

**COMMONWEALTH OF KENTUCKY**  
**BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of:

The Electronic Application of Duke Energy )  
Kentucky, Inc., for: 1) An Adjustment of the )  
Electric Rates; 2) Approval of New Tariffs; ) Case No. 2022-00372  
3) Approval of Accounting Practices to )  
Establish Regulatory Assets and Liabilities; )  
and 4) All Other Required Approvals and )  
Relief. )

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**DUKE ENERGY KENTUCKY, INC.’S**  
**REPLY IN SUPPORT OF PETITION FOR REHEARING**

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Comes now Duke Energy Kentucky, Inc. (Duke Energy Kentucky or the Company), by counsel, pursuant to KRS 278.400, 807 KAR 5:001, Section 5, and other applicable law, and does hereby tender its Reply in Support of Duke Energy Kentucky, Inc.’s Petition for Rehearing (Reply), respectfully stating as follows:

**I. INTRODUCTION**

Following the Kentucky Public Service Commission’s (Commission) October 12, 2023 Order (Order), Duke Energy Kentucky filed a Petition for Rehearing (Petition) on November 1, 2023. Two intervenors—the Office of the Attorney General (OAG) and Sierra Club—each tendered a Response to the Petition (each, a Response), collectively contesting only three of the issues raised for rehearing in Duke Energy Kentucky’s Petition: (1) Planned Outage Operations and Maintenance (O&M) and Forced Outage Purchased Power Deferral Discontinuance, (2) East Bend Retirement Date,<sup>1</sup> and (3) Terminal Net Salvage Adjustment.<sup>2</sup> In accordance with 807 KAR

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<sup>1</sup> Sierra Club only contests this issue in its Response.

<sup>2</sup> Neither the OAG nor Sierra Club contests the following issues raised for rehearing in Duke Energy Kentucky’s Petition: (1) Appendix B Rates, (2) On-Site Payment Location, (3) Waiver of 807 KAR 5:006, Section 7(1)(a)(3) for

5:001, Section 5, regarding the limited scope of a reply, the Company addresses the three issues substantively addressed by the OAG and Sierra Club below, respectfully incorporating the arguments raised in the Company’s Petition and advancing arguments not previously addressed in the Company’s Petition.

## II. ARGUMENT

### A. **Planned Outage O&M and Forced Outage Purchased Power Deferral Discontinuance**

The OAG contests Duke Energy Kentucky’s request for rehearing on the Commission’s discontinuance of the planned outage O&M and forced outage purchased power deferrals by citing KRS 278.400, which—in the OAG’s own words—“limits a rehearing to new evidence not readily discoverable at the time of the original hearing, to correct any material errors or omissions, *or to correct findings that are unreasonable or unlawful.*”<sup>3</sup> Despite the plain language of this standard, the OAG only notes that the Company’s request for rehearing on this issue should be rejected because it “has provided no new evidence that was not readily discoverable at the time of the original hearing on the planned and forced outage deferral issues, and is merely attempting to relitigate these issues that were fully addressed by the Commission’s Final Order.”<sup>4</sup> This is not the standard. The Commission is also allowed to correct findings that are unreasonable and unlawful. The Commission’s discontinuance of the deferrals with limited explanation is in fact unreasonable because, as described in further detail below, no party requested such a discontinuance. OAG limits its argument to the “new evidence” standard of KRS 278.400. The Commission should therefore disregard the OAG’s argument on this point, as it ignores the other parts of the KRS 278.400

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Time of Use with Critical Peak Pricing, (4) Rate Case Expense Disallowances, and (5) Items for Correction or Clarification (*i.e.*, clerical errors and clarifying questions identified by the Company).

<sup>3</sup> The Attorney General’s Response to Duke Energy Kentucky, Inc.’s Petition for Rehearing (OAG Response), 1 (emphasis added); *see also id.* at 4.

<sup>4</sup> *Id.*

rehearing standard, in particular the part that allows rehearing to be granted when a decision is unreasonable.

Even more, the Company also provided new evidence not readily discoverable at the hearing as part of its Petition on this issue. The Petition contains references to and excerpts from testimony in Case No. 2017-000321,<sup>5</sup> which was not necessary to raise at the hearing in this case due to the nature of the OAG's objections on these matters. While the OAG contested the proposed amortization periods for the two deferrals,<sup>6</sup> it did not necessarily contest the deferrals themselves, instead arguing that the Company "wait until the next base rate case to determine whether the subject deferral account has netted to zero."<sup>7</sup> This implies that the OAG recommended that the deferrals in fact continue, and the Company therefore had no reason to seek admission of evidence showing why the deferrals were conceptually necessary to begin with.

Indeed, the deferral itself was fully litigated in the Company's 2017 electric base rate case, and the Commission approved the Company's proposal based upon the record in that case. The deferral continued through the Company's 2019 electric base rate case, which again, was fully litigated. The testimony from the 2017 case became necessary to raise, however, upon the Commission's Order discontinuing the deferrals despite no party's—including the OAG's—objection to the continuance, and there being no evidence in the record that the deferral was now somehow unreasonable to continue. That testimony described how the deferrals would "ensure

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<sup>5</sup> *In the Matter of the Electronic Application of Duke Energy Kentucky, Inc., for: 1) an Adjustment of the Electric Rates; 2) Approval of an Environmental Compliance Plan and Surcharge Mechanism; 3) Approval of New Tariffs; 4) Approval of Accounting Practices to Establish Regulatory Assets and Liabilities; and 5) All Other Required Approvals and Relief*, Case No. 2017-000321, Direct Testimony of David Doss at 4–6 (Sept. 1, 2017).

<sup>6</sup> OAG Response, 3 ("In the original application, Duke Kentucky requested to amortize and recover a planned outage expense regulatory asset over five years. *The Attorney General recommended denial of this request, and argued to instead wait until the next base rate case to determine whether the subject deferral account has netted to zero.* Similarly, the Company requested to amortize and recover a forced outage expense regulatory asset over five years. *The Attorney General also recommended the denial of this request because Duke Kentucky had not submitted evidentiary proof demonstrating that these expenses were prudent, reasonable, or necessary.*") (emphasis added) (internal citations omitted).

<sup>7</sup> *Id.*

that customers are not overpaying and the Company is not under recovering for actual costs incurred in serving customers,”<sup>8</sup> and the OAG did not dispute the introduction of this testimony nor its veracity, in particular with regard to ensuring that customers will not over-pay.

Indeed, the Commission’s decision to eliminate the deferral is at odds with the other aspects of the Commission’s Order, including its stated goal of “encouraging Duke Kentucky to operate East Bend as long as it is economically viable.”<sup>9</sup> Allowing the Company to continue its existing deferral process for planned outages is necessary to enable the Company to continue to make timely maintenance investments to keep this aging plant operating for customers as long as economically possible, all without increasing the volatility of the Company’s income statement or incurring more frequent rate cases to recover costs for such maintenance. Thus, the Company’s Petition also raises new evidence not readily discoverable at the hearing, and the OAG did not dispute this evidence in its Response. The Company’s Petition on this point is therefore in line with the various standards of KRS 278.400, and rehearing should be granted on these issues.

#### **B. East Bend Retirement Date**

The OAG also argues that the Company has already litigated East Bend’s retirement date and therefore the Company should be precluded from seeking rehearing on this issue. However, the OAG once again fails to recognize that the Company may seek rehearing for reasons other than raising new evidence not readily discoverable at the time of the hearing. Specifically, as noted above, the Company may raise issues for rehearing to correct findings that are unreasonable or unlawful,<sup>10</sup> and the Company did so here. The Commission’s departure from aligning depreciation

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<sup>8</sup> Duke Energy Kentucky, Inc.’s Petition for Rehearing (Petition), 12 (citing *In the Matter of the Electronic Application of Duke Energy Kentucky, Inc., for: 1) an Adjustment of the Electric Rates; 2) Approval of an Environmental Compliance Plan and Surcharge Mechanism; 3) Approval of New Tariffs; 4) Approval of Accounting Practices to Establish Regulatory Assets and Liabilities; and 5) All Other Required Approvals and Relief*, Case No. 2017-000321, Direct Testimony of David Doss at 4–6 (Sept. 1, 2017).

<sup>9</sup> Order, 14.

<sup>10</sup> OAG Response, 1.

rates with the most probable anticipated date of retirement—without explanation—is indeed unreasonable. That the OAG believes no new evidence was raised does not preclude the Company’s request for rehearing. The Commission’s ruling on East Bend’s probable retirement date of 2041, despite the volume of record evidence showing that 2035 is the most likely and most prudent retirement date, was unreasonable. Moreover, there is no record evidence to rebut the Company’s analysis other than conclusory statements by the OAG’s witness Kollen, which contained no independent analysis of unit retirement scenarios more probable than the 2035 date the Company supported. Accordingly, the Commission’s determination is unreasonable and is unsupportable in the record.

Regardless, the Commission’s Order and the Company’s Petition actually raised new evidence that was not readily discoverable or litigable at the time of the hearing: Kentucky Senate Bill 4 (SB 4), as codified in KRS 278.264. SB 4 was signed into law just weeks before the hearing in this case began, and while the parties may have been able to make preliminary assessments of the new law and its potential impacts on this case, those assessments could be only cursory, as the parties had no Commission precedent on SB 4 at the time of the hearing.<sup>11</sup> Thus, while the OAG’s argument on this point ignores the other rehearing standards, it also incorrectly applies the rehearing standard related to new evidence, as SB 4 and the Commission’s ruling applying SB 4 to this case are new precedent that could not meaningfully be litigated at the hearing.

With regard to Sierra Club’s Response, Sierra Club does not meaningfully respond to the issues raised by the Company related to East Bend’s retirement date in its Petition, but instead uses its “Response” to reiterate its position that 2030 is the most likely retirement date for East Bend.

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<sup>11</sup> See Sierra Club’s Response to Duke Energy Kentucky, Inc.’s Petition for Rehearing (Sierra Club Response), 3 (indicating that the Commission precedent on SB 4 was “recent and [a] previously unavailable decision interpreting K.R.S. § 278.264 as a matter of first impression”); see also *id.* at 9 (“Duke[ Energy Kentucky]’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.”).

While the Company disagrees with Sierra Club on this point, it will not repeat here its reasoning as to why the record supports a retirement date of 2035.<sup>12</sup> Further, Sierra Club's Response reads more like a petition for rehearing, which Sierra Club was welcome to file at the same time the Company filed its Petition. However, it chose not to do so, and the Company notes here that the Commission should not allow parties to use response filings to circumvent KRS 278.400. Without having timely filed its own petition for rehearing, Sierra Club should be barred from making a filing that merely responds to assertions made in the Commission's Order and not the Company's Petition.

That said, the Company conceptually agrees with Sierra Club regarding the Commission's granting rehearing on this issue. The Company's Petition explains exactly why the Commission should do so.

### **C. Terminal Net Salvage Adjustment**

While the OAG again argues that the arguments presented in the Company's Petition related to terminal net salvage were in the record at the time of the hearing, this ignores the other standards for rehearing provided in KRS 278.400—namely, that rehearing can be granted to correct Commission findings that are either unreasonable or unlawful.<sup>13</sup> The Commission's removal of terminal net salvage from depreciation rates was unreasonable, as discussed in further detail in the Company's Petition.<sup>14</sup> Moreover, it is contrary to Commission precedent, having fully litigated the reasonableness of including terminal net salvage in depreciation rates as part of Case No 2017-00321.<sup>15</sup> As such, the Commission should disregard the OAG's argument on this point.

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<sup>12</sup> See Petition, 15–18.

<sup>13</sup> OAG Response, 1.

<sup>14</sup> Petition, 18–21.

<sup>15</sup> *In the Matter of the Electronic Application of Duke Energy Kentucky, Inc., for: 1) an Adjustment of the Electric Rates; 2) Approval of an Environmental Compliance Plan and Surcharge Mechanism; 3) Approval of New Tariffs; 4) Approval of Accounting Practices to Establish Regulatory Assets and Liabilities; and 5) All Other Required Approvals and Relief*, Case No. 2017-000321, Order at 27 (April 13, 2018).

Even if the “new evidence” standard were the only rehearing standard under KRS 278.400, the Company raised new evidence under its terminal net salvage arguments—namely, SB 4. Given the then-recent enactment of SB 4 and its close proximity to the hearing in this case, neither the Company nor the other parties were able to meaningfully evaluate its ramifications on this case and the Commission’s interpretation of it as applied to the Company’s application. It was unknown that the Commission would interpret SB 4 to deny recovery of any and all possible decommissioning costs prior to unit retirement, including amounts previously determined to be reasonable and included in base rates prior to the enactment of SB-4, as opposed to “new or incremental” decommissioning costs. Contrary to the OAG’s assertions otherwise, the Company did raise new evidence that is worthy of further analysis and discussion as part of rehearing.

Further, the Company asserts that the Commission’s ruling on terminal net salvage was *unlawful*, a standard that OAG’s Response on this point also ignores. While the Commission indeed has the authority to set “fair, just, and reasonable rates for ratepayers,”<sup>16</sup> it is not authorized to order a taking of the Company’s property. In fact, the United States and Kentucky Constitutions prohibit it.<sup>17</sup> Under those constitutional provisions, private property may not be taken or held for public use without just compensation. A taking deprives the property owner of its right to earn a reasonable return on the value of its property, and this rule applies to a variety of private property owners, including utility providers like Duke Energy Kentucky. As a public utility, the Company has a right to receive just compensation in exchange for providing safe, necessary, and reliable electric service to the public in its service territory.

Decommissioning the generating units that have provided decades of safe and reliable electric service to customers is a cost rightfully incurred by the Company in providing that electric

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<sup>16</sup> OAG Response, 8.

<sup>17</sup> U.S. Const. art. I, § 19; Ky. Const. art XIII, § 14.

service, and a cost that should be borne by the customers benefitting from the assets' generation. The Commission's excluding these costs from depreciation rates—and, in turn, preventing the Company from recovering these costs—turns Commission precedent on its head, and creates intergenerational inequity, an outcome the Commission previously determined warrants inclusion of these costs in rates.<sup>18</sup> Removing existing costs attributed to assets in service to serve the public that are rightfully included in existing base rates, begs the question of whether a taking has occurred.<sup>19</sup> The Commission's "plenary ratemaking authority"<sup>20</sup> is not so absolute as to allow it to violate the United States and Kentucky Constitutions. The Company has therefore raised a question as to whether the Commission's Order was unlawful on this point. The OAG's Response does not address this constitutional issue. Moreover, as the Company pointed out in its Petition, the Commission's removal of terminal net salvage for all generating units, including those not within the scope of KRS 278.264, was unlawful, unreasonable, and further, is contrary to Commission precedent.

### III. CONCLUSION

The Company again respectfully suggests that rehearing is warranted on each of the issues raised in its Petition. The OAG and Sierra Club—as well as the other intervenors in this case—do not appear to contest several of the issues raised in the Petition, and the Company has shown via this Reply that the OAG's and Sierra Club's objections to the three remaining issues should be disregarded. Accordingly, Duke Energy Kentucky's Petition should be granted.

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<sup>18</sup> *In the Matter of the Electronic Application of Duke Energy Kentucky, Inc., for: 1) an Adjustment of the Electric Rates; 2) Approval of an Environmental Compliance Plan and Surcharge Mechanism; 3) Approval of New Tariffs; 4) Approval of Accounting Practices to Establish Regulatory Assets and Liabilities; and 5) All Other Required Approvals and Relief*, Case No. 2017-000321, Order at 27 (April 13, 2018) (rejecting the OAG witness Kollen's recommendation to remove terminal net salvage from depreciation rates).

<sup>19</sup> Under the Commission's Order, "[r]emoving terminal net salvage increases rate base by \$1.446 million for a revenue requirement increase of \$135,109 (\$0.135 million)." Order, 14.

<sup>20</sup> OAG Response, 8.



WHEREFORE, on the basis of the foregoing, Duke Energy Kentucky respectfully requests that the Commission grant the rehearing and the relief prayed for in the Company's Petition.

This 13th day of November, 2023.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

This is to certify that the foregoing electronic filing is a true and accurate copy of the document in paper medium; that the electronic filing was transmitted to the Commission on November 13, 2023; that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding; and that submitting the original filing to the Commission in paper medium is no longer required as it has been granted a permanent deviation.<sup>21</sup>

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<sup>21</sup> *In the Matter of Electronic Emergency Docket Related to the Novel Coronavirus COVID-19*, Case No. 2020-00085, Order (July 22, 2021).