

**COMMONWEALTH OF KENTUCKY**

**BEFORE THE PUBLIC SERVICE COMMISSION**

**In the Matter of:**

<b>ELECTRONIC APPLICATION OF DUKE</b>	)	
<b>ENERGY KENTUCKY, INC. FOR (1) AN</b>	)	
<b>ADJUSTMENT OF ELECTRIC RATES; (2)</b>	)	
<b>APPROVAL OF NEW TARIFFS; (3) APPROVAL</b>	)	<b>Case No. 2022-00372</b>
<b>OF ACCOUNTING PRACTICES TO</b>	)	
<b>ESTABLISH REGULATORY ASSETS AND</b>	)	
<b>LIABILITIES; AND (4) ALL OTHER</b>	)	
<b>REQUIRED APPROVALS AND RELIEF</b>	)	

**SIERRA CLUB’S RESPONSE TO DUKE ENERGY KENTUCKY, INC.’S PETITION FOR REHEARING**

As Sierra Club argued in its post-hearing brief, the evidence in this proceeding demonstrates that East Bend will become uneconomic no later than the mid-2020s and can feasibly be replaced by 2030. While 2030 is the most likely retirement date based on information at this time, the Inflation Reduction Act (“IRA”) and federal environmental regulation may make an earlier date more probable, and they provide necessary insights for Duke Energy Kentucky (“Duke”) in planning for a post-East Bend future. Sierra Club, Duke, and other parties extensively briefed the issue of East Bend 2’s probable retirement date, and there was extensive evidentiary testing of this question. Sierra Club, in its briefing, argued that the depreciation date must align with the anticipated retirement date in accordance with the “used and useful” standard and that the most probable retirement date for East Bend 2 based on available information is, again, 2030.

The Commission’s Final Order in this proceeding concluded, “Amending the depreciable retirement date of East Bend at this time, based on incomplete analyses from the 2021 IRP, without the benefit of the legal standard in KRS 278.264 seems unreasonable in light of the rate increase to

customers resulting from such a decision.” Order at 14. The Commission’s Order does not address the Commission’s departure from the “used and useful” standard and the concomitant principle of intergenerational equity that has guided its decision-making in other proceedings. Nor does it address the additional information that has become available following the 2021 IRP analysis that indicates that the most likely retirement date for East Bend 2 is earlier than 2041 (or identify missing information that points toward a later retirement date). Because of these omissions, rehearing is warranted.

Further, the Commission’s recent order in Case No. 2022-402, *Electronic Joint Application of Ky. Utils. Co. & Louisville Gas & Elec. Co. for Certificates of Public Convenience & Necessity & Site Compatibility Certificates & Approval of a Demand Side Management Plan & Approval of Fossil Fuel-Fired Generating Unit Retirements*, examines the legal standard in K.R.S. § 278.264 as an issue of first impression. Because this litigation has involved the expenditure of significant resources, because this decision was previously unavailable, and because K.R.S. § 278.264 was enacted in the middle of these proceedings after direct testimony was filed, the Commission should order rehearing and limited testimony, evidentiary hearing, and briefing on this issue. In the interests of administrative economy, the Commission should also include limited testimony, evidentiary hearing, and briefing that will complete the 2021 IRP analysis and allow for the Commission to issue a decision in this litigation—rather than requiring the filing of another rate case on the issue of the East Bend 2 depreciation date.

### **LEGAL STANDARD**

Rehearing is appropriate to hear “new evidence not readily discoverable at the time of the original hearings, to correct any material errors or omissions, or to correct findings that are

unreasonable or unlawful.”<sup>1</sup> Findings are unreasonable where “the evidence presented leaves no room for difference of opinion among reasonable minds.”<sup>2</sup>

## **ARGUMENT**

Regarding the retirement of East Bend 2, the Commission concluded, “Amending the depreciable retirement date of East Bend at this time, based on incomplete analyses from the 2021 IRP, without the benefit of the legal standard in KRS 278.264 seems unreasonable in light of the rate increase to customers resulting from such a decision.” Order at 14. But this conclusion is inconsistent with the Commission’s ordinary practice of aligning depreciation with a unit’s anticipated retirement date, given the showing in these proceedings that a date before 2041 is the most probable retirement date for East Bend 2. Further, K.R.S. § 278.264 became law after Duke’s application and filing of direct testimony in this matter.

Given the significant resources already expended on this litigation and the Commission’s recent and previously unavailable decision interpreting K.R.S. § 278.264 as a matter of first impression, the most prudent course of action is to provide for limited testimony, a limited evidentiary hearing, and limited briefing (1) analyzing the retirement of East Bend 2 under the criteria of K.R.S. § 278.264 and (2) evaluating any other issues that the Commission finds contribute to “incomplete analyses.” Order at 14. This path will allow for the conservation of Commission resources while ensuring that the depreciation date for East Bend 2 is aligned to the probable retirement date, to allow Duke to prepare for the future and to ensure that future customers are not paying the costs of an asset for which they receive no benefit.

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<sup>1</sup> *In re: Elec. App. Of Big Rivers Elec. Corp. for Annual Review of Its MRSM Charge for Calendar Year 2022*, Case No. 2023-00038, 2023 WL 7220130 (Ky. P.S.C. Oct. 26, 2023).

<sup>2</sup> *Id.* (quoting *Energy Regulatory Comm’n v. Ky. Power Co.*, 605 S.W. 2d 46 (Ky. App. 1980)).

**I. The Commission Regularly Aligns Depreciation With Anticipated Retirement and Seeks to Avoid Intergenerational Inequities, But It Departed From Those Principles Here Without Reasoned Explanation.**

The Commission regularly aligns depreciation with a unit’s anticipated retirement date, to ensure that the same customers who enjoy the benefits of an asset are also paying the costs of that asset. As Sierra Club noted in its post-hearing brief, an important factor in determining “fair, just, and reasonable” rates is whether an electric generating unit is “‘used and useful’ for the benefit of” customers.<sup>3</sup> This is because “our public policy, statutes, and cases clearly seek to protect consumers from paying for facilities which do not benefit them.”<sup>4</sup> Sierra Club’s post-hearing brief described the Commission’s regular application of the “used and useful” standard to align depreciation with retirement. Sierra Club Post-Hearing Brief at 7-8. As the Commission has previously explained, “Requiring ratepayers to pay for costs of an asset when they received no benefit from that asset creates intergenerational inequities.”<sup>5</sup>

Here, though, the Commission did not identify the time period for which East Bend 2 is most likely to be “used and useful,” in order to attempt to best align depreciation with retirement. Instead, the Commission noted that amending the depreciable retirement date would result in a “rate increase to customers” and concluded that, without analysis under K.R.S. § 278.264 and with other “incomplete analyses” from the 2021 IRP, such a change was “unreasonable.” Order at 14. But this analysis does not square with the Commission’s typical approach to depreciation. It is true that amending the retirement date to an earlier date—as requested by both Duke and Sierra Club—would lead to a rate increase for customers. But that rate increase would in fact be “fair, just, and reasonable” under the Commission’s prior decisions. That is because of the principle that this

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<sup>3</sup> *In re: Elec. Application of Big Rivers Elec. Corp. for Approval to Modify Its Mrsm Tariff, Cease Deferring Depreciation Expenses, Establish Regul. Assets, Amortize Regul. Assets, & Other Appropriate Relief*, No. 2020-0064, 2020 WL 3512155, at \*11 (Ky. P.S.C. June 25, 2020).

<sup>4</sup> *Nat’l-Southwire Aluminum Co. v. Big Rivers Elec. Corp.*, 785 S.W. 2d 503, 511 (Ky. Ct. App. 1990).

<sup>5</sup> *Id.*

Commission has repeatedly followed, that existing customers who use a resource should pay for that resource, rather than future customers who are not receiving a benefit from that resource.

In other words, a rate increase is an ordinary and reasonable outcome where the most likely retirement date has changed to an earlier one. And the Commission did not determine what the *most likely* retirement date is based on the available information—and whether that date has shifted to before 2041. This leaves the distinct possibility that future customers who will not benefit from East Bend 2 will be left paying for the unit after its retirement, an outcome that would be inconsistent with the Commission’s typical application of the “fair, just, and reasonable” legal standard to depreciation. *See* K.R.S. § 278.030(1). The Commission’s material omission in its unexplained departure from its ordinary application of the law warrants rehearing.

**II. The Record Demonstrates that A Date Before 2041—Specifically, 2030—Is the Most Likely Retirement Date for East Bend, and Any Incomplete IRP Analysis Pushes Toward an Earlier Retirement Date.**

As Duke stressed throughout this proceeding, that anticipated retirement date is the *most likely* retirement date based on an uncertain future.<sup>6</sup> The record in this proceeding demonstrates that that date is before 2041—and, thus, that the depreciation date should be adjusted in accordance with the “used and useful” standard.

As Sierra Club argued in its initial briefing, 2030 is the most likely retirement date based on the record in this proceeding. Sierra Club Post-Hearing Brief at 9-24. Specifically, Duke’s IRP demonstrates that 2030 is the most likely retirement date for East Bend. In fact, in three out of six scenarios, the IRP identifies the mid-2020s as the economically optimal retirement date for East Bend. *See* Sierra Club Post-Hearing Brief at 10. In the scenario with carbon regulation and the base

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<sup>6</sup> *E.g.*, Park Reb. Test. at 19:9-12 (“A prudent decision needs to include risk-informed economic analysis. Since the future is uncertain, a prudent decision needs to be informed by what the Company thinks is most likely to happen, based upon robust modeling and analysis.”).

gas price, East Bend is optimally retired in 2027. *See id.* The 2021 IRP takes 2030 as the anchoring date for retirements. *See id.* at 12.

Subsequent developments confirm that an earlier retirement date than 2041 is economically optimal—and that the IRP’s estimate of the continued economic viability of East Bend is too lengthy. As Sierra Club argued in its post-hearing brief, Duke’s testimony in this proceeding, Ms. Shenstone-Harris’s analysis of Duke’s modeling, the passage of the IRA, and new federal environmental regulations all militate toward an earlier retirement date—and all indicate that the most reasonable anticipated retirement date for depreciation purposes is 2030. *Id.* at 16-24. Thus, the IRP’s “incomplete” analyses do not counsel against adjustment of the depreciation date. Instead, the failure to adequately consider each of these factors indicates that the probable retirement date is earlier than the 2035 retirement date identified by Duke—not later. To the extent that the analyses are “incomplete,” it is because they do not take into account factors that push the retirement date earlier.

The Commission’s Order states, “Duke Kentucky’s 2021 IRP is not a reasonable planning document for the retirement date because Duke Kentucky’s Generation Retirement Study did not adequately support the requested retirement date of 2035.” Order at 14. But the Order also determines that the “Generation Retirement Study” “did not result in a formal study other than the testimony and data responses from Lisa Quilici” and concludes that “[t]he evidence provided in the Generation Retirement Study was of little substance or usefulness,” to the extent that “the expense was gratuitous.” *Id.* at 19. It is unclear why the absence of a meaningful generation retirement study would make the 2021 IRP not a reasonable planning document. The issue appears to be not a genuine conflict between two analyses by Duke, but rather that the Generation Retirement Study was wholly inadequate to its purposes. But, given the available information, the burden of that inadequate study should not fall on Duke customers. And the fact that the Generation Retirement

Study was inadequate would not seem to have any bearing on whether the 2021 IRP, independently, was a reasonable planning document. The IRP does not rely on the Generation Retirement Study.

Thus, the evidence in this proceeding shows that a date before 2041 is the most likely retirement date for East Bend. While the IRP is incomplete, not taking into account the passage of the IRA or new federal environmental regulations only confirms that a date before 2041 is most likely as a retirement date. Duke's deeply flawed Generation Retirement Study does not have relevance to the reasonableness of looking to the IRP's analysis. Failing to take into account the information in the record regarding a retirement date earlier than 2041 risks a heavy burden falling on Duke's future customers due to lack of alignment between the most probable retirement date and the depreciation date—again, contrary to the “used and useful” principle. Due to this omission, as well, rehearing is warranted.

### **III. Upon Granting Rehearing, the Commission Should Reopen This Case For Limited Testimony and Briefing.**

The Commission has repeatedly allowed for new testimony on rehearing. Recently, in rate cases for Louisville Gas & Electric and Kentucky Utilities, the Commission granted partial rehearing on five specific issues, heard additional testimony at an evidentiary hearing with witness testimony and hearing exhibits, and provided for post-hearing discovery.<sup>7</sup> Numerous other cases dating back decades have included new testimony and new formal evidentiary hearings upon rehearing.<sup>8</sup>

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<sup>7</sup> *In re Elec. Application of Ky. Utils. Co. for an Adjustment of Its Electric Rates, a Certificate of Public Convenience and Necessity to Deploy Advanced Metering Infrastructure, Approval of Certain Regulatory & Accounting Treatments, & Establishment of a One-Year Surcredit*, Case No. 2020-00349, & *In re Elec. Application of Louisville Gas & Elec. Co. for an Adjustment of Its Electric & Gas Rates, a Certificate of Public Convenience and Necessity to Deploy Advanced Metering Infrastructure, Approval of Certain Regulatory & Accounting Treatments, & Establishment of a One-Year Surcredit*, Case No. 2020-00350.

<sup>8</sup> *E.g., In re Ky. Indus. Util. Customers v. Ky Utils. Co. & Louisville Gas & Elec. Co.*, Case No. 2018-00034; *In re Application of Big Rivers Elec. Corp. for a General Adjustment in Rates*, Case No. 2011-00036; *In re Application of Shadow Wood Subdivision Sewer Service for an Adjustment of Rates*, Case No. 2001-00423; *In re Tariff Filing of Columbia Gas of Ky. Inc.*, Case No. 1999-165.

Further, on occasion, this Commission has reopened cases for further investigation, including under its authority for rehearing. For example, in *In re Delta Natural Gas Co., Inc.*, Case No. 94-028, 2001 WL 1736590 (Ky. P.S.C. May 30, 2001), the Commission reopened a proceeding to modify an order in light of “significant[]” changes in the governing law. Numerous other cases have involved some form of reopening related to new evidence.<sup>9</sup> Most recently, just a few months ago in *In re Electronic Tariff Filing of Columbia Gas of Ky., Inc.*, Case No. 2021-00386, 2023 WL 3230915 (Ky. P.S.C. Apr. 27, 2023), the Commission reopened a proceeding for a formal hearing with testimony under the rubric of a motion for rehearing. *Id.* (“The Commission will treat Columbia Kentucky’s motion to reopen as a motion for rehearing. . . . The Commission finds that this proceeding should be reopened for the purposes of holding a formal hearing where the Commission will hear testimony . . . .”)

For the reasons set forth above, the Commission should grant rehearing in this matter. Upon doing so, the Commission should provide for further limited testimony, an evidentiary hearing, and briefing to address application of the legal standard in K.R.S. § 278.264. Because the Commission recently decided a case of first impression regarding this standard, in Case No. 2022-402, *Electronic Joint Application of Ky. Utils. Co. & Louisville Gas & Elec. Co.*, the parties can apply that standard to the facts already adduced in this lengthy proceeding that has involved thousands of pages of testimony and a multi-day hearing. The Commission should also provide for further limited testimony, evidentiary hearing, and briefing on any issues regarding “incomplete analyses from the

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<sup>9</sup> *E.g.*, *In re Application of Wireless Co, L.P.*, Case No. 96-228, 1996 WL 34588599 (Ky. P.S.C. Oct. 7, 1996) (reopening a case for further investigation when the Commission discovered evidence that information in the record was potentially inaccurate); *In re Application of Martin Gas, Inc. for Rate Adjustment for Small Utilities*, Case No. 2016-00332, 2018 WL 1806011 (Ky. P.S.C. Apr. 11, 2018); *In re Electronic Application of East Ky. Power Cooperative, Inc. for a General Adjustment of Rates*, Case No. 2021-00103, 2022 WL 1785787 (Ky. P.S.C. May 25, 2022) (reopening a case based on limited factual information regarding the appropriate date for a filing requirement).



2021 IRP.” Order at 14. Doing so will preserve administrative economy by allowing for the full examination of this information in this proceeding, without the necessity of filing a new rate case. Duke’s initial application of course did not contemplate and was not geared toward the retirement standard set forth in K.R.S. § 278.264, since it did not yet exist. But now with the benefit of the analysis in the Commission’s recent decision and clarity as to the need for evaluating depreciation in light of § 278.264, supplemental testimony, hearing, and briefing will allow for resolution of this matter without duplication in a separate case.

### CONCLUSION

The Commission should grant the request for rehearing and reopen this case for limited testimony, an evidentiary hearing, and briefing regarding analysis under K.R.S. § 278.264, in light of the Commission’s recent interpretation of that statute, and for any other issues that will provide for a complete analysis of the anticipated retirement date of East Bend 2.

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that the foregoing copy of Sierra Club's response in support of rehearing in this action is being electronically transmitted to the Commission on September 8, 2023, and that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding.

/s/ Joe F. Childers  
JOE F. CHILDERS