COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC TARIFF FILING OF KENTUCKY POWER COMPANY FOR APPROVAL OF A SPECIAL CONTRACT WITH EBON INTERNATIONAL, LLC	))))	CASE NO. 2022-00387

POST-HEARING BRIEF OF JOINT INTERVENORS MOUNTAIN ASSOCIATION, KENTUCKIANS FOR THE COMMONWEALTH, APPALACHIAN CITIZENS' LAW CENTER, SIERRA CLUB, AND KENTUCKY RESOURCES COUNCIL, INC.

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Come now Joint Intervenors Mountain Association, Kentuckians for the Commonwealth, Appalachian Citizens' Law Center, Sierra Club, and Kentucky Resources Council, Inc., ("Joint Intervenors") and tender this post hearing brief in the above-captioned matter. For the reasons set forth below, the proposed special contract in this case is not reasonable, poses significant risk of increased costs to Kentucky Power's other customers, and seeks to provide a discounted Economic Development Rate ("EDR") without meeting all the requirements set forth in Administrative Case No. 327 and Kentucky Power's Tariff E.D.R., and therefore should be denied.

I. Statement of the Case

This matter concerns whether the Public Service Commission ("Commission") should approve a special contract between Kentucky Power Company ("Kentucky Power" or "the Company") and Ebon International, LLC ("Ebon") for an up to 250 MW cryptocurrency mining and blockchain data computing facility that would be located at the site of Kentucky Power's Big Sandy gas plant in Louisa, Kentucky. The special contract includes a discounted rate that is modeled after an EDR, but Kentucky Power is seeking approval of the contract outside of its Tariff E.D.R. The proposed contract would exceed the cap on capacity that Kentucky Power is allowed to offer under Tariff E.D.R., and the proposed contract does not adhere to all the requirements and protections for other customers that are normally required in EDR contracts in exchange for access to a discounted rate. This proposed special contract would also require Kentucky Power to purchase additional capacity to serve Ebon, leaving Kentucky Power customers at risk to market exposure and increased costs.

When Kentucky Power first began negotiating a special contract with Ebon, the Company intended the special contract to be filed under Tariff E.D.R. On June 9, 2022, Kentucky Power submitted an application to the Commission to amend its Tariff E.D.R. to expand its approved EDR cap from 250 MW to 550 MW and to authorize multiple special contracts for EDRs, including special contracts for 11 entities for 12 sites, totaling approximately 482.5 MW.[1] The largest of these proposed special contracts was for the proposed 250 MW Ebon facility.[2] The June 2022 application also sought approval to deviate from Administrative Case No. 327's Finding 5 requirements that "EDRs should only be offered during periods of excess capacity" and that a utility demonstrate with "the submission of each EDR contract[] that the expected load to be served during each year of the contract period will not cause the utility to fall below a reserve margin that is considered for system reliability"[3] as the Company currently does not own sufficient generating capacity to serve its existing customers, let alone new customers, and thus is required to contract for purchases of additional capacity each year.[4]

In July 2022, after the Commission scheduled an evidentiary hearing on the

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[1] *Electronic Application of Kentucky Power Company for an Order Approving the Company's Amended Tariff E.D.R. to Increase the Capacity Available to be Served Under the Tariff and for Required Deviations from the Commission's September 24, 1990 Order In Administrative Case No. 327*, Case No. 2022-00181 (Ky. P.S.C. Jun. 9, 2022).
[2] *See id.* at 11, Exhibit 2 (noting a proposed 250 MW contract for a cryptocurrency mining facility in Lawrence County); *see also* July 20, 2023, HVT at 11:16:00 (confirming that this facility was the Ebon facility).
[3] *Id.* at 2–3.
[4] *Id.* at 13–14.

request in Case No. 2022-00181,[5] Kentucky Power filed a Motion to Withdraw Application Without Prejudice, stating that "it has determined it is not in the best interest of the Company to proceed with the prosecution of its application at this time."[6]

After going back to the drawing board, a few months later Kentucky Power submitted the proposed special contract at issue in this case for approval.[7] The Company's current proposal is for a 10-year special contract submitted outside of Tariff E.D.R. The cost of construction of the Ebon Facility is estimated at over $250 million, but only $85 million of that total will be spent on permanent infrastructure at the site.[8] The other $165 million that Kentucky Power included in that total is for the cost of purchasing computer equipment,[9] which Ebon will likely purchase from an affiliated company in Southeast Asia (essentially, Ebon will be purchasing computers from itself).[10] The proposed facility would be located on 55 acres to be leased from Kentucky Power through a confidential pricing mechanism.[11] Phase One of the contract would allow Kentucky Power to provide up to approximately 80 MW of service, and Phase Two would be for up to 250 MW of service after additional construction.[12]

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[5] Order, *In re: Electronic Application of Kentucky Power Company for an Order Approving the Company's Amended Tariff E.D.R. to Increase the Capacity Available to be Served Under the Tariff and for Required Deviations from the Commission's September 24, 1990 Order In Administrative Case No. 327*, Case No. 2022-00181 (Ky. P.S.C. Jul. 8, 2022).
[6] Motion To Withdraw Application Without Prejudice, *In re: Electronic Application of Kentucky Power Company for an Order Approving the Company's Amended Tariff E.D.R. to Increase the Capacity Available to be Served Under the Tariff and for Required Deviations from the Commission's September 24, 1990 Order In Administrative Case No. 327*, Case No. 2022-00181, at 1 (Ky. P.S.C. Jul. 15, 2022).
[7] *Kentucky Power Company's Special Contract for Electric Service and Rider D.R.S. Addendums with Ebon International, LLC.,* ("Kentucky Power-Ebon Proposed Contract"), Case No. TFS 2022-00529 (Oct. 28, 2022).
[8] Kentucky Power's Company response to OAG-KIUC's Initial Data Request 1.20 (Dec. 9, 2023).
[9] *Id.*
[10] July 20, 2023, HVT at 09:43:30.
[11] Kentucky Power's Company response to Joint Intervenor's Initial Data Request 1.8 (Dec. 9, 2023).
[12] Kentucky Power's Company response to Joint Intervenor's Initial Data Request 1.29 (Dec. 9, 2023).

On November 17, 2022, Joint Intervenors, along with the Kentucky Conservation Committee, filed comments opposing the proposed special contract. Joint Intervenors raised concerns in those comments that Kentucky Power had tried to circumvent the EDR requirements and protections by filing the Ebon special contract outside of its Tariff E.D.R., that the Company does not have sufficient capacity for this contract, that the Company failed to present evidence that Ebon would not locate in Kentucky Power's service territory in the absence of a discounted EDR rate, and 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).[13] Joint Intervenors questioned whether the EDR discounts in the proposed special contract would create new, full-time, local jobs and/or other economic development in Kentucky Power's territory, and whether the proposed special contract included adequate protections for ratepayers in the event that Ebon defaulted or relocated before the contract concluded.[14] The Office of the Attorney General ("OAG") and Kentucky Industrial Utility Customers, Inc. ("KIUC") also submitted comments opposing the special contract.[15]

On November 23, 2022, the Commission entered an Order establishing a procedural schedule to investigate the reasonableness of the proposed special contract and suspended the contract until April 26, 2023. The Commission stated the intent of

[13] Comments of Mountain Association, Kentuckians for the Commonwealth, Appalachian Citizens' Law Center, Sierra Club, and Kentucky Resources Council RE: Kentucky Power Company's Special Contract for Electric Service and Rider D.R.S. Addendums with Ebon International, LLC, Case No. TFS 2022-00529 (Nov. 17, 2022); Order, Case No. 2022-00387, Nov. 23, 2022, Appendix B.
[14] *Id.*
[15] *Id.*

the investigation as being to "determine the reasonableness of the proposed Contract."[16] Discovery requests and responses were filed in this case, along with pre-filed direct testimony from Joint Intervenors' and OAG/KIUC's witnesses and rebuttal testimony from Kentucky Power's witnesses.[17] The Commission held a hearing in this case on July 20, 2023, where Kentucky Power's witnesses Brian K. West, Amanda C. Clark, and Lerah M. Kahn testified, along with Joint Intervenors' witnesses Stacy Sherwood and Chelsea Hotaling and OAG/KIUC's shared witness Stephen Baron. Post-hearing discovery requests were submitted following the hearing, along with an addendum to the special contract.

II. Legal Background

The Commission has plenary authority to review special contracts to ensure their proposed rates are fair, just, and reasonable.[18] Both KRS 278.030 and KRS 278.040 require that the Commission act to ensure that rates are "fair, just and reasonable."[19] KRS 278.030 states "[e]very utility may demand, collect and receive fair, just and reasonable rates for the services rendered or to be rendered by it to any person."[20] KRS 278.040 gives the Commission authority to "regulate utilities and enforce" these

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[16] Order, Case No. 2022-00387, Nov. 23, 2022 (Hearing held Jul. 20, 2023).
[17] *See* Joint Intervenors, Staff, and Attorney General's Data Requests filed Dec. 8, 2022, Dec. 9, 2022, Jan. 17, 2023 and Post Hearing Data Requests filed Jul. 21, 2023, Company's Response to Data Requests filed, Dec. 28, 2022, Feb. 2, 2023, and Jul. 28, 2023; Testimony of Stacy Sherwood, Chelsea Hotaling, and Stephen Baron filed Feb 8, 2023, and Rebuttal Testimony of Brian K. West, Amanda C. Clark, and Lerah M. Kahn filed Mar. 15, 2023.
[18] *See Pub. Serv. Comm'n of Ky. v. Commonwealth of Ky.*, 320 S.W.3d 660, 668 (Ky. 2010) (finding that "a particular EDR is sustainable provided the PSC determines that the rate is reasonable and that determination withstands the appropriate scrutiny on judicial review"); *see also Ky. Pub. Serv. Comm'n v. Com. ex rel. Conway*, 324 S.W.3d 373, 380–83 (Ky. 2010) (discussing the Commission's plenary authority to investigate and determine fair, just, and reasonable rates).
[19] *Ky. Pub. Serv. Comm'n v. Com. ex rel. Conway*, 324 S.W.3d 373, 380–81 (Ky. 2010).
[20] KRS 278.030.

provisions.[21]

In Administrative Case No. 327, the Commission created guidelines for how an EDR should be structured along with delineating the circumstances under which an offering of such rates could be found to be reasonable. The Commission stated that an EDR:

> is considered to be a gas or electric rate discount, offered to large commercial and industrial customers, which is intended to stimulate the creation of new jobs and capital investment both by encouraging existing customers to expand their operations and by improving the likelihood that new large commercial and industrial customers will locate in Kentucky.[22]

The *Order* in Administrative Case No. 327 created the requirement that "EDRs should only be offered during periods of excess capacity and that each utility should demonstrate, upon submission of each EDR contract, that the load expected to be served during each year of the contract period will not cause the utility to fall below a reserve margin that is considered essential for system reliability. Such a reserve margin should be identified and justified with each EDR contract filing."[23] The *Order* outlined a number of findings to be considered.

Regarding capacity, Finding 5 states: "EDRs should only be offered during periods of excess capacity. Utilities should demonstrate, upon submission of each EDR contract, that the load expected to be served during each year of the contract period will not cause them to fall below a reserve margin that is considered essential for system reliability. Such a reserve margin should be identified and justified with each EDR

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[21] KRS 278.040.

[22] Order, *In re: An Investigation into the Implementation of Economic Development Rates by Electric and Gas Utilities*, at 1 (Ky. P.S.C. Sept. 24, 1990).

[23] *Id.* at 5–6.

contract filing."[24]

The Commission further found that "during rate proceedings, utilities with EDR customers should demonstrate through detailed cost-of-service analysis that nonparticipating ratepayers are not adversely affected by these EDR customers."[25]

Finding 14 of the *Order* in Administrative Case No. 327 provides that:

> "The term of an EDR contract should be for a period twice the length of the discount period, with the discount period not exceeding five years. During the second half of an EDR contract, the rates charged to the customer should be identical to those contained in a standard rate schedule that is applicable to the customer's rate class and usage characteristics."[26]

Additionally, the *Order* provides that while there is no minimum requirement, "increased economic activity is the *major objective* of EDRs" and that "[t]wo key indicators of economic activity are job creation and capital investment."[27] "EDRs are expected to promote growth in both of these areas."[28]

III. Argument

A. The Proposed Ebon Contract Should Be Denied Because It Does Not Meet the Administrative Case No. 327 and Kentucky Power Tariff Requirements for EDRs.

To fully protect Kentucky Power's other customers, this special contract should adhere to the requirements for an EDR set forth in Administrative Case No. 327.[29] As noted above, Kentucky Power initially sought approval to offer Ebon a special contract under an expanded Tariff E.D.R., in Case No. 2022-00181. Kentucky Power then

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[24] *Id.*
[25] *Id.* at 8.
[26] *Id.* at 27.
[27] *Id.* (emphasis added).
[28] *Id.*
[29] Sherwood Testimony at 14–15; Baron Testimony at 35–37.

changed course, withdrawing that case and seeking approval to offer this special contract outside of its Tariff E.D.R., while at the same time acknowledging that "the discounts included in the Special Contract are **identical** to capacity discounts found in the Company's Tariff E.D.R."[30] While offering Ebon the benefit of a discounted EDR rate, however, the proposed special contract does not incorporate all of the protections for other customers that Administrative Case No. 327 and Kentucky Power's Tariff E.D.R. require for contracts that include these discounted rates.

The Commission should reject the proposed Ebon contract because it attempts to sidestep inclusion of the important protections for Kentucky Power's other customers required by Administrative Case No. 327 and Kentucky Power's Tariff E.D.R. Provision of a discounted rate outside of an approved Tariff E.D.R. is impermissible under KRS Chapter 278, and lacks the guardrails created by the Commission to assure that such preferential rates are available only where accompanied by protections for non-participating ratepayers. Specifically, the Commission should reject the proposed special contract because (1) Kentucky Power lacks sufficient generating capacity to take on any new EDR customers, especially such a large customer (up to 250 MW) as Ebon, and the proposed special contract will require other customers to share in Kentucky Power's costs of purchasing additional capacity to serve Ebon; (2) the proposed special contract's billing structure would allow Ebon to [BEGIN CONFIDENTIAL [redacted] END CONFIDENTIAL], contrary to the requirements of Administrative Case

[30] Kentucky Power's Response to Joint Intervenors' Supplemental Data Request 2.4 (Jan. 27, 2023) (emphasis added).

No. 327 and Kentucky Power's Tariff; (3) Kentucky Power has not demonstrated that its other customers will not be adversely affected by the terms of the Company's lease of land to Ebon at the Big Sandy property and the potential increase in property taxes as a result of Ebon's improvements there; and (4) Kentucky Power has not adequately accounted for other potential increased costs and risks to its customers from the proposed special contract, including the risks of increased energy prices and market exposure.

1. Kentucky Power Lacks Sufficient Generating Capacity to Serve Ebon, and the Company Concedes that the Costs of Purchasing Additional Capacity Will Adversely Affect Other Customers.

Kentucky Power's proposed special contract with Ebon is inconsistent with both the Company's own Tariff E.D.R. and the Administrative Case No. 327 requirements for EDRs. The Company's Tariff E.D.R. provides that

> "The Company will offer the EDR to qualifying customers with new or increased load ***when the Company has sufficient generating capacity available.*** When sufficient generating capacity is not available, the Company will procure the additional capacity on the customer's behalf. The cost of capacity procured on behalf of the customer shall reduce on a dollar-for-dollar basis the customer's [Incremental Billing Demand Discount] and [Supplemental Billing Demand Discount]."[31]

Tariff E.D.R. further provides that "[t]he new or increased load cannot accelerate the Company's plans for additional generating capacity during the period for which the customer receives a demand discount," and that Kentucky Power's ability to offer EDR contracts is capped at 250 MW.[32] As discussed at the hearing, this 250 MW cap in Tariff

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[31] Kentucky Power's Tariff E.D.R., at 37-1 (emphasis added), https://psc.ky.gov/tariffs/Electric/Kentucky%20Power%20Company/Tariff.pdf.
[32] *Id.*; *see also* Case No. 2020-00174, January 13, 2021 Order.

E.D.R. was based on the amount of excess capacity that Kentucky Power had under the Rockport UPA at the time that the tariff was approved.[33] Clearly, these tariff provisions were designed to implement and be consistent with Finding 5 of Administrative Case No. 327 (quoted above), which requires that utilities only offer EDR contracts during periods where they have excess capacity.[34]

Kentucky Power's proposal here to offer a special contract containing an EDR discount outside of its Tariff E.D.R., both in excess of its approved cap and at a time when it is capacity short, is a direct attempt to circumvent both its own tariff requirements and Administrative Case No. 327.[35] The Commission should reject Kentucky Power's effort here to evade these requirements, which are meant to protect customers from the risk of market exposure, and further reject Kentucky Power's claim that it does currently have "sufficient generating capacity" within the meaning of Tariff E.D.R. because it has been annually making bilateral capacity purchases to make up its capacity shortfall while the Company reassesses its future resource needs.[36] Moreover, during the life of this ten-year contract, the Company will soon be at even more of a capacity shortfall once it divests from the Mitchell plant in 2028.[37] If approved, the proposed special contract with Ebon would necessarily require Kentucky Power to make additional purchases in coming years – and ultimately to secure a larger capacity resource in the future, once the Company completes its planning process – but does not

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[33] July 20, 2023, HVT at 14:48:00.

[34] Order, *In re: An Investigation into the Implementation of Economic Development Rates by Electric and Gas Utilities*, at 5–6 (Ky. P.S.C. Sept. 24, 1990).

[35] Sherwood Testimony at 14–15; Hotaling Testimony at 4–5; Baron Testimony at 35–37.

[36] Testimony of Brian K. West at 7–8; July 20, 2023, HVT at 09:26:00–09:30:00.

[37] July 20, 2023, HVT at 09:26:00-09:30:00; *see also* Testimony of Chelsea Hotaling, Appendix B.

require Ebon to bear the full costs of that additional capacity,[38] contrary to the requirements of Tariff E.D.R. and Administrative Case No. 327.

In addition, Kentucky Power is relying on Ebon's participation in Rider D.R.S. to limit the amount of capacity that the Company would need to purchase to serve Ebon to 25 MW (10% of Ebon's load), but the Company concedes that if Ebon fails to curtail its load, then that would result in further increased costs to customers.[39] As Witness Hotaling points out, "if Ebon does not curtail its load, then [Kentucky Power] could face an additional load obligation of 45 MW (225 MW x .2 MW) in future years."[40] Although Rider D.R.S. includes a provision that would cause Ebon to lose some or all of its Rider D.R.S. bill credits if Ebon fails to curtail when called on to do so, Ebon would still be able to retain the benefit of its EDR discounts even if its failure to curtail results in increased capacity costs for other customers.[41] Witness West testified that Kentucky Power has never had a Rider D.R.S. customer fail to curtail its load when called on,[42] but he later admitted that Ebon is a significantly larger customer than other Rider D.R.S. customers (up to 250 MW as compared to approximately 25 MW) and therefore poses greater risk to customers from a failure to curtail.[43] Also, as noted at the hearing, because Ebon is a cryptocurrency mining facility, there may be circumstances unique to this type of customer that might cause Ebon to ignore Kentucky Power's requests to

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[38] *See, e.g.*, July 20, 2023, HVT at 27.
[39] July 20, 2023, HVT at 13:47:00; *see also* Kentucky Power's Response to Commission Staff Data Request 3.8 (Jul. 13, 2023).
[40] Testimony of Chelsea Hotaling at 12; Kentucky Power's Response to Commission Staff Data Request 3.8 (Jul. 13, 2023).
[41] *Id.*
[42] July 20, 2023, HVT at 09:28:00.
[43] *Id.* at 13:37:00–13:47:00.

curtail, such as if Ebon perceives the potential value of the cryptocurrencies that it is mining to be sufficiently high that it decides to incur the penalty of losing its Rider D.R.S. credits in order to continue operating.[44] Based on Witness West's testimony at the hearing, Kentucky Power does not appear to have considered this risk to customers at all.

2. The Proposed Billing Structure Is Inconsistent with EDR Requirements.

In addition, the proposed special contract has a "complex billing structure"[45] that allows Ebon to [BEGIN CONFIDENTIAL [redacted]

[44] *Id.* at 13:46:00.
[45] Rebuttal Testimony of Brian K. West at 5.
[redacted]
[redacted]
[redacted]

[redacted] END CONFIDENTIAL] This is yet another reason why the Commission should deny the proposed special contract.

3. Kentucky Power Has Not Demonstrated that the Lease of Big Sandy Property and Potential Property Tax Increases Would Not Adversely Affect Other Customers.

Kentucky Power has also failed to demonstrate that the Company has maximized the potential benefits to customers from leasing property at the Big Sandy site to Ebon. Kentucky Power has offered to lease the property to Ebon at the [BEGIN CONFIDENTIAL [redacted]

[redacted]

END CONFIDENTIAL].[51] At the hearing, Witness Clark admitted that these lease terms are another benefit to Ebon,[52] and that benefit comes to the detriment of Kentucky Power's other customers, as the Company has acknowledged that any revenues from the lease of the property would be credited toward the Company's revenue requirement.[53] Accordingly, Witness Clark conceded at the hearing that, to the extent that the Company failed to maximize the revenue that it could receive through the lease of the property, that would adversely affect other customers by leaving money on the table that would otherwise benefit them in a future rate case.[54]

Although Witness Clark asserted at the hearing that Kentucky Power did not believe that the property at Big Sandy had any lease value above the price at which the Company offered to it to Ebon, Kentucky Power has not provided any evidence to support these claims. By contrast, at the hearing, Commissioner Chandler noted a 2016 article in which Kentucky Power officials claimed that this property could be a valuable asset as an industrial park.[55] Alternatively, as Witness Hotaling suggests, Kentucky Power could itself invest in redevelopment of the property to site new generation facilities, including potential renewable energy projects,[56] and nowhere in the record is there evidence that the Company has considered these alternatives. This opportunity is especially valuable now, with the Inflation Reduction Act's 10% bonus to tax credits for

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[redacted]

52 July 20, 2023, HVT at 15:48:00.
53 Kentucky Power's Response to Joint Intervenors' Initial Data Request 1.8(c) (Dec. 9, 2023); July 20, 2023, HVT at 15:43:00.
54 July 20, 2023, HVT at 15:44:00.
55 *Id.* at 15:59:00.
56 Testimony of Chelsea Hotaling at 17–18.

new renewable energy projects in energy communities, for which the Big Sandy site would qualify.[57]

Another, related way in which the proposed Ebon contract would adversely affect Kentucky Power's other customers is that it would put them at risk of bearing increased property tax costs based on any improvements that Ebon makes to the property while leasing it. Kentucky Power has acknowledged that it, and not Ebon, would be responsible for covering these costs, and that any increased property tax costs would also be passed on to other customers.[58] At the hearing, Witness Clark asserted that Kentucky Power had been in discussions with Lawrence County officials about the possibility of seeking an abatement of any property tax increases, but there is no written evidence of this in the record of this proceeding and, in any event, Witness Clark admitted that there was no guarantee that any such abatement would be approved by the County.[59] Thus, Kentucky Power has not demonstrated that its other customers would not be adversely affected by these potential cost increases.

4. Kentucky Power Has Failed to Account for Increased Costs and Risks from the Proposed Special Contract from Potential Increased Energy Prices and Market Exposure.

Kentucky Power acknowledges that this proposed special contract increases the risk to customers from increases in energy market prices. For example, at the hearing, when asked whether "customers will have a greater risk to market exposure" as a result

[57] Testimony of Chelsea Hotaling at 17–18.
[58] Kentucky Power's Response to Joint Intervenors' Supplemental Data Request 2.3 (Jan. 17. 2023); July 20, 2023, HVT at 15:44:30.
[59] July 20, 2023, HVT at 15:44:45.

of the contract, Witness Kahn agreed that it would.[60] Similarly, Witness West conceded during confidential session that [BEGIN CONFIDENTIAL [redacted] END CONFIDENTIAL].[61]

The potential costs and risks to customers from the proposed special contract are further magnified by the size of Ebon's load and the potential effects that Ebon's load could have on energy prices for Kentucky Power's other customers. According to Witness Hotaling, addition of such a large load as Ebon could lead to a reverse to the Demand Reduction Induced Price Effects ("DRIPE"): "By the end of Phase Two of the contract, Ebon's load is anticipated to be 250 MW, which is a significant increase in the capacity and energy requirements of [Kentucky Power's] system – a roughly 30% increase in energy requirements. One potential impact from this new load would be an increase in the wholesale market prices experienced by all of [Kentucky Power's] load and passed onto all customers."[62] In his rebuttal testimony, Witness West made clear that Kentucky Power did not account for this risk of increased costs to its other customers in its analysis of the proposed special contract.[63] Kentucky Power's failure to account for, and protect its other customers against, this risk in the proposed special contract is another fatal flaw that should compel the Commission to deny the proposed special contract.

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[60] *Id.* at 16:47:00–16:51:00.

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[62] Testimony of Chelsea Hotaling at 12.

[63] West Rebuttal Testimony at 14; *see also* July 20, 2023, HVT at 10:19:00–10:23:00 (CONFIDENTIAL).

B. The Claimed Benefits of the Proposed Ebon Contract Do Not Justify the Increased Costs and Risks to Customers.

Kentucky Power freely acknowledges that there are risks of potential adverse effects on its other customers from the proposed Ebon contract – indeed, Witness West conceded as much at the hearing, noting that nothing in the proposed Ebon contract guarantees a positive outcome to ratepayers.[64] Nevertheless, Kentucky Power has repeatedly argued that the potential economic development and job creation benefits of the proposed Ebon contract outweigh the numerous costs and risks to customers. A critical examination of the record, however, shows that this is not the case.

Through the post-hearing filing of a contract addendum, Ebon has now committed to creating "at least 25 new permanent full-time jobs at the service location during Phase 1 of the Contract term and at least 50 new permanent full-time jobs at the service location during Phase 2 of the Contract term."[65] Although these jobs numbers would be significant if they are actually realized, those numbers are far lower than the 125 jobs that Kentucky Power assumed in its rebuttal testimony as the basis for claiming that the proposed Ebon contract would have significant benefits to eastern Kentucky.[66] Moreover, as discussed at the hearing, the majority of the jobs that Ebon has been projecting – and the jobs most likely to be created at the site – are lower-salaried positions such as maintenance and security guards that could not be located remotely.[67] Nothing in the contract addendum commits Ebon to creating any of the

[64] July 20, 2023, HVT at 11:23:00–11:27:00.
[65] Addendum to Contract for Firm Electric Service Between Kentucky Power Company and Ebon International LLC ("Addendum"), at Section 7.10 (Jul. 23, 2023).
[66] Clark Rebuttal Testimony at 8.
[67] July 20, 2023, HVT starting at 15:38:00; *see also* Sherwood Testimony at 18 (noting that many jobs that Ebon was claiming would be created at the site could be hired remotely).

higher-salaried positions that Kentucky Power and Ebon have touted, which would contribute disproportionately to the benefits estimates that Kentucky Power's IMPLAN modeling exercise assumed would result from the contract. It is those higher-salaried positions that are not captured in the contract addendum's jobs guarantee, and if those positions are not in fact created locally by Ebon, it would substantially reduce the actual economic development benefits of the proposed facility to Lawrence County and the surrounding area.

Particularly in light of Ebon's failure to fully guarantee the 125 jobs that it had previously claimed would be created by this special contract, Kentucky Power's claimed economic development benefits from the contract are wildly overstated and should be given no weight by the Commission. As discussed at the hearing, Kentucky Power's IMPLAN modeling was in no way site-specific; rather, Kentucky Power modeled based on a "generic industry standard" for what benefits would result from a new facility that would create 125 jobs with particular salaries.[68] Witness Clark was not even able to explain what the "generic industry standard" was that the modeling was based on.[69] Moreover, Witness Clark conceded that Kentucky Power does nothing to verify any of the jobs information provided by Ebon or other customers; rather, Kentucky Power simply assumes that whatever their customer says will come true.[70]

Nor has Kentucky Power done anything to verify the actual number of jobs that

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[68] *Id.* at 15:21:00.
[69] *Id.*
[70] *Id.* at 15:37:00; *see also* Kentucky Power's Response to Joint Intervenor's Supplemental Discovery Request 2.1 (Jan. 17, 2023).

would be created on site at the Ebon facility, as opposed to being located elsewhere.[71] When asked how many jobs have already been created specific to the facility, if any, Company witnesses could not answer.[72] Witness Clark stated that "Kentucky Power is unaware of the current status of the recruitment as the Company is not involved in its hiring process."[73] When maps of the proposed facility[74] were examined at the hearing, the Company could not speak to where these new employees would be working, as no office buildings nor parking spots were shown on the map.[75] As Witness West admitted, "employees need to work somewhere."[76] However, there is no record evidence showing where any specific number of workers would be located (in terms of offices, parking, etc.) on site.

Finally, even with the contract addendum, significant questions remain as to the enforceability of the contract, should Ebon either fail to create the minimum number of jobs that they are now claiming to guarantee, or if they default on the contract before the end of the contract term. The addendum that was filed has no clause concerning what enforcement would look like in the event Ebon fails to create the minimum guaranteed number of jobs.[77] Nor is there any discussion in the addendum of how Kentucky Power would verify that the minimum job creation guarantees are met, which is particularly concerning given that (as noted above) Kentucky Power freely admits that it does

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71 *See* Sherwood Testimony at 18.
72 July 20, 2023, HVT at 15:30:30.
73 Kentucky Power's Response to Joint Intervenors' Initial Data Request 1.3 (Dec. 28 ,2022).
74 Kentucky Power's Response to Commission Staff's Initial Data Request 1.2, Attachments 1 & 2.
75 July 20, 2023, HVT at 13:28:00–13:32:00; 15:40:00–15:42:00.
76 *Id.* at 13:31:00.
77 Addendum To Contract For Firm Electric Service Between Kentucky Power Company And Ebon International, LLC ("Addendum"), Case No. 2022-00387 at Section 7.10 (Jul. 24, 2023).

nothing to verify customers' job creation claims.

During the hearing, Witness West realized that the proposed special contract had failed to include a claw-back provision for the EDR discounts in case Ebon decided to end the contract earlier than the ten-year term.[78] The Company filed an addendum to the contract post-hearing which stated: "The Customer may discontinue service under this Contract only by reimbursing the Company for any and all Capacity Discounts and Incremental Discounts received by Customer under this Contract when billed at the applicable rates."[79] However, it is unclear how Kentucky Power would enforce this provision in the event of a default or bankruptcy by Ebon, given that there is no evidence that Ebon has any assets in the United States,[80] nor has Ebon agreed to provide a surety bond to cover these costs.[81] And even if this claw-back provision were enforceable, it only applies to the amounts of the discounts that Ebon would receive under the contract, and not to the other costs that the contract would impose on other customers, such as the costs of purchasing additional capacity or increased property tax costs (discussed above). Thus, even with the contract addendum, the proposed special contract does not contain provisions sufficient to make other customers whole in the event of a default or bankruptcy by Ebon.

C. Rejection of the Special Contract Would Not Constitute Unfair Discrimination Against a Customer.

[78] July 20, 2023, HVT at 14:01:00.
[79] Addendum at Section 7.11.
[80] July 20, 2023, HVT at 12:11:00.
[81] July 20, 2023, HVT at 09:19:00; *see also* West Direct Testimony at 13, lines 3–5 (describing remedies available under Kentucky law in event of default); Response to JI 1.35 (clarifying that Mr. West was referring solely to common law remedies for breach of contract).

Contrary to Kentucky Power's arguments, denying this proposed special contract would not be unfair or unreasonable discrimination against Ebon. Ebon is a distinctively large customer seeking the benefits of a discounted EDR rate without agreeing to meet all of the requirements that other EDR customers must meet to protect other customers. As noted above, Ebon also poses unique risks to customers due to the size of the load (225 MW) that it is being counted on to curtail under Rider D.R.S.[82] As Witness West stated at the hearing, no other Rider D.R.S. customer is as large as Ebon in terms of capacity, with the largest being around 25 MW.[83]

To further the distinctiveness regarding Ebon, it is fair to be wary of the volatility associated with cryptocurrency mining. As Witness Sherwood highlights:

> Cryptocurrency mining operations are not tethered to any particular geography, but rather seek cheap energy, speed to market, and flexibility. For example, multiple companies offer mining equipment in shipping containers to chase the best prices and when prices fluctuate, mining facilities can migrate quickly. Cryptocurrency operations prioritize seeking out utilities where industrial electricity rates are low or discounted as in the present proposal.[84]

Indeed, the Company admitted that the containers containing the computer equipment can be easily moved and dropped onto the Big Sandy site,[85] meaning these containers could also be packed up quickly and moved elsewhere if needed. As noted above, Ebon is also at a unique risk of default or bankruptcy, given that it appears to have no assets in the United States, and the proposed special contract does not require Ebon to provide a surety bond to secure repayment of EDR discounts in the event of default.[86]

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[82] July 20, 2023, HVT at 13:45:00-13:47:00.
[83] *Id.* at 13:37:30–13:38:00.
[84] Testimony of Stacy Sherwood at 6.
[85] July 20, 2023, HVT at 15:47:00.
[86] *Id.* at 09:19:00, 12:11:00.

On the opposite end, if Bitcoin and other cryptocurrencies suddenly become profitable, this means the computers could be running more frequently, thus raising energy usage and making it more likely that Ebon would refuse to curtail its load under Rider D.R.S. during peak periods.[87] On both ends of the spectrum – i.e., if the proposed Ebon facility is either highly unsuccessful or highly successful – Kentucky Power's other customers face unique risks from this proposed special contract. Because of this, denial of this proposed special contract on the grounds set forth above would not constitute unfair or unreasonable discrimination against Ebon.

IV. Conclusion

WHEREFORE, for the reasons stated above and on the basis of the written and verbal testimony adduced at hearing, Joint Intervenors respectfully urge the Commission to deny Kentucky Power's request for approval of the proposed special contract.

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[87] *Id.* at 13:42:00–13:48:00.

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CERTIFICATE OF SERVICE

In accordance with the Commission's July 22, 2021 Order in Case No. 2020-00085, this is to certify that the electronic filing was submitted to the Commission on August 8, 2023; that the documents in this electronic filing are a true representation of the materials prepared for the filing; and that the Commission has not excused any party from electronic filing procedures for this case at this time.

Byron Gary