

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC TARIFF FILING OF)	
KENTUCKY UTILITIES COMPANY)	
FOR APPROVAL OF AN ECONOMIC)	CASE NO. 2022-00371
DEVELOPMENT RIDER SPECIAL)	
CONTRACT WITH BITIKI-KY, LLC)	

REPLY BRIEF OF JOINT INTERVENORS
KENTUCKIANS FOR THE COMMONWEALTH, KENTUCKY SOLAR
ENERGY SOCIETY, MOUNTAIN ASSOCIATION, AND KENTUCKY
RESOURCES COUNCIL, INC.

Dated: July 7, 2023

I. Introduction

Come now Joint Intervenors Kentuckians for the Commonwealth, Kentucky Solar Energy Society, Mountain Association, and Kentucky Resources Council, Inc. (“Joint Intervenors”) and tender this reply brief in the above-captioned matter. For the reasons set forth below and discussed in more detail in Joint Intervenors’ Opening Brief, Kentucky Utilities Company (“KU” or “the Company”) has failed to show that the proposed Economic Development Rate (“EDR”) special contract in this case with Bitiki, LLC (“Bitiki”) is reasonable and would spur additional economic development in the Company’s territory. As the Commission has recognized, providing EDR discounts to customers who do not need them to operate their facilities allows them to act as “free riders,” to the detriment of the utility and non-participating customers. This is true even if the Commission accepts KU’s marginal cost analysis, because providing a discount to customers who do not need it still takes away revenue that would otherwise benefit the utility and other customers. Because the proposed special contract here does not meet all of the requirements set forth in Administrative Case No. 327, KU’s request for approval of the special contract should be denied.

II. Argument

A. KU Has Not Proven that the Approval of the Special Contract Would Create Jobs in Kentucky.

KU has failed to provide any evidence that approval of this special contract would create any new jobs at the Bitiki facility, thus failing to show that the proposed EDR meets one of the “key indicators” of economic development recognized by the Commission in Administrative Case No. 327.¹ Given that the Bitiki facility has already been either fully or partially

¹ Order, *In re: An Investigation into the Implementation of Economic Development Rates by Electric and Gas Utilities* at 10, Administrative Case No. 327 (Sept. 24, 1990).

constructed,² and operating at almost full capacity,³ the Company has done nothing to show that any new jobs will be created if the proposed EDR is approved. In fact, at the hearing, KU witnesses did not have *any* knowledge of the current nature of the jobs at the facility, let alone any evidence that any new jobs would be created if the EDR were approved.⁴

None of KU’s testimony, nor any of its arguments in its brief, demonstrate otherwise. Although the Company repeatedly refers to Bitiki’s anticipated creation of five jobs “resulting from [the facility’s] operation,”⁵ this number was provided before the facility was constructed and began operating without an EDR rate in place. The Bitiki facility has now been in operation under general rates since August 2022⁶ without an EDR, and thus any jobs “resulting from [the facility’s] operation” cannot be attributed to the proposed EDR special contract. Nor has KU provided any evidence as to the number of jobs at the facility as it is now operating, and whether any of those jobs are full-time and based on-site (as opposed to part-time, shared with other sites, and/or based remotely), let alone whether any new jobs would be created by KU’s requested approval of the EDR. Rather, Company witnesses have admitted that they have no knowledge of any jobs benefits that would result from the Commission approving the EDR in this case.⁷

Joint Intervenors are not attempting to “move the goal posts” regarding job creation and economic development, as KU asserts.⁸ As discussed in detail in Joint Intervenors’ Opening Brief, the Commission laid out principles in Administrative Case No. 327 requiring that

² *Post-Hearing Brief of Joint Intervenors Kentuckians for the Commonwealth, Kentucky Solar Energy Society, Mountain Association, and Kentucky Resources Council*, Case No. 2022-00371 (June 29, 2023) at 3–4.

³ *Id.*

⁴ *Id.* at 7–10.

⁵ *Post-Hearing Brief of Kentucky Utilities Company*, Case No. 2022-00371 (June 29, 2023) at 10.

⁶ *Filing of Special Contract under Kentucky Utilities Company’s Economic Development Rider (EDR), Bitiki-KY, LLC* (“KU-Bitiki Proposed Contract”), Attach. 2, at 1, Case No. TFS2022-00371 (Oct. 7, 2022).

⁷ *Id.* at 7–10. Indeed, in its own brief, KU states: “People had to deliver and install [the equipment],” suggesting that any jobs related to delivery and installation have already been completed. *Post-Hearing Brief of Kentucky Utilities Company* at 9.

⁸ *Post-Hearing Brief of Kentucky Utilities Company* at 17.

discounted rates create actual economic development benefits in the utility’s territory and minimize the risk of free ridership.⁹ Requiring specific evidence be presented by the utility that demonstrates that the approval of an EDR would actually create new jobs and economic development in the utility’s territory that would not exist without the EDR is necessary to ensure these requirements are met.¹⁰ Because KU has failed to meet its burden of presenting such evidence in this case, KU’s requested approval of the proposed EDR special contract must be denied.

Contrary to the Company’s arguments that Joint Intervenors’ recommendations would lead to “potentially protracted litigation to obtain EDR discounts,”¹¹ Joint Intervenors’ request that the Commission require “a more detailed standardized application” would provide *greater* certainty to the Commission and interested stakeholders that a proposed EDR meets all the requirements of Administrative Case No. 327, and thereby *reduce* the need for further Commission inquiry or litigated proceedings.¹² As Witness Sherwood points out, requiring sufficient evidence upfront is particularly important for proposed EDR special contracts with nontraditional and/or potentially risky customers such as cryptocurrency mining facilities that may have uncertain and/or *de minimis* economic development benefits to Kentucky communities.¹³

B. KU Has Failed to Show that an EDR Discount was Needed for Bitiki to Locate to Kentucky for its Current and Future Operations.

KU also has not demonstrated that if not for the EDR discounted rate, Bitiki would not have chosen to locate in KU’s territory, thus failing to meet the Administrative Case No. 327

⁹ Order, at 10, 14–15, Administrative Case No. 327 (Sept. 24, 1990).

¹⁰ *Post-Hearing Brief of Joint Intervenors* at 14–16.

¹¹ *Post-Hearing Brief of Kentucky Utilities Company* at 17.

¹² *Post-Hearing Brief of Joint Intervenors* at 15–16 (citing Testimony of Stacy L. Sherwood, at 17–19 (Jan. 17, 2023)).

¹³ *Id.*

requirement that a utility demonstrate that the proposed EDR customer would not be a “free rider” that does not require the discount to locate and operate in the utility’s territory.¹⁴ The Company suggests that correspondence between the Company and Bitiki wherein Bitiki states that it had “struggled with determining the best location”¹⁵ for its facility is sufficient to show this, but nowhere in the record is there any evidence that Bitiki was considering any locations for its facility outside of KU’s territory. Further, this statement from Bitiki does not establish that the discounted EDR rate was *necessary* for Bitiki to locate there. Bitiki had other incentives to move to the location, including being approved for tax reimbursements from the Kentucky Economic Development Finance Authority (“KEDFA”).¹⁶ Bitiki’s meter point was also transferred from an affiliated company, UC Processing LLC, which also points to Bitiki having an additional, pre-existing interest in the site.¹⁷ And the fact that Bitiki subsequently moved forward with constructing and operating the facility under general rates and without any certainty about whether the proposed EDR would be approved further contradicts KU’s claim that the EDR was necessary to Bitiki’s decision.

The additional documents provided by KU in its post-hearing discovery responses and relied on by KU in its brief only underscore that Bitiki’s decision to locate and operate in its territory was *not* dependent on the Commission’s approval of an EDR discount. KU’s communications with Bitiki representatives show at most that Bitiki is unsure whether it would

¹⁴ Order, at 14–15, Administrative Case No. 327 (Sept. 24, 1990). KU erroneously claims that because it negotiated a special contract with Bitiki, that alone is sufficient proof against free ridership. *Post-Hearing Brief of Kentucky Utilities Company* at 11. The mere fact that KU negotiated the special contract with Bitiki does not prove that Bitiki is not a free rider, in the absence of evidence that the EDR was necessary to Bitiki’s decision to locate in KU territory.

¹⁵ *Post-Hearing Brief of Kentucky Utilities Company* at 11.

¹⁶ *Post-Hearing Brief of Joint Intervenors* at 8. KU witness Bevington conceded that numerous economic development projects move forward in KU’s territory utilizing KEDFA tax incentives without also needing an EDR discount. Rebuttal Testimony of John Bevington, at 3 (Feb. 21, 2023); May 31, 2022 HVT at 11:36:00.

¹⁷ *Id.* at 11.

continue to increase capacity at the facility if the EDR is not approved, stating only that “[n]ot expanding would be a possibility.”¹⁸ Nothing in the record of this case indicates that Bitiki will not continue operating at its current 10 MW capacity without the EDR, as KU witness Bevington acknowledged at the hearing,¹⁹ nor does any evidence in the record foreclose that Bitiki would choose to continue expanding without an EDR. Accordingly, the Commission should find that the requested EDR is not necessary for current and potential future operations of the Bitiki facility in KU’s territory and therefore deny KU’s request for approval of the EDR.

C. KU’s Assertions that it had a “Reasonable Expectation” the Commission Would Approve the Special Contract is Without Merit.

The Company’s claim that it had a “reasonable expectation” that the Commission would approve this contract given the approval of the UMine, LLC contract in Case No. 2022-00355 is misplaced, for at least two reasons. First, as noted above, Bitiki entered into an agreement with KU to take service under general rates in August 2022,²⁰ months before the Commission issued its October 2022 order in Case No. 2022-00355. Bitiki had already made its decision to construct its facility and begin operating under general rates (and without an EDR) before the October 2022 order was issued. Second, in this case (unlike the UMine case), the Commission decided to open a contested proceeding to fully investigate whether sufficient evidence existed to support approval of the KU-Bitiki proposed special contract. The Commission does not have the resources to open a formal proceeding to investigate the reasonableness of every contract for which a utility requests approval, but because it chose to do so here, KU bears the burden of providing sufficient evidence to support the reasonableness of the proposed EDR special

¹⁸ *Post-Hearing Brief of Kentucky Utilities Company* at 12 (quoting KU Response to JI PHDR 3-1(a), Attachment 1, pages 2–3).

¹⁹ May 31, 2022 HVT at 11:59:30.

²⁰ KU-Bitiki Proposed Contract, Attach. 2, at 1.

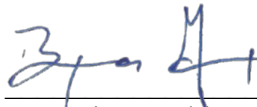
contract, a burden which it has not met here. Particularly once the Commission opened this case as a contested proceeding, it was not reasonable for KU or Bitiki to believe that the Commission would simply rubber stamp this proposed special contract instead of doing a thorough investigation to ensure that the Administrative Case No. 327 requirements are met.

Similarly, KU's discussion of 2021 House Bill 230 also misses the mark. As the Commission itself pointed out during the hearing, the General Assembly's policy choice to incentivize certain activities using taxpayer funds is distinct and separate from the Commission's mandate to determine whether proposed rates are fair, just, and reasonable.²¹ Nothing in the 2021 legislation in any way weakens the standards that KU must meet in this case to demonstrate that the proposed EDR special contract is reasonable, which again have not been met here.

III. Conclusion

WHEREFORE, for the reasons stated herein and in Joint Intervenors' Opening Brief, Joint Intervenors respectfully urge the Commission to deny KU's request for approval of the proposed special contract.

Respectfully submitted,



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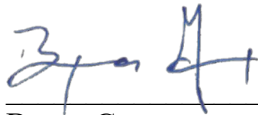
²¹ May 31, 2022 HVT at 13:23:32.

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CERTIFICATE OF SERVICE

In accordance with the Commission's July 22, 2021 Order in Case No. 2020-00085, *Electronic Emergency Docket Related to the Novel Coronavirus COVID-19*, this is to certify that the electronic filing was submitted to the Commission on July 7, 2023; that the documents in this electronic filing are a true representations of the materials prepared for the filing; and that the Commission has not excused any party from electronic filing procedures for this case at this time.



Byron Gary