

**COMMONWEALTH OF KENTUCKY**

**BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of:

Electronic Investigation of the  
Service, Rates and Facilities of  
Kentucky Power Company

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)  
)

Case No. 2021-00370

**DIRECT TESTIMONY OF**

**TONY CLARK**

**ON BEHALF OF KENTUCKY POWER COMPANY**

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**TABLE OF CONTENTS**

<b><u>SECTION</u></b>	<b><u>PAGE</u></b>
I. INTRODUCTION .....	1
II. PURPOSE OF TESTIMONY .....	2
III. RECOMMENDATIONS FOR EVALUATING THE ISSUES RAISED IN THE SHOW CAUSE ORDER.....	3
IV. AN INADEQUACY OF SERVICE PROCEEDING DOES NOT PRESENT THE COMMISSION THE BEST OPPORTUNITY TO ADDRESS ITS CONCERNS.....	11

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**I. INTRODUCTION**

1 **Q. PLEASE STATE YOUR NAME AND GIVE YOUR RELEVANT PROFESSIONAL**  
2 **BACKGROUND.**

3 A. My name is Tony Clark. I am a Senior Advisor at the firm of Wilkinson Barker Knauer,  
4 LLP, where I provide firm clients with advice on addressing utility regulatory matters.  
5 Prior to my current position, my career was spent in public service. From 2012 through  
6 2016, I was a Commissioner of the Federal Energy Regulatory Commission (“FERC”).  
7 From 2001 through 2012, I was a Commissioner of the North Dakota Public Service  
8 Commission, and for approximately half that time, I was the Commission’s Chairman. I  
9 was the President of the National Association of Regulatory Utility Commissioners in  
10 2010-11. Prior to my time in utility regulation, I served in various roles in state government  
11 in North Dakota, including as a state legislator, administrative officer for the North Dakota  
12 Tax Department, and as Labor Commissioner in the Cabinet of Governor Ed Schafer. I  
13 have a bachelor’s degree in political science from North Dakota State University and a  
14 master’s degree in public administration from the University of North Dakota. In addition  
15 to my duties at Wilkinson Barker Knauer, I am an independent director of Northwestern  
16 Energy Group, Inc., and I am Directorship Certified by the National Association of  
17 Corporate Directors.

## II. PURPOSE OF TESTIMONY

1 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

2 A. The purpose of my testimony is to recommend a policy framework for the Commission to  
3 evaluate the concerns raised in its June 23, 2023, order (the “Show Cause Order”), namely  
4 those related to (1) exposure to market costs for energy, and (2) the ownership, availability  
5 and deliverability of capacity sufficient for Kentucky Power to adequately serve customers.  
6 My goal is to present the Commission with a pathway that best protects the public interest  
7 while preserving important Commission regulatory prerogatives. This framework I  
8 propose best positions the Commission to lead Kentucky Power, and potentially other  
9 utilities in the state, towards the reliability and rate impact goals the Commission desires.

10 **Q. CAN YOU PLEASE PROVIDE AN OVERVIEW OF YOUR TESTIMONY?**

11 I begin my testimony by offering the Commission regulatory approaches to address its  
12 economic concerns on energy costs and its physical concerns on resource adequacy.

13 With respect to Kentucky Power’s economic choices leading up to the 2022-2023  
14 winter, including Winter Storm Elliott, I believe the Commission should proceed with a  
15 standard prudence analysis, to the extent they have not been addressed in connection with  
16 the Company’s request to establish a regulatory asset or separately. The prudence analysis  
17 is well suited to evaluating the reasonableness of Kentucky Power’s decision making and  
18 the attendant cost effects on customers. At the same time, the remedies are directed to, and  
19 proportional with, any identified harms. Prudence reviews are also well-understood by  
20 investors and considered to be part of standard regulatory practice.

21 As to resource adequacy, I believe the best course forward is to pursue a regulatory  
22 solution that is proactive and forward looking. I do not recommend a single course, but

1 offer five attributes that I believe are important for any proceeding: (1) Forward-looking;  
2 (2) Transparent; (3) Clarifying; (4) Customer-centric, and; (5) Comprehensive. I also  
3 provide a number of examples to assist the Commission, building upon the experiences of  
4 other states that have faced similar issues. Based on my experience as a regulator, I believe  
5 this will help the Commission achieve its aims more effectively than relying on regulatory  
6 tools that are, by their nature, backward-looking and that threaten extreme sanctions, such  
7 as the loss of a franchise.

8 My testimony concludes with a discussion of the advantages of the proposed  
9 framework over one that seeks to achieve Commission goals through an inadequacy of  
10 service proceeding.

11 **Q. DO YOU RECOMMEND ANY PARTICULAR OUTCOME?**

12 A. No. I am not here to suggest a particular commission outcome to the Commission's  
13 reviews. As to prudence, how much, or by what mechanisms, a utility is permitted to  
14 recover its expenses is a question of fact, law, and precedent to be established via a robust  
15 evidentiary record, and subject to judicial review. And as for resource adequacy, there are  
16 many reasonable ways for regulators to ensure reliability, as evidenced by the diversity of  
17 regulatory requirements across the country. My goal is simply to provide the Commission  
18 with a framework for evaluating these questions.

19 **III. RECOMMENDATIONS FOR EVALUATING THE ISSUES RAISED IN THE**  
20 **SHOW CAUSE ORDER**

21 **Q. WHAT IS YOUR UNDERSTANDING OF THE ISSUES RAISED IN THE SHOW**  
22 **CAUSE ORDER?**

A. I understand the Show Cause Order to address two primary concerns about Kentucky  
Power stemming from its performance during Winter Storm Elliott in December 2022. The

1 first is economic adequacy, *i.e.*, were the company's choices about how it structured its  
2 capacity and energy acquisitions economically prudent for customers given the best  
3 information management had at the time the decisions were made? The second is physical  
4 adequacy, *i.e.*, whether the company had, or has, access to adequate physical resources to  
5 provide reliable power.

6 **Q. AFTER REVIEWING THE ORDER TO SHOW CAUSE, DID YOU HAVE ANY**  
7 **INITIAL TAKEAWAYS?**

8 A. As an initial matter, I commend the Commission for taking its job seriously. I believe the  
9 topics of purchased power costs and capacity availability are issues about which  
10 conscientious regulators should be inquiring in general. Since the questions are  
11 appropriate, the next step is to discern the most constructive way for the Commission to  
12 get the answers it seeks, and to then develop a regulatory framework to incentivize the  
13 utility behavior that the Commission believes is in the public interest.

14 **Q. DO YOU BELIEVE THE COMMISSION SHOULD APPLY THE SAME**  
15 **ANALYSIS BOTH TO THE ECONOMIC AND PHYSICAL RELIABILITY**  
16 **ISSUES?**

17 A. No. In my view, these issues should be considered separately. On the one hand, the  
18 question of economic management is naturally backwards looking. Regulators routinely  
19 evaluate the reasonableness of utility decision making in assessing whether costs are  
20 collectable from customers, and can disallow part or all of a utility's expenses if they are  
21 determined to be imprudent. On the other hand, resource adequacy is a forward-looking  
22 concept. Through formal proceedings, such as integrated resource planning ("IRP"), and  
23 less formal exchanges, regulators provide guidance to utilities on how they should meet

1 their reliability requirements over the coming years. I believe the forward-looking nature  
2 of the resource adequacy question is especially apt here given my understanding that  
3 Kentucky Power has not had a capacity-related reliability event (*e.g.*, load shed) in at least  
4 twenty years, and likely much longer.

5 **Q. WHAT APPROACH DO YOU SUGGEST FOR QUESTIONS ABOUT COST AND**  
6 **RECOVERY OF EXPENSES?**

7 A. I suggest that questions relating to cost—for example, how to handle purchased power  
8 costs that exceeded amounts eligible for recovery in Kentucky Power’s Fuel Adjustment  
9 Clause—be addressed in the context of a standard cost recovery/prudency review docket.  
10 Having seen these sorts of dockets play out in states across the country, investors and  
11 outside observers will view this type of proceeding as well within standard regulatory  
12 practice – even though state-by-state outcomes may be perceived as more or less favorable  
13 to investors.

14 I realize the Commission may believe that it has already addressed these economic  
15 regulatory matters through the denial of Kentucky Power’s request for the establishment  
16 of a regulatory asset for costs associated with meeting its customers’ requirements during  
17 Winter Storm Elliott. If so, that would seem to be a judicially appealable decision and,  
18 because Kentucky Power has appealed this decision, it will be up to the courts to determine  
19 if the Commission met all standards of law, provided appropriate due process, did not act  
20 arbitrarily or capriciously, and reasonably explained its rationale based on an evidentiary  
21 record. But to the extent that the Commission intends its show cause order to take the place  
22 of a more conventional economic review of the Company’s resource planning decisions,

1 then my recommendation would be to consider matters of economic adequacy in a fully  
2 developed prudency review/cost recovery proceeding.

3 **Q. HOW DO YOU PROPOSE THE COMMISSION ADDRESS CONCERNS**  
4 **RELATED TO RELIABILITY, ADEQUACY OF SERVICE, OR MORE**  
5 **GENERALLY, “RESOURCE ADEQUACY?”**

6 A. I recommend implementing forward looking tools that give the Commission the  
7 opportunity to consider cost-benefit tradeoffs more fully under various scenarios.  
8 Although there are many courses the Commission can take to complete this review—  
9 several of which I will describe shortly—I believe any proceeding should follow five  
10 general attributes:

11 (1) Forward-looking – they attempt to ascertain how utilities will meet their  
12 obligations in the foreseeable future;

13 (2) Transparent – all affected parties have a good sense of the regulatory process  
14 up-front;

15 (3) Clarifying – by producing clear Commission signals, the end result of the  
16 proceedings ensures that utilities, their customers, investors, and affected  
17 communities are not left to “read between the lines” regarding regulator  
18 expectations;

19 (4) Customer-centric – the focus in each of these proceedings is to produce what  
20 customers most want, the provision of reliable electricity during all hours of the  
21 day and in all operating conditions; and



1 (5) Comprehensive – approach capacity retention holistically, by ensuring that all  
2 load serving entities (“LSEs”) are planning and communicating their plans in a  
3 similar, systematic way, as they are part of a wider, interconnected grid.

4 Overall, how the utility meets its resource adequacy responsibility always has a  
5 degree of judgement, informed by regulatory statutes, rules, guidance and expectations. As  
6 FERC Chairman Willie Phillips said, “reliability remains job one.” This should be true of  
7 both utility management and the regulators overseeing them. In my opinion, the public  
8 policy outcomes that best meet the public’s interests will seek to incentivize utility  
9 performance, as informed by regulators who give clear signals about how they view the  
10 different tradeoffs between engineering and economics.

11 **Q. CAN YOU GIVE SOME EXAMPLES OF HOW THIS CAN BE ACHIEVED?**

12 A. Yes. I believe there are number of strategies that can enhance utility decision making  
13 regarding how to achieve resource adequacy, ensuring it is done in a cost-effective way  
14 that meets regulatory expectations. I will start with mechanisms that, despite their  
15 informality, may be effective in achieving positive results.

16 One mechanism we employed in my home state of North Dakota was to schedule  
17 meetings several times a year – perhaps three or four – between the entire Commission and  
18 each of our regulated utilities. We called them “Periodic Information Exchange” meetings.  
19 They were noticed open meetings on non-pending, non-contested matters. They could be  
20 on any topic that would benefit the Commission, but often the agenda centered on things  
21 like future capacity planning, RTO operations, retail service offerings, reliability, service  
22 territory economic development updates, or safety results, to name a few topics. The  
23 meetings were an opportunity, in a non-adversarial forum, to have a two-way dialogue

1 between the Commission and regulated companies about topics that were likely to be of  
2 interest. While the idea was simple, these meetings were effective in helping align utility  
3 operational planning with regulator perspectives. The Commission has an important role  
4 in establishing an environment where ideas can be discussed and developed openly. An  
5 open format for discussion benefits everyone involved and shows the stakeholders that the  
6 Commission is focused on solutions that balance its responsibilities to the customers and  
7 utility.

8 Another way to achieve similar results is through things like the opening of  
9 inquiries, technical conferences, and workshops. Not only states, but FERC especially,  
10 make frequent use of these mechanisms to share perspectives, “shine a light,” and gather  
11 technical information to inform staff and commissioners on emerging areas of interest or  
12 concern.

13 A generally more formal venue for state commissions to set forward-looking  
14 regulatory expectations is through the IRP process. States handle these sorts of proceedings  
15 differently depending on state law or regulatory practice. Some are very formal, very  
16 litigated, and carry with them legally meaningful decisions. Some are far more informal –  
17 perhaps even just informational in nature. I would not presume to characterize Kentucky’s  
18 process, since this Commission is the expert agency in your state. But I would just say that  
19 there are different models for IRPs, and if a state is concerned it is not working, there are  
20 other models from which to copy.

21 Moving up the ladder of formality, the rulemaking process is another tool.  
22 Rulemaking can be particularly useful if the matter with which the Commission is  
23 grappling is one of general concern across the state and across utilities. Rulemakings

1 typically allow commissions to take into consideration critical technical information in a  
2 more legislative style, as compared to a litigated, contested proceeding. Rulemakings  
3 produce binding rules of general application to all utilities in the state.

4 Finally, on the upper end of the scale of formality, states can adopt statutory changes  
5 to modify utility behavior. This, obviously, is a decision ultimately made not by  
6 Commissions, but through the legislative process.

7 **Q. ARE THERE EXAMPLES OF STATES EMPLOYING THESE SORTS OF**  
8 **REGULATORY TOOLS TO ADDRESS ANALOGOUS CAPACITY RETENTION**  
9 **AND PLANNING ISSUES?**

10 A. Yes. I will provide three examples in which states used different mixes of rulemakings,  
11 resource planning and and/or statutory changes.

12 The first state approach to which I would draw the Commission's attention is being  
13 employed in Louisiana. There, the Commission opened a rulemaking in response to  
14 concerns that had been raised regarding generation capacity availability in the state given  
15 fleet retirements and the shifting generation resource mix.<sup>1</sup> The crux of the matter related  
16 to whether all LSEs in the state were retaining and procuring enough capacity to ensure  
17 reliability under a variety of operating conditions, and especially during tight RTO market  
18 operations. The Louisiana Commission's concern was that if too many LSEs were all  
19 "leaning" on the market at the same time, that could cause system reliability problems. The  
20 Louisiana PSC approach to address the issue was to open a rulemaking regarding the  
21 establishment of minimum physical capacity thresholds for LSEs. As of this date, that

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<sup>1</sup> Notice of Rulemaking, *In re: Consideration of Whether the Commission Should Adopt Minimum Physical Capacity Threshold Requirements for Load Serving Entities*, La. P.S.C. Docket No. R-36263 (Feb. 12, 2022).

1 rulemaking is still open, and Commission staff has issued a report which could serve as the  
2 basis for further exploration or proposed rules.<sup>2</sup>

3 A second state approach I will highlight is recent activities in Michigan. Concerns  
4 about planning for adequate capacity in Michigan date back several years, overlapping with  
5 my time as a member of FERC. Some of these concerns arose from Michigan’s rather  
6 unique experience with utility restructuring and retail choice, but the central issue—how  
7 utilities can demonstrate that they have appropriately planned for resource adequacy—  
8 provides lessons for any state. As a proactive measure to address capacity retention and  
9 planning in Michigan, LSEs are required as a matter of law and Commission order to file  
10 capacity demonstrations that prove their ability to adequately serve load in future planning  
11 years. Staff then audits the filings, contracts and associated materials and can find that an  
12 LSE has either satisfied or failed to satisfy the requirement that it has procured appropriate  
13 levels of resources for the future planning year in question. The Michigan process contains  
14 enough flexibility to address emerging issues, such as new capacity accreditation measures  
15 taking shape in the RTOs, which can impact LSE capacity demonstrations in the state. A  
16 recent example is the Michigan PSCs March 2023 technical conference report, “Integration  
17 of the MISO Seasonal Resource Adequacy Construct and the Michigan Capacity  
18 Demonstration Process & Requirements.”<sup>3</sup>

19 A final state I will highlight is Kentucky’s neighbor, Indiana. Similar to Michigan,  
20 Indiana requires “an annual reporting mechanism for Indiana electric utilities to identify  
21 how they plan to meet their customers’ electricity needs in the near-term”. The

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<sup>2</sup> Notice of Staff’s Recommendation of Proposed Rule and Request for Comments, *In re: Consideration of Whether the Commission Should Adopt Minimum Physical Capacity Threshold Requirements for Load Serving Entities*, La. P.S.C. Docket No. R-36263 (Sep. 18, 2023).

<sup>3</sup> <https://mi-psc.my.site.com/sfc/servlet.shepherd/version/download/0688y000007ItwMAAS>

1 Commission (IURC) is directed to then compile and analyze the utility data, investigate,  
2 and if necessary, act to address unsatisfactory conditions. The first of these reports was  
3 published in October 2022, and demonstrates the value of such inquiry.<sup>4</sup>

4 **Q. ARE YOU ENDORSING ANY ONE APPROACH, EITHER FORMAL OR**  
5 **INFORMAL?**

6 A. No. I am not here to endorse any one approach, but I believe each of these approaches  
7 offer a potential pathway for this Commission to consider. I particularly find merit in each  
8 of these approaches insofar as they put the state and the Commission in a leadership role  
9 that embraces the five regulatory attributes I previously noted. It is particularly valuable  
10 that each of these approaches permits the Commission a more comprehensive record by  
11 which it can assess tradeoffs related to different ways the state's utilities can meet their  
12 resource adequacy imperatives.

IV. **AN INADEQUACY OF SERVICE PROCEEDING DOES NOT PRESENT THE**  
**COMMISSION THE BEST OPPORTUNITY TO ADDRESS ITS CONCERNS**

13 **Q. DO YOU BELIEVE THAT AN INADEQUACY OF SERVICE PROCEEDING IS AN**  
14 **EQUALLY PREFERABLE WAY TO ADDRESS STATE COMMISSION**  
15 **CONCERNS RELATED TO EXTRAORDINARY, PURCHASED POWER COSTS**  
16 **AND PHYSICAL CAPACITY REQUIREMENTS?**

17 A. No. Addressing these issues in the context of an inadequacy of service proceeding does  
18 not emulate the five regulatory attributes I noted.

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<sup>4</sup> <https://www.in.gov/iurc/files/HEA1520-Report-10.5.2022-Final.pdf>

1 **Q. DO YOU HAVE ANY INITIAL OBSERVATIONS REGARDING INADEQUACY**  
2 **OF SERVICE AS A REGULATORY TOOL?**

3 A. I do. As an initial matter, I would again emphasize that it is appropriate for the Commission  
4 to ask questions about purchased power costs, resource adequacy, generation capacity, and  
5 capacity deliverability, as well as review utility decisions about owned resources vs.  
6 contracted resources vs. market resources. These sorts of things are the bread-and-butter  
7 work of regulatory commissions. But the manner through which a commission signals its  
8 expectations matters greatly. I mean to suggest that it is important for commissions to  
9 choose the most appropriate, proportionate, regulatory tools and frameworks to achieve an  
10 outcome that supports the overall public interest.

11 **Q. DO YOU BELIEVE THAT AN INADEQUACY OF SERVICE PROCEEDING IS**  
12 **THE BEST WAY TO GO ABOUT THIS MISSION OF SUPPORTING THE PUBLIC**  
13 **INTEREST IN THIS INSTANCE?**

14 A. No. While there is a time and place for utilizing inadequacy of service statutes in rare  
15 circumstances, I do not believe it is the right tool in this instance, and I have concerns that  
16 this type of proceeding could have unintended negative consequences.

17 **Q. WHY DO YOU SAY THAT?**

18 A. First, I would emphasize the extraordinary nature of invoking an inadequacy of service  
19 statute. It is far from a routine regulatory proceeding. I do not recall any such similar  
20 proceeding in my nearly 12 years at the North Dakota Commission, and they are not  
21 common proceedings in the regulatory arena generally, to my knowledge.

22 Second, they are backward looking proceedings in which the remedies tend to be  
23 punitive in nature, such as the ultimate loss of a franchise. This stands in contrast with

1 more standard regulatory tools, such as prudence reviews or cost of service ratemaking,  
2 which, though sometimes backward looking, attempt to allocate costs to companies and  
3 customers by assessing whether, for example, utility assets are used and useful, or whether  
4 the utility management made reasonable and prudent decisions based on the information it  
5 knew or should have known at the time decisions were made.

6 Third, inadequacy of service proceedings also stand in contrast with IRP,  
7 performance-based ratemaking or rulemaking proceedings, all of which are mechanisms  
8 for improving future utility performance by clearly laying out utility performance  
9 expectations and requirements. Invoking an inadequacy of service statute is a sort of  
10 ultimate regulatory hammer, where the result can go so far as to terminate the utility's  
11 ability to conduct business in the state. Given the potentially extreme nature of the remedy,  
12 it is unsurprising that these are not common proceedings in the utility space. My general  
13 understanding is that inadequacy of service statutes have been reserved for situations in  
14 which a utility's customers have filed complaints regarding reliability and requested to be  
15 served by another utility,<sup>5</sup> or in which the Commission has investigated whether the

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<sup>5</sup> See *In The Matter Of: Jonathan S. Roland Complainant v. Kenergy Corp. Defendant*, Case No. 2003-00057; *In The Matter Of: Russell Murphy, Jr. Complainant v. Inter-County Energy Cooperative Corporation Defendant*, Case No. 2014-00106.

1 utility's financial or operational condition renders it able to deliver adequate service, for  
2 example, small, independent water companies.<sup>6</sup>

3 **Q. ARE YOU FAMILIAR WITH ANY COMMISSION INVOKING AN**  
4 **INADEQUACY OF SERVICE STATUTE WHERE THE FACTS ARE SIMILAR TO**  
5 **THIS CASE?**

6 A. I am not. There are, however, states that have addressed substantially similar capacity  
7 issues through different mechanisms, as I previously explained. In addition, there are  
8 several states that just recently addressed extraordinary cost issues that arose from the  
9 extreme weather event that relates to this proceeding: the extraordinary winter weather  
10 conditions experienced throughout much of the Eastern interconnection during Winter  
11 Storm Elliott in late December 2022. This weather event was not dissimilar in impacts as  
12 Winter Storm Uri in the Central U.S. in February 2021. Both incidents saw extreme winter  
13 weather cause operational challenges for utilities, generators, and grid operators – and both  
14 also entailed significant price increases in the wholesale markets. In response, the incidents  
15 led to significant regulatory proceedings across the country, including this one.

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<sup>6</sup> See *In The Matter Of: Electronic Investigation Into The Financial And Operating Capacity Of Rattlesnake Ridge Water District Including Rattlesnake Ridge Water District And Its Individual Commissioners, And Manager David Gifford For Alleged Failure To Comply With KRS 278.300 As Well As Possible Vacancies On The Board Of Commissioners Of Rattlesnake Ridge Water District*, Case No. 2021-00340; *In The Matter Of: Investigation Into Excessive Water Loss By Kentucky's Jurisdictional Water Utilities*, Case No. 2019-00041; *In the Matter of: Jeffrey and Christy Vice, Complainant; Fleming-Mason Energy Cooperative, Inc., Defendant*, Case No. 2013-00010.

Examples from outside of Kentucky include: (1) *In the Matter of the Commission Investigation of Shawnee Hills Utility Co. relative to its Quality of Service*, Pub. Util. Comm. Ohio Case No. 88-169-WW-COI, 1988 Ohio PUC LEXIS 220 (Feb. 17, 1988) (directing Shawnee Hills to “appear and show cause as to why the company should be not be found to be in violation of [Ohio’s adequate service statute],” given the PUCO Staff’s findings that the utility “[did] not have enough water to provide adequate pressure to run the water system”); and (2) *Pennsylvania Pub. Util. Comm. v. Pennsylvania Gas & Water Co.*, Pa. Pub. Util. Comm. No. C-861049, 1988 Pa. PUC LEXIS 500 (July 11, 1988) (approving a settlement in a show cause proceeding alleging “that PG&W had failed to provide adequate, efficient, safe and reasonable service and facilities”).



1 **Q. CAN YOU DESCRIBE THE NATURE OF THESE PROCEEDINGS THAT WERE**  
2 **PRECIPITATED BY RECENT EXTREME WEATHER EVENTS?**

3 A. I would divide the proceedings into two different categories. The first are proceedings  
4 dedicated to addressing the financial/economic implications of these extreme weather  
5 events. The second category of proceedings are related to the operational challenges  
6 exposed by the events. The economic proceedings are substantially like Kentucky Power's  
7 initial application to establish a regulatory asset for the company's non-Fuel Adjustment  
8 Clause eligible fuel costs arising from the unusual market conditions during Winter Storm  
9 Elliott. States across the country handled out-of-the-ordinary costs in various ways, but  
10 the financial impacts of the weather events were typically addressed in the context of  
11 economic regulation dockets.<sup>7</sup> The second category of issues relate to operational  
12 challenges brought about by unanticipated and/or extreme weather. These reliability-  
13 focused proceedings have occurred at the state level (state commission reviews), the federal

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There are several examples arising from Winter Storm Uri in 2021, and I will call out just a few that impacted other AEP companies.

In Oklahoma, legislation was passed to allow securitization of the extraordinary fuel and purchased power costs from the storm, and utilities made filings to securitize and pass through their storm costs. *See Application of Public Service Company of Oklahoma for a Financing Order Pursuant to the February 2021 Regulated Utility Consumer Protection Act Approving Securitization of Costs arising from the Extreme Winter Weather Event of February 2021, and Related Relief*, Cause No. PUD 202100076, Financing Order (Feb. 10, 2022).

In Arkansas, the Commission allowed Southwestern Electric Power Company ("SWEPCO") to extend the period over which it would recover the fuel costs over a period of 6 years at the company's weighted average cost of capital. *In the Matter of the Application of Southwestern Electric Power Company for Approval of a General Change in Rates and Tariffs*, Docket No. 19-008-U, Order No. 21.

Lastly, in Louisiana, the Louisiana Public Service Commission ("LPSC") approved two special orders in March and April 2021 granting a temporary modification to fuel clauses, and shortly thereafter SWEPCO began recovery of its Louisiana jurisdictional share of these fuel costs based on a five-year recovery period. The special orders state that fuel and purchased power costs incurred will be subject to a future LPSC audit. *See Undocketed, In re: Establishment of a regulatory asset for jurisdictional utilities for costs associated with the Winter Storm Event of February 2021, as needed, and for accounting purposes only*, Special Order Number 21-2021 (Apr. 5, 2021); *Undocketed, In re: Temporary modifications to the FAC and PGA General Orders for electric and gas utilities for fuel costs associated with the February 2021 Winter Storm Events*, Special Order Number 19-2021 (March 25, 2021).

1 level (FERC and NERC) and through grid operators (e.g., PJM, MISO and SPP). The  
2 operational reviews include both backward looking components (“what happened?”), and  
3 forward-looking components (“what new rules or processes should be implemented to  
4 mitigate the risk of future events?”). As I noted previously, I am unfamiliar with a state  
5 initiating inadequacy of service proceedings on the basis of these sorts of events, which  
6 affected utilities operating throughout widespread regions of the country.

7 **Q. WERE THESE EVENTS SEVERE ENOUGH TO CAUSE LOAD SHEDDING IN**  
8 **OTHER PARTS OF THE COUNTRY?**

9 A. Indeed, they were. The blackouts in Texas during Storm Uri are well documented, but  
10 much of the Central U.S., especially the SPP region, is more analogous to Kentucky, where  
11 state-regulated, vertically integrated utilities operate within an RTO. Some of these areas  
12 experienced rotating temporary load sheds, where power was curtailed over short blocks  
13 of time to maintain bulk power system stability. In Winter Storm Elliott, some portions of  
14 the Southeast experienced outages. Despite that load was shed in these locations, I am not  
15 aware of these extreme weather events giving rise to inadequacy of service proceedings in  
16 those other states. By contrast, from the submissions that have been filed in this docket, it  
17 is my understanding that unlike other utilities across the country during similar events,  
18 Kentucky Power did not incur load sheds or blackouts during Storm Elliott.

19 This underscores a recommendation I have for the Commission. As I mentioned  
20 previously, regulatory tools should be proportionate and appropriate. Here we have a case  
21 where the utility did “keep the lights on” during an extreme event that resulted in blackouts  
22 elsewhere. And while a single blackout alone would not be dispositive in proving an  
23 inadequacy of service (blackouts may happen for a variety of reasons that would not

1 otherwise alone merit a designation of inadequate service), an inadequacy of service  
2 proceeding seems particularly inapposite in a case where the utility did, during an  
3 unprecedented event, in fact have “sufficient capacity to meet the maximum estimated  
4 requirements” of customers to be served. In brief, an inadequacy of service proceeding—  
5 with its extreme remedy—seems like a poor regulatory fit in a circumstance where service  
6 interruptions were not part of the context or the fact pattern, especially considering how  
7 the utility subject to the order performed relative to its national and regional utility peers.

8 **Q. JUST BECAUSE OTHER STATES HAVEN’T PURSUED THIS SORT OF**  
9 **REGULATORY REMEDY, WHY SHOULDN’T KENTUCKY AVAIL ITSELF OF A**  
10 **NOVEL WAY OF APPROACHING A MATTER WHERE THE COMMISSION HAS**  
11 **CONCERNS?**

12 A. I would suggest that the potential harm is multi-fold. The biggest concern I have is for  
13 how this could negatively affect customers and communities. One of the key purposes of  
14 regulation should be to support outcomes that incentivize utility performance to result in  
15 good outcomes for customers – all while permitting, as required by law, the regulated  
16 companies an opportunity to earn a reasonable return on investments made for the benefit  
17 of customers. Regulatory tools that neither incentivize nor align utility operations with  
18 positive customer outcomes run the risk of being “lose-lose” propositions for both  
19 companies and customers. I would characterize state inadequacy of service statutes as an  
20 extraordinary regulatory remedy, a sort of “break glass in case of emergency” law to be  
21 employed when the commission has found the utility’s management and operational  
22 capability have so clearly deteriorated that it cannot reasonably be expected to provide  
23 essential services. And an extraordinary remedy should require an extraordinary record

1 that establishes the fact pattern, since the remedies, like the loss of a franchise, are so  
2 severe. But there is a potential harm for consumers should the Commission use tools in  
3 the regulatory toolbox in a way that could be perceived as disproportionate to the  
4 circumstances.

5 **Q. WHAT SORT OF HARM ARE YOU CONCERNED ABOUT, AND WHAT DO YOU**  
6 **MEAN BY A “LOSE-LOSE” OUTCOME?**

7 A. By “lose-lose,” I mean to suggest that the customers do not get what they want: a properly  
8 run utility providing reliable service at just and reasonable rates; and the company and its  
9 investors and employees also lose through reputation damage and, ultimately, the loss of  
10 ability to conduct business. It is difficult to see what the clear path forward would be for  
11 the utility – or any successor utility – to meet Commission expectations, since an  
12 inadequacy of service inquiry is, by itself, a rearview-mirror assessment of utility decisions,  
13 without forward-looking guidance to the specific utility – or other utilities operating in the  
14 state – on how they can meet future expectations. An inadequacy of service finding by a  
15 commission inarguably tells a regulated utility that the Commission thinks it “screwed up,”  
16 but it does not provide a roadmap for what it should do to meet regulator expectations –  
17 other than “don’t do that.” In short, it is not forward-looking, it does not foster clarity or  
18 transparent expectations for the regulated business going forward or for other utilities in  
19 the state, it is not particularly customer focused, and since it involves just one utility, it is  
20 not comprehensive.

21 I also think it is important to appreciate how the use of the inadequacy of service  
22 tool in any but the most extreme circumstances would be perceived by those who invest in  
23 and supply capital to utility companies. The money utilities invest in operations in any

1 state generally come from one of three sources: from a company's retained earnings, from  
2 the issuance of equity, or from taking on debt. Since investors expect utilities to be  
3 generally stable, dividend producing entities, they tend to not be large cash stockpiling  
4 companies. That means that most investments in capital assets are financed through a  
5 combination of debt and equity – usually at around a 50:50 ratio – but sometimes a little  
6 heavier on one side or the other. While stock may trade at the holding company level for  
7 a large multi-state entity like Kentucky Power's parent, American Electric Power, debt for  
8 individual operating companies/subsidiaries is likely to be raised state-by-state. As a result,  
9 the cost of debt can vary between jurisdictions based on institutional debt issuers'  
10 perceptions of the regulatory climate within the state. The terms of debt will tend to be  
11 more customer friendly for states that are perceived to have constructive regulatory  
12 climates, and less favorable if the climate is viewed as less constructive.<sup>8</sup>

13 Notice I used the word “constructive” because I am not arguing for policies that  
14 necessarily favor the utility or customer per se. Rather, my focus is on an approach to  
15 regulation that investors see as providing a degree of transparency into commission  
16 rationale and expectations. As I have previously noted, I believe an inadequacy of service  
17 proceeding to be a significant and remarkable action.

18 One of the things that has particularly struck me since leaving government service  
19 is learning about the degree to which financial institutions and investors track what is done

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<sup>8</sup> See Moody's Investor Service, *Rating Methodology, Regulated Electric and Gas Utilities* (Jun. 23, 2017) (<https://ratings.moodys.com/api/rmc-documents/68547>). The report describes the factors that Moody's weighs to determine a public utility's overall rating and notes that 25% of its ratings evaluation is based on the utility's “Regulatory Framework,” including Consistency and Predictability of Regulation, which accounts for half of that factor's scoring. *Id.* at 4. An additional 25% of Moody's ratings evaluation is based on the utility's “Ability to Recover Costs and Earn Returns,” which is equally weighted between timeliness of cost recovery and the sufficiency of rates and returns. *Id.*

1 and said by regulatory commissions. What I might have even thought of as relatively  
2 innocuous matters while I was on a commission can be interpreted (or sometimes  
3 misinterpreted) by commission observers in ways I would not have necessarily considered.

4 I believe an inadequacy of service proceeding, even just being opened, is not  
5 viewed as a run-of-the-mill docket. My overarching concern is that the Commission  
6 utilizing an inadequacy of service approach to address matters that other states are handling  
7 through more conventional avenues, will be perceived negatively relative to other  
8 jurisdictions – perhaps more so than the Commission intends. Customers and the  
9 Commission should care about this because debt issued at a lower cost directly translates  
10 into customer savings via a lower weighted cost of capital, and ultimately, a lower overall  
11 revenue requirement. That is to say, cheaper debt costs mean lower customer rates.

12 **Q. ARE THERE OTHER REASONS AN INADEQUACY OF SERVICE APPROACH**  
13 **IS SUBOPTIMAL?**

14 A. Yes, I believe there are. If one takes the inadequacy of service finding to its ultimate  
15 conclusion, it could mean severe penalties – up to and including termination of a company’s  
16 ability to provide service. Yet there will still be a need for some company to maintain  
17 reliable provision of services. That would mean some sort of forced transition. I cannot  
18 pretend to know what that transition would look like, but I must believe it would be  
19 protracted, expensive, and legally messy.

20 This would not be a standard utility acquisition or merger. It would be somewhat  
21 uncharted territory since I suspect there is not a large body of this sort of precedent – at  
22 least not on the scale of a company like Kentucky Power. Perhaps the closest analogy I  
23 can envision might be somewhat akin to a litigated government takeover of a utility, like

1 forced municipalization fights that on rare occasion crop-up in certain communities in the  
2 U.S. I don't believe much positive would come from a battle over who will provide  
3 electricity service – not for customers, communities, investors nor employees given the  
4 tremendous amount of uncertainty that would hang over the entire matter.

5 In short, I believe handling the issues in this matter through an inadequacy of  
6 service process creates downside risks that are too steep, and upside benefits too small. It  
7 is backward-looking, its remedies are punitive rather than corrective, and it is unclear what  
8 actionable forward-looking signals the commission would be sending to utilities in the  
9 state. My recommended approach – employing regulatory tools and proceedings utilized  
10 in several other states to provide specific, transparent, and comprehensive forward-looking  
11 guidance regarding both the aspects of resource adequacy identified would permit the  
12 Commission to exercise its statutory responsibilities in a way that most benefits customers  
13 and the public interest.

14 **Q: DOES THIS COMPLETE YOUR TESTIMONY?**

15 **A. Yes.**



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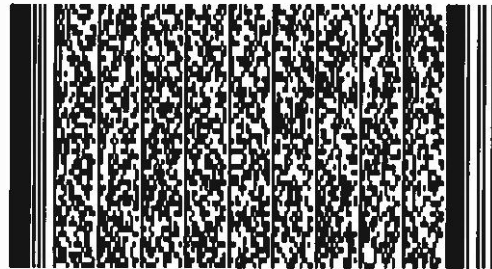
#### E-Signature Summary

**E-Signature 1: Anthony Clark (AC)**

December 21, 2023 10:06:11 -8:00 [50F550E62047] [141.156.178.121]  
 TClark@wbklaw.com (Principal) (Personally Known)

**E-Signature Notary: Marilyn Michelle Caldwell (MMC)**

December 21, 2023 10:06:11 -8:00 [E31D2BCA0DA2] [167.239.221.106]  
 mmcaldwell@aep.com  
 I, Marilyn Michelle Caldwell, did witness the participants named above electronically sign this document.



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VERIFICATION

The undersigned, Tony Clark, being duly sworn, deposes and says he is the Senior Advisor for Wilkinson Barker Knauer, LLP, that he has personal knowledge of the matters set forth in the foregoing testimony and the information contained therein is true and correct to the best of his information, knowledge, and belief after reasonable inquiry.

Anthony Clark  
Signed on 2023-12-21 10:26:11 -0500

Tony Clark

Commonwealth of Kentucky )  
 )  
County of Boyd )

Case No. 2021-00370

Subscribed and sworn to before me, a Notary Public in and before said County and State, by Tony Clark, on December 21, 2023.

Marilyn Michelle Caldwell

Notary Public

MARILYN MICHELLE CALDWELL  
ONLINE NOTARY PUBLIC  
STATE AT LARGE KENTUCKY  
Commission # KYNP71841  
My Commission Expires May 05, 2027

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