual inaccuracy is that the Commission
6 concluded that Kimberly-Clark’s self-generation is “materially different” from a
7 QFS customer.²⁹ There was more than sufficient evidence in the record to support
8 this conclusion, as Big Rivers explained in its briefs.³⁰ This is another improper
9 rehashing of arguments raised during the case, and as such, the Commission should
10 deny rehearing on this issue.

11 **III. Conclusion**

12 For the foregoing reasons, the Commission should deny the Petition for
13 Rehearing.

14 On this the 29th day of March, 2022.

²⁸ Petition for Rehearing at p. 1.

²⁹ See Petition for Rehearing at p. 8.

³⁰ See, e.g., Post-Hearing Brief of Big Rivers Electric Corporation at pp. 11-12; Response Brief of Big Rivers Electric Corporation at p. 11; see also Big Rivers’ response to Item 4 of the Commission Staff’s Post-Hearing Requests for Information.

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Respectfully submitted,

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