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 UNDER ITS ECONOMIC DEVELOPMENT RIDER AND DEMAND RESPONSE SERVICE TARIFFS WITH CYBER INNOVATION GROUP, LLC	)))))	CASE NO. 2022-00424

REPLY 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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I. Introduction

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 reply brief in the above-captioned matter. For the reasons set forth below and discussed in more detail in Joint Intervenors' Opening Brief, Kentucky Power Company ("Kentucky Power" or "the Company") has failed to show that its proposed EDR special contract with Cyber Innovation Group, LLC ("CIG") for a cryptocurrency mining facility in Pike County (the "Rockhouse Facility") is reasonable and adequately protects ratepayers from increased costs and risks. The proposed special contract should be denied.

II. Argument

A. The Commission Should Apply the Same Analysis as in Its Recent Decision on the Proposed Ebon Contract and Find that Kentucky Power Lacks "Sufficient Generating Capacity" under its Tariff E.D.R. to Offer This Contract.

As noted in Joint Intervenors' Opening Brief, the Commission should deny Kentucky Power's request for approval of the proposed special contract because the Company does not have "sufficient generating capacity" within the meaning of the Company's Tariff E.D.R. or "excess capacity" as required by Administrative Case No. 327.[1] By its own admission, Kentucky Power is capacity short and must purchase additional capacity from PJM markets each year to cover the difference.[2] This creates an unreasonable risk to the Company's other customers and ratepayers of exposure to potential price increases in both the capacity and energy markets; when Kentucky Power's native load is increased by new EDR customers without sufficient capacity to

[1] *Post-Hearing Brief of Joint Intervenors Mountain Association, Kentuckians for the Commonwealth, Appalachian Citizens' Law Center, Sierra Club and Kentucky Resources Council, Inc.,* Case No. 2022-00424 (Aug. 28, 2023) at 6–8.

[2] *See, e.g.*, July 25, 2023, HVT at 9:29:00 to 09:32:00, 09:55:00 to 09:57:00, 11:38:00 to 11:40:00.

serve those customers, the Company's other ratepayers are left at risk of being forced to share in any increased costs.[3]

The Commission's recent decision denying Kentucky Power's proposed special contract with Ebon International LLC, Case No. 2022-00387, also supports denial of the proposed special contract in this case. The Commission denied the Ebon proposal, *inter alia*, because of Kentucky Power's "[l]ack of existing generating capacity and over-reliance on as of yet unobtained capacity purchases in the later years of the Contract."[4] The Commission further found that "Kentucky Power's lack of capacity that can produce energy creates the risk that energy prices rise in the footprint, and as a net purchaser of energy, the power bills of all customers will go up."[5] The Commission also found "a number of associated risks, including the risk that Kentucky Power is unable to timely curtail Ebon load and the risk that Kentucky Power incurs capacity costs that are not fully recovered from Ebon, or never recovered at all."[6] Finally, the Commission rejected Kentucky Power's "unreasonable position" that its Tariff E.D.R. language could be reinterpreted to allow the Company to procure year by year whatever additional capacity it might need to serve new EDR customers, at whatever price it might be available, without specifically assigning those additional capacity costs to the new customers.[7]

Although the Ebon contract was proposed outside of Kentucky Power's Tariff E.D.R., the Commission appropriately considered the language of Tariff E.D.R. in its decision and should

[3] *Post-Hearing Brief of Joint Intervenors Mountain Association, Kentuckians for the Commonwealth, Appalachian Citizens' Law Center, Sierra Club and Kentucky Resources Council, Inc,* Case No. 2022-00424 (Aug. 28, 2023) at 6–8.
[4] Order, *Electronic Tariff Filing of Kentucky Power Company for Approval of a Special Contract with Ebon International LLC*, Case No. 2022-00387, at 18 (Aug. 28, 2023).
[5] *Id.* at 12–13.
[6] *Id.* at 13. With regard to the risk of Ebon failing to curtail under Rider D.R.S., the Commission further found that "[i]f Kentucky Power misses those curtailment hours, or if Ebon chooses to ignore curtailment requests because it stood to benefit economically from refusal, the proposed contract would increase costs for other customers, degrading any purported benefits of the contract." *Id.* at 13–14.
[7] *Id.* at 13.

apply the same analysis here. Specifically, the Commission should deny the proposed special contract for the Rockhouse Facility because Kentucky Power does not have sufficient generating capacity to serve its existing customers, let alone any new customers.[8] At a minimum, the Commission should *only* approve this proposed special contract on the condition that the amount of any EDR discounts be reduced dollar for dollar by the cost of capacity purchased to serve the Rockhouse Facility. Kentucky Power's captive ratepayers should not be put at risk in any manner by special contracts such as that proposed here.

B. Kentucky Power's Proposed Surety Bond Requirement for the Rockhouse Facility is Insufficient to Fully Protect Its Other Customers.

The Commission should also deny this proposed special contract because Kentucky Power has failed to show that the security provisions of the contract addendum are adequate to fully protect ratepayers from the risk that CIG will default or go bankrupt during the contract term.[9] As discussed in Joint Intervenors' Opening Brief, the Rockhouse Facility poses a uniquely high risk of default, and CIG poses a uniquely high risk of bankruptcy, yet the contract addendum does not provide sufficiently detailed information concerning the amount of security to be provided or the enforceability of its provisions.[10] Kentucky Power's opening brief did not provide any additional detail on either of these critical issues. Accordingly, for the reasons set forth in Joint Intervenors' Opening Brief, the Commission should deny approval of this proposed special contract for this additional reason, or alternatively, if the Commission chooses to approve the special contract, it should do so only on the conditions that: (1) Kentucky Power be required to file additional supporting information demonstrating that the amounts of security in the

[8] July 25, 2023, HVT at 10:12:00, 10:19:00, 13:31:00.
[9] *Post-Hearing Brief of Joint Intervenors Mountain Association, Kentuckians for the Commonwealth, Appalachian Citizens' Law Center, Sierra Club and Kentucky Resources Council, Inc,* Case No. 2022-00424 (Aug. 28, 2023) at 8–12.
[10] *Id.* at 9–12.

contract addendum are sufficient; and (2) adequate security be provided for each year of the contract earlier than 30 days prior to each contract year, to reduce the risk that a default or bankruptcy might occur without adequate security in place.

C. There is No Evidence in the Record that New Jobs Were Actually Created at the Rockhouse Facility, Let Alone that Approval of an EDR Would Create Any Additional Jobs or Economic Development.

Another reason that the proposed special contract should be denied is that the Company has failed to provide evidence that approval of an EDR for the Rockhouse Facility would create any new jobs or economic development.[11] As discussed in Joint Intervenors' Opening Brief, Kentucky Power has done nothing to verify whether any new jobs have actually *been* created at the Rockhouse Facility (as opposed to being shared with CIG's nearby Long Fork facility), let alone whether any additional jobs would be created with the approval of an EDR for the Rockhouse Facility now beyond any that have already been created at the site since it was constructed and began operating over a year ago without a discounted EDR rate in place.[12] The record citations provided in Kentucky Power's opening brief simply repeat CIG's claims (e.g., CIG "plans on adding at least three more" jobs) from before the Rockhouse Facility was built, over a year ago,[13] and only underscore that Kentucky Power has no current knowledge or evidence of whether any jobs were actually created at that site, let alone that approval of an EDR for the Rockhouse Facility would be necessary to incentivize any job creation. Kentucky Power has not offered sufficient evidence to show that the Rockhouse Facility would not be a "free rider" on its Tariff E.D.R., taking advantage of discounts that do not actually contribute to job creation or economic development.[14]

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[11] *Id.* at 12–14.
[12] *Id.*
[13] *Post-Hearing Brief of Kentucky Power Company*, Case No. 2022-00424 (Aug. 28, 2023) at 20.
[14] *Post-Hearing Brief of Joint Intervenors Mountain Association, Kentuckians for the Commonwealth, Appalachian Citizens' Law Center, Sierra Club and Kentucky Resources Council, Inc,* Case No. 2022-00424 (Aug. 28, 2023) at

D. Legislation Providing Tax Incentives for Cryptocurrency Facilities Does Not Authorize Kentucky Power to Offer EDR Contracts without Necessary Protections for Its Other Customers.

Kentucky Power's contention that the Company's proposed EDR contract for the Rockhouse Facility "is effecting and implementing the General Assembly's policy to attract these kinds of cryptocurrency companies to Kentucky"[15] is without merit. Although it is certainly true that the General Assembly adopted certain *tax* incentives for these types of facilities, the same statute finds that one of the key purposes of these incentives is to promote "[i]ncreasing the usage of electricity ***in areas which have an abundant supply*** due to the loss of manufacturing businesses across the state."[16] The General Assembly is presumed to have been aware of existing law concerning Commission utility rate setting and the standards established in Administrative Case No. 327 for economic development riders,[17] and did not waive or relax those standards for cryptocurrency facilities as an incentive to attract them. Nothing in the General Assembly's legislative findings suggested that encouragement of cryptocurrency ventures should be at the cost of protection of other ratepayers. As Kentucky Power does not have sufficient generating capacity to serve its existing customers, let alone a new facility, the proposed special contract with Ebon is not consistent with this statutory goal and the Commission should not give weight to Kentucky Power's arguments concerning this statute.

III. Conclusion

WHEREFORE, for the reasons stated herein and in Joint Intervenors' Opening Brief, Joint Intervenors respectfully urge the Commission to deny Kentucky Power's request for approval of the proposed special contract.

12–14.

[15] *Post-Hearing Brief of Kentucky Power Company*, Case No. 2022-00424 (Aug. 28, 2023) at 26.

[16] KRS 154.27-020(3)(e) (adopted by the legislature and signed by the Governor in 2021, see 2021 Ky. Acts Ch. 141 (SB 255)) (emphasis added).

[17] *Lewis v. Jackson Energy Coop. Corp.*, 189 S.W.3d 87, 93 (Ky. 2005)

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with the Commission's July 22, 2021 Order in Case No. 2020-00085, *Electronic Emergency Docket Related to the Novel Coronavirus COVID*-19, this is to certify that the electronic filing was submitted to the Commission on September 1, 2023; that the documents in this electronic filing are a true representations 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