

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

THE ATTORNEY GENERAL’S BRIEF ON REHEARING

The Intervenor, the Attorney General of the Commonwealth of Kentucky, through his Office of Rate Intervention (“Attorney General”) submits the following brief in response to Duke Energy Kentucky, Inc.’s (“Duke Kentucky” or “Company”) petition for rehearing of the Commission’s October 12, 2023 Final Order (“Final Order”) in the above-styled matter.

STATEMENT OF THE CASE

On November 1, 2023, Duke Kentucky filed a petition for rehearing on a multitude of issues contained in the Commission’s Final Order. The Attorney General filed a response brief to Duke Kentucky’s petition for rehearing on November 8, 2023, and the Company filed a reply in support of its petition for rehearing on November 13, 2023. On November 21, 2023, the Commission issued an Order granting in part and denying in part Duke Kentucky’s petition for rehearing.¹ The Commission denied Duke Kentucky’s request for rehearing on the following issues: removal of decommissioning costs from depreciation rates related to fossil fuel related

¹ Case No. 2022-00372, *Electronic Application of Duke Energy Kentucky, Inc. for (1) An Adjustment of Electric Rates; (2) Approval of New Tariffs; (3) Approval of Accounting Practices to Establish Regulatory Assets and Liabilities; and (4) All Other Required Approvals and Relief* (Ky. PSC Nov. 21, 2023), Rehearing Order at 13.

generation, depreciation rates related to the retirement of the East Bend 2 Generating Station, and the removal of forced outage expense.² The Commission granted Duke Kentucky's request for rehearing on a multitude of issues, including the decommissioning expense related to solar generation assets, and the errors alleged in Attachment A of the Final Order.³

Following the Commission's issuance of a procedural schedule on rehearing, the Commission Staff and the Attorney General issued several rounds of discovery requests, to which Duke Kentucky filed responses into the record. On February 9, 2024, Duke Kentucky and the other parties filed notices that the case could be submitted on the existing record for a decision. However, the Attorney General filed a request to be permitted to file a brief to address Duke Kentucky's issues on rehearing, and then to submit the case on the record for a final decision. On February 15, 2024, the Commission issued an Order granting the Attorney General's request to brief the rehearing issues. The February 15, 2024 Order further stated that after the respective briefs have been filed into the record, the matter shall stand submitted for a ruling on April 2, 2024.

ARGUMENT

KRS 278.400 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.⁴ A Commission Order is deemed unreasonable only when, "the evidence presented leaves no room for difference of opinion among reasonable minds."⁵ A Commission Order can only be unlawful if it violates state and federal statute or constitutional

² *Id.*

³ *Id.*

⁴ See Case No. 2021-00214, *Electronic Application of Atmos Energy Corporation for an Adjustment of Rates* (Ky. PSC June 24, 2022), Order at 1 - 2; Case No. 2021-00365, *Electronic Application of Kenergy Corp. for a Certificate of Public Convenience and Necessity for the Construction of a High-Speed Fiber Network for Approval of the Leasing of the Network's Excess Capacity to an Affiliate to be Engaged in the Provision of Broadband Service to Unserved and Underserved Households and Businesses of the Commonwealth* (Ky. PSC May 19, 2022), Order at 1; See also KRS 278.430.

⁵ *Energy Regulatory Comm'n v. Kentucky Power Co.*, 605 S.W.2d 46, 50 (Ky. App. 1980).

provisions.⁶ However, a petition for rehearing does not present parties with the opportunity to relitigate a matter fully addressed in the original Commission Order.⁷

The Attorney General contends that with the exception of the Rider Environmental Surcharge Mechanism (“ESM”) revenue issue, Duke Kentucky has failed to meet its burden of proof required for a rehearing, and is merely attempting to relitigate the issues that were already addressed and decided by the Commission in its Final Order. Thus, the Attorney General requests the Commission grant in part, and deny in part, Duke Kentucky’s pending petition for rehearing. If this response is silent to any particular issue(s) raised in the Company’s petition for rehearing, that silence should not be construed as acquiescence, approval, or agreement to the same.

I. To prevent the Company from excessive recovery the Rider ESM Revenues should be removed from Duke Kentucky’s approved revenue requirement.

Duke Kentucky initially requested to transfer the recovery of the return on rate base and the related depreciation and property tax expenses from Rider ESM revenues to base revenues for four in-service capital projects.⁸ The Attorney General’s witness Lane Kollen in his testimony recommended denial of this roll-in, because the Company’s proposal is not revenue neutral between base rate cases.⁹ This is due to the fact that the required return on the environmental rate base will continue to decline as the plant is depreciated.¹⁰ The decline in this component of the revenue requirement is reflected in the ESM revenues each month, all else equal.¹¹ This benefits

⁶ *Public Service Comm’n v. Conway*, 324 S.W.3d 373, 377 (Ky. 2010); *Public Service Comm’n v. Jackson County Rural Elec. Coop. Corp.*, 50 S.W.3d 764, 766 (Ky. App. 2000); *National-Southwire Aluminum Co. v. Big Rivers Elec. Corp.*, 785 S.W.2d 503, 510 (Ky. App. 1990).

⁷ See Case No. 2021-00214, *Electronic Application of Atmos Energy Corporation for an Adjustment of Rates* (Ky. PSC June 24, 2022), Order at 2; Case No. 2021-00365, *Electronic Application of Kenergy Corp. for a Certificate of Public Convenience and Necessity for the Construction of a High-Speed Fiber Network for Approval of the Leasing of the Network’s Excess Capacity to an Affiliate to be Engaged in the Provision of Broadband Service to Unserved and Underserved Households and Businesses of the Commonwealth* (Ky. PSC May 19, 2022), Order at 2.

⁸ Direct Testimony of Amy B. Spiller (“Spiller Testimony”) at 4.

⁹ Direct Testimony of Lane Kollen (“Kollen Testimony”) at 40 – 43.

¹⁰ *Id.* at 42.

¹¹ *Id.*

customers, but still provides the Company dollar for dollar recovery, no more and no less.¹² However, if the environmental rate base and related costs are transferred to recovery through base revenues then the recovery will be fixed at the test year level, and the recovery will not decline as the underlying costs decline each month.¹³ This will harm customers and provide the Company excessive recovery compared to continued recovery through the Rider ESM.¹⁴ Duke Kentucky in rebuttal testimony stated that it did not oppose this recommendation.¹⁵ In the Final Order, the Commission agreed with the Attorney General’s recommendation and denied the ESM Rider roll-in proposal,¹⁶ which should have reduced the Company’s revenue requirement by approximately \$3.290 million.¹⁷

However, Duke Kentucky now asserts in the pending rehearing request that the approved electric rates and charges as reflected in Appendix B of the Commission’s Final Order may include the Rider ESM revenues.¹⁸ In response to discovery requests from both the Attorney General and Commission Staff, Duke Kentucky provides what it deems as the correct electric rates excluding the Rider ESM revenues.¹⁹ If Duke Kentucky is correct in that the Rider ESM revenues were inadvertently rolled-in and included in the approved rates, then the Attorney General concurs with Duke Kentucky in that these specific revenues should be removed from the approved electric rates to benefit the customers.

II. The Commission should deny Duke Kentucky’s request to include terminal net

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Revised Rebuttal Testimony of Lisa D. Steinkuhl (“Steinkuhl Revised Rebuttal Testimony”) at 5 and 7.

¹⁶ Case No. 2022-00372, *Electronic Application of Duke Energy Kentucky, Inc. for (1) An Adjustment of Electric Rates; (2) Approval of New Tariffs; (3) Approval of Accounting Practices to Establish Regulatory Assets and Liabilities; and (4) All Other Required Approvals and Relief* (Ky. PSC Oct. 12, 2023), Order at 11.

¹⁷ *Id.*; Duke Kentucky’s Petition for Rehearing at 3.

¹⁸ Duke Kentucky’s Petition for Rehearing at 3.

¹⁹ Duke Kentucky’s response to the Attorney General’s First Request for Information on Rehearing (“Attorney General’s First Rehearing Request”), Item 1; Duke Kentucky’s response to the Commission Staff’s First Request for Information on Rehearing (“Staff’s First Rehearing Request”), Item 5.

salvage in its proposed depreciation rates for its solar generating facilities.

In its petition for rehearing, Duke Kentucky requests terminal net salvage (i.e. decommissioning costs) to be included in its proposed depreciation rates for the Crittenden Solar Project and Walton Solar Project (“collectively the solar generating facilities”).²⁰ In its Final Order, the Commission found that the terminal net salvage should be removed from the depreciation rates for all of Duke Kentucky’s generating assets due to the requirements of KRS 278.264(2).²¹ In its petition for rehearing, Duke Kentucky states that the Commission’s removal of decommissioning costs from depreciation rates means that at the time of retirement for the generating assets, the customers will bear the entire burden of decommissioning the units all at once, rather than over the useful life of the asset, which will in turn create generational inequity.²² The Company further asserts that the Commission has previously approved decommissioning costs in the Company’s depreciation rates, and that it was unreasonable and unlawful to remove said costs.²³ Nevertheless, it should be noted that it has been well established that KRS 278.030 and KRS 278.040 expressly grant the Commission plenary authority over ratemaking, which requires the Commission to ensure rates are fair, just, and reasonable.²⁴ Therefore, the Commission is not required to approach an issue in the same manner it has in the past.

All of the aforementioned arguments that Duke Kentucky has presented on this issue in its

²⁰ Direct Testimony of Jeffrey T. Kopp (“Kopp Testimony”) at 3 – 10.

²¹ Case No. 2022-00372, *Electronic Application of Duke Energy Kentucky, Inc. for (1) An Adjustment of Electric Rates; (2) Approval of New Tariffs; (3) Approval of Accounting Practices to Establish Regulatory Assets and Liabilities; and (4) All Other Required Approvals and Relief* (Ky. PSC Oct. 12, 2023), Order at 14.

²² Duke Kentucky’s Petition for Rehearing at 19.

²³ *Id.*; Duke Kentucky’s Reply in Support of Petition for Rehearing at 6 – 7.

²⁴ *Kentucky Public Service Com’n v. Commonwealth ex rel. Conway*, 324 S.W.3d 373, 380-81 (Ky. 2010); *See Federal Power Comm’n v. Hope Nat. Gas Co.*, 320 U.S. 591, 602, 64 S.Ct. 281, 287 (1944), the Court noted that in prior rulings, it has found that a rate setting Commission is “. . . not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of ‘pragmatic adjustments.’ . . . Under the statutory standard of ‘just and reasonable’ it is the result reached not the method employed which is controlling. Moreover, in the ratemaking process, ‘the fixing of ‘just and reasonable’ rates, involves a balancing of the investor and the consumer interests.’”; *See also* Case No. 2020-00160, *Electronic Application of Water Service Corporation of Kentucky for a General Adjustment in Rates* (Ky. PSC December 8, 2020), Order at 42.

petition for rehearing were in the original record.²⁵ Duke Kentucky has provided no new evidence that was not readily discoverable at the time of the original hearing on the decommissioning costs in its proposed depreciation rates for its solar generating assets, and is merely attempting to relitigate this issue that was fully addressed by the Commission's Final Order. Further, the Commission's Final Order as to this issue was both reasonable and lawful. Thus, pursuant to KRS 278.400, the Commission should deny Duke Kentucky's rehearing request to include the decommissioning costs in its depreciation rates for the Company's solar generating assets.

Duke Kentucky further argues that if the Commission utilized KRS 278.264 to remove decommissioning costs from the Company's generating assets, then it should only apply to fossil fuel-fired combustion or steam generating sources, and not to the decommissioning costs of its solar generation facilities.²⁶ Yet, as previously discussed, the Commission does not need to rely upon KRS 278.264 in its decision to disallow estimated decommissioning costs from the depreciation rates for all of Duke Kentucky's generating assets, including the solar generating facilities, because it has the plenary ratemaking authority to remove said costs. If the Commission does not include the decommissioning costs in depreciation rates and expense, or as a separate standalone expense at this time, it has the discretion and the authority to allow recovery after the generating assets are retired and the decommissioning costs actually are incurred. Only after the costs are incurred are they known and measurable. Further, the recovery of decommissioning costs before they actually are incurred imposes a cost penalty on customers because the decommissioning expense must be grossed up for income taxes until they are incurred and can be deducted for income tax purposes.²⁷ The Commission is tasked with reviewing the evidentiary

²⁵ See Duke Kentucky's Post-Hearing Brief at 29 – 33; Spanos Rebuttal at 5 – 11; Rebuttal Testimony of Jeffrey T. Kopp ("Kopp Rebuttal") at 1 – 4; Steinkuhl Rebuttal at 9 – 11.

²⁶ Duke Kentucky's Petition for Rehearing at 19 – 20.

²⁷ Duke Kentucky's response to the Attorney General's First Rehearing Request, Item 6.

record and setting fair, just, and reasonable rates for the ratepayers.²⁸ The Commission is well within its statutory authority to review the evidentiary record, and use its plenary authority to disallow the decommissioning costs from the depreciation rates for all of the Company's generating assets in order to discharge its statutory duty to set fair, just, and reasonable rates.

In the alternative, if the Commission is inclined to grant Duke Kentucky's rehearing request to allow decommissioning expense to be recovered on the solar generation facilities, the Attorney General's alternative recommendation is to require the decommissioning expense to be included and recovered as a separate standalone expense that is not embedded in the depreciation rates and expenses. The Attorney General further recommends to limit the escalation of the decommissioning expense of the solar generation facilities to the Company's test year, which will thereby reduce said expense.

- a. If the Commission were to grant Duke Kentucky's rehearing request to include decommissioning expense for its solar generating facilities then it should be included and recovered as a separate standalone expense instead of embedded in depreciation rates and expenses.**

On rehearing, Duke Kentucky requests to incorporate an estimate of the future decommissioning costs for the solar generating facilities into the calculation of the proposed depreciation rates.²⁹ The Company's decommissioning study estimated the future post-retirement decommissioning costs in 2022 dollars.³⁰ Due to the estimated decommissioning costs including no assumptions as to the probable retirement dates for the generating facilities, Duke Kentucky then escalated the estimated decommissioning costs from 2022 dollars to future probable

²⁸ KRS 278.030(1); KRS 278.040.

²⁹ Direct Testimony of Jeffrey T. Kopp ("Kopp Testimony"), at 3 – 10; Kollen Testimony at 32.

³⁰ Kollen Testimony at 32.

retirement dates dollars using a 2.5% escalation rate,³¹ thus compounding the uncertain estimated decommissioning costs in today's dollars to estimated inflated decommissioning costs in future dollars. The Company added the decommissioning cost estimate inflated to future dollars to each of the generating facilities' actual remaining net book values at December 31, 2021 (the date of the depreciation study), and then divided this sum by the average remaining service lives for each plant account pertaining to each of these generating facilities to calculate the proposed depreciation rates.³² Duke Kentucky then utilized the proposed developed depreciation rates to calculate the depreciation expense for each month during the test year.³³ The Company applied the proposed depreciation rates to the gross plant, including capital additions, less retirements, for each operating generating facility for each month during the test year.³⁴

Duke Kentucky further improperly compounded and increased the estimated decommissioning expense by including the costs in the depreciation rates rather than as a separate and standalone expense.³⁵ The error occurs when Duke Kentucky includes the decommissioning expense as a component of the depreciation rates calculated using the gross plant at December 31, 2021, the date of the depreciation study, but then applies the depreciation rates to the gross plant in the test year ending June 30, 2024.³⁶ To the extent that the test year's gross plant is greater than the gross plant at December 31, 2021, the decommissioning component in the depreciation rate expense applied to the gross plant in the test year results in a proportionately greater

³¹Duke Kentucky's response to the Attorney General's First Request, Item 118; Kollen Testimony at 32; Duke Kentucky's response to the Attorney General's Second Request for Information on Rehearing ("Attorney General's Second Rehearing Request"), Item 1.

³² Kollen Testimony at 33.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

decommissioning expense than if the decommissioning costs were calculated and reflected as a separate and standalone decommissioning expense.³⁷

Duke Kentucky contends throughout the case that when the Federal Energy Regulatory Commission's Uniform System of Accounts ("FERC USOA") are "read together" then it is "clear" that the decommissioning costs "must be recovered through depreciation expense."³⁸ This assertion is simply inaccurate. None of the FERC USOA sections specifically state that depreciation rates must include decommissioning costs. At the evidentiary hearing, when Duke Kentucky's witness was questioned upon this issue, he stated that recovering decommissioning expense on a standalone basis, instead of being included in the depreciation rates, is "not the standard practice."³⁹ The witness further admitted at the hearing that although the "specific words" are not stated in FERC USOA, in his opinion the decommissioning expense should be included in the depreciation rates, and not recovered on a standalone basis.⁴⁰ The FERC USOA's requirements should not be conflated with a witness' opinion or standard practice. The FERC USOA simply requires that the decommissioning expense be recovered, and does not identify the specific means of such recovery. Regardless, the FERC USOA dictates accounting for FERC reporting purposes; *it does not dictate state ratemaking*. FERC USOA also does not mandate how depreciation rates and decommissioning expense are recovered at the retail level, and it certainly does not direct this Commission to set rates that provide excessive recovery of decommissioning expense. Moreover, Duke Kentucky confirms in rehearing discovery that the Generally Accepted Accounting Principles ("GAAP") does not require a utility to record decommissioning expense during the

³⁷ *Id.* at 33 – 34.

³⁸ John J. Spanos Rebuttal Testimony ("Spanos Rebuttal"), at 8.

³⁹ VTE at 10:54:57 – 10:55:07; VTE at 11:06:00 – 11:21:00.

⁴⁰ VTE 11:19:00 – 11:21:00.

service lives of generating assets unless it is authorized by the regulator for recovery in regulated utility rates.⁴¹

If the Commission is inclined to grant Duke Kentucky's rehearing request to include decommissioning expense for its solar generating facilities then in order to rectify the overstatement of decommissioning expense, the Attorney General recommends the Commission remove the decommissioning expense from the solar generating facilities' depreciation rates and the resulting calculations of depreciation expense for the test year, and instead simply include the decommissioning expense as a separate and standalone expense in the base revenue requirement.⁴² This in turn will ensure that the test year's decommissioning expense is not incorrectly increased and overstated by the percentage increase in the solar generating facilities' gross plant during the test year as compared to the gross plant balances at the date of the depreciation study.⁴³

b. If the Commission were to grant Duke Kentucky's rehearing request to include decommissioning expense for solar generating facilities then it should be reduced to limit the escalation to the Company's test year.

Pursuant to 807 KAR 5:001, Section 16(6)(b), forecasted adjustments in a rate case shall be limited to the twelve months immediately following the suspension period.⁴⁴ In the pending case, pursuant to KRS 278.190(2), the Commission suspended the effective date of Duke Kentucky's proposed rates to July 14, 2023. Yet, as previously discussed, Duke Kentucky escalated the estimated decommissioning expense well beyond the fully forecasted test year ending on June 30, 2024.⁴⁵ More specifically, Duke Kentucky extrapolated the estimated decommissioning costs for the solar generating facilities out to 2047, twenty-three years beyond

⁴¹ Duke Kentucky's response to the Attorney General's Second Rehearing Request, Item 2.

⁴² Kollen Testimony at 34.

⁴³ *Id.*

⁴⁴ 807 KAR 5:001, Section 16(6)(b).

⁴⁵ Kollen Testimony at 35.

the test year.⁴⁶ Thus, the Company's forecasted adjustments to the decommissioning expense, which occur decades past the test year are not in compliance with 807 KAR 5:001, Section 16(6)(b).

In contrast to how Duke Kentucky calculated its estimated decommissioning cost in 2047, the gross plant included in the Company's rate base used to calculate depreciation expense is limited to the capital expenditures through the end of the test year, and does not reflect a forecast of future costs after the test year.⁴⁷ Moreover, the retirement dates being used for the Company's generating units to escalate the decommissioning costs are not known and measurable because there are no official retirement dates for the solar generating facilities.⁴⁸

If the Commission were inclined to grant Duke Kentucky's rehearing request to include decommissioning expense for its solar generating facilities then the Attorney General recommends the Commission limit the escalation of the decommissioning cost and related expense to the test year and reject the Company's request to escalate the cost through the speculative, probable retirement dates.⁴⁹

CONCLUSION

WHEREFORE, the Attorney General respectfully requests that the Commission rule upon Duke Kentucky's petition for rehearing in accordance with his brief as set forth herein.

⁴⁶ *Id.* at 37.

⁴⁷ *Id.* at 36.

⁴⁸ *Id.*; Duke Kentucky's response to the Attorney General's First Request, Item 51.

⁴⁹ Kollen Testimony at 37.

Respectfully submitted,

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Certificate of Service and Filing

Pursuant to the Commission's Orders and in accord with all other applicable law, Counsel certifies that the foregoing electronic filing was transmitted to the Commission on March 18, 2024, and there are currently no parties that the Commission has excused from participation by electronic means in this proceeding.

This 18th day of March, 2024,



Assistant Attorney General