

**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 DISMISS PROCEDURES
INITIATED PURSUANT TO KRS 278.018(3) AND MEMORANDUM IN SUPPORT**

Kentucky Power Company (“Kentucky Power” or the “Company”) respectfully moves the Public Service Commission of Kentucky (“Commission”) to dismiss the proceedings initiated under KRS 278.018(3) by the Commission’s June 23, 2023 Order requiring the Company 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)” based on the allegation that the Company has not procured adequate generating capacity (“Show Cause Order”).

Under the plain language of KRS 278.018(3), the Show Cause Order’s allegations cannot, as a matter of law, constitute a violation of the statute.¹ KRS 278.018(3) concerns service to a *particular* facility. Thus, it asks whether the utility is “is rendering or proposes to render adequate service to an electric-consuming facility” in its service territory. If the utility fails to do so, then the remedy is to allow another utility to “furnish retail electric service to such facility.” KRS 278.018(3) (emphasis added). The statute was enacted along with other statutes that together sought to resolve disputes over which utility had the right and obligation to extend service to customers who previously were not connected to a utility system. This package of laws—the certified territory statutes—solved that problem by drawing service territory boundaries, giving

¹ The Company previously filed its response to the Show Cause Order, which provided evidence that Kentucky Power has provided, and continues to provide, adequate, efficient, and reasonable service under Kentucky law.

the utility the right to serve all customers within its territory, and imposing the obligation to serve customers within that territory who had not previously been connected. KRS 278.018(3) addresses a situation in which the utility fails to provide adequate service to a particular customer within its territory.

The Order to Show Cause does not identify any particular facility that the Company has failed to serve. Instead, it makes broad, sweeping allegations about the Company's resource planning and capacity procurement for its service territory generally. KRS 278.018(3) does not fit those allegations. The disconnect between the allegations made in the Order to Show Cause and KRS 278.018(3) is further confirmed by the Commission's own prior practice. The Company is not aware of any case in which the Commission has invoked KRS 278.018(3) to address the kind of broad allegations made in the Order to Show Cause.

Moreover, there is no need to stretch KRS 278.018(3) beyond what the text permits. The Commission has also relied on KRS 278.030(2) in its Order to Show Cause, and that statute does generally require utilities to provide adequate, efficient, and reasonable service. In addition, the Commission can review the prudence of the jurisdictional costs incurred by the Company to serve its retail customers in other proceedings including base rate cases and periodic rider reviews. It likewise has other proceedings, such as certificate proceedings initiated by the Company to review whether new generation resources requested to be built or acquired by the Company are in the public interest, to provide guidance on generation sources and their adequacy to efficiently and reasonably meet retail customer capacity and energy needs.

Because the allegations made by the Commission in the Show Cause Order cannot support a finding of violation under KRS 278.018(3), the Commission is not empowered to enforce the

procedures or remedy in that statute here, and the proceedings initiated under KRS 278.018(3) should be dismissed.

I. APPLICABLE AUTHORITY

In 1972, the General Assembly enacted Kentucky's certified territory law, which granted the Commission the right to establish geographical boundaries of certified areas within which its regulated utilities have the exclusive right and obligation to furnish retail electric service to all electric-consuming facilities.² "Three sections, KRS 278.016, KRS 278.017 and KRS 278.018 comprise the certified territory statute and the purpose [is] set forth in KRS 278.016."³ "This legislation was designed to encourage an orderly development of retail electric service."⁴

KRS 278.016 provides for the Commonwealth of Kentucky to be divided into geographical service areas for retail electric service. That statute states in its entirety:

It is hereby declared to be in the public interest that, in order to encourage the orderly development of retail electric service, to avoid wasteful duplication of distribution facilities, to avoid unnecessary encumbering of the landscape of the Commonwealth of Kentucky, to prevent the waste of materials and natural resources, for the public convenience and necessity and to minimize disputes between retail electric suppliers which may result in inconvenience, diminished efficiency and higher costs in serving the consumer, the state be divided into geographical areas, establishing the areas within which each retail electric supplier is to provide the retail electric service as provided in KRS 278.016 to 278.020 and, except as otherwise provided, no retail electric supplier shall furnish retail electric service in the certified territory of another retail electric supplier.

KRS 278.017(1) establishes those geographical service areas, or certified territories:

Except as otherwise provided in this section, the boundaries of the certified territory of each retail electric supplier are hereby set as a line or lines substantially equidistant between its existing distribution lines and the nearest existing distribution lines of any other retail electric supplier in every direction, with the result that there is hereby certified to each retail electric supplier such area which in its entirety is located substantially in closer proximity to one of its

² See *Grayson Rural Electric Corp. v. City of Vanceburg*, 4 S.W.3d 526, 528 (Ky. 1999).

³ *City of Florence v. Owen Elec. Co-op., Inc.*, 832 S.W.2d 876, 879 (Ky. 1992).

⁴ *City of Vanceburg*, 4 S.W.3d at 528.

existing distribution lines than to the nearest existing distribution line of any other retail electric supplier.

The remainder of KRS 278.017 provided the process, which began in 1972, for establishing each retail electric supplier's certified territory boundaries. The Commission established certified territories for each retail electric supplier, including Kentucky Power, pursuant to those provisions of KRS 278.017 in Administrative Case No. 163.⁵

KRS 278.018, entitled "Right to serve certified territory" establishes that "each retail electric supplier shall have the exclusive right to furnish retail electric service to all electric-consuming facilities located within its certified territory..."⁶ KRS 278.018 also generally provides a series of principles designed to encourage the orderly extension of service to new customers and prevent conflicts between service providers:

- that no retail electric supplier shall furnish retail electric service to an electric-consuming facility located within the certified territory of another retail electric supplier;⁷
- that any retail electric supplier may extend its facilities through the certified territory of another if necessary to serve customers in its own certified territory;⁸
- that the Commission shall determine which retail electric supplier shall serve an electric-consuming facility that locates in two or more adjacent certified territories;⁹
- what happens when new electric-consuming facilities are located in an area not yet included in an established certified territory map;¹⁰

⁵ See *In The Matter Of: Establishment Of Certified Territories For Retail Electric Suppliers*, Admin. Case No. 163.

⁶ KRS 278.018(1).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ KRS 278.018(2).

- that no retail electric supplier shall furnish service to an electric-consuming facility to which such service is being lawfully furnished by another retail electric supplier on June 16, 1972 or thereafter lawfully commenced;¹¹
- that retail electric suppliers may extend service to property and facilities owned and operated by that retail electric supplier;¹² and
- that retail electric suppliers may contract with each other, subject to Commission approval, for the purposes of allocating territories and consumers between them and designating which are to be served by which respective retail electric supplier.¹³

In addition to the above, KRS 278.018(3), upon which the Commission relies on, in part, to issue the Show Cause Order, provides an exception to the exclusive right to serve a certified territory, and provides in its entirety:

The commission may, after a hearing had upon due notice, make such findings as may be supported by proof as to whether any retail electric supplier operating in a certified territory is rendering or proposes to render adequate service to an electric-consuming facility and in the event the commission finds that such retail electric supplier is not rendering or does not propose to render adequate service, the commission may enter an order specifying in what particulars such retail electric supplier has failed to render or propose to render adequate service and order that such failure be corrected within a reasonable time, such time to be fixed in such order. If the retail electric supplier so ordered to correct such failure fails to comply with such order, the commission may authorize another retail electric supplier to furnish retail electric service to such facility.

As used in KRS 278.018(3), “adequate service” is defined by KRS 278.010(14) as:

having sufficient capacity to meet the maximum estimated requirements of the customer to be served during the year following the commencement of permanent service and to meet the maximum estimated requirements of other actual customers to be supplied from the same lines or facilities during such year and to assure such customers of reasonable continuity of service.

¹¹ KRS 278.018(4).

¹² KRS 278.018(5).

¹³ KRS 278.018(6).

Importantly, the definition of “adequate service” provided in KRS 278.010(14) was also enacted as part of the certified territory legislative package in 1972.¹⁴

KRS 278.010(14) further defines “electric-consuming facilities” as “everything that utilizes electric energy from a central station source.” The Commission previously has analyzed the phrase “electric-consuming facility” to determine what would constitute a single facility (the object of the rule’s reference to “*an* electric-consuming facility”) and concluded after analysis that the definition could be reasonably interpreted to include a distinct subset of customers (in that case, an industrial park), but the Company is not aware of any authority holding or even suggesting that the term could be read to refer to a service provider’s entire service territory.¹⁵

II. THE SHOW CAUSE ORDER

The Commission issued the Show Cause Order ordering Kentucky Power 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.”¹⁶ The Show Cause Order reproduces the definition of “adequate service” provided in KRS 278.010(14), and the entirety of KRS 278.018(3).¹⁷ The Commission further states that “[t]his Order is 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

¹⁴ See 1972 Ky. Acts ch. 83.

¹⁵ See KRS 278.010(8) (defining “electric-consuming facilities”); *Owen Cnty. Rural Elec. Coop. Corp. v. Pub. Serv. Comm’n*, 689 S.W.2d 599, 600 (Ky. App. 1985).

¹⁶ Show Cause Order at 1.

¹⁷ *Id.* at 2-3.

occurred in connection with Winter Storm Elliott in December 2022.”¹⁸ The Show Cause Order further explains the circumstances under which the Commission decided to issue the Show Cause Order, which generally includes reliance on the records of other Commission proceedings concerning the Company’s current capacity and energy position and its overall strategy for capacity and energy procurement to serve all Kentucky Power customers, as well as the operational performance of the Company’s owned generation.¹⁹ The Commission then asserts:

Kentucky law requires retail electric suppliers, such as Kentucky Power, to have sufficient capacity to meet maximum estimated customer demand, including sufficient generation capacity. It is clear to the Commission from the records of Case Nos. 2022-00283 and 2023-00145 that Kentucky Power does not have sufficient capacity available to serve customers’ energy needs, has been aware of that shortcoming for a significant amount of time, understands the detriment that insufficiency can cause customers, has described the speed and ease by which it could fix that shortcoming, and yet has chosen not to address its inadequacy of service.²⁰

The Commission ordered Kentucky Power to file a response to the Show Cause Order “address[ing] the allegation that it is failing to comply with its statutory obligations under KRS 278.030(2). Separately, but relatedly, Kentucky Power should address, pursuant to KRS 278.018(3), how it proposes to render adequate service and the reasonable time frame it intends to correct its failures.”²¹

Kentucky Power filed its response to the Show Cause Order on July 21, 2023, which provided evidence that Kentucky Power has and continues to provide adequate, efficient, and reasonable service to its customers.

¹⁸ *Id.* at 3.

¹⁹ *Id.* at 3-7.

²⁰ *Id.* at 7.

²¹ *Id.*

III. ARGUMENT

The provisions of KRS 278.018(3) do not apply to the circumstances as alleged by the Commission in the Show Cause Order. Applying KRS 278.018(3) here would require an unreasonable and unlawful interpretation and application of the plain language of that statute, KRS 278.010(14), and the certified territory statutes as a whole. The Commission must administer the law as written and it may not impose requirements in excess of, or contrary to, those set out in its governing statutes.²² Nor may the Commission alter a statutory definition,²³ or employ administrative procedures or remedies not granted by statute.²⁴ The Commission exceeds its grant of statutory authority by misapplying KRS 278.018(3) to the circumstances alleged in the Show Cause Order, and the Commission must dismiss the proceedings initiated pursuant to that statute.²⁵

A. The Certified Territory Statutes Were Promulgated For A Much Narrower Purpose Than That Alleged In The Show Cause Order, And They Do Not Apply Here.

The plain language of the certified territory statutes as a whole (KRS 278.016, KRS 278.017 and KRS 278.018) indicates that they were promulgated as a comprehensive legislative package designed to “encourage the orderly development of retail electric service” and to

²² See *Natural Resources & Env'tl. Protection Cabinet v. Pinnacle Coal Corp.*, 729 S.W.2d 438, 439 (Ky. 1987); *Dep't for Env'tl. Protection and Natural Resources v. Stearns Coal & Lumber Co.*, 563 S.W.2d 471, 473 (Ky. 1978); *Ruby Const. Co., Inc. v. Dep't of Revenue*, 578 S.W.2d 248, 252 (Ky. Ct. App. 1978); *Winston Ford Const. Co., Inc. v. Maggard*, 560 S.W.2d 562, 564 (Ky. Ct. App. 1978).

²³ *Sladon v. Shawk*, 815 S.W.2d 404, 405-06 (Ky. Ct. App. 1991).

²⁴ *Revenue Cabinet v. Cherry*, 803 S.W.2d 570, 572-73 (Ky. 1990); *Flying J Travel Plaza v. Com., Transp. Cabinet, Dep't of Highways*, 928 S.W.2d 344, 347 (Ky. 1996) (“the authority of the agency is limited to the direct implementation of the functions assigned to the agency by the statute. Regulations are valid only as subordinate rules when found to be within the framework of the policy defined by the legislation”); *Public Service Comm'n v. Attorney General of Com.*, 860 S.W.2d 296, 298 (Ky. Ct. App. 1993) (agency may not add to or delete from statutory requirements whatever the utility of the proposed agency action).

²⁵ Moreover, to the extent a remedy contemplated by the Commission is to “authorize another retail electric supplier to furnish retail electric service to such facility,” the Commission cannot proceed under 278.018(3), which is about a particular facility, as described herein, and would instead be required to proceed under the procedures established by the abandonment statute. See KRS 278.021.

eliminate frequent Commission and court battles over services areas, by dividing the Commonwealth into certified territories.²⁶ The statutes have the primary purpose of allocating service territory among various retail electric suppliers and setting rules for resolving any boundary disputes that may arise. All existing Kentucky cases reviewed by the Company addressing KRS 278.018 generally reflect this understanding of the provision as about resolving territorial disputes.²⁷

For example, in *City of Florence v. Owen Electric Cooperative*, the Supreme Court of Kentucky considered a territorial dispute between two utility providers that arose when a city, which had granted a franchise to one utility, expanded its boundaries by annexation into territory that included areas served by another utility.²⁸ The Court upheld the latter utility's right to continue serving the portions of its certified territory now within the annexed city by recognizing the boundary-setting function of the service territory statutes. Summarizing those statutes, the Court explained that the "legislature explicitly granted the right to the Public Service Commission to establish boundaries of certified areas by its enactment of KRS 278.017 and granted the right to serve certified territories by the enactment of KRS 278.018(1)."

The kinds of territorial disputes typically governed by KRS 278.018 are far afield from the circumstances as alleged in the Show Cause Order. Indeed, the Company has been unable to find a single instance where the Commission has imposed the remedy provided in KRS 278.018(3) based on circumstances similar to those alleged in the Show Cause Order. Because the certified territory statutes were never intended to apply to the circumstances alleged in the

²⁶ *City of Vanceburg*, 4 S.W.3d at 528.

²⁷ See *Grayson Rural Elec. Coop. Corp. v. Pub. Serv. Comm'n*, 2017 WL 65603, at *1 (Ky. App. 2017); *City of Vanceburg*, 4 S.W.3d at 52; *Owen Elec. Co-op., Inc.*, 832 S.W.2d 876.

²⁸ *Owen Elec. Coop.*, 832 S.W.2d at 878.

Show Cause Order, the Commission should not apply them here and lacks the statutory authority to do so.

B. The Plain Language Of KRS 278.018(3) Indicates A Much Narrower Application Than That Alleged In The Show Cause Order, And It Is Not Applicable Here.

The entirety of KRS 278.018(3) states:

The commission may, after a hearing had upon due notice, make such findings as may be supported by proof as to whether any retail electric supplier operating in a certified territory is rendering or proposes to render adequate service to *an electric-consuming facility* and in the event the commission finds that such retail electric supplier is not rendering or does not propose to render adequate service, the commission may enter an order specifying in what particulars such retail electric supplier has failed to render or propose to render adequate service and order that such failure be corrected within a reasonable time, such time to be fixed in such order. If the retail electric supplier so ordered to correct such failure fails to comply with such order, the commission may authorize another retail electric supplier to furnish retail electric service *to such facility*.²⁹

The plain language of KRS 278.018(3) indicates a much narrower application than that alleged in the Show Cause Order. The General Assembly specifically chose to include the singular phrases “*an electric consuming facility*” and “*such facility*.” The Kentucky Court of Appeals analyzed the meaning of “electric-consuming facility” in KRS 278.018(3) in the context of whether the definition included only a singular building, or whether it could include an entire industrial park.³⁰ The Court of Appeals held, “The definition does not limit a facility to being a building. The definition is broad enough for the PSC to reasonably interpret it to mean the entire industrial park, which will be served from the central station source.”³¹ If there was a question as to whether the definition could be expanded to include a single industrial park, it would be

²⁹ KRS 278.018(3) (emphasis added).

³⁰ *Owen Cnty. Rural Elec. Co-op. Corp. v. Public Service Com'n of Kentucky*, 689 S.W.2d 599 (Ky. App. 1985).

³¹ *Id.* at 602 (emphasis added).

unreasonable, based on the plain language of the statute, to further expand the definition to apply to all customers or all electric-consuming facilities in Kentucky Power’s entire certified territory.

The narrow scope of KRS 278.018(3) is further confirmed by the Commission’s past invocation of this provision. The Commission has directed parties to this provision in response to individual complainants raising concerns about the adequacy of retail service received and seeking to transfer service to another provider. For example, just this month, the Commission referenced KRS 278.018(3) in response to a complaint from a Timothy and Patricia Brown that “Kentucky Utilities (KU) caused damage to their main panel bus bar, GFI breakers, GFI outlets, some light fixtures, and all major appliances including the furnace as a result of back fed high voltage from the overhead main transmission line.”³² The Browns requested that their property “be served by [Owen Electric] instead of KU.”³³ The Commission concluded that the Browns had “established a *prima facie* case that KU has violated a statute, regulation, tariff, or order for which the Commission may grant some relief” and “direct[ed] the parties to KRS 278.018(3) regarding the circumstances under which Owen Electric may be permitted to serve the Browns’ property.”³⁴

Thus, the plain language of the statute, and the Commission’s previous interpretation of that language, clearly indicate that it should be applied only to the review of whether the retail electric supplier is rendering adequate service to a single electric-consuming facility, and not to all customers or all electric-consuming facilities in the retail electric supplier’s service territory.

³² *Brown v. Ky. Utils. Co.*, 2023 WL 5125178, at *1 (Ky. PSC Aug. 7, 2023).

³³ *Id.*

³⁴ *Id.*; see also, e.g., *Murphy v. Inter-Cnty. Energy Coop. Corp.*, 2015 WL 927461, at *1 (Ky. PSC Mar. 2, 2015) (involving an individual complaint regarding “numerous outages since 2005” and requesting a “transfer[] from Inter-County to Kentucky Utilities Company”).

The Court of Appeals also interpreted the definition of “electric consuming facility” to be confined to a facility that is “served from the same central station source,” which phrase also is included in the statutory definition of “electric-consuming facilities.” Kentucky Power’s customers cannot be, and are not, all served from the same central station source. Therefore, expanding the definition of “electric consuming facility” to mean all customers or all electric-consuming facilities in the Company’s service territory would be unreasonable for this reason as well.

For these reasons, KRS 278.018(3) does not apply to the circumstances alleged in the Show Cause Order, and the Commission lacks the statutory authority to apply the procedure and remedy provided therein to Kentucky Power.

C. The Plain Language Of KRS 278.010(14) Indicates A Much Narrower Application Than That Alleged In The Show Cause Order.

Adequate service is defined by statute as:

having sufficient capacity to meet the maximum estimated requirements of *the customer* to be served *during the year following the commencement of permanent service* and to meet the maximum estimated requirements of other actual customers to be supplied from the same lines or facilities *during such year* and to assure such customers of reasonable continuity of service.³⁵

The plain language of the definition of “adequate service” as it is used in KRS 278.018(3) likewise is subject to narrower application than the Show Cause Order implies. First, the General Assembly specifically chose to use the singular “customer” in the former part of the definition, and the plural “customers” in the latter part of the definition. Thus, the use of the terms “the maximum estimated requirements of the customer [singular]” as compared to “other actual customers [plural] to be supplied from the same lines or facilities” indicates that the adequate

³⁵ KRS 278.010(14) (emphasis added).

service requirement in KRS 278.018(3) is triggered when there are concerns about whether a retail electric supplier has sufficient capacity to serve a single, new customer and other customers served by the same lines or facilities.

Second, the language “to be supplied from the same lines or facilities” also suggests that “adequate service” is to be interpreted much more narrowly in KRS 278.018(3) as a question of distribution and transmission system sufficiency rather than generation capacity. The phrase “from the *same* lines or facilities” necessarily must mean customers served from the same lines or facilities at the distribution or transmission level, and not at the generation level. Kentucky Power customers may be served from different transmission or distribution facilities (hence, the need to identify which are served from the *same* or *different* facilities), but they are all served from a common set of generation resources aggregated by the Company. Thus, it is unreasonable to interpret the adequate capacity requirement defined in KRS 278.010(14) to include system-wide generation capacity.

Third, the language “during the year following the commencement of permanent service” and “during such year” suggests that the adequate service requirement as applied in KRS 278.018(3) is triggered only when a new customer [singular] signs up to take service and encompasses only the year following that initial sign-up. This reading is even more logical when considering that the definition for “adequate service” in KRS 278.010(14) was promulgated as part of the certified territory statute package, which legislative package was intended to resolve disputes over which utility had the right and obligation to extend service to customers who previously were not connected to a utility system. Thus, it would be unreasonable to interpret this language, which is constricted to a clearly defined time period after service is initiated, to apply to any given time in the utility’s existence, in perpetuity.

Based on the plain language of the statutory definition of “adequate service” as it is used in KRS 278.018(3), the adequate service requirement only applies to 1) “the [new] customer [singular]”, and 2) “other actual customers [plural] to be supplied from the same lines or facilities” “during the year following the commencement of permanent service” by the new customer. “Adequate service” as used in KRS 278.018(3) cannot reasonably be read to establish a requirement related to *generation* capacity system-wide for all of its customers for its entire existence.

IV. CONCLUSION

Under the plain language of KRS 278.018(3), and given the purpose of that provision and the certified territory statutes as a whole, the allegations in the Order to Show Cause cannot as a matter of law state a violation of KRS 278.018(3). Therefore, the procedure and remedy outlined in KRS 278.018(3) do not apply here, the Commission lacks the statutory authority to apply that procedure and remedy to Kentucky Power.

For these reasons, the Company respectfully requests that the Commission dismiss the proceedings initiated in the Show Cause Order pursuant to KRS 278.018(3).

Respectfully submitted,



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