

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

The Intervenor, the Attorney General of the Commonwealth of Kentucky, through his Office of Rate Intervention (“Attorney General”) submits the following 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. 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.

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.¹ A Commission Order is deemed unreasonable only when, “the

¹ 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*

evidence presented leaves no room for difference of opinion among reasonable minds.”² A Commission Order can only be unlawful if it violates state and federal statute or constitutional provisions.³ However, a petition for rehearing does not present parties with the opportunity to relitigate a matter fully addressed in the original Commission Order.⁴

The Attorney General contends that for the following issues discussed, 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.

I. Rider ESM Revenues

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.⁵ The Attorney General’s witness Lane Kollen recommended denial of this roll-in in his testimony,⁶ and the Company stated that it did not oppose this recommendation in rebuttal testimony.⁷ The Commission agreed with the Attorney General’s recommendation and denied the roll-in proposal,⁸ which should have reduced the Company’s

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.

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

³ *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).

⁴ *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.

⁵ Direct Testimony of Amy B. Spiller (“Spiller Testimony”) at 4.

⁶ Direct Testimony of Lane Kollen (“Kollen Testimony”) at 40 – 43.

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

⁸ 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.

revenue requirement by approximately \$3.290 million.⁹

However, Duke Kentucky asserts that it appears the approved electric rates and charges reflected in Appendix B of the Commission’s Final Order may include the Rider ESM revenues.¹⁰ 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.

II. Duke Kentucky’s Planned Outage Operations and Maintenance ("O&M") and Forced Outage Purchased Power Deferrals

In the original application, Duke Kentucky requested to amortize and recover a planned outage expense regulatory asset over five years.¹¹ 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.¹² Similarly, the Company requested to amortize and recover a forced outage expense regulatory asset over five years.¹³ 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.¹⁴ The Commission found that Duke Kentucky’s deferral mechanisms for forced and planned outages were, “no longer necessary, given that Duke Kentucky expects the expense to be in line with the base rate amounts.”¹⁵

In Duke Kentucky’s petition for rehearing, the Company argues that its previously

⁹ *Id.*; Duke Kentucky’s Petition for Rehearing at 3.

¹⁰ Duke Kentucky’s Petition for Rehearing at 3.

¹¹ Direct Testimony of Lisa D. Steinkuhl (“Steinkuhl Testimony”) at 17 – 18.

¹² Kollen Testimony at 21.

¹³ Steinkuhl Testimony at 18 – 19.

¹⁴ Kollen Testimony at 21 – 23.

¹⁵ 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 18.

authorized deferrals for forced and planned outage expense above and below base rates are reasonable and benefits customers by smoothing out year-to-year volatility in outage expenses.¹⁶ The Company further asserts that, “[w]hile the Commission is correct that over time and on average, these outage expenses should align to the amounts included in base rates, nonetheless, these expenses are volatile year to year.”¹⁷ The Company admits that while there are years in which these expenses are greater than base rate amounts, there are also years in which these expenses are less.¹⁸ Duke Kentucky concludes that the removal of the deferrals could drive future rate cases.¹⁹

All of the arguments that Duke Kentucky has presented on this issue in its petition for rehearing were in the original record.²⁰ Duke Kentucky 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. Thus, pursuant to KRS 278.400, the Commission should deny Duke Kentucky’s request for a rehearing on the planned and forced outage deferral issues.

III. East Bend 2 Generating Station’s (“East Bend”) Probable Retirement Date

In its application, Duke Kentucky requested for the depreciation expense of East Bend to be increased to reflect an earlier probable retirement date of 2035 compared to the probable retirement date of 2041 as reflected in the current depreciation rates.²¹ The Attorney General argued that the probable retirement date of East Bend for depreciation purposes should remain at

¹⁶ Duke Kentucky’s Petition for Rehearing at 11.

¹⁷ *Id.* at 13.

¹⁸ *Id.*

¹⁹ *Id.* at 14.

²⁰ See Duke Kentucky’s Post-Hearing Brief at 21 – 27; Rebuttal Testimony of John D. Swez (“Swez Rebuttal”) at 1 – 11; Rebuttal Testimony of Lisa D. Steinkuhl (“Steinkuhl Rebuttal”) at 12 – 16; Rebuttal Testimony of William Luke (“Luke Rebuttal”) at 5 – 9.

²¹ Duke Kentucky’s Post-Hearing Brief at 34 – 35; Spiller Testimony at 25.

2041 because Duke Kentucky had no current plans to actually retire East Bend, and the Company had not received approval from the Commission to retire East Bend pursuant to KRS 278.264 (also referred to as Senate Bill 4).²² The Commission found that, “[l]eaving the current depreciable rate for East Bend balances the risk of retirement before the unit is fully depreciated while encouraging Duke Kentucky to operate East Bend as long as it is economically viable.”²³ The Commission further found that the Company’s 2021 Integrated Resource Plan (“IRP”) was not a reasonable planning document for the probable retirement date because Duke Kentucky’s Generation Retirement Study did not adequately support the requested retirement date of 2035.²⁴ Additionally, the Commission disagreed with Duke Kentucky’s assertion that KRS 278.264 prevents the retirement of East Bend if there are stranded assets at the time of retirement.²⁵ The Commission concluded that amending the depreciable retirement date of East Bend at this time based upon 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.²⁶

In its petition for rehearing, Duke Kentucky argues that the 2021 IRP provided analyses that support an earlier retirement date for East Bend than 2041.²⁷ The Company further argues that the Final Order ignores environmental regulations that will make it unlikely for East Bend to operate beyond 2035, at least not at existing capacity factors.²⁸ The Company also states that the Commission failed to consider risks of having the depreciable lives set at 2041 for East Bend and

²² Attorney General’s Post-Hearing Brief at 9 – 10.

²³ 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.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Duke Kentucky’s Petition for Rehearing at 16.

²⁸ *Id.*

2040 for the Woodsdale units.²⁹ Finally, Duke Kentucky asserts that a depreciable life of 2041 for East Bend will result in intergenerational inequity.³⁰

All of the arguments that Duke Kentucky has presented on this issue in its petition for rehearing were in the original record.³¹ Duke Kentucky has provided no new evidence that was not readily discoverable at the time of the original hearing on the depreciable life of East Bend, and is merely attempting to relitigate this issue that was fully addressed by the Commission's Final Order. Thus, pursuant to KRS 278.400, the Commission should deny Duke Kentucky's request for a rehearing on East Bend's depreciable life.

IV. Terminal Net Salvage Adjustment

Duke Kentucky initially requested terminal net salvage (i.e. decommissioning costs) in its proposed depreciation rates for its generating assets.³² The Attorney General objected to the inclusion of the decommissioning expense in the depreciation rates because it overstates said expense.³³ The Attorney General also argued that the inclusion of escalated decommissioning expense for the Company's generating assets well beyond the fully forecasted test year was speculative and violated 807 KAR 5:001, Section 16(6)(b).³⁴ The Commission found that the terminal net salvage should be removed from the depreciation rates due to the requirements of KRS 278.264(2), which states that the Commission, "shall not . . . take any other action which authorizes or allows for the recovery of costs for the retirement of an electric generating unit. . . ."

²⁹ *Id.* at 17.

³⁰ *Id.* at 18.

³¹ *See* Duke Kentucky's Post-Hearing Brief at 34 – 45; *See* Duke Kentucky's Post-Hearing Reply Brief at 2 – 5; John J. Spanos Rebuttal Testimony ("Spanos Rebuttal") at 1 – 5; Steinkuhl Rebuttal at 8 – 9; Rebuttal Testimony of Sarah E. Lawler Rebuttal ("Lawler Rebuttal") at 2 – 23; Rebuttal Testimony of Scott Park ("Park Rebuttal") at 1 – 31; Luke Rebuttal at 1 – 5;

³² Direct Testimony of Jeffrey T. Kopp ("Kopp Testimony") at 3 – 10.

³³ Attorney General's Post-Hearing Brief at 16.

³⁴ *Id.* at 18.

unless the presumption created by this section is rebutted.”³⁵ The Commission concluded that Duke Kentucky has the burden to overcome the presumption established in KRS 278.264 and without sufficient evidence for the rebuttal, the Commission cannot allow recovery of costs for the retirement of the electric generating units.³⁶

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 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.³⁷ The Company further asserts that the Commission has previously approved decommissioning costs in the Company’s depreciation rates.³⁸ However, 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.³⁹ 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 petition for rehearing were in the original record.⁴⁰ Duke Kentucky has provided no new evidence that was not readily discoverable at the time of the original hearing on the

³⁵Case 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.

³⁶ *Id.*

³⁷ Duke Kentucky’s Petition for Rehearing at 19.

³⁸ *Id.*

³⁹ *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.

⁴⁰ *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.

decommissioning costs in its proposed depreciation rates for its generating assets, and is merely attempting to relitigate this issue that was fully addressed by the Commission's Final Order. Thus, pursuant to KRS 278.400, the Commission should deny Duke Kentucky's request for a rehearing on the removal of the decommissioning costs from its depreciation rates for the Company's 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.⁴¹ Yet, as previously discussed, the Commission does not need to rely upon KRS 278.264 in its decision to disallow decommissioning costs from the depreciation rates for all of Duke Kentucky's assets because it has the plenary ratemaking authority to remove said costs. The Commission is tasked with reviewing the evidentiary record and setting fair, just, and reasonable rates for the ratepayers.⁴² 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.

CONCLUSION

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

⁴¹ Duke Kentucky's Petition for Rehearing at 19 – 20.

⁴² KRS 278.030(1); KRS 278.040.

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 November 8, 2023, and there are currently no parties that the Commission has excused from participation by electronic means in this proceeding.

This 8th day of November, 2023,



Assistant Attorney General