

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)	Case No. 2022-00424
Response Service Tariffs With Cyber Innovation)	
Group, LLC)	

REPLY BRIEF OF KENTUCKY POWER COMPANY

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I. INTRODUCTION

The Attorney General's ("AG") brief concludes by asserting that if the Commission is inclined to approve the proposed contract between Kentucky Power and Cyber Innovation International, LLC ("Cyber Innovation") under the Company's Tariff E.D.R. (Economic Development Rider) ("EDR Contract"), such approval should only come if Kentucky Power clearly demonstrates that ratepayers are fully protected from the cost impacts of the contract and are protected in the event of default. The evidence on the record demonstrates satisfaction of each of these requirements to the fullest extent possible, based on reasonable reliance on the information provided by Cyber Innovation and reasonable assumptions regarding the future cost to serve Cyber Innovation and expected revenues from the contract. The EDR contract, including the Addendum to Contract for Electric Service Between Kentucky Power Company and Cyber Innovation Group, LLC dated August 3, 2023 ("Security Addendum"), and Tariff E.D.R. provide sufficient protections in the event of a default by Cyber Innovation. Importantly, the Company sought and received Cyber Innovation's agreement to provide security that will secure all EDR discounts provided or estimated to be provided to Cyber Innovation. The Company also has sufficiently demonstrated that the expected revenues from Cyber Innovation will exceed the cost to serve Cyber Innovation through reasonable and reliable marginal cost studies, even taking into account generation capacity costs.

The Commission should not give weight to the AG's and Joint Intervenors' unsupported or unreasonably inflated claims that distract from the evidence provided by the Company in this case. This evidence demonstrates that the proposed EDR Contract meets all the requirements of Tariff E.D.R., the Order in Administrative Case No. 327 ("Administrative 327 Order"), and that the Company's marginal cost studies show the expected revenues exceed the cost to serve Cyber Innovation, including generation capacity costs.

II. ARGUMENT

A. Every Finding From Administrative 327 Order Is Satisfied.

The AG and Mountain Association, Kentuckians for the Commonwealth, Appalachian Citizens' Law Center, Sierra Club, and Kentucky Resources Council, Inc. (collectively, "Joint Intervenors") do not allege that the proposed EDR Contract fails to meet any finding under Administrative 327 Order other than Finding Number 5 ("Finding 5"). In its Initial Brief, the Company discussed the substantive evidence in the record showing that these findings are satisfied. The Company will address only those issues related to Finding 5 here.

1. Finding Number 5.

Finding 5 states in its entirety:

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 contract filing.

As an initial matter, the plain language of Finding 5 indicates that the requirement is aimed at ensuring that offering an EDR contract does not affect system reliability. The Company has stated throughout this proceeding that the Company properly and prudently plans for capacity and energy to meet system reliability needs. The Company has the capacity it needs and has access to the PJM market for energy when needed. The record of this case shows that the Company, through owned or contracted resources, has sufficient capacity to serve all of its customers. That capacity is also sufficient to serve Cyber Innovation. It is uncontested that during each year of the contract period Cyber Innovation's firm load under the contract (and for that matter its entire projected load of 7 MW) will not cause Kentucky Power to fall below a reserve margin that is considered essential for system reliability.

a. The Company’s Position On Implementing The Discount Reduction Provisions Of Tariff E.D.R.

The AG and Joint Intervenors argue that the Company’s interpretation of the discount reduction provisions¹ of Tariff E.D.R. is inconsistent with Administrative 327 Order. This is not the case. In any event, as the Company stated in its Initial Brief, if the Commission does not agree with the Company’s interpretation of that tariff provision and is not inclined to grant the requested deviation, then the Commission can still approve the proposed EDR Contract and the Company can implement the discount reduction provisions when applicable.

This is a novel situation and the Company has not yet had occasion to implement the discount reduction provisions of Tariff E.D.R.² As such, the Company requested the opportunity at the hearing in this matter to provide additional evidence on this issue, and it did so in response to Commission Staff’s Post-Hearing Data Request No. 5 (“KPSC PHDR 5”). The AG claims that the Company’s testimony on this issue was confusing or cryptic. For clarity, the Company’s position on this issue, and how it would implement the discount reduction provisions of Tariff E.D.R. if required, is as follows:

The Company maintains its interpretation that the discount reduction provisions in Tariff E.D.R. do not apply, as it was described in the November 16, 2022 cover letter filed with the initial contract filing in this case.

¹ “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 IBDD and SBDD. Such reduction shall be capped so that the customer’s maximum demand charge shall be the nondiscounted tariff demand charge. The reduction will be applied in reverse chronological order beginning with the most recent customer to receive discounted service under this tariff. The last customer to sign up for the EDR tariff would be the first customer responsible for paying the cost of incremental capacity purchases. In any year during the discount period in which the customer pays the full tariff demand charge for all twelve months, the Company will reduce the term of the contract by one year.” Tariff Sheet 37-1 at Terms and Conditions, Section (1).

² See Company’s response to KPSC PHDR 5 (August 4, 2023).

At the time of the initial contract filing, Kentucky Power had surplus capacity of over 115 MW, and it expected that surplus to remain through December 7, 2022, when the Company's Rockport Unit Power Agreement ("UPA") expired. As set out in Kentucky Power's 2019 Integrated Resource Plan filed in Case No. 2019-00443, the Company planned to purchase any additional capacity needed to serve all customers after December 7, 2022. Kentucky Power planned to make bilateral purchases to meet the needs of EDR customers during times when excess capacity may not exist. The Company highlighted in the cover letter that Tariff E.D.R included provisions that reduce the customer's EDR credits when market purchases are required under certain circumstances. The Company asserted that it did not believe this tariff provision applied in the circumstances presented by the proposed EDR Contract and the expiration of the Rockport UPA.

The Company stated that because of the expiration of the Rockport UPA in December 2022, the Company is required to purchase excess capacity to serve all customers, not just Cyber Innovation. Thus, the provisions of Tariff E.D.R. reducing credits in the event capacity purchases are required to serve the EDR customer are inapplicable because the Company will not be purchasing excess capacity solely to serve Cyber Innovation. In addition, Cyber Innovation designated 1,000 kW of Firm Capacity beginning in year one of the EDR Contract, while the remaining 6,000 kW of Cyber Innovation's load remains interruptible under Rider D.R.S. Thus, only 1,000 kW of the Cyber Innovation load will be counted toward the Company's PJM capacity requirements; such capacity requirement does not alter the amount of capacity the Company is required to have to serve all its customers. The evidence in the record does not support a finding that additional capacity would need to be purchased specifically to serve Cyber Innovation's load under the EDR Contract. Notwithstanding, the Company further advised that

in the event that the Company incurs incremental costs to purchase additional capacity to serve Cyber Innovation over the course of the EDR Contract term, the Company has discussed the specific provision regarding the reduction of the EDR discounts with Cyber Innovation.

For those reasons, Kentucky Power asserted upon initially filing the EDR Contract that Finding 5 from Administrative 327 Order was satisfied in all material respects. As reiterated by the Company on several occasions throughout this case, the Company requested,

given the novel situation presented by the expiration of the Rockport UPA, that the Commission confirm Kentucky Power's interpretation of Finding Number 5 of the [*sic*] Administrative Case No. 327, the provisions of Tariff E.D.R., and the Company's application of the same to the Contract. To the extent the Commission does not confirm the Company's interpretation, the Company respectfully requests a deviation from Finding 5 in order to effectuate the ultimate purpose of Tariff E.D.R. and encourage economic development through such contracts in the Company's service territory.

The Company stated further that if the Commission disagreed with the Company's interpretation of the tariff and was not inclined to grant the Company's request for a deviation with respect to the same, then the Company would implement the discount reduction provisions.

The EDR Contract expressly contemplates the possibility of the Company having to implement the discount reduction provisions of Tariff E.D.R.³ In that event, the Company explained in its response to KPSC PHDR 5 how it would generally implement those provisions:

For EDR customers coming online post Rockport UPA expiration, the Company will annually (during preparation of its annual tariff EDR report) determine what incremental capacity purchases were necessary for those customers based upon their inclusion in Kentucky Power's load obligation. This will be for every year in which those customers receive discounts. Should the Company determine an EDR customer required incremental capacity purchases the dollar amount to be clawed back will be based on their actual contribution to Kentucky Power's capacity obligation. The simplified formula is as follows:

³ EDR Contract at Article 4.9. The Joint Intervenors assert that the EDR Contract does not provide expressly that the discount reduction provisions are included. This is not accurate. The EDR Contract expressly incorporates those provisions and has the customer acknowledge their existence and applicability in Article 4.9.

MW capacity purchases necessary for the customer (determined by their contribution to the 5CP) multiplied by the average incremental purchase cost in \$per MW-day less the customer's discounted contribution towards capacity costs.

The claw-back will occur in the following twelve months on the EDR customer's bill.⁴

Specifically with respect to Cyber Innovation, the Company would not be making an incremental capacity purchase to serve Cyber Innovation. This is because the capacity needed to serve Cyber Innovation's 1,000 kW of firm load would already be included in the capacity the Company purchases to serve all other customers. No true incremental purchase would be needed to serve Cyber Innovation.

The AG asserts that "the Company will almost never enforce the requirement that [incremental capacity] costs be passed along to Tariff E.D.R. participants."⁵ There is no credible evidence in the record to support such conclusion. The only pertinent evidence, consistent with the Company's commitment, shows instead that if the Commission does not confirm the Company's interpretation that the discount reduction provisions do not apply generally because the Company is purchasing capacity to serve all customers, then the Company *would* apply the discount reduction provisions to applicable EDR customers when a true incremental capacity purchase is made to serve the EDR customer and the capacity required to serve that EDR customer is not already included in what would be purchased to serve all customers. That is not the case under the present contract. It follows that the Company would not be required to apply these discount reduction provisions specifically to Cyber Innovation simply because the capacity needed to serve Cyber Innovation would be included in capacity already purchased to serve all

⁴ Id.

⁵ AG's Initial Post-Hearing Brief at 9.

customers. The AG asserts that the Company's reading is too restrictive here. Indeed, Cyber Innovation is the only customer at issue in this proceeding, and the restrictive reading is necessary in this instance. Cyber Innovation's firm load is so small (relatively) that in practical terms the Company would not make a single incremental purchase of 1 MW (or 7MW, for that matter) to serve this particular customer.

b. The Company Will Implement The Discount Reduction Provisions Of Tariff E.D.R. Consistent With Any Commission Directive.

The AG asserts that the Company has ignored the Commission's directives in the Big Run EDR contract case,⁶ but this is not the case. Rather, beginning with the Company's submission of the proposed EDR contract for Cyber Innovation's Long Fork facility (TFS2022-73, submitted February 25, 2022), the Company proactively requested Commission to confirm its interpretation that the discount reduction provisions of Tariff E.D.R. did not apply after the expiration of the Rockport UPA when the Company was purchasing capacity to serve all customers, or to grant any deviation. All EDR customers whose EDR contracts were approved in advance of the Rockport UPA expiration⁷ were accounted for and captured within the replacement capacity that was necessary upon loss of the Rockport capacity.⁸ As such, the discount reduction provisions in Tariff E.D.R. should not apply to those customers whose EDR contracts have been previously approved. However, if the Commission does not confirm the Company's interpretation and indicates Kentucky Power should be reducing applicable customers' EDR discounts, including those whose contracts have already been approved, the

⁶ In The Matter Of: Electronic Application Of Kentucky Power Company For Approval Of A Contract For Electric Service Under Tariff E.D.R., Case No. 2018-00378.

⁷ Big Run Power Producers, LLC; Dajcor Aluminum; Discover AI, LLC; and Cyber Innovation's Long Fork Facility.

⁸ See Company's response to KPSC PHDR 5 (August 4, 2023).

Company will take all measures possible to ensure the tariff is enforced as the Commission holds it should be.

B. The Security Addendum Is Reasonable Under The Particular Circumstances And Provides Robust Protection For The Company And Other Customers In The Event Of A Default.

The Joint Intervenors allege that the Commission should deny the proposed EDR Contract because the marginal cost studies indicate that there will be a net cost to serve Cyber Innovation for the first few years of the proposed EDR Contract. They further assert that there is no protection if Cyber Innovation defaults and files for bankruptcy within those first few years. The Joint Intervenors suggest that a security bond should be required. Indeed, the Company *has* required Cyber Innovation to post additional security pursuant to the Security Addendum.

The Joint Intervenors then are critical of the procedure and timing for posting security required by the Security Addendum. They essentially say the procedure is not good enough. On the contrary, the Security Addendum provides a sufficiently detailed procedure by which the security would be required and calculated. The applicable terms of the Security Addendum provide:

Security shall be posted no later than 30 calendar days prior to the beginning of the new Contract year. Failure to timely post security will result in the total estimated security amount (the total security amount required per year beginning in Contract year six) being required for the remainder of the Contract term. Failure to post security within 30 days after the beginning of the new Contract year will be deemed a default under this Contract and the Company shall be entitled to pursue all remedies available under this Contract and under Kentucky law.

The Company worked diligently and thoughtfully to include these provisions rather than just including a bare bones requirement to provide security. The timing requirements for providing security, including the requirement to post security within 30 days of the new contract year or face default, is prudent and appropriate. For example, if Cyber Innovation failed to post

security within 30 days of the new contract year, the Company would require the security bond in the amount of credits received in prior contract year(s) under the EDR Contract to date. Thus, only approximately 30 days of credits would be unsecured. The Company could then immediately call a default under these contract provisions and collect on the security and pursue all other available remedies at law. In addition, the Company would also have a customer deposit in the amount of 2/12ths of the estimated bill, without discounts, to apply to any outstanding billed amounts. Finally, the Company's marginal cost studies demonstrate that there is no harm to other customers, even when taking into account generation capacity. Thus, the EDR Contract, including the Security Addendum, provides sufficient protection for the Company and other customers in the event of a default, whether during the first few years of the contract term or otherwise, and demonstrates that other customers will not be harmed by the EDR Contract.

C. The Company's Marginal Cost Studies Are Reasonable And Reliable And No Evidence Of Record Demonstrates Otherwise.

The Joint Intervenors' Initial Brief makes no argument that the Company's marginal cost studies presented in this case are unreasonable or unreliable, and otherwise takes no issue with the marginal cost analyses. The AG presented no witness testimony or other evidence in this case that the Company's marginal cost studies were unreasonable or unreliable. The AG further had no questions for the Company's witness supporting its marginal costs studies at the hearing in this matter.⁹ However, the AG's Initial Brief now argues that the Company's marginal cost studies are "based on flawed assumptions."¹⁰ The Commission should reject the AG's unsupported arguments regarding the reasonableness or reliability of the Company's marginal cost studies for these reasons.

⁹ See Hearing Testimony of Company Witness Kahn, Video Record ("VR") 07/25/2023 15:04:26.

¹⁰ AG's Initial Brief at 10.

The evidence of record shows that the Company's marginal cost studies (Errata Attachment 3 or KPCO_R_KPSC_PHDR_11_Attachment1) are reasonable and reliable.¹¹ In each iteration of the marginal cost study, whether including generation capacity costs and/or escalated transmission costs or not, the Company has demonstrated, based on the rates offered, that revenues expected to be received from Cyber Innovation exceed the marginal cost associated with serving the customer. There is no evidence to the contrary in the record of this case.

D. The Evidence In The Record Rebutts The Joint Intervenors' Assertions That Cyber Innovation Would Be A 'Free Rider' Under Tariff E.D.R.

Both the Joint Intervenors and the AG allege that Cyber Innovation would be a 'free rider' if the proposed EDR Contract is approved, and generally raise concerns that the Rockhouse Facility is already operating absent the discounts. They further raise concerns about Cyber Innovation expecting to bring two to three new jobs in addition to those already added at Cyber Innovation's Long Fork Facility, and that the Company has done nothing to verify these job numbers.

Cyber Innovation would not be a free rider on Tariff E.D.R. Cyber Innovation has represented to the Company that it would not operate its Rockhouse Facility absent receiving the discounts.¹² At the time the Company submitted the proposed EDR Contract in this case, the Commission had approved the EDR contract for Cyber Innovation's Long Fork Facility within 30 days of its submission.¹³ Given that the proposed EDR Contract in this case is virtually identical, the Company and Cyber Innovation likewise expected the Commission to approve it within 30 days of submission.¹⁴ Based on that assumption, Cyber Innovation began operating its

¹¹ See Kahn Hearing Test. at VR 07/25/2023 16:24:11-16:27:38.

¹² West Hearing Test. VR 07/25/2023 13:17:03-13:18:08.

¹³ Id.

¹⁴ Id.

Rockhouse Facility at lower-than-planned demand levels with the expectation that it would begin receiving EDR discounts within a short time.¹⁵ When the Commission suspended the proposed EDR Contract and opened this investigation, Cyber Innovation has continued to operate the Rockhouse Facility at lower demand levels until the proposed EDR Contract can be approved.

In addition, the Company relies on the information provided to it by prospective customers. Neither Tariff E.D.R. nor Administrative 327 Order require utilities to verify the prospective EDR customer's representations regarding estimated capital investment or job creation. In any event, Cyber Innovation does not qualify to receive the Supplemental Billing Demand Discount under Tariff E.D.R. and therefore, any issues raised by the intervenors related to job creation should be moot.

For these reasons, Cyber Innovation should not be considered a free rider on Tariff E.D.R.

E. The Commission Should Not Rely On Information From Other Cases Or Extra-Record Sources In Its Review Of The Proposed EDR Contract.

Reliance on the records from other proceedings in reviewing whether the proposed EDR Contract in this matter is fair, just, and reasonable is inappropriate. Specifically, the Commission should not rely on the June 23, 2023 Show Cause Order issued by the Commission in Case No. 2021-00370 ("Show Cause Order") or observations made by the Commission in the Company's last Integrated Resource Plan ("IRP") case to support that the Company's application is inappropriate or should be denied here.

The Commission issued the Show Cause Order in that case pursuant to KRS 278.018(3) raising concerns about the Company's capacity and energy planning strategy and providing the

¹⁵ Id.

Company the opportunity to respond to the alleged concerns. The Company filed its response to that Show Cause Order providing evidence that the Company's capacity and energy position and overall strategy comply with Kentucky law. Pursuant to the procedure proscribed by that statute, after the Company has been given a meaningful opportunity to respond, notice, and a full hearing, the Commission will determine whether any deficiencies actually exist and give the Company the opportunity to cure any deficiencies. That evidentiary hearing has neither been held nor scheduled. No findings as to the adequacy of the Company's capacity or energy position or overall strategy have yet been made according to the procedure mandated by KRS 278.018(3).

Further, the Commission's discussion of the Company's capacity position and planning strategy in its June 4, 2021 order adopting the Staff Report in the IRP case (Case No. 2019-00443) is not based on sufficient evidence in that record, much less here, and it is inappropriate to apply it here to support a denial or any other action.

In addition, the AG cites information not contained in any past Kentucky Power case record concerning statements made by a PJM Vice President to the Kentucky General Assembly. The Commission should disregard this portion of the AG's brief entirely.

Any reliance on the Show Cause Order, the Commission's order in the Company's past IRP case, or statements made by PJM representatives to the Kentucky General Assembly is inappropriate here and should be given no weight in the Commission's review of the proposed EDR Contract.

III. CONCLUSION

For the reasons set forth above and in the Company's Initial Post-Hearing Brief, the Company has demonstrated that the proposed EDR Contract with Cyber Innovation contains rates that are fair, just, and reasonable and meets all applicable legal requirements. The Commission should approve the proposed EDR Contract for these reasons.

Respectfully submitted,



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