

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

In the Matter of:

ELECTRONIC INVESTIGATION OF THE)	
SERVICE, RATES AND FACILITIES OF)	Case No. 2021-00370
KENTUCKY POWER COMPANY)	

**Kentucky Power Company’s Motion to Strike the
Direct and Rebuttal Testimony of Lane Kollen**

Kentucky Power Company (“Kentucky Power” or “Company”) moves to strike and exclude in its entirety the Direct and Rebuttal Testimonies and associated Exhibits of Lane Kollen, expert witness for the intervenors, Kentucky Industrial Utility Customers, Inc. (“KIUC”) and the Attorney General (“AG”) (collectively, “AG-KIUC”), filed in this proceeding on December 22, 2023 (the “Kollen Direct Testimony”) and February 21, 2024 (the “Kollen Rebuttal Testimony,” collectively with the Kollen Direct Testimony, the “Kollen Testimony”). The Commission should strike the Kollen Testimony on the grounds that the testimony raises issues that are outside the scope of this proceeding and because the testimony is largely unreasoned, unsupported, and provides no evidentiary value. Thus, and as set forth in greater detail below, the Kollen Testimony is not relevant and must be stricken from the record of this proceeding.

I. PROCEDURAL HISTORY

A. The Scope of This Proceeding and the Kollen Testimony.

When the Commission issued its order to show cause in this proceeding on June 23, 2023 (“Show Cause Order”), it ordered the Company specifically to “show cause why it should not be subject to the remedy for failure to provide adequate service in its service territory under KRS 278.018(3) and why it should not be subject to an assessment of civil penalties under KRS 278.990 for Kentucky Power’s alleged violation of KRS 278.030, which requires a utility to provide

adequate, efficient and reasonable service to the utility’s customers.”¹ Adequate service, as used in the statutes cited by the Commission, relates to whether the Company has “sufficient capacity” as described in KRS 278.010(14). The Show Cause Order further stated that the order was “necessary in large part due to Kentucky Power’s request to defer approximately \$11.5 million in non-fuel adjustment clause (non-FAC) eligible purchased power costs that occurred in connection with Winter Storm Elliott in December 2022.”² The remainder of the discussion in the Show Cause Order relates to the Company’s generation resource availability during Winter Storm Elliott.³ When the Company later requested that the Commission “provide the Company with notice of all issues the Commission will consider at the evidentiary hearing in this matter and all evidence upon which the Commission will rely to issue any order in this matter,”⁴ the Commission stated that it “is gathering evidence whether Kentucky Power is meeting its legal obligation to provide adequate electric service in its service territory, which includes the legal obligation to have sufficient capacity to serve customers’ energy needs.”⁵

In the more than seven months since the Show Cause Order was issued, the Commission has never indicated that its investigation in the proceeding created by the Show Cause Order would include topics unrelated to whether the Company has met its legal obligation to provide adequate electric service in its service territory. The Commission has not expanded the scope of the proceeding established by the Show Cause Order to include topics such as the future disposition of the Company’s undivided 50 percent interest in the Mitchell Plant, and the Company’s FERC-

¹ June 23, 2023 Order (“Show Cause Order”) at 1.

² *Id.* at 3.

³ *Id.* at 3-7.

⁴ Kentucky Power Company’s Request For Notice And Motion To Amend Procedural Schedule at 3 (filed October 27, 2023).

⁵ December 1, 2023 Order at 8.

jurisdictional transmission expenses and revenues. Similarly, topics such as the operation and performance of the Company's generating units outside of Winter Storm Elliott and the condition of or investment in the Company's distribution system bear no rational connection to the specific proceeding established in the Show Cause Order, namely the Company's capacity to serve its customers. Those topics simply do not bear on the reliability of the Company's power supply to serve its customers and access to sufficient capacity and energy to do so through its membership in PJM.

The Kollen Testimony attempts to shoehorn an unrelated list of grievances against the Company into the specific proceeding created in the Show Cause Order by citing to the broad investigative powers the Commission relied on to open Case 2021-00370 over two and a half years ago.⁶ The Kollen Testimony's reliance on the Commission's broad investigative powers ignores the specific nature of the current proceeding set forth in the Show Cause Order. The Kollen Testimony fails to address the stated purpose of this proceeding set forth in the Show Cause Order—whether the Company has sufficient access to generation capacity to serve customers' energy needs—at all.

II. ARGUMENT

A. The Kollen Testimony Is Outside The Scope Of This Proceeding, Is Not Relevant, And Must Be Stricken.

The Kollen Testimony focuses on topics that are outside the scope of the specific proceeding set forth in the Show Cause Order and which, in many cases, have already been addressed in other recent Kentucky Power proceedings. The Kollen Testimony does not bear on the subject of the Commission's review of the issues identified in the Show Cause Order and, therefore, should be stricken.

⁶ Kollen Direct Test, at 3; Kollen Rebuttal Test. at 1.

1. Generation Operation And Performance.

Mr. Kollen alleges that Kentucky Power’s generating units performed “poorly” during the previous five years and therefore caused additional costs to customers in the form of fuel and purchase power costs.⁷ The issues identified in the Show Cause Order do not include that topic, which relates not to service adequacy but cost prudence and whose scope predates the December 2022 Winter Storm Elliott. Moreover, the operation of the Company’s generating units and related fuel and purchase power costs during the two-year period ended October 31, 2022 are already the subject of the Company’s pending two-year Fuel Adjustment Clause (“FAC”) review proceedings, in Case No. 2023-00008,⁸ as the Kollen Testimony acknowledges.⁹ The Commission should confine its review of fuel and purchase power costs to Case No. 2023-00008 and decline AG-KIUC’s invitation to improperly duplicate review of those issues, which have no bearing on whether the Company has sufficient capacity to meet customers’ energy requirements, in this proceeding.

⁷ Kollen Direct Test. at 7-10; Kollen Rebuttal Test. at 4-13

⁸ *In The Matter Of: An Electronic Examination Of The Application Of The Fuel Adjustment Clause Of Kentucky Power Company From November 1, 2020 Through October 31, 2022*, Case No. 2023-00008.

⁹ Kollen Direct Test. at 7-8, 9; Kollen Rebuttal Test. at 6-8. It is unclear whether the Kollen Testimony seeks re-examination of any fuel and purchase power costs that the Company incurred prior to November 2020 (the beginning of the two-year review period in Case No. 2023-00008). To the extent it does so, it additionally should be stricken as an improper attempt to relitigate issues that are *res judicata*. See *United States v. Utah Construction and Mining Co.*, 384 U.S. 394, 422 (1966); *Bank of Shelbyville v. Peoples Bank of Bagdad*, 551 S.W.2d 234, 236 (Ky. 1977); *Godbey v. University Hospital of Albert B. Chandler Medical Center*, Ky. App., 975 S.W.2d 104, 105 (1998). *Drummond v. Commissioner of Social Security*, 126 F.3d 837, 840 (6th Cir 1997). The Commission has deemed all of the Company’s fuel and purchased power costs prior to November 2020 to be fair, just, and reasonable via its orders in past FAC review cases. Those costs, and the resulting rates, are final and cannot be re-examined by the Commission; any adjustment to or penalty related to those costs would constitute improper retroactive ratemaking. *In The Matter Of: Kentucky Industrial Utility Customers, Inc., et al. v. Big Rivers Corp.*, Case No. 95-00011 (Ky. P.S.C. April 1, 1997) (“The Commission finds no legal authority for the Complainants’ contention that FAC charges are never final and are always subject to Commission review and revision. Neither Administrative Regulation 807 KAR 5:056 nor KRS Chapter 278 supports such a broad proposition. Some degree of finality and stability must be maintained. “Even a public utility,” the Kentucky Court of Appeals has noted, “has some rights, one of which is the right to a final determination of its claim within a reasonable time and in accordance with due process.” Once the Commission has completed its biennial review of a utility’s fuel costs and approved the fuel charges rendered in the biennial period, therefore, these charges achieve the status of commission-established rates. At that point, the rule against retroactive rate-making prevents the Commission from re-examining them.”) (internal citations omitted).

2. The Disposition Of The Mitchell Plant.

Mr. Kollen alleges that the Commission also should delve in this proceeding into issues surrounding the Company's disposition of its interest the Mitchell Plant.¹⁰ The Commission has never indicated that the proceeding established by the Show Cause Order would include that topic, which also does not relate to whether the Company has provided adequate service to customers. The Company's future plans for Mitchell have no bearing on the issues that are the subject of this show cause proceeding. In addition, not only is Mr. Kollen's assumption about the Company's plans with respect to Mitchell completely out of left field, but his suggested remedy is wildly inappropriate, has no evidentiary or factual basis, and is premature. The Company anticipates commencing a process or proceeding before this Commission regarding the Mitchell Plant with an opportunity for all stakeholders to participate. The Company will determine the appropriate format in which to proceed, and will pursue all required Commission approvals as described in the Rebuttal Testimony of Company Witness Cynthia G. Wiseman.¹¹ For these reasons, the Commission should strike the portion of the Kollen Testimony related to the future disposition of the Mitchell Plant.

3. Transmission Expenses And Distribution Investment.

Mr. Kollen alleges that the Company failed to adequately address transmission expenses and revenues and avers, without evidence or other support, that the Company should merge with East Kentucky Power Cooperative in order to cure the perceived issue.¹² Mr. Kollen also alleges, again without evidence or support, that Kentucky Power underinvested in its distribution system.¹³

¹⁰ Kollen Direct Test. at 10-12; Kollen Rebuttal Test. at 14-15.

¹¹ See Wiseman Rebuttal Test. at R9.

¹² Kollen Direct Test. at 13-14.

¹³ *Id.* at 14-15.

The Commission has never indicated, through the Show Cause Order or otherwise, that this specific proceeding would include these topics, which again do not relate to the sufficiency of the Company's access to generation capacity and energy. Mr. Kollen's statements about the alleged impact of the Company merging with EKPC are unsupported by fact or evidence, are not germane to the scope of this proceeding, and serve only as a distraction without evidentiary value.

Mr. Kollen's stated concerns about transmission expenses and distribution investment were addressed and subject to Commission review in the Company's most recent base rate case.¹⁴ AG-KIUC, and Mr. Kollen specifically, participated in that rate case. The Commission's final order in that case addressed both sets of issues. The Company provided evidence that its transmission expenses were reasonable and prudently incurred, and that it had properly invested in its distribution system. The Commission denied the Company's proposed adjustment to annualize test year PJM LSE OATT Expense, which the Company has appealed, and the Commission found that storm costs incurred over the previous three years were prudently incurred. Thus, each of these issues were examined and disposed of by the Commission in Case No. 2023-00159 and are *res judicata*.¹⁵ Accordingly, the portions of the Kollen Testimony regarding transmission expenses and revenues and distribution investment should be stricken because the issues are outside the scope of this proceeding and/or have already been addressed.

III. CONCLUSION

Mr. Kollen's testimony is completely silent as to the sufficiency of Kentucky Power's access to generation capacity to meet customers' energy needs. It provides no evidentiary value

¹⁴ See *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 Accounting Practices To Establish Regulatory Assets And Liabilities; (4) A Securitization Financing Order; And (5) All Other Required Approvals And Relief*, Case No. 2023-00159.

¹⁵ See n. 9.

to the Commission in addressing the issues raised in the Show Cause Order. The Kollen Testimony instead attempts to inject unsupported and unreasoned concepts into this proceeding that have no bearing on its stated, narrow scope. None of the issues complained of by Mr. Kollen fall under the stated purpose of this proceeding, and many either have already been reviewed and adjudicated by the Commission or will properly be considered in future proceedings. Accordingly, as set forth above, the Commission should strike and disregard the Kollen Testimony in its entirety.

WHEREFORE, Kentucky Power Company respectfully requests that the Commission enter an Order:

1. Striking the Direct Testimony and Exhibits of Lane Kollen filed on December 22, 2023 in its entirety;
2. Striking the Rebuttal Testimony and Exhibits of Lane Kollen filed on February 21, 2024 in its entirety; and
3. Granting such further relief to which the Company may be entitled.

Respectfully submitted,



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