COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

Electronic Investigation Of Kentucky Power Company Rockport Deferral Mechanism	))	Case No. 2022-00283

POST-HEARING BRIEF OF KENTUCKY POWER COMPANY

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I. INTRODUCTION

This case stems from a non-unanimous settlement agreement approved, with modifications, by the Public Service Commission of Kentucky ("Commission") in Kentucky Power Company's ("Kentucky Power" or the "Company") 2017 base rate case. As part of that settlement agreement, Kentucky Power agreed that it would defer $50 million of non-fuel, non-environmental expense incurred under a FERC-approved unit power agreement to take capacity and energy from the Rockport Plant. Kentucky Power was entitled to recover the entirety of that $50 million and could not have been compelled by the Commission to defer recovery of those amounts absent the Company's agreement. Nonetheless, the Company agreed to defer that $50 million in expenses as part of an overall compromise that made up the settlement in 2017, which resulted in a significant reduction in base rates. As part of the overall settlement, the Company and the parties to the agreement also agreed that the Company would be entitled to a carrying charge on the deferred amounts until they were fully recovered, as well as the ability to collect additional amounts necessary for the Company to earn its Commission-authorized return on equity for 2023 (subject to a cap).

The Commission reviewed the terms of the settlement agreement and the written testimony filed in support of the same, and heard testimony from the Company and the intervenors at the hearing in that matter in 2017. The Commission found the terms of the settlement agreement fair, just, and reasonable and issued its order explicitly approving the terms of the agreement related to the Rockport deferral mechanism. In reliance on that order, the Company deferred $50 million in expenses over the last five years with the understanding and expectation that the terms of that settlement agreement would be honored in their entirety.

Importantly, the circumstances surrounding the deferral mechanism, for all intents and purposes of this proceeding, remain unchanged. Nothing in the record supports a deviation from the thoughtfully-considered and comprehensive terms of the settlement agreement that were approved by the Commission nearly five years ago. The intervenors in this case claim, without support, that the sale of Kentucky Power to Liberty Utilities Company in January 2023 sufficiently changes the circumstances to warrant modification, or outright abandonment, of the settlement agreement related to the Rockport deferral mechanism. However, those arguments, in addition to being unsupported, are a red herring. Any effects that the sale of Kentucky Power may have on the Company's per books earnings in 2023 can be accounted for and reviewed as part of the 2024 true-up proceeding already contemplated by the settlement agreement.

All the Commission need do in this proceeding is implement the terms of the settlement agreement that the Commission previously found in 2017 to be fair, just, and reasonable, by doing three things: 1) approving the amortization of the Rockport Deferral Regulatory Asset over five years through Tariff P.P.A beginning December 9, 2022, consistent with the Settlement Agreement (defined below) as modified and approved in Case No. 2017-00179; 2) reviewing and approving the Rockport Fixed Cost Savings (defined below); and 3) reviewing and approving the methodology for estimating the Rockport Offset (defined below) amount to be used in Tariff P.P.A. until the Rockport Offset True-Up (defined below) takes place.

II. BACKGROUND AND CASE OVERVIEW

A. The Rockport UPA

Kentucky Power is a party to a FERC-approved unit power agreement ("Rockport UPA") under which it is entitled to 15 percent of the capacity and energy associated with Rockport Unit 1 and Rockport Unit 2.[1] The Rockport UPA is scheduled to expire on December 8, 2022.[2] The

[1] Direct Testimony of Brian K. West at 4.

[2] *Id.*

total annual Rockport UPA expense currently in customer rates is approximately $50.8 million.[3] Approximately $40.8 million of this amount is recovered by the Company through base rates, and the remaining approximately $10 million is recovered by the Company through Tariff Purchase Power Adjustment ("Tariff P.P.A.").[4]

B. Case No. 2017-00179 – 2017 Base Rate Case

Kentucky Power filed an application with the Kentucky Public Service Commission ("Commission") seeking an increase in base rates and other relief on June 28, 2017.[5] In its application, the Company sought an annual increase in revenues of $60,397,438.[6] Throughout the course of the case, the Company engaged with the parties and Commission Staff to settle the issues.[7] One of the parties to the case, KIUC, first introduced the idea of deferring recovery of a portion of non-fuel, non-environmental costs incurred by the Company under the Rockport UPA in Direct Testimony.[8] As KIUC Witness Kollen described, KIUC believed the deferral proposal boasted several benefits:

> First, it constructively resolves the cost recovery related to the Company's excess capacity problem in a manner that balances the Company's recovery of costs with the need to restrain growth in customer rates now because of the depressed Eastern Kentucky economy. Second, it lowers the rate increase in this proceeding…and provides lower rates for the next five years. It allows recovery over the subsequent…years as a partial offset to the rate reduction that will occur

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[3] *Id.*

[4] *Id.*

[5] *In The Matter Of: Electronic Application Of Kentucky Power Company For (1) A General Adjustment Of Its Rates For Electric Service; (2) An Order Approving Its 2017 Environmental Compliance Plan; (3) An Order Approving Its Tariffs And Riders; (4) An Order Approving Accounting Practices To Establish Regulatory Assets And Liabilities; And (5) An Order Granting All Other Required Approvals And Relief*, Case No. 2017-00179 ("2017 Base Rate Case").

[6] *See Order*, 2017 Base Rate Case (Ky. P.S.C. January 18, 2018) ("2017 Rate Case Order"), attached hereto as **Appendix 1**.

[7] *See* November 7, 2017 Informal Conference Memorandum, 2017 Base Rate Case (November 8, 2017), attached hereto as **Appendix 2**.

[8] *See* Direct Testimony of KIUC Witness Kollen at 7-15, 2017 Base Rate Case (October 3, 2017), attached hereto as **Appendix 3**.

due to the elimination of the…Rockport [] non-fuel purchased power expense. It does this without harming the Company financially because it will fully recover the expenses that are deferred. No Rockport [] costs would be disallowed. KIUC's deferral recommendation only changes the timing of cost recovery. Third, it mitigates the increases in future proceedings by amortizing and recovering the deferrals over a longer period of time…and on a levelized basis, rather than front-loading the recovery under the traditional revenue requirement cost recovery curve…

While the Company agreed in Rebuttal Testimony that the "concept proposed by Mr. Kollen [was] a creative way of reducing the Company's revenue requirement, the details of the deferral [were] problematic."[9] "The UPA expenses are incurred in connection with a FERC-approved agreement and Kentucky Power is entitled as a matter of law to their concurrent recovery."[10] The use of a deferral "must be carefully considered," and while the proposal appeared attractive because it lowered bills in the near-term, a deferral simply pushes payment off to a later date.[11] The Company averred that the risk to it was two-fold:

> First, there is a detriment to its financial statements carrying such a large unrecovered regulatory asset with the promise of future recovery…Second, while the expectation is that a Commission Order that authorizes a deferral will be honored in the future, there are still parties that could seek to deny collection of the deferred amount…Denying the collection of deferrals on the back end that were agreed upon or ordered to assist with lowering customer bills in the near-term is an undoing of the deal and punishes the Company for participating in the exercise.[12]

The Company further raised the issue that "[t]imely and sufficient cost recovery is required to maintain the cash flows necessary to support a stable investment grade credit."[13] If

[9] Rebuttal Testimony of Matthew J. Satterwhite at R11, 2017 Base Rate Case (November 3, 2017), attached hereto as **Appendix 4**.

[10] Rebuttal Testimony of Ranie K. Wohnhas at R8, 2017 Base Rate Case (November 3, 2017), attached hereto as **Appendix 15**.

[11] Appendix 4, Satterwhite Rebuttal Test. at R11 (November 3, 2017).

[12] *Id.*

[13] Appendix 15, Wohnhas Rebuttal Test. at R10, 2017 Base Rate Case (November 3, 2017).

"further deterioration of Kentucky Power's cash flows continue [upon agreement to the Rockport Deferral], the Company could face ratings downgrade pressure and increased borrowing costs associated with future financing activity."[14]

The Company and the intervenors in the 2017 Base Rate Case participated in an informal settlement conference, where Commission Staff were present, to discuss the possibility of resolving the issues in the case, including discussion of KIUC's proposed Rockport deferral proposal.[15] "After a period of discussion, of the parties in attendance, Kentucky Power Company, Kentucky Industrial Utility Customers, Kentucky School Boards Association, Kentucky League of Cities, and Wal-Mart Stores East and Sam's East reached an agreement in principle to resolve their respective positions on the issues in [the] proceeding."[16]

1. The Settlement Agreement

The Company and nearly all intervenors (including KIUC) eventually entered into a settlement agreement with respect to several aspects of the Company's application ("2017 Settlement Agreement"), including the deferral of $50 million of non-fuel, non-environmental Rockport UPA Expense ("Rockport Deferral").[17] The Attorney General and Kentucky Commercial Utility Customers ("KCUC") were not signatories to the agreement. The Company agreed to the Rockport Deferral as part of the overall compromise, which would have produced, among other things, an annual revenue increase of $31,780,734.[18] This represented a

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[14] *Id.* at R9.

[15] *See* Appendix 2, November 7, 2017 Informal Conference Memorandum, 2017 Base Rate Case (November 8, 2017).

[16] *Id.*

[17] *See* Settlement Agreement, filed as BKW- Exhibit 1 to the West Direct Test.

[18] Settlement Agreement at ¶ 2(a).

$28,616,704 reduction from the $60,397,438 sought by the Company in its application.[19] The overall compromise would have resulted in an average monthly bill increase for residential customers of only $1.35 or 0.79 percent.[20] (The Commission eventually ordered a base rate increase of only $12.35 million.)[21]

Specifically, the 2017 Settlement Agreement provided that under the Rockport Deferral, the Company would defer $15 million per year in 2018 and 2019, $10 million in 2020, and $5 million per year in 2021 and 2022, for a total deferral of $50 million.[22] The Rockport Deferral created a $15 million base rate credit. In subsequent years, the difference between the $15 million base rate credit and the annual deferral amount would be recovered through the Company's Tariff P.P.A. The Rockport Deferral timeline was summarized as follows:

YEAR	CREDIT IN BASE RATES	DEFERRAL AMT	AMT RECOVERED VIA TARIFF PPA
2018	$15 million	$15 million	$0
2019	$15 million	$15 million	$0
2020	$15 million	$10 million	$5 million
2021	$15 million	$5 million	$10 million
2022	$15 million	$5 million	$10 million[23]

The 2017 Settlement Agreement further provided that, while being deferred, the Rockport Deferral Regulatory Asset would be subject to a carrying charge at the Company's

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[19] *Id*.

[20] Kentucky Power Post-Hearing Brief at 33-34, 2017 Base Rate Case (January 5, 2018), attached hereto as **Appendix 5**.

[21] 2017 Rate Case Order at 31.

[22] Settlement Agreement at 4-5.

[23] Appendix 5, Kentucky Power Post-Hearing Brief at 47, 2017 Base Rate Case (January 5, 2018).

weighted average cost of capital ("WACC").[24] The Company estimated that the Rockport Deferral Regulatory Asset would total $59 million at the end of 2022.[25] The recovery of the Rockport Deferral Regulatory Asset would begin on December 9, 2022.[26] The regulatory asset would be amortized over five years.[27] In the event the Company elected not to extend the Rockport UPA, then starting on the termination date, it would no longer incur the costs associated with the Rockport UPA ("Rockport Fixed Cost Savings").[28] The Company estimated that the Rockport Fixed Cost Savings would total about $54 million.[29] Under the Settlement Agreement, the Company would credit back to customers these Rockport Fixed Cost Savings through Tariff P.P.A. until new base rates were set.[30] However, the Rockport Fixed Cost Savings credit would, for 2023 only, be subject to an offset in the amount of revenue, capped at the amount of the Rockport Fixed Cost Savings, necessary for the Company to earn its Commission-authorized return on equity.[31]

The Company would collect an estimated amount for this offset during 2023 and then true-up any amounts to be collected from or credited back to customers beginning March 2024 ("Rockport Offset True-Up").[32] The "Estimated Rockport Offset" was defined by the Settlement Agreement to mean the amount of additional annual revenue the Company estimates would be necessary for it to earn the Commission-authorized return on equity for 2023 considering the

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[24] Settlement Agreement at 5.

[25] Appendix 5, Kentucky Power Post-Hearing Brief at 47, 2017 Base Rate Case (January 5, 2018).

[26] Settlement Agreement at 5.

[27] *Id*.

[28] *See id*. at 6.

[29] 2017 Rate Case, Satterwhite Hearing Testimony, Vol. I at 330-331, attached hereto as **Appendix 6**.

[30] Settlement Agreement at 6.

[31] *Id.*

[32] *See id.* at 7.

termination of the Rockport UPA and the Rockport Fixed Cost Savings.[33] The "Actual Rockport Offset", which ultimately would be determined via the Rockport Offset True-Up in 2024, was defined by the Settlement Agreement to mean the amount of additional annual revenue that would have been necessary for the Company to earn the Commission-authorized return on equity for 2023 considering the termination of the Rockport UPA and the Rockport Fixed Cost Savings.[34] The Settlement Agreement further required that "[t]he Company shall calculate the Actual Rockport Offset using a comparison of the per books return on equity for 2023 to the Commission-approved return on equity."[35] The Rockport Deferral, Rockport Fixed Cost Savings, Estimated Rockport Offset, Actual Rockport Offset, and Rockport Offset True-Up are referred to collectively herein as the "Rockport Deferral Mechanism."

Finally, the Settlement Agreement contained a provision making clear that: 1) The Settlement Agreement shall inure to the benefit of, and be binding upon, the parties to the Settlement Agreement, their successors, and assigns;[36] and 2) If the Commission did not accept and approve the Settlement Agreement in its entirety, then any adversely affected Party had the ability to withdraw from the Settlement Agreement within the statutory periods provided for rehearing and appeal of the Commission's order. All Parties that did not timely withdraw continued to be bound by the terms of the Settlement Agreement as modified by the Commission's order.

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[33] *Id.* at 7.

[34] *Id.*

[35] *Id.*

[36] Settlement Agreement at 17.

Neither the Attorney General nor KCUC offered settlement testimony concerning the Rockport Deferral Mechanism.[37] However, during the hearing and in his post-hearing brief, the Attorney General expressed his concerns about the "very large financing costs" associated with the deferrals, stating that the "$50M over the entire deferral period is going to have financing costs piled on top of it… [t]hese financing costs are at the weighted average cost of capital including the 9.75 percent return of equity which then gets a tax gross up on top of it."[38] The Attorney General further argued that "the Rockport cost deferral as proposed in the non-unanimous settlement would represent a profit center to [Kentucky Power] as in the long run, it will end up extracting an additional $9 million more from ratepayers."[39] The Attorney General further stated a concern that the costs of the deferral will eventually require rate recovery in future rate proceedings.[40] The Attorney General recommended that the carrying charge be reduced to 4.36 percent for Kentucky Power's long term debt.[41]

In response, Kentucky Power argued that the 9.11 percent WACC made Kentucky Power financially whole because of its need to finance the deferral through a combination of debt and equity, and therefore was appropriate.[42]

2. The Commission's January 18, 2018 Order and February 27, 2018 Rehearing Order

The Commission issued its final order in the 2017 Base Rate Case on January 18, 2018. The Commission clearly and expressly approved the Settlement Agreement, subject to certain

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[37] 2017 Rate Case Order at 39.

[38] *Id.*

[39] Attorney General's Post-Hearing Brief at 31, 2017 Rate Case (January 5, 2018), attached hereto as **Appendix 7**.

[40] *Id.*

[41] *Id.*

[42] Appendix 5, Kentucky Power Post-Hearing Brief at 48 (January 5, 2018).

modifications not related to the Rockport Deferral Mechanism, in that order. In ordering paragraph 2, the Commission stated: "The provisions in the Settlement, as set forth in Appendix A to this Order, are approved, subject to the modifications and deletions set forth in this Order."[43] Appendix A contained the Settlement Agreement in its entirety. The Commission's Order did not modify or delete any aspect of the Settlement Agreement related to the Rockport Deferral Mechanism. With respect to the Rockport Deferral the Commission's Order held in relevant part:

> The Commission recognizes that there are inherent risks associated with any deferral mechanism, especially since the deferral recovery is contingent upon not renewing the Rockport UPA. Given Kentucky Power's excess capacity and slow load growth, the Commission believes the benefits of the deferral outweigh the associated risks, and approves the Rockport Deferral Mechanism and the associated $15 million decrease to rate base. The carrying charges associated with this rider shall be based on the WACC approved in this Order and are effective as of the date of this Order. This approval is for accounting purposes only, and the appropriate ratemaking treatment for this regulatory asset account will be addressed in Kentucky Power's next general rate case.[44]

In its February 27, 2017 order on rehearing ("2017 Rehearing Order"), the Commission clarified this paragraph, at the request of the Company, to state that the deferral recovery was *not* contingent upon not renewing the Rockport UPA.[45] The Commission also found in the 2017 Rehearing Order that

> the costs to be recovered by Kentucky Power for its UPA are established by the Federal Energy Regulatory Commission, and as the UPA represents an assignment of costs from an affiliate of Kentucky Power, <u>the Commission has no discretion to deny recovery of those costs</u>. We can, however, determine the manner and timing of cost recovery. Here, Kentucky Power has agreed to defer the current cost recovery of the Rockport UPA and to record a deferred asset to reflect the subsequent recovery of those costs in rates. <u>Under these circumstances, Kentucky Power is correct that the recording of a deferred asset is not just for</u>

[43] Appendix 1, 2017 Rate Case Order at 75.

[44] *Id.* at 40.

[45] *Order*, 2017 Base Rate Case (Ky. P.S.C. February 27, 2018), attached hereto as **Appendix 8**..

accounting purposes but is to reflect the future rate recovery of the deferred UPA costs.[46]

No party to the Settlement Agreement timely withdrew from the Settlement Agreement.

3. Chairman Schmitts's Op-Ed

On March 1, 2018, six weeks after the Commission issued the 2017 Rate Case Order, then-Commission Chairman Michael J. Schmitt issued an op-ed in a local Kentucky newspaper stating that the Commission must be "thorough in [its] pursuit of fairness to all parties, including both the consumer and the company…Like any business, if utility companies are forced to provide their services at a loss, the company cannot succeed and consumers will ultimately be harmed when those services are no longer available."[47] Speaking specifically about the 2017 Base Rate Case, Chairman Schmitt went on to say, "Kentucky Power negotiated with various customer groups…to achieve a reasonable compromise. I want to compliment Kentucky Power for their willingness to negotiate and for working with their customers to help make rate relief possible."[48]

C. Case No. 2020-00174 – 2020 Base Rate Case

Kentucky Power filed its next base rate case on June 29, 2020.[49] At that point, Kentucky Power had deferred collection of over $30 million of Rockport UPA expense under the terms of the 2017 Settlement Agreement. As part of the 2020 Base Rate Case, Kentucky Power requested that the Commission approve the Company's recovery of the Rockport Deferral Regulatory

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[46] *Id.* (emphasis added)

[47] Kentucky Power Hearing Exhibit 1. The op-ed may also be accessed online at https://www.thelevisalazer.com/2018/03/01/op-ed-the-public-service-commission-dedicated-to-fair-electric-rates/.

[48] *Id.*

[49] *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) Approval Of A Certificate Of Public Convenience And Necessity; And (5) All Other Required Approvals And Relief*, Case No. 2020-00174 ("2020 Rate Case").

Asset over a five-year amortization period, and for authority to recover the amortization through Tariff P.P.A., in conformity with and in order to implement the terms of the 2017 Settlement Agreement.[50]

In the 2020 Rate Case Order the Commission denied the Company's request to approve the amortization of the Rockport Deferral regulatory asset over five years stating, in part, that

> [t]he purpose of the Commission deciding the amortization period at a later date was to allow Kentucky Power's plans regarding the renewal of the Rockport UPA to become more certain. For instance, if Kentucky Power's proposed replacement capacity was more expensive than initially anticipated, a longer amortization period may be more reasonable so as to reduce the rate impact to customers.[51]

The Commission also stated that "Kentucky Power was unable to confirm the amortization amount or the savings once the Rockport UPA terminates."[52] The Commission ultimately found the Company's request to amortize and recover the Rockport Deferral regulatory asset over five years to be premature.[53] The Commission deferred "the determination of the appropriate amortization period and recovery mechanism to a subsequent matter" to be initiated by the Commission on its own motion.[54] However, despite the Commission's recognition of the benefits and risks associated with any deferral in the 2017 Rate Case,[55] in its approval of the

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[50] *See* Order at 64, *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) Approval Of A Certificate Of Public Convenience And Necessity; And (5) All Other Required Approvals And Relief*, Case No. 2020-00174 (Ky. P.S.C. January 13, 2021) ("2020 Rate Case Order"), attached hereto as **Appendix 9**.

[51] *Id.*

[52] *Id.*

[53] *Id.* at 65.

[54] *Id.*

[55] *See* Appendix 8, 2017 Rehearing Order at 9 ("The recovery period of the proposed Rockport Deferral Mechanism is not contingent upon Kentucky Power's decision whether or not to renew the Rockport UPA. Given Kentucky Power's excess capacity and slow load growth, the Commission believes the benefits of the deferral outweigh the associated risks, and approves the Rockport deferral mechanism and the associated $15 million decrease to rate base.")

terms of the 2017 Settlement Agreement, the Commission in dicta offered its thoughts about the approach it would take in the future: "As part of this subsequent matter, the Commission will also review and clarify items related to provisions of the final Order in Case No. 2017-00179 regarding Kentucky Power's ability to use the savings from the expiration of the Rockport UPA to earn its Commission-approved ROE in calendar year 2023."[56]

The Commission clarified on rehearing that it would initiate a new proceeding to address the Rockport Deferral Mechanism regulatory asset once Kentucky Power made a written filing identifying, by name, the capacity replacement for Rockport UPA and the expected costs.[57] Neither the 2020 Rate Case Order nor the 2020 Rehearing Order modified the 2017 Rate Case Order or the Settlement Agreement.

D. Kentucky Power's August 12, 2022 Written Filing

On August 12, 2022, Kentucky Power made its written filing in the post-case correspondence file of the 2020 Rate Case ("Written Filing").[58] Therein, Kentucky Power indicated that it proposed to obtain its initial capacity replacement for the Rockport UPA following its expiration on December 8, 2022 through, and under the terms and conditions of, the Power Coordination Bridge Agreement ("PCBA") between Kentucky Power and the AEP Operating Companies.[59]

The Company also detailed its projected capacity requirements during that period and the projected costs that of replacement capacity.[60] The Company indicated that those capacity

[56] Appendix 9, 2020 Rate Case Order at 65.

[57] *See* Order at 25-26, 2020 Rate Case (Ky. P.S.C. February 22, 2021) ("2020 Rehearing Order"), attached hereto as **Appendix 10**.

[58] *See* August 12, 2022 Written Filing, 2020 Rate Case Post-Case Correspondence (August 12, 2022), attached hereto as **Appendix 11**.

[59] *Id.* at 1.

[60] *Id.* at 1-2.

purchases through the PCBA are intended as an interim measure.[61] Kentucky Power would file its 2022 Integrated Resource Plan ("IRP") with the Commission, and the 2022 IRP will identify the Company's long-term plans for replacing the Rockport UPA capacity beyond the PJM 2023/2024 planning year.[62]

The Company again emphasized that retroactively changing the Settlement Agreement after customers have received the full benefit of the bargain struck in the agreement, and before the Company receives the quid pro quo for its agreement to accept lower rates in the near term raises serious legal and financial concerns.[63] It also highlighted the importance of honoring the Settlement Agreement for the financial health and stability of the Company.[64]

E. Procedural History of This Case

1. The Opening Order

After the Company made its Written Filing, the Commission initiated this proceeding "pursuant to KRS 278.030, KRS 278.260, and KRS 278.270, to investigate the appropriate amortization period and recovery mechanism of Kentucky Power Company's (Kentucky Power) Rockport Unit Power Agreement (UPA) deferral regulatory asset (Rockport Deferral Regulatory Asset), as well as a credit for Rockport Fixed Costs Savings and Rockport Offset."[65] The Commission stated that "the amortization amount of the Rockport Deferral Regulatory Asset or expected savings from the termination of the Rockport UPA are properly before the Commission in accordance with the Commission's statutory duty to ensure that Kentucky Power's rates are

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[61] *Id.* at 2.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] Order at 1, *In The Matter Of: Electronic Investigation Of Kentucky Power Company Rockport Deferral Mechanism*, Case No. 2022-00283 (Ky. P.S.C. September 2, 2022) ("Opening Order").

fair, just and reasonable."[66] By the Opening Order, the Commission established a procedural schedule and ordered Kentucky Power to "file its proposal for the amortization period and recovery mechanism of the Rockport Deferral Regulatory Asset, as well as the credit for the Rockport Fixed Costs Savings and Rockport Offset, supported by testimony, within seven days of service of this Order."[67] The Attorney General and KIUC also were made parties to the proceeding.[68]

2. The Company's Positions

Kentucky Power timely filed the Direct Testimony of Brian K. West in response to the Commission's Opening Order. The West Direct Testimony supported the implementation of the Rockport Deferral Mechanism provisions of the Settlement Agreement, as approved by the Commission in the 2017 Rate Case. Given that the Settlement Agreement was clear on nearly every aspect of the Rockport Deferral Mechanism, the Company asserted that, in this proceeding the Commission need only: 1) approve the amortization of the Rockport Deferral Regulatory Asset over five years through Tariff P.P.A beginning December 9, 2022, consistent with the Settlement Agreement as modified and approved in Case No. 2017-00179; 2) review and approve the Rockport Fixed Cost Savings; and 3) review and approve the methodology for estimating the Rockport Offset amount to be used in Tariff P.P.A. until the Rockport Offset True-Up takes place.[69]

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[66] Opening Order at 9.

[67] *Id.*

[68] *Id.* at 10.

[69] West Direct Test. at 10.

The Company provided a detailed calculation of the Rockport Deferral Regulatory Asset,[70] a detailed accounting of the Rockport Fixed Cost Savings,[71] and a calculation of the Estimated Rockport Offset.[72] Of the $50.8 million of total annual Rockport UPA non-fuel, non-environmental expense currently in customer rates,[73] the Company estimated $14.4 million would be returned to customers through reduced rates during 2023.[74] The Company further stated that $13.6 million of the balance would be allocated to payment of the Rockport Deferral Regulatory Asset; the remaining $22.8 million would be required for the Estimated Rockport Offset in 2023.[75]

The Company reiterated its position that any modification to the Settlement Agreement could result in far-reaching damage.[76] Any such modification would send a message to financial institutions, the market, and to potential investment in the Commonwealth that Commission-approved settlement agreements cannot be reasonably relied upon.[77] Rating agency downgrades also are possible, which in turn would increase risk of borrowing raising interest rates which would ultimately be passed on to customers.[78]

3. AG-KIUC's Positions

On September 15, 2022, the Attorney General and KIUC (collectively, "AG-KIUC") filed their Notice of Witness Sharing Agreement and jointly filed the intervenor testimony of

[70] West Direct Test. BKW-Exhibit 2 (September 9, 2022).

[71] West Direct Test. BKW-Exhibit 3 (September 9, 2022).

[72] West Direct Test. BKW-Exhibit 4 (September 9, 2022).

[73] West Direct Test. at 4.

[74] *Id.* at 8.

[75] *Id.* at 8-9.

[76] *Id.* at 11.

[77] *Id.*

[78] *Id.*

Lane Kollen. Mr. Kollen asserted that the "Company's proposed ratemaking recovery of the Rockport Deferrals is based on a settlement agreement in Case 2017-00179 that the Commission did not expressly approve in the Order in that proceeding."[79]

Mr. Kollen further recommended that the Commission adopt the Company's proposal to set the Estimated Rockport Offset using the actual per books earnings for the twelve months ending June 30, 2022, but that the Commission not follow the terms of the Settlement Agreement, reject the Company's proposal to set the Actual Rockport Offset and the resulting true-up using the actual per books earnings for calendar year 2023, and instead use the Estimated Rockport Offset as the Actual Rockport Offset, thus avoiding the need to calculate a true-up and avoiding the need for a rate increase to recover the true-up in 2024.[80] Mr. Kollen asserted not that the terms of the Settlement Agreement were unclear but rather that "calendar year 2023 results will reflect an overarching change in facts and circumstances: the sale of the Company to Liberty."[81] He further argued, without any evidentiary support, that "there would be significant one-time and ongoing costs resulting from the transaction resulting in a reduction in the actual per books earnings in 2023, [and an] increase in the Actual Rockport Offset and true-up."[82]

4. The Company's Motion to Recuse

Kentucky Power filed its Motion to Recuse Chairman Chandler on September 14, 2022.[83] Given Chairman Chandler's direct opposition on behalf of his former client (the Attorney General) to the non-unanimous Settlement Agreement and the Rockport Deferral Mechanism,

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[79] Kollen Direct Test. at 4.

[80] *Id.* at 5.

[81] *Id.*

[82] *Id.*

[83] Kentucky Power Company's Motion to Recuse (September 14, 2022) ("Motion to Recuse").

which was approved in the 2017 Rate Case, his prior involvement as counsel to one of the parties (the Attorney General) to this proceeding, and the need to protect the appearance of impartiality of the Commission, the Company respectfully requested Chairman Chandler to recuse himself from this proceeding.[84]

In a letter filing filed in this proceeding on November 23, 2022, Chairman Chandler declined to recuse himself.[85] On November 23, 2022 the Commission issued an order denying Kentucky Power's Motion to Recuse as moot because Chairman Chandler declined to recuse himself via the Chairman's Letter Filing, and because the "rule of necessity" justified the Chairman's participation in this matter.[86]

F. The Company's November 15, 2022 PPA Update

On November 15, 2022, Kentucky Power filed into the post-case correspondence file of the 2020 Rate Case its November 15, 2022 Tariff P.P.A. Update and clean and redlined versions of its 3rd Revised Tariff Sheet No. 35-2 (Tariff P.P.A.).[87] This filing was made in order to comply with the Commission's 2017 Rate Case Order and the terms of the Settlement Agreement to demonstrate the Company's proposed implementation of the Rockport Deferral Mechanism through Tariff P.P.A. beginning December 9, 2022.

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[84] *Id.* at 1.

[85] November 23, 2022 Letter of Chairman Kent A. Chandler (November 23, 2022) ("Chairman's Letter Filing").

[86] Order (Ky. P.S.C. November 23, 2022) at 1-3.

[87] *See* November 15, 2022 Tariff P.P.A. Update, 2020 Rate Case Post-Case Correspondence (November 14, 2022), attached hereto as **Appendix 12**.

III. THE COMMISSION SHOULD NOT MODIFY THE SETTLEMENT AGREEMENT AND SHOULD APPROVE THE COMPANY'S REQUESTS FOR A FIVE-YEAR AMORTIZATION OF THE ROCKPORT DEFERRAL REGULATORY ASSET, TO APPROVE THE ROCKPORT FIXED COST SAVINGS, AND TO APPROVE THE METHODOLOGY FOR ESTIMATING THE ROCKPORT OFFSET UNTIL THE ROCKPORT OFFSET TRUE-UP TAKES PLACE.

A. The Commission explicitly approved the terms of the Settlement Agreement and any modification now would have deleterious effects.

1. The Commission approved the Settlement Agreement provisions as fair, just, and reasonable via the 2017 Rate Case Order, and the circumstances have not changed in the intervening five years to justify modification of those provisions.

The Commission's 2017 Rate Case Order was clear: "The provisions in the Settlement, as set forth in Appendix A to this Order, are approved, subject to the modifications and deletions set forth in this Order."[88] Appendix A contained the Settlement Agreement in its entirety, and the order did not modify or delete any aspect of the Settlement Agreement related to the Rockport Deferral Mechanism. AG-KIUC Witness Kollen's arguments to the contrary[89] are refuted by the plain language of the 2017 Rate Case Order. Of course, the 2017 Rate Case Order speaks for itself.[90]

The 2017 Rate Case Order provided a detailed "road map" for the five-year Rockport Deferral and the implementation of the procedure by which the Company would credit back to customers the Rockport Fixed Cost Savings, and recover the regulatory asset and the Rockport Offset. The Commission reviewed the terms of the Settlement Agreement during the 2017 Rate Case, found them fair, just, and reasonable, and approved all of the terms, without modification, related to the Rockport Deferral Regulatory Asset, the Rockport Fixed Cost Savings, the Estimated Rockport Offset, the Actual Rockport Offset, and the Rockport Offset True-Up.

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[88] Appendix 1, 2017 Rate Case Order at 75.

[89] *See* Kollen Direct Testimony at 4.

[90] Hearing Testimony of AG-KIUC Witness Kollen, Video Record ("VR") 11/28/2022 14:39:43.

At the time of the 2017 Rate Case Order, the Commission knew or recognized the following concerning the Settlement Agreement as it related to the Rockport Deferral Mechanism: 1) The Rockport UPA expired on December 8, 2022, and regardless of whether the Company renewed the UPA or not, the Company proposed to begin recovering the Rockport Deferral Regulatory Asset through the demand component of Tariff P.P.A. on December 9, 2022; 2) The $50 million of non-fuel, non-environmental Rockport UPA expense would be deferred over five years and a carrying charge assessed until fully recovered at the Company's WACC, which was 7.88% at the time; 3) The Company estimated that the Rockport Deferral Regulatory Asset would total $59 million at the end of 2022;[91] 4) If the Company elected not to renew the Rockport UPA, there would be a reduction in Rockport fixed costs that the Company no longer would incur, and the Company would immediately begin to credit back to customers those Rockport Fixed Cost Savings through Tariff P.P.A. beginning December 9, 2022 rather than waiting until the Company's next base rate case to modify base rates; 5) The Company estimated that the Rockport Fixed Cost Savings would total about $54 million;[92] 6) For 2023 only, the Rockport Fixed Cost Savings would be offset by the amount, if any, necessary for the Company to earn its Commission-authorized ROE for 2023; 7) That the Commission-authorized ROE at that time was 9.7%,[93] and therefore could at least be that high come 2023; 8) The Company had consistently not actually earned its Commission-authorized ROE in prior years;[94]

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[91] Appendix 5, Kentucky Power Post-Hearing Brief at 47, 2017 Base Rate Case (January 5, 2018).

[92] Appendix 6, 2017 Rate Case, Satterwhite Hearing Testimony, Vol. I at 330-331.

[93] Appendix 1, 2017 Rate Case Order at 41.

[94] *See* Appendix 5, Kentucky Power Post-Hearing Brief at 15, fn. 80 (citing Kentucky Power Company's Response to data request KPSC 1-38, Attachment1.xlsx.), 2017 Rate Case ("Notwithstanding the challenges imposed by the long-lived financial pressure endured by Kentucky Power as a result of the Company's failure to earn a reasonable return on equity, Kentucky Power did not–as the years of earnings far below the authorized level testify—rush into filing this case."); *see also* Hearing Testimony of AG-KIUC Witness Kollen, VR 11/28/2022 14:35:15.

9) The Rockport Offset was capped at the amount of the Rockport Fixed Cost Savings, and thus the Rockport Offset could be as much as the total amount of the Rockport Fixed Cost Savings; 10) The Rockport Offset True-Up amount would be recovered from or credited back to customers over three months; 11) The Company would calculate the Actual Rockport Offset using a comparison of the per books return on equity for 2023, considering the termination of the Rockport UPA, and the Rockport Fixed Cost Savings; and 12) The Company's proposed timeline for implementing all of these aspects of the Rockport Deferral Mechanism through Tariff P.P.A.

Since the issuance of the 2017 Rate Case Order, Kentucky Power has not sought to change any aspect of the 2017 Settlement Agreement. It has held up its end of the bargain completely and has deferred $50 million in non-fuel, non-environmental UPA expense. Moreover, the inputs considered and detailed in the Settlement Agreement remain essentially the same, or have become more beneficial to customers since the 2017 Rate Case. For example, the Company testified herein that the amount of the Rockport Deferral Regulatory Asset at the time of the expiration of the Rockport UPA, on December 8, 2022, is estimated to be $58.1 million,[95] or about $900,000 less than estimated in the 2017 Rate Case. The carrying charge on the deferred asset (Kentucky Power's Commission-authorized WACC) has decreased from 7.88% to 7.62%.[96] Kentucky Power's Commission-authorized ROE for 2023 is now 9.3%, or 0.4% lower than authorized in the 2017 Rate Case Order.[97] The Rockport Fixed Cost Savings are approximately $50.8 million,[98] or approximately $3 million less than estimated in 2017.

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[95] West Direct Test. at 6. *See also* BKW-Exhibit 2.

[96] Company's response to data request KPSC 1-2 (October 5, 2022).

[97] Appendix 9, 2020 Rate Case Order at 50.

[98] West Direct Test. BKW-Exhibit 3.

Put simply, for all intents and purposes here, the circumstances surrounding the Rockport Deferral Mechanism remain unchanged.

AG-KIUC argue that the sale of Kentucky Power to Liberty Utilities Co. in 2023 represents an "overarching change in facts and circumstances," which will be reflected in "calendar year 2023 results."[99] For this reason only, AG-KIUC urge the Commission to "reject the Company's proposal to set the Actual Rockport Offset and the resulting true-up using the actual per books earnings for calendar year 2023 and instead use the Estimated Rockport Offset as the Actual Rockport Offset, thus avoiding the need to calculate a true-up and avoiding the need for a rate increase to recover the true-up in 2024."[100] KIUC should be estopped from making any such argument as it explicitly agreed in the Settlement Agreement, "Notwithstanding anything contained in this Settlement Agreement, Kentucky Power and the Settling Intervenors recognize and agree that the effects, if any, of any future events upon the income of Kentucky Power are unknown and this Settlement Agreement shall be implemented as written."[101]

Moreover, the Company has assured the Commission and the parties throughout this proceeding that accounting for and neutralizing the effects, if any, that the sale of Kentucky Power to Liberty may have on the 2023 per books net income, can be accomplished as part of the 2024 Rockport Offset True-Up.[102] "[T]he Commission and the parties to this proceeding are sophisticated, knowledgeable, and capable of working through much more complicated issues than those presented with respect to the Company's 2023 earnings, which are merely matters of

[99] Kollen Direct Test. at 5.

[100] *Id.*

[101] Settlement Agreement at 18.

[102] *See* Company's response to data request AG-KIUC 2-9 (October 20, 2022); West Rebuttal Test. at 11.

addition and subtraction."[103] "The parties and the Commission should not simply abandon the exercise as Mr. Kollen suggests."[104]

Nor does the cost to replace the Rockport energy have any effect on the enforceability or validity of the Settlement Agreement, or whether it is fair, just, and reasonable. The parties appropriately recognized in the 2017 Rate Case the risk that the Rockport replacement energy costs—just like all other energy costs—could increase or decrease, and the Commission should not alter the bargained-for treatment of the Rockport Deferral Regulatory Asset or the Company's ability to recover the Rockport Offset up to the amount of the Rockport Fixed Cost Savings on that possibility.[105] In fact the only evidence of record in this case on this issue demonstrates that the price of energy is forecasted to be lower in 2023, post-Rockport UPA, than it has been in 2022.[106]

Moreover, the Commission contemplated the terms of the Settlement Agreement, including the Company's entitlement to recover the Rockport Deferral, its entitlement to recover the Rockport Offset based on the 2023 per books net income, and the WACC to be applied to the Rockport Deferral Regulatory Asset, in the 2017 Base Rate Case and found them fair, just, and reasonable.[107] The Commission only reserved for a future proceeding the "appropriate ratemaking treatment for this regulatory asset account."[108] If the Commission were to disturb any aspects of the Settlement Agreement, including the Company's entitlement to recover the Rockport Deferral, its entitlement to recover the Rockport Offset based on the 2023 per books

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[103] West Rebuttal Test. at 11.

[104] *Id.*

[105] *See* Appendix 1, 2017 Rate Case Order at 40;

[106] *See* Company's response to data request KPSC PHDR-4.

[107] *See id,* at 41, 75.

[108] *Id.* at 40.

net income, and the WACC to be applied to the Rockport Deferral Regulatory Asset, it would have the effect of modifying an already-approved Settlement Agreement that the Commission previously found to be fair, just, and reasonable with respect to the Rockport Deferral Mechanism.

2. Any modification of the Settlement Agreement now could have far-reaching deleterious effects.

A settlement agreement is a contract entered into by settling parties to a proceeding to provide for more certainty with respect to a case's outcome and thereby mitigate risk for all sides.[109] It brings certainty in that terms are agreed to and once approved, can be relied upon for forecasting and strategic planning.[110] Approved settlement agreements are also relied upon by parties outside of a proceeding, such as financial institutions as well as credit rating agencies.[111]

The damage associated with any modification of the Settlement Agreement could be far reaching.[112] First, altering the terms of a Commission-approved settlement agreement, especially in the instant case when the Company has deferred a significant amount of costs and recovery is about to commence, sends a message to financial institutions, the market, and to potential investment in the Commonwealth that Commission-approved settlement agreements cannot be reasonably relied upon.[113] Orders and settlement agreements are used by the Company and other Kentucky utilities for financial forecasts and planning, while financial institutions and rating agencies use them to determine the level of risk associated with operating in the given regulatory

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[109] West Rebuttal Test. at R3.

[110] *Id.*

[111] *Id.*

[112] West Direct Test. at 11.

[113] *Id.*

environment.[114] Rating agency downgrades are possible which in turn will increase risk of borrowing raising interest rates which will ultimately be passed on to customers.[115]

The Company expressed these very concerns in the 2017 Rate Case after KIUC first proposed the idea of the Rockport Deferral.[116] Each of the terms of the Settlement Agreement related to the Rockport Deferral Mechanism, including specifically the Rockport Offset, thus were important and necessary components that made it possible for the Company to agree to the Settlement Agreement.[117]

When the Company's customers have received the full benefit of the 2017 Settlement Agreement for nearly five years, it is only fair that the Company should receive the consideration approved by the Commission in exchange for its five-year commitment to accept lower rates in the near term.[118]

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[114] *Id.*

[115] *Id.*; *see also* Company's response to data request KPSC 1-1 (October 5, 2022).

[116] *See* Appendix 4, 2017 Rate Case, Satterwhite Rebuttal Testimony at R11(November 3, 2017); Wohnhas Rebuttal Testimony at R8, R9-R10 (November 3, 2017) ("Cash flows from operations are a key component of the ratios utilized to score a company's financial strength. According to Moody's credit opinion published February 2017, Kentucky Power's stable rating outlook is primarily based on the expectation that Kentucky Power will maintain a constructive relationship with the KPSC and that the combination of rate actions and prudent financial policy will enable the utility to preserve financial credit metrics that support the rating."); McKenzie Rebuttal Testimony at 75 (November 3, 2017) ("The uncertainties that investors associate with cost deferrals and a deterioration in earnings quality are significant and many of the key indicators relied on by securities analysts and bond rating agencies focus on measures of cash flow."), attached hereto as **Appendix 13**.

[117] *See* 2017 Rate Case, Satterwhite Settlement Testimony at S13 ("The Company will be incurring and paying the Rockport UPA expenses prior to their recovery and will be financing the associated under-recovery with a combination of debt and equity. Thus, applying a carrying charge at the Company's WACC, which represents Kentucky Power's financing costs, is appropriate. This is especially true in light of the magnitude of the under-recovery and the time frame for recovering the regulatory asset."), attached hereto as **Appendix 14**; *see also* Appendix 6, 2017 Rate Case, Satterwhite Hearing Testimony at Vol. I, 333-334 ("But what [the Rockport Offset] does is it makes sure that there's not some unintended consequence, that the fact that we've lost or no longer have the Rockport generation in our portfolio, that there's not a catastrophic event that impacts our ROE.")

[118] West Direct Test. at 11.

B. Implementation of the Settlement Agreement in its entirety and as sought by the Company will have an overall positive effect on rates for Kentucky Power customers.

The Company provided a comprehensive look at all known rate impacts due to the expiration of the Rockport UPA, and overall, it is estimated that customers will see a significant rate decrease as a result of the expiration of the UPA.[119] As demonstrated below, customers are estimated to see a $180.9 million reduction in rates beginning January 2023 through May 2025 after the expiration of the Rockport UPA and implementation of the Rockport Deferral Mechanism.[120] For illustration, this number even takes into account the scenario where the entirety of the Rockport Fixed Cost Savings are required for the Rockport Offset and Rockport Offset True-Up.[121] Thus, even the maximum estimated rate impact under the Rockport Deferral Mechanism[122] results in a significant decrease in rates over the next three years.

	Sum Through May 2025
Recovery of Deferral*	**$32,720,482**
Declining Rockport Deferral	**($24,166,667)**
Fixed Cost Credit	**($98,675,258)**
ROE Offset	**$22,785,645**
ROE True Up**	**$18,045,496**
Forecasted Replacement Capacity	**$3,604,329**
Environmental Surcharge	**($63,574,407)**
Capacity Charge	**($14,983,333)**
Fuel Adjustment Clause	**($56,612,632)**
Net Impact	**($180,856,345)**

[123]

[119] *See* Attachment 1 to Company's response to KPSC 2-6 (October 20, 2022) (also provided as Exhibit BKW-R1 (November 10, 2022)).

[120] *Id.*

[121] Despite AG-KIUC's assertions that "[t]he Company will retain the entirety of the $40.8 million [Rockport Fixed Cost Savings] and customers will receive none the savings" *Kollen Direct Test. at 19*, the Company firmly maintains that it has never indicated an intention to retain the entirety of the Rockport Fixed Cost Savings before 2023 actuals are known. Rather the Company's demonstrative included that possibility in order to show the maximum estimated rate impact on customers. In any event, the Commission approved the cap on the Rockport Offset at the amount of the Rockport Fixed Cost Savings, which means the scenario is possible.

[122] *See* West Rebuttal Test. at R8.

[123] Attachment 1 to Company's response to KPSC 2-6 (October 20, 2022) (also provided as Exhibit BKW-R1 (November 10, 2022)). Note that the "Fuel Adjustment Clause" line does not take into account the Rockport

C. The Commission need only perform three tasks in this proceeding given that the Settlement Agreement is clear on all other issues.

Considering the significant rate reductions for customers, that the Commission approved the Settlement Agreement provisions as fair, just, and reasonable via the 2017 Rate Case Order, and the potential far-reaching deleterious effects of any modification to the Settlement Agreement, the Commission should implement the terms of the Settlement Agreement as written. As such, in this proceeding the Commission need only: 1) approve the amortization of the Rockport Deferral Regulatory Asset over five years through Tariff P.P.A beginning December 9, 2022, consistent with the Settlement Agreement as modified and approved in Case No. 2017-00179; 2) review and approve the Rockport Fixed Cost Savings; and 3) review and approve the methodology for estimating the Rockport Offset amount to be used in Tariff P.P.A. until the Rockport Offset True-Up takes place.

1. The Commission should approve the amortization of the Rockport Deferral Regulatory Asset over five years through Tariff P.P.A beginning December 9, 2022, consistent with the Settlement Agreement as modified and approved in Case No. 2017-00179.

As an initial matter, there is no question as to the Company's entitlement to recover the Rockport Deferral Regulatory Asset. The Commission made clear that "the costs to be recovered by Kentucky Power for its UPA are established by the Federal Energy Regulatory Commission, and as the UPA represents an assignment of costs from an affiliate of Kentucky Power, the Commission has no discretion to deny recovery of those costs."[124] AG-KIUC

replacement energy costs, which the Company forecasts may be lower in 2023 than Rockport UPA energy costs were in 2022. Company's response to data request KPSC PHDR-4 Confidential Attachment 1. Further, the "ROE True Up" line assumes that the entirety of the Rockport Fixed Cost Savings will be captured for the Rockport Offset, which means the amount in that line could potentially decrease.

[124] Appendix 8, 2017 Rehearing Order at 9.

agree.[125] However, the Commission did indicate that it would "determine the manner and timing of cost recovery" in a future proceeding.[126]

Recovery of the Rockport Deferral Regulatory Asset over five years is appropriate because it mirrors the time period that the Rockport UPA expense was deferred, and it conforms with the recovery period that the parties agreed upon as part of the overall bargain in the Settlement Agreement.[127] The Company agreed to a five-year amortization period as part of the Settlement Agreement because it helped address the credit metric concerns that the Company had with respect to the deferral.[128] No evidence has been provided that would indicate a departure is necessary from the time period agreed upon by the parties in the Settlement Agreement.

As such, the Commission should approve the amortization of the Rockport Deferral Regulatory Asset over five years through Tariff P.P.A beginning December 9, 2022, consistent with the Company's November 15, 2022 Tariff P.P.A. Update.

a. In the event that the Commission orders a longer amortization period, a carrying charge at the rate of the Company's Commission-approved WACC should be assessed for the entirety of the amortization period.

In the event that the Commission orders a longer amortization period than five years, it is appropriate for the Commission to allow a carrying charge until the regulatory asset is fully recovered. The parties agreed in the Settlement Agreement that "[f]rom December 9, 2022 until

[125] Hearing Testimony of AG-KIUC Witness Kollen, VR 11/28/2022 14:31:00.

[126] Appendix 8, 2017 Rehearing Order at 9.

[127] Settlement Agreement at 5.

[128] *See* Appendix 6, 2017 Rate Case, Wohnhas Hearing Testimony at 969-970 ("Q. [Overstreet]…Does the fact that the total deferral amount is a lesser amount [$50 million], does the fact that there's a step-down over the five-year deferral period of the amount that's being deferred, and does the fact that the regulatory asset would be amortized over one half [five years] of the time provided for by Mr. Kollen's deferral [ten years], does that, standing alone, address your credit metrics concerns? A. [Wohnhas] Yes, it does.").

the Rockport Deferral Regulatory Asset is fully recovered, the WACC will be applied to the monthly Rockport Deferral Regulatory Asset balance including deferred carrying charges net of ADIT."[129] As the Company confirmed in the 2017 Rate Case, the carrying charge is appropriate; it simply makes the Company whole as a result of its need to finance the deferral through a combination of debt and equity.[130] This fact was contemplated as part of the Settlement Agreement, which the Commission ultimately approved.

2. The Commission should approve the Rockport Fixed Cost Savings.

No party opposes Kentucky Power's request to approve the Rockport Fixed Cost Savings, which total $50,831,141,[131] and to begin crediting back to customers the Rockport Fixed Cost savings through Tariff P.P.A. beginning December 9, 2022, as detailed in the Settlement Agreement and demonstrated in the Company's November 15, 2022 Tariff P.P.A. Update.[132] The Commission should approve the Company's request and implement the terms of the Settlement Agreement, as demonstrated in the Company's November 15, 2022 Tariff P.P.A. Update.

3. The Commission should approve the methodology for estimating the Rockport Offset amount to be used in Tariff P.P.A. until the Rockport Offset True-Up takes place.

The provisions of the Settlement Agreement with respect to the Rockport Offset (estimated and actual) and the Rockport Offset True-Up were clear and comprehensive. Under the Settlement Agreement, the Company would credit back to customers the Rockport Fixed

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[129] Settlement Agreement at 5.

[130] *See* Appendix 5, 2017 Rate Case, Kentucky Power Post-Hearing Brief at 49-50; Appendix 6, Kollen Hearing Testimony Vol. II at 565-66.

[131] West Direct Test. Exhibit-BKW 3 (September 9, 2022).

[132] Settlement Agreement at 7.

Cost Savings through Tariff P.P.A. beginning December 9, 2022 until new base rates were set.[133] However, the Rockport Fixed Cost Savings credit would, for 2023 only, be subject to an offset in the amount of revenue, capped at the amount of the Rockport Fixed Cost Savings, necessary for the Company to earn its Commission-authorized return on equity.[134]

The Company would collect an estimated amount for this offset during 2023 and then true-up any amounts to be collected from or credited back to customers beginning March 2024 (Rockport Offset True-Up).[135] The Estimated Rockport Offset was defined by the Settlement Agreement to mean the amount of additional annual revenue the Company estimates would be necessary for it to earn the Commission-authorized return on equity for 2023 considering the termination of the Rockport UPA and the Rockport Fixed Cost Savings.[136] The Actual Rockport Offset was defined by the Settlement Agreement to mean the amount of additional annual revenue that would have been necessary for the Company to earn the Commission-authorized return on equity for 2023 considering the termination of the Rockport UPA and the Rockport Fixed Cost Savings.[137] The Settlement Agreement further required that "[t]he Company shall calculate the Actual Rockport Offset using a comparison of the per books return on equity for 2023 to the Commission-approved return on equity."[138]

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[133] Settlement Agreement at 6.

[134] *Id.*

[135] *See id.* at 7.

[136] *Id.* at 7.

[137] *Id.*

[138] *Id.*

a. The Commission should accept the Company's calculation of the Estimated Rockport Offset.

The Company provided as Exhibit 4 to the Direct Testimony of Brian K. West a detailed calculation of the Estimated Rockport Offset[139] based on a per-books 12-months ending June 30, 2022 ROE.[140] The Rockport Offset calculation template used by the Company to create BKW-Exhibit 4 was included as an exhibit to the Settlement Agreement.[141]

For the 12-months' ended June 30, 2022, Kentucky Power's earned ROE was 7.74% with an authorized ROE of 9.3%, which results in a total Estimated Rockport Offset amount of $22.786 million.[142] The best available data available to the Company at the time BKW-Exhibit 4 was filed was for the 12-months' ending June 30, 2022.[143] Thus, it was appropriate to use this information for purposes of calculating the Estimated Rockport Offset. However, in Mr. West's Rebuttal Testimony, the Company provided more recent data—the ROE for the 12-months' ended September 30, 2022, which demonstrated that Kentucky Power's earned ROE was 6.27% as compared to the authorized ROE of 9.3%.[144] This would result in a total Estimated Rockport Offset amount of $36.546 million.[145]

The Settlement Agreement did not prescribe the method or data to be used for calculating the Estimated Rockport Offset. The Company's method and form for calculating the Estimated Rockport Offset (BKW-Exhibit 4) is reasonable and effects the intent of the Settlement Agreement as written and approved by the Commission in the 2017 Rate Case. Using the most

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139 West Direct Test. BKW-Exhibit 4 (September 9, 2022).

140 West Direct Test. at 7.

141 *Id.*

142 BKW-Exhibit 4; West Rebuttal Test. at R8.

143 West Rebuttal Test. at R5.

144 *Id.*

145 *Id.*

recent earned ROE data for the 12-months' ending September 30, 2022 in calculating the Estimated Rockport Offset, which would also result in a smaller potential Rockport Offset True-Up amount, also is appropriate and effects the intent of the Settlement Agreement.

b. The Commission should use the 2023 per books net income for purposes of the Estimated Rockport Offset, the Actual Rockport Offset, and the Rockport Offset True-Up as agreed in the Settlement Agreement and approved by the Commission.

The parties to the Settlement Agreement provided specific detail as to each of the inputs for the Rockport Deferral Mechanism, including the use of the 2023 per books net income to calculate the Estimated and Actual Rockport Offset and the Rockport Offset True-Up.[146] The parties used such specificity in order to provide protection to the Company on the back end of the agreement and to give certainty with respect to the agreement and the future implementation of the Settlement Agreement.[147]

Moreover, use of the 2023 per books net income for purposes of calculating the Rockport Offset is reasonable. First, the Settlement Agreement specifically provides that the Company shall calculate the Actual Rockport Offset "using a comparison of the per books return on equity for 2023 to the Commission-approved return on equity."[148] The parties to the Settlement Agreement agreed to the use of the 2023 per books net income, no party raised any concern or issue with its use at the hearing in the 2017 Rate Case, and the Commission approved it. Second,

[146] Settlement Agreement at 6-7.

[147] *See* Appendix 6, 2017 Rate Case, Satterwhite Hearing Test. at 334-336 ("And what we've done is tried to create all the balance, think of all the things that might happen, and make sure that, if you're going to go to this extreme to make sure you're trying to provide affordability for customers in the near term, what are the protections that are needed on the back end? I mean, we need to make sure there's protections…So that's why it's so intricate in this settlement agreement, to make sure we have balance, the ying to the yang of all the points in here, to make sure the parties could agree on something.")

[148] Settlement Agreement at 7.

"per books net income" is a GAAP-defined term that the parties purposefully used in the Settlement Agreement in order to provide certainty.[149]

Further, making ratemaking adjustments to the 2023 per books net income is inappropriate, as the two are unrelated.[150] The Company was asked in a data request to "[e]xplain whether Kentucky Power's 2023 per books net income will include categories of expenses that were removed for ratemaking purposes in Case No. 2020-00174. If not, explain how these costs would be excluded."[151] The Company responded that the Company did expect that its 2023 per books net income would be calculated on a per books basis, in accordance with GAAP, without any ratemaking adjustments.[152] This approach would be consistent not only with GAAP, but also with the Company's historical approach to calculating net income and the Commission-approved Settlement Agreement.[153] The Commission should not adjust the 2023 per books net income in accordance with ratemaking adjustments[154] because doing so would be inconsistent with the calculation of per books net income under GAAP,[155] and because it was not contemplated or approved in the Settlement Agreement.

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[149] *See* Hearing Testimony of Brian West, VR 11/28/2022 10:05:34.

[150] Hearing Testimony of Company Witness Whitney, VR 11/28/2022 12:07:30, 12:09:40.

[151] *See* Company's response to data request KPSC 2-2 (October 20, 2022).

[152] *Id.*

[153] *Id.*

[154] It also would be inappropriate to adjust the 2023 per books net income with certain ratemaking adjustments that were ordered by the Commission in the Company's 2020 Base Rate Case because whether those expenses should have been removed for ratemaking purposes in Case No. 2020-00174 is the subject of a pending appeal before the Franklin Circuit Court, the conclusion of which may affect whether those items should be included in future rates. *See* Company's response to data request KPSC 2-2 (October 20, 2022). Moreover, certain expenses removed for ratemaking purposes in the 2020 Base Rate Case were removed on the basis that the Commission found the Company failed to provide sufficient evidence to support them. *Id.* The Company has no basis to expect that such expenses similarly would be excluded from ratemaking in a future case. *Id.*

[155] Hearing Testimony of Company Witness Whitney, VR 11/28/2022 12:07:30, 12:09:40.

The Chairman also raised concerns at the November 28, 2022 hearing in this matter that, given the prospect of recovering the Rockport Offset, the Company may be negatively influenced in making certain business decisions that may have some impact on the 2023 per books net income. However, the Company squarely refuted the implication and assured the Commission that the Company will not run the business any differently in 2023 given the Company's ability to recover the Rockport Offset.[156] Regardless, the parties fully contemplated the purpose and operation of the Rockport Offset and agreed to cap the amount of the Rockport Offset at the amount not to exceed the Rockport Fixed Cost Savings. The Rockport Offset does not represent a limitless source of funds for the Company to earn its ROE in 2023.[157]

Finally, although AG-KIUC raise unfounded concerns with the Rockport Offset and the Rockport Offset True-Up,[158] AG-KIUC agree that the Company is entitled to an offset to the Rockport Fixed Cost Savings.[159] However, if the Commission were to modify the Settlement Agreement consistent with KIUC's recommendation to allow Kentucky Power an offset only in the amount of $22.8 million and eliminate the Rockport Offset True-Up,[160] it would deprive the Company of the opportunity to realize the full Actual Rockport Offset, to which the parties agreed in the Settlement Agreement, the Commission approved, and which comprised a vital and necessary part of the Settlement Agreement that allowed the Company to agree to and otherwise make possible the Rockport Deferral and the Settlement Agreement in its totality.[161]

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[156] Hearing Testimony of Brian West, VR 11/28/2022 10:10:30 – 10:11:55.

[157] *Id.*

[158] *See* Section III(A)(1) *supra*.

[159] *See* AG-KIUC's Post-Hearing Brief at 8 (November 30, 2022).

[160] *See id*.

[161] If the Company is deprived of the benefit of the Rockport Offset based on the actual 2023 per books earnings, it would be arbitrary in violation of Section 2 of the Kentucky Constitution and the Fifth and Fourteenth Amendments to the Constitution of the United States, and constitute a taking under both constitutions. *Allard v. Big Rivers Elec. Corp.*, 602 S.W.3d 800, 807 (Ky. App. 2020) quoting *God's Center Found., Inc. v. Lexington-Fayette Urban Cnty.*

D. The sale of Kentucky Power to Liberty Utilities Co. is irrelevant and any effects that the sale may have on Kentucky Power's 2023 per books net income can be addressed as part of the 2024 Rockport Offset True-Up.

The Company anticipates that the sale of the Kentucky Power to Liberty will occur in mid-January 2023.[162] The parties initially believed the sale would close in the second quarter of 2022. However, the closing date is now expected to occur in mid-January 2023 as a result of the FERC tolling the deadline for it to issue an order until December 16, 2023, and the need to be able to best plan for a seamless transfer between the parties.

AG-KIUC raised its concerns that "[n]o party to the settlement agreement could have known or foreseen that AEP would sell the Company to [Liberty], that the transaction would close in 2023, or that there would be significant one-time and ongoing costs resulting from the transaction resulting in a reduction in the actual per books earnings in 2023, increase in the Actual Rockport Offset and true-up."[163] However, the purpose of this proceeding is to implement the commitments contained in the Settlement Agreement, to which KIUC was a signatory, and which, in relevant part, was approved by the Commission in the 2017 Rate Case.[164] The "issues" raised by AG-KIUC concerning the sale of Kentucky Power to Liberty are inapposite and have no bearing on the determinations to be made in this case.[165]

There may always be unforeseen events that happen after the Commission issues an order in any case, and the 2017 Rate Case is no different.[166] The parties to the Settlement Agreement

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Govt, 125 S.W.3d 295, 299-300 (Ky. App. 2002) (prohibition against arbitrary action under Section 2 of the Kentucky Constitution extends to takings); *Herr v. U.S. Forest Serv.*, 865 F.3d 351 (6th Cir. 2017). *See also*, Ky. Const. § 13.

[162] *See* Company's response to data request AG-KIUC 2-10 (October 20, 2022).

[163] Kollen Direct Test. at 5.

[164] *See* Company's response to data request AG-KIUC 2-11 (October 20, 2022)

[165] *Id.*

[166] West Rebuttal Test. at R6.

recognized this very fact.[167] It is inappropriate to retroactively modify the Commission-approved Settlement Agreement on that basis. Even if it were appropriate, it would nonetheless be speculative and premature for the Commission to do so now, in 2022, when Kentucky Power's 2023 ownership, operations, and net income are unknown and unknowable.[168] The parties and the Commission will have the ability to evaluate the actual facts in early 2024, when the Company files the Rockport Offset True-Up.[169]

Regardless, Liberty Witness Tisha Sanderson provided an affidavit that confirmed that neither Transaction Costs[170] nor One-Time Transition Costs[171] would be carried on the books of Kentucky Power.[172] They will be carried on the books of Liberty,[173] and as a result, will not need to be excluded from Kentucky Power's books. Therefore, none of these costs need be taken into account in determining Kentucky Power's 2023 per books net income, or as part of the Rockport Offset True-Up. The only kind of transition costs that Liberty expects will appear on Kentucky Power's books are Long Lived Transition Costs, which Liberty defines as "the capital investments to enable day-to-day operations continuity, particularly where sellers retain some or all of the pre-existing systems."[174] Long Lived Transition Costs will replace similar costs that

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[167] Settlement Agreement at 18.

[168] West Rebuttal Test. at R6-R7.

[169] *Id.* at R7.

[170] Defined as the "internal and external costs of due diligence, legal, and other professional support to evaluate and execute the transaction, and carry out the requisite regulatory approvals." Liberty's response to data request KPSC PHDR-3(a).

[171] Defined as "the costs of staff required to work on the transitioning of the business from AEP to Liberty, IT support and external services between agreement to the sale and closing. In addition, One-Time Transition Costs include expenses of rebranding and customer communications to enable the handover of operational control from the buyer to seller." Liberty's response to data request KPSC PHDR-3(b).

[172] Company's response to data request KPSC 3-2; Liberty's response to data request KPSC PHDR-3.

[173] *Id.*

[174] Company's response to data request KPSC 3-2; Liberty's response to data request KPSC PHDR-3.

may be currently in Kentucky Power's rates, and the Company will regularly conduct reviews of costs to ensure that Transition Costs are captured in the appropriate work order.[175] Thus, those expenses that *are* expected to be carried on Kentucky Power's books (Long Lived Transition Costs) will be identifiable and able to be reviewed as part of the Rockport Offset True-Up in 2024.

Therefore, the Commission should disregard AG-KIUC's arguments that the sale of Kentucky Power to Liberty will have some effect on the Company's 2023 per books net income and that the Commission should eliminate the Rockport Offset True-Up, or eliminate the Rockport Offset altogether based on that possibility. The Commission should instead implement the terms of the Settlement Agreement as written, which expressly contemplated the possibility of changed circumstances and provided certainty in the event of their occurring.

IV. CONCLUSION

The Commission, therefore, should approve the Company's requests and grant the relief sought in the Direct Testimony of Brian K. West by implementing the provisions of the Settlement Agreement as written and as filed in Kentucky Power's November 15, 2022 Tariff P.P.A. Update.

[175] *Id.*

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