

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

POST-HEARING RESPONSIVE BRIEF OF
KENTUCKY UTILITIES COMPANY

Dated: July 7, 2023

TABLE OF CONTENTS

INTRODUCTION.....	1
ARGUMENT.....	1
I. The Joint Intervenors’ Brief Demonstrates that the Bitiki EDR Special Contract Will Benefit Existing KU Customers and Be Consistent with Kentucky’s Stated Policy Supporting Cryptocurrency Mining in the Commonwealth.....	1
II. The Joint Intervenors’ Assertions about Free Ridership Continue to Be Financially Irrational and Contrary to the Evidence in this Proceeding.....	3
III. KU and the Joint Intervenors Agree: There Is No Minimum Jobs Requirement for EDR, the Joint Intervenors’ Attempts to Invent One Notwithstanding.....	9
IV. The Joint Intervenors Significantly Misconstrue the Importance of the Amount of Investment and Load Bitiki Has Determined Not to Make until the EDR Special Contract Is Approved.....	11
V. The Joint Intervenors’ Proposal to Measure Capital Investment and Job Creation from the Date of EDR Contract Approval Is both Contrary to the Terms of the EDR Contract and Detrimental to Economic Development.	13
VI. Turning What Have Historically Been Straightforward Special Contract Filings into Formal Applications that Could Result in Extended Litigation Would Be Harmful to Economic Development, Yet that Is Precisely What the Joint Intervenors Advocate.	14
CONCLUSION.....	16

INTRODUCTION

Kentucky Utilities Company (“KU”) respectfully submits this responsive brief to the Kentucky Public Service Commission (“Commission”) in further support of the proposed Economic Development Rider (“EDR”) special contract (“Bitiki EDR Special Contract”) between KU and Bitiki-KY, LLC (“Bitiki”).¹

ARGUMENT

I. The Joint Intervenors’ Brief Demonstrates that the Bitiki EDR Special Contract Will Benefit Existing KU Customers and Be Consistent with Kentucky’s Stated Policy Supporting Cryptocurrency Mining in the Commonwealth.

On the whole, the Joint Intervenors’ brief (“JI Brief”) is notable because, through what it says and what it does not say, it actually supports approving the Bitiki EDR Special Contract as highly beneficial to KU’s existing customers. At the outset, the JI Brief acknowledges that Bitiki is projected to provide \$24.3 million of demand-charge revenues net of EDR discounts over 10 years.² Tellingly, nowhere does the JI Brief assert that Bitiki’s marginal costs will exceed its projected revenues; nowhere does it assert that customers will be harmed by the EDR discounts. Thus, the JI Brief supports rather than undermines KU’s position that customers will receive significant benefits from the Bitiki EDR Special Contract.

The JI Brief references their initial comments opposing the Bitiki EDR Special Contract, stating that “cryptocurrency mining is a uniquely risky and volatile industry because cryptocurrency mining companies seek cheap energy and could relocate elsewhere quickly (presenting acute risks to ratepayers)”³ But the Joint Intervenors’ own subsequent testimony undermines supposed concerns about protecting customers, stating that customers will be

¹ The “Joint Intervenors” are Kentuckians for the Commonwealth, Kentucky Solar Energy Society, Mountain Association and Kentucky Resources Council, Inc.

² JI Brief at 3.

³ JI Brief at 4.

adequately protected by the \$1.275 million deposit collateral Bitiki has posted and because KU made no incremental capital investment to serve Bitiki.⁴ Also, the claw-back provision in the Bitiki EDR Special Contract, which provides significant repayment obligations for EDR discounts if Bitiki stops taking service any time prior to a full ten years from the date Bitiki first begins receiving EDR discounts, provides additional protection regarding a possible business failure.⁵ These facts show that thwarting the use of Kentucky’s fossil-fired generation to serve cryptocurrency mining is the Joint Intervenors’ real objective.⁶ Their arguments to amend the EDR criteria and gloss over the evidence in the record of this case are made to advance this objective.

Moreover, the JI Brief criticizes cryptocurrency miners for seeking “cheap energy.” But the Kentucky General Assembly and the current Governor have already spoken on this policy issue by enacting legislation to *promote* locating cryptocurrency mining operations in Kentucky: “[T]he Commonwealth has an opportunity to become a national leader in the emerging industry of the commercial mining of cryptocurrency *given its abundant supply of electricity that can be provided at lower rates than most states*”⁷ The legislation further clarified that the tax code would “continue to encourage the location and expansion of such operations in the Commonwealth, rather than in other states likewise competing for such businesses[.]”⁸ Thus, the JI Brief effectively acknowledges the competitive nature of locating and retaining cryptocurrency mining

⁴ Sherwood Testimony at 14-15.

⁵ Bitiki EDR Special Contract at 2.

⁶ *See, e.g.*, Joint Intervenors’ Letter to PSC Executive Director and Daniel Hinton dated October 27, 2022 at 4 (“And lastly, cryptocurrency mining operations pose other significant climate, public health, and damaging impacts on local communities that the Commission should consider. The Commission should approach proposals for new cryptocurrency mining facilities, such as this one, with an eye toward whether they truly create stable, good-paying jobs, what grid and infrastructure upgrades are needed, fire and safety risks, as well as increases in local air, water, and solid waste pollution.”).

⁷ 2021 Ky. Acts 122 (emphasis added).

⁸ *Id.* (emphasis added).

operations—making it much harder to argue plausibly that Bitiki’s EDR discounts constitute free ridership—and highlights how KU’s ability to provide Bitiki an “abundant supply of electricity . . . at lower rates than most states,” is in accordance with, not contrary to, the stated policy of the Commonwealth.

The only two substantive objections the JI Brief raises to the Bitiki EDR Special Contract are threadbare at this point in the proceeding: (1) supposed but unfounded free ridership claims;⁹ and (2) claims relating to a minimum jobs requirement for EDR special contracts that the Joint Intervenors themselves acknowledge does not exist and importantly would have no impact on the benefits of the Bitiki EDR Special Contract for KU’s existing customers.¹⁰ Notwithstanding that the record of this proceeding and the Commission’s seminal Order in Administrative Case No. 327 already fully rebut these arguments, KU addresses them below.

II. The Joint Intervenors’ Assertions about Free Ridership Continue to Be Financially Irrational and Contrary to the Evidence in this Proceeding.

Although there is no evidence in the record to support it, the Joint Intervenors continue to advance the financially irrational assertion that the Bitiki EDR Special Contract constitutes free ridership.¹¹ All of the evidence and financial logic are to the contrary.

First, it is plainly *not* in KU’s interest to provide EDR discounts to customers who would locate in KU’s service territory without receiving such discounts. It would be financially irrational for KU to do so; KU would be forgoing millions of dollars of *net* revenue *for no reason at all*. On the Joint Intervenors’ own accounting, offering Bitiki EDR unnecessary discounts would result in KU receiving \$4.3 million *less* demand charge revenue than it would otherwise receive.¹² Thus,

⁹ JI Brief at 10-14.

¹⁰ *Id.* at 7-10.

¹¹ *Id.* at 10-14.

¹² JI Brief at 3.

the assertion that there is a free rider issue concerning the Bitiki EDR Special Contract defies all financial rationality.

When asked about this issue at hearing, Joint Intervenors' witness Stacy Sherwood entirely undermined any rationale for asserting that Bitiki is a free rider.¹³ She provided no account of what benefit KU would receive for offering EDR discounts to Bitiki if they were not needed to incentivize Bitiki to locate in KU's service territory; rather, she asserted that a motivation for offering EDR discounts would be "the long-term contract."¹⁴ Crucially, there is *no evidence* in the record to support Ms. Sherwood's theoretical motive for the Bitiki EDR Special Contract; rather, the record shows that EDR discounts *were* a factor in Bitiki's decision to locate in KU's service territory.¹⁵ That aside, the Joint Intervenors cannot have it both ways. If KU would obtain a benefit for its customers by having Bitiki commit to take service from KU for ten years rather than only one year under a standard Rate RTS contract, then Bitiki would not be a free rider because Bitiki would be giving consideration to obtain EDR discounts; it would be giving value for value, which is *not* free ridership. Indeed, on the Joint Intervenors' account, "[C]ryptocurrency mining is a uniquely risky and volatile industry because cryptocurrency mining companies seek cheap energy and *could relocate elsewhere quickly (presenting acute risks to ratepayers) ...*,"¹⁶ which presumably means that obtaining a ten-year service commitment from Bitiki to remain a KU customer is particularly valuable, not value-less. All of this makes it implausible at best to assert that the Bitiki EDR Special Contract is free riding.

Second, there is nothing new about EDR free ridership concerns, and the Commission fully addressed them in its Final Order in Administrative Case No. 327 in a manner entirely consistent

¹³ May 31, 2023 H.V.T. at 13:05:45-13:08:35.

¹⁴ *Id.* at 13:08:00-13:08:05.

¹⁵ KU Response to JI 1.4, Attachment 3 at 3-4; KU Response to JI PHDR 3-1(a), Attachment 1 at 2-3.

¹⁶ JI Brief at 4 (emphasis added).

with offering EDR discounts to Bitiki.¹⁷ At the time the Commission was conducting Administrative Case No. 327, utilities had EDR tariff provisions that compelled providing discounts to any applicant that met certain conditions.¹⁸ That arrangement created free ridership concerns precisely because those utilities could not exercise discretion about offering EDR discounts.¹⁹ To address this concern, the Commission required that all subsequent EDRs be the product of discretionary contract negotiations, just as KU negotiated its EDR special contract with Bitiki.²⁰ This approach ensures utilities will offer EDR discounts only when needed to attract new customers or incentivize existing customers to expand in their current locations. Thus, the Bitiki EDR Special Contract is evidence *against* free ridership, not for it.

Third, although the Joint Intervenors attempt to suggest otherwise, the evidence in this proceeding demonstrates both that EDR discounts actually influenced Bitiki's decision to locate in KU's service territory and that the delay and uncertainty this proceeding has created concerning those discounts has caused Bitiki to pause its investment in its facilities in KU's service territory.²¹ Concerning Bitiki's initial decision to locate in KU's service territory, the facts show that Bitiki's decision to locate in KU's service territory was far from certain and that EDR discounts affected Bitiki's ultimate decision. On February 23, 2022, *after months of deliberations* (demonstrated by

¹⁷ See *An Investigation into the Implementation of Economic Development Rates by Electric and Gas Utilities*, Admin. Case No. 327, Order at 14-15 (Ky. PSC Sept. 24, 1990).

¹⁸ *Id.* at 14 (“Current Commission EDR guidelines require utilities to file a general EDR rate schedule. This requirement, in effect, fixes the rate discount that is offered to all EDR customers regardless of their individual needs or usage characteristics. This precludes utilities from determining the minimum discount necessary to provide an incentive to new and existing customers and to identify potential free riders who do not require a discounted rate.”).

¹⁹ *Id.* at 14-15.

²⁰ *Id.* (“The Commission seeks to minimize the number of free riders taking advantage of discounted utility rates in Kentucky. Therefore, the Commission finds that utilities should have the ability to negotiate discounted rates with individual customers through the use of special contracts. This flexibility should enable the utilities to limit the number of EDRs they offer, thereby reducing the amount of foregone revenues resulting from discounted rates. Consequently, full contributions to system fixed costs would be made by some industrial customers that, under general EDR tariff provisions, would have automatically received rate discounts.”).

²¹ See, e.g., KU Response to JI 1.4, Attachment 3 at 3-4; KU Response to JI PHDR 3-1(a), Attachment 1 at 2-3.

the November 15, 2021 email from KU representative Derek Rahn to Mr. Ford),²² Mr. Ford stated in relevant part:

We have struggled with determining the best location for our data center expansion. That said, we have finally made progress with Kentucky Economic Development Cabinet. This progress has provided a clear path for our project to be located at Alliance Coal's existing UC Processing, LLC location This meter point is currently active, and the existing load will be removed. We intend to transfer the UC Processing, LLC meter point into Bitiki-KY, LLC's name/Tax-ID and use the KEIA approval to qualify for an Economic Development Rider (activating the EDR in Jan of 2023). We are in the process of working through the KEIA approval process. We are hoping the approval will occur at the end of next month.

*We haven't made any commitments, waiting on the KEIA approval.*²³

Notably, Mr. Ford drafted this email well before KU filed the Bitiki EDR Special Contract; it reflects the candid view of Bitiki at the time. And the plain meaning of the message is clear: Bitiki had considered other locations, and EDR was important to locating at its current site in KU's service territory. Bitiki's subsequent communications with KU concerning Bitiki's pausing of its investment due to the uncertainty and delay this proceeding has caused further evidences the importance of EDR to Bitiki's location and investment decisions.²⁴

Relatedly, the Joint Intervenors attempt to suggest that an August 22, 2022 email from KU to Bitiki stating that "we do not need to have the EDR finished to establish service" somehow shows that EDR was not important to Bitiki's decision to locate in KU's service territory.²⁵ This cherry-picking of quotes is problematic for at least two reasons. First, as the Bitiki EDR Special Contract itself contemplates (as do all of KU's EDR special contracts), it is entirely ordinary and

²² KU Response to JI 1.4, Attachment 3 at 3-4.

²³ *Id.* at 3 (emphases added).

²⁴ KU Response to JI PHDR 3-1(a), Attachment 1, pages 2-3.

²⁵ JI Brief at 11, quoting KU's Response to JI 1.15, Attachment 1 at 1.

expected that EDR customers will begin taking electric service under a standard rate schedule at non-discounted rates before EDR discounts begin; beginning to take service at non-discounted rates therefore has no bearing on the impact of EDR discounts on a customer's decision to locate or expand in KU's service territory.²⁶ Second and more importantly, the email the JI Brief quoted is part of a response from Bitiki to KU earlier the same day that opened with, "Machines are landing in ATL tomorrow. *I need an update on the status of the EDR contract ASAP.*"²⁷ The plain fact—supported by all the evidence of record—is that it was not a foregone conclusion that Bitiki was going to locate in KU's service territory, and Bitiki indicated at every reasonable opportunity the importance of EDR discounts, including when Bitiki was pressuring KU to complete the EDR special contract on August 22, 2022.²⁸

Fourth, there is clear evidence that KU does not gratuitously offer EDR discounts:

Over the past decade, customers in KU's and Louisville Gas and Electric Company's ("LG&E's") service territories have announced \$31 billion of new investments and 100,000 new jobs to be created. Of those announcements, only 16 customers have been offered and approved for an EDR, all of which were involved in rigorous economic development processes to make the decision to expand or locate in Kentucky and were involved with a variety of other parties to help with those processes, including Kentucky's Economic Development Cabinet.²⁹

KU is not offering EDR contracts willy-nilly to every potential commercial or industrial customer or existing customer who might expand operations. Indeed, there are only ten KU EDR contracts currently in effect, five of which are now beyond the five-year discount period:

²⁶ Bitiki EDR Special Contract at 2.

²⁷ KU's Response to JI 1.15, Attachment 1 at 2 (emphasis added).

²⁸ See also KU's Response to JI 1.4, Attachment 3 at 1 for a timeline of the process of bringing Bitiki online as a customer and regarding EDR contract negotiation and completion.

²⁹ KU Response to JI 2.4.

Customer Name	Date	MW
Berry Plastics Corp. ³⁰	2014	2
Custom Food Products ³¹	2015	1.5
Toyota Motor Manufacturing, Kentucky, Inc. ³²	2015	6
North American Stainless ³³	2017	13
Hendrickson Trailer Commercial Vehicle Systems ³⁴	2018	2
Central Motor Wheel America ³⁵	2019	7.5
Phoenix Paper Wickliffe, LLC ³⁶	2019	33.8
Manchester Tank and Equipment Co. ³⁷	2020	3.85
Danimer Scientific KY, Inc. (two contracts) ³⁸	2022	4/2.8

Thus, neither is there a KU EDR free rider problem in general, nor is there evidence of—or even a plausible reason for there to be—a free rider problem concerning the Bitiki EDR Special

³⁰

https://psc.ky.gov/tariffs/Electric/Kentucky%20Utilities%20Company/Contracts/Current/Berry%20Plastics%20Corporation/2014-08-09_Special%20Contract%20Economic%20Development%20Rider.pdf

³¹

https://psc.ky.gov/tariffs/Electric/Kentucky%20Utilities%20Company/Contracts/Current/Custom%20Food%20Products/2015-04-30_Special%20Contract%20Economic%20Development%20Rider.pdf

³²

https://psc.ky.gov/tariffs/Electric/Kentucky%20Utilities%20Company/Contracts/Current/Toyota%20Motor%20Manufacturing%20Kentucky%20Inc/2016-02-24_Special%20Contract%20Economic%20Development%20Rider.pdf

³³

https://psc.ky.gov/tariffs/Electric/Kentucky%20Utilities%20Company/Contracts/Current/North%20American%20Stainless/2017-07-08_Contract%20for%20Electric%20Service.pdf

³⁴

https://psc.ky.gov/tariffs/Electric/Kentucky%20Utilities%20Company/Contracts/Current/Hendrickson%20Trailer%20Commercial%20Vehicle%20Systems/2018-05-26_Special_Contract_for_Economic_Development.pdf

³⁵

https://psc.ky.gov/tariffs/Electric/Kentucky%20Utilities%20Company/Contracts/Current/Central%20Motor%20Wheel%20America/2022-04-30_Contract%20for%20Electric%20Service.pdf

³⁶

https://psc.ky.gov/tariffs/Electric/Kentucky%20Utilities%20Company/Contracts/Current/Phoenix%20Paper%20Wickliffe,%20LLC/2019-08-23_Contract%20for%20Electric%20Service.pdf

³⁷

https://psc.ky.gov/tariffs/Electric/Kentucky%20Utilities%20Company/Contracts/Current/Manchester%20Tank%20and%20Equipment%20Company/2020-08-30_Contract%20for%20Electric%20Service.pdf

³⁸

[https://psc.ky.gov/tariffs/Electric/Kentucky%20Utilities%20Company/Contracts/Current/Danimer%20Scientific,%20Inc/2022-08-17_Contract%20for%20Electric%20Service%20with%20EDR%20\(existing%20service\).pdf](https://psc.ky.gov/tariffs/Electric/Kentucky%20Utilities%20Company/Contracts/Current/Danimer%20Scientific,%20Inc/2022-08-17_Contract%20for%20Electric%20Service%20with%20EDR%20(existing%20service).pdf) and [https://psc.ky.gov/tariffs/Electric/Kentucky%20Utilities%20Company/Contracts/Current/Danimer%20Scientific,%20Inc/2022-08-17_Contract%20for%20Electric%20Service%20with%20EDR%20\(new%20service\).pdf](https://psc.ky.gov/tariffs/Electric/Kentucky%20Utilities%20Company/Contracts/Current/Danimer%20Scientific,%20Inc/2022-08-17_Contract%20for%20Electric%20Service%20with%20EDR%20(new%20service).pdf)

Contract in particular. The Commission can therefore approve the Bitiki EDR Special Contact without free ridership concerns.

III. KU and the Joint Intervenors Agree: There Is No Minimum Jobs Requirement for EDR, the Joint Intervenors' Attempts to Invent One Notwithstanding.

The JI Brief makes one statement with which KU fully agrees: “[T]here is no minimum job requirement to be eligible for an EDR under Administrative Case No. 327”³⁹ If the Joint Intervenors had ended their sentence there, their position would be fully consistent with the Commission’s precedents. But the Joint Intervenors go on to contradict both themselves and the Commission’s seminal Order in Administrative Case No. 327 by stating in the next clause of the same sentence, “[T]here needs to be a showing that at a minimum *some* appreciable economic development would be spurred by the EDR that would not otherwise occur.”⁴⁰ That is entirely incorrect, and KU has already addressed this issue at length.⁴¹ It suffices here to quote the Commission’s reasoning in Administrative Case No. 327, namely that establishing minimum job or investment requirements would be arbitrary and could *impede* rather than promote economic development, noting that some kinds of economic development can convey “tangible economic benefits unrelated to job creation”:

The Commission finds that, while job creation and increases in capital investment are the desired outcome of EDRs, *requiring specific levels of job creation and capital investment for EDR eligibility might, in some instances, impede rather than promote economic activity*. For instance, such a requirement might prevent a customer from participating in an EDR program *even if tangible economic benefits unrelated to job creation or capital investment would have been realized*. Furthermore, specific job creation and capital investment levels would be arbitrary and would not recognize the needs and characteristics of individual service areas and of new and expanding customers.

³⁹ JI Brief at 7.

⁴⁰ *Id.* (emphasis in the original).

⁴¹ *See, e.g.*, KU Brief at 7-10.

...

The Commission finds that a uniform job creation and capital investment requirement for each EDR contract is inappropriate.⁴²

Therefore, the JI Brief on this issue is half right: there is no minimum jobs requirement for EDR special contracts. But it is *only* half right; there is no requirement to “show[] that at a minimum some appreciable economic development would be spurred by the EDR”⁴³ Therefore, the Commission must reject the Joint Intervenors’ attempt to interpose such a requirement where one neither exists *nor should exist* on the Commission’s longstanding reasoning and practice.

That notwithstanding, as the JI Brief effectively concedes, the Bitiki EDR Special Contract already has spurred job-related activity, and there is every reason to believe it will continue to do so. The JI Brief makes a noteworthy concession on this point: “KU has not provided any evidence showing that *additional jobs* would be created by approval of the EDR *beyond the few that might have already been created at the facility*”⁴⁴ As KU has previously noted, Bitiki has made capital investments in anticipation of receiving EDR discounts;⁴⁵ photos of the facilities already installed are in the record of this proceeding.⁴⁶ People had to deliver and install them. Additionally, someone must maintain, update, and repair Bitiki’s computers and related equipment and facilities, and someone must manage Bitiki’s business affairs; indeed, the names of at least three such people are in the record of this proceeding: Cliff Ford, Kirk Tholen, and Heath Lovell.⁴⁷ In short, Bitiki has already had and will continue to have some effect on employment. Further,

⁴² Admin. Case No. 327, Order at 10-12 (Ky. PSC Sept. 24, 1990) (emphases added).

⁴³ JI Brief at 7.

⁴⁴ *Id.* at 7-8.

⁴⁵ KU Response to JI PHDR 3-1(a), Attachment 1, pages 2-3.

⁴⁶ KU Response to JI 1-4, Attachment 3.

⁴⁷ Cliff Ford is Bitiki’s primary point of contact with KU. *See, e.g.*, KU Response to JI PHDR 3-1(a), Attachments 1 and 2. Kirk Tholen signed the amended Bitiki contract for electric service. *See* KU Response to JI PHDR 3-1(c), Attachment at page 2. Heath Lovell signed the KIPDA Agreement. *See* EDR Special Contract Filing, KIPDA Agreement, page 6. KU inadvertently overlooked Mr. Lovell in its initial brief.

Bitiki has represented in a signed contract presented to this Commission that it anticipates five jobs resulting from its operations.⁴⁸ Thus, although there is no minimum jobs requirement for an EDR special contract, Bitiki has already demonstrated job-related activity at its site—as the Joint Intervenors concede. Moreover, there is no plausible ground for denying that the anticipated approval of the Bitiki EDR Special Contract preceded and motivated Bitiki’s investment and job-related activity. Therefore, the Commission should approve the Bitiki EDR Special Contract without any job creation-related concern.

IV. The Joint Intervenors Significantly Misconstrue the Importance of the Amount of Investment and Load Bitiki Has Determined Not to Make until the EDR Special Contract Is Approved.

It is important to correct what KU assumes was an unintentional but nonetheless significant misconstruing of a message from Bitiki to KU concerning the importance of the remaining amount of load and investment Bitiki has paused due to the uncertainty around the Bitiki EDR Special Contract. The JI Brief asserts, “Bitiki itself admits that the remaining MW [between 10 MW and 13 MW] is ‘not a significant amount,’ reflecting that the bulk of the investments in the facility have been made – and as noted above, any jobs already created – without the EDR discount.”⁴⁹

That is incorrect. The quoted email is a message from Bitiki to KU on April 1, 2023 states:

Without the EDR being in place as we expected, we’ve paused our growth plans. *It’s not a significant amount, but we were billed for an additional 631.3 kVA on base.* I don’t want this to get out of hand over the next few months. Once the EDR is approved, it will take a few months to get back on track. We can discuss this when you get back from vacation, but it’s something I don’t want to forget to address before April billing.⁵⁰

⁴⁸ Bitiki EDR Special Contract at 2.

⁴⁹ JI Brief at 13.

⁵⁰ KU Response to JI PHDR 3-1(a), Attachment 1 at 3 (emphasis added).

The full email text is clear that the referent of, “It’s not a significant amount,” was the remainder of that sentence, “[B]ut we were billed for an additional 631.3 kVA on base,” *not* the remaining 3 MW of load and related investment Bitiki had planned to make but paused due to the EDR uncertainty.

Moreover, the actual import of Bitiki’s communications to KU is unambiguous: *EDR was important to Bitiki’s siting decision*. For example, Bitiki representative Cliff Ford stated to KU in an April 21, 2023 email: “Things are in limbo without knowing the EDR status as it was in our base case/budget. Not having the EDR approved in early 2023 has caused significant concern – I don’t think we understood that we could be in this situation given the KEIA approval process we went through in March of 2022.”⁵¹ Therefore, there is no plausible, credible understanding of the evidence in this proceeding other than this: KU offered Bitiki EDR discounts to incentivize Bitiki to locate in KU’s service territory, and Bitiki reasonably began investing at its current site on the understanding that the Bitiki EDR Special Contract would be timely accepted by the Commission because that was KU’s experience for at least ten years concerning its EDR special contract filings.⁵² To assert that Bitiki would have located and made the investments it has made to date in KU’s service territory without the EDR contract is flatly contrary to all of the evidence of record in this case, and nowhere does either Bitiki or KU suggest that the 3 MW of additional load and investment Bitiki had planned to make is “not a significant amount.” The Commission should reject this obvious misconstruing of the facts of this case.

⁵¹ *Id.* at 2.

⁵² KU Responseto JI PHDR 3-1(d).

V. The Joint Intervenors' Proposal to Measure Capital Investment and Job Creation from the Date of EDR Contract Approval Is both Contrary to the Terms of the EDR Contract and Detrimental to Economic Development.

The JI Brief unambiguously takes a position that would be damaging to future economic development in Kentucky, namely that all economic development activity that could support approving an EDR special contract must occur *after* contract acceptance or approval by the Commission.⁵³ As KU addressed in its initial brief,⁵⁴ this is a fallacious and dangerous position; it would be a bait-and-switch that could cause real harm to future economic development in Kentucky and the current Administration's economic development efforts. Bitiki unambiguously communicated to KU that it began investing to deploy facilities there (which necessarily supported jobs) on the expectation that the Commission would accept the EDR special contract shortly after filing.⁵⁵ That was a completely reasonable belief because the Commission had accepted all other KU EDR special contracts for more than a decade.⁵⁶ (To be clear, the Commission can and should hold proceedings like these when it deems them necessary; KU does not dispute that.) On that reasonable belief, as the Joint Intervenors concede and the evidence shows, Bitiki has made considerable investments and spurred job-related activity.⁵⁷ To ignore that investment and job activity would communicate to the economic development community that prospective EDR customers must engage in potentially protracted litigation to obtain EDR discounts and that they must not begin creating jobs or making EDR-incentivized investments prior to obtaining Commission approval or they risk not obtaining the very discounts driving their investment. That

⁵³ See, e.g., JI Brief at 7-8 (“KU has not provided any evidence showing that *additional* jobs would be created by approval of the EDR beyond the few that might have already been created at the facility”) (emphases added).

⁵⁴ KU Brief at 17.

⁵⁵ KU Response to JI PHDR 3-1(a), Attachment 1 at 2-3.

⁵⁶ KU Response to JI PHDR 3-1(d).

⁵⁷ See, e.g., JI Brief at 10 (“KU has failed to provide any evidence that any new jobs would be created by the Commission's approval of the proposed EDR discount in this case that have not already been created by the construction and operation of the facility without the EDR in place.”).

would be damaging to the Commonwealth overall and to KU's customers in particular in this proceeding. The Commission should therefore refuse to move the EDR job- and investment-related goal posts as the Joint Intervenors have proposed.

VI. Turning What Have Historically Been Straightforward Special Contract Filings into Formal Applications that Could Result in Extended Litigation Would Be Harmful to Economic Development, Yet that Is Precisely What the Joint Intervenors Advocate.

The JI Brief, apparently overlooking numerous EDR special contract filing requirements set out over four pages of the Commission's final Order in Administrative Case No. 327,⁵⁸ asserts that "the Commission should require 'a more detailed standardized application' that would 'provide an efficient way to evaluate all necessary requirements for approval and clearly identify the economic benefits of the EDR with supporting evidence identified.'"⁵⁹ The only specific recommendation the JI Brief provides is that the Commission should "require an affidavit or equivalent competent evidence ... that the proposed facility would not locate or expand in the utility's territory in the absence of the EDR and more specific information about the jobs and capital investment that the applicant might undertake as a result."⁶⁰

KU respectfully submits that the Commission should do no such thing.

First, as noted above, the Commission clearly articulated the requirements of EDR special contracts and what utilities should submit to support them over 30 years ago.⁶¹ KU has submitted a dozen such contracts in the last decade supported by evidence comparable to what it provided in filing the Bitiki EDR Special Contract, all consistent with KU's Commission-approved EDR tariff provisions, and all of which the Commission accepted for filing without concern, objection, or modification until last year. The notion that there is something fundamentally lacking in KU's (or

⁵⁸ Admin. Case No. 327, Order at 25-28 (Ky. PSC Sept. 24, 1990).

⁵⁹ JI Brief at 15.

⁶⁰ *Id.*

⁶¹ Admin. Case No. 327, Order at 25-28 (Ky. PSC Sept. 24, 1990).

any other utility's) EDR filing support or process finds no basis in longstanding practice with this Commission. KU further respectfully states that the appropriate means for an administrative agency to promulgate or change rules of general applicability, including long- and well-established practice over the course of at least a decade, is through an administrative case (such as Administrative Case No. 327) or a notice-and-comment rulemaking, not in an order in an EDR special contract review proceeding concerning a single utility.

Moreover, the JI Brief and Joint Intervenors' witness Ms. Sherwood suggest adding an affidavit requirement to demonstrate "that the proposed facility would not locate or expand in the utility's territory in the absence of the EDR" as though that were a novel idea for EDRs. Yet the Commission's final Order in Administrative Case No. 327 reveals that the Commission was not only aware of the possibility of instituting such a requirement, but it actually did so only for EDRs to retain existing customers' load:

EDR contracts designed to retain the load of existing customers should be accompanied by an affidavit of the customer stating that, without the rate discount, operations will cease or be severely restricted. In addition, the utility must demonstrate the financial hardship experienced by the customer.⁶²

Neither the JI Brief nor Ms. Sherwood demonstrated any awareness of this existing requirement for a limited subset of EDR special contracts or provided the Commission any good reason to broaden the scope of a requirement the Commission chose not to impose on all EDR special contracts in Administrative Case No. 327. Indeed, it is not at all clear what purpose such an affidavit would serve for new or expanding EDR customers, who are already required to sign contracts specifying their new job, investment, and load expectations and intentions. Thus, the

⁶² Admin. Case No. 327, Order at 27 (Ky. PSC Sept. 24, 1990). *See also id.* at 20-21.

Commission should refuse to institute such a requirement, and it should certainly refuse to promulgate such a requirement of general applicability in this proceeding.

Finally, KU notes the JI Brief's repeated use of the term "application" concerning EDR special contract filings.⁶³ It would be potentially damaging to all Kentucky utilities' economic development efforts if the current standard procedure of filing EDR special contracts with supporting documentation, which ordinarily receive Commission acceptance within 30 days, were to be replaced by full-blown application proceedings. Such a change in procedure would necessarily increase the cost and delay associated with EDRs, making them less economically appealing to new and expanding businesses, for which time and cost are often (if not always) of the essence. As stated above, the Commission can and should hold proceedings like these when it deems them necessary; KU does not dispute that. But KU respectfully submits that fully litigated EDR special contract proceedings should be the exception, not the norm, if successful economic development efforts are the goal.

CONCLUSION

The JI Brief concedes important points supporting approving the Bitiki EDR Special Contract, namely significant benefits to existing KU customers and job-related activity and investment already provided by Bitiki. In addition, as KU discussed at length in testimony and its initial brief, approving the Bitiki EDR Special Contract would be fully consistent with the cryptocurrency mining EDR special contract with the Commission recently approved for East Kentucky Power Cooperative, Inc., Jackson Energy Cooperative Corp., and UMine, LLC.⁶⁴ KU

⁶³ See, e.g., JI Brief at 14-16.

⁶⁴ *Electronic Tariff Filing of East Kentucky Power Cooperative, Inc. for Approval of a Special Contract Pursuant to Its Interruptible Service Tariff and Economic Development Rider between It, Jackson Energy Cooperative Corp., and UMine, LLC*, Case No. 2022-00355, Order (Ky. PSC Oct. 31, 2022).

therefore respectfully asks the Commission to approve the Bitiki EDR special contract as soon as possible.

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Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

In accordance with the Commission's Order of July 22, 2021 in Case No. 2020-00085 (Electronic Emergency Docket Related to the Novel Coronavirus COVID-19), this is to certify that the electronic filing has been transmitted to the Commission on July 7, 2023; and that there are currently no parties in this proceeding that the Commission has excused from participation by electronic means.



Counsel for Kentucky Utilities Company