

**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

DOMTAR PAPER COMPANY, LLC

Complainant

v.

BIG RIVERS ELECTRIC CORPORATION

KENERGY CORP.

Defendants.

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Case No. 2023-00017

**RESPONSE TO JOINT PETITION FOR REHEARING
BY DOMTAR PAPER COMPANY, LLC**

Domtar Paper Company, LLC (“Domtar”) respectfully submits this Response to the Joint Petition for Rehearing filed by Big Rivers Electric Corporation’s (“Big Rivers”) and Kenergy Corp. (“Kenergy”) on April 13, 2023 (“Petition”). For the reasons set forth below, the Kentucky Public Service Commission (“Commission”) should deny the Petition.

PROCEDURAL BACKGROUND

On January 11, 2023, Domtar filed a Complaint, supported by affidavit, explaining how for over twenty years, Domtar has taken standby service to cover planned and unplanned outages at its Qualifying Facility (“QF”) cogeneration plant from Big Rivers/Kenergy at Commission-approved contract rates. Domtar’s QF is fueled by renewable wood byproducts from the paper-making process. Domtar also explained that Big Rivers/Kenergy were attempting to terminate this long-standing standby service rate structure and move Domtar immediately to the pilot Large Industrial Customer Standby Service (“LICSS”) tariff as of April 1, 2023, which would have

resulted in an estimated \$3.4 million, or 20.9%, rate increase to Domtar.¹ Big Rivers/Kenergy sought to move Domtar to this pilot rate without providing any cost-based justification supporting that substantial rate increase and despite the fact that Big Rivers/Kenergy have had the opportunity to plan their systems and design their rates around Domtar's QF cogeneration facility for over twenty years. Big Rivers'/Kenergy's attempted move would have been unjust and unreasonable in violation of KRS 278.030 and state/federal rules under the Public Utility Regulatory Act of 1978 ("PURPA"). The state and federal PURPA rules require cost-based standby service.² Accordingly, Domtar asked the Commission to maintain its long-standing rate until a permanent cost-based standby service tariff rate is established.

On February 10, 2023, Big Rivers/Kenergy filed a Joint Answer arguing that Domtar's Complaint should be dismissed. Big Rivers/Kenergy alleged that Domtar's long-standing contract rate did not fully cover their fixed costs of providing service to Domtar. Big Rivers/Kenergy also alleged that Domtar does not have to take backup service for the full rating of its cogeneration facility and that Domtar did not meet its burden to prove that moving Domtar to the pilot LICSS tariff would be unjust and unreasonable.

On February 16, 2023, Domtar filed a separate Motion for Contract Extension, again explaining in detail why moving Domtar from its long-standing Commission-approved contract rate to the pilot LICSS rate would result in an unjust, unreasonable, and unlawful rate increase of 20.9% (\$3.4 million). Domtar again requested an order maintaining the status quo until the Commission establishes a permanent standby service tariff.

¹ The estimated rate impacts were supported by a workpaper included as Attachment 2 to the Complaint.

² 18 C.F.R. 292.305 and 807 KAR 5:054.

On February 23, 2023, Big Rivers/Kenergy filed a Response to Domtar’s Motion, arguing that it should also be denied for the same reasons set forth in Big Rivers’/Kenergy’s Joint Answer. Big Rivers/Kenergy further stated that Domtar’s standby rate is subsidized by other customers and should not be extended.

On February 28, 2023, Domtar filed a Reply to Big Rivers’/Kenergy’s Response, explaining that Domtar had already provided evidence sufficient to establish a prima facie case under the Commission’s regulations, that the statutory protections against unjust and unreasonable rates apply to customers of electric cooperatives, and that Big Rivers/Kenergy refused to entertain further negotiations to resolve these matters.

Big Rivers/Kenergy did not request a hearing on either the Complaint or Motion for Contract Extension.

On March 27, 2023, the Commission issued an Order directing that Domtar’s long-standing electric rate will remain in effect until further order of the Commission (“Order”). The Commission found that *“allowing a long-standing contract to expire and forcing Domtar onto a tariff that has only been approved on a pilot basis would not result in a fair, just, and reasonable rate.”*³ The Commission also found that *“from the case record, there is no evidence of a change in Domtar’s circumstances that would justify”* moving Domtar to the pilot LICSS tariff.⁴ In making its determination, the Commission explained that it was *“merely maintaining the status quo until the Commission is presented with information necessary to make a decision regarding the reasonableness of the LICSS tariff.”*⁵

On April 13, 2023, Big Rivers/Kenergy filed their Joint Petition for Rehearing.

³ Order at 5.

⁴ *Id.*

⁵ *Id.*

LEGAL STANDARD

KRS 278.400 addresses a party's right to seek rehearing at the Commission, providing in part that “[a]fter a determination has been made by the commission in any hearing, any party to the proceedings may, within twenty (20) days after the service of the order, apply for a hearing with respect to any of the matters determined...The commission shall either grant or deny the application for rehearing within twenty (20) days after it is filed, and failure of the commission to act upon the application within that period shall be deemed a denial of the application. Notice of the hearing shall be given in the same manner as notice of an original hearing. Upon the rehearing any party may offer additional evidence that could not with reasonable diligence have been offered on the former hearing....”

KRS 278.400 limits any new evidence on rehearing to 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.⁶ A Commission order is deemed unreasonable only when *"the evidence presented leaves no room for difference of opinion among reasonable minds."*⁷ An order can only be unlawful if it violates a state or federal statute or constitutional provision.⁸

Rehearing does not present parties with the opportunity to relitigate a matter fully addressed in the original Order.⁹ KRS 278.400 is intended to provide closure to Commission proceedings by limiting rehearing to new evidence not readily discoverable at the time of the

⁶ *In the Matter of Electronic Application of Big Sandy Water District...*, Case No. 2022-00044, Order (November 2, 2022) at 1.

⁷ *Id.* at 1-2 (citing *Energy Regulatory Comm'n v. Kentucky Power Co.*, 605 S.W.2d 46 (Ky. App. 1980)).

⁸ *Id.* at 2 (citing *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, 509 (Ky. App. 1990)).

⁹ *In the Matter of Electronic Application of Kentucky-American Water Company for an Adjustment of Rates*, Case No. 2018-000358, Order (August 8, 2019) at 1-2.

original hearings.¹⁰ Thus, final orders remain undisturbed absent extraordinary circumstances, such as a material error or omission in the order.¹¹

RESPONSE

I. Big Rivers'/Kenergy's Request For Rehearing Is Barred By Statute Because The Commission Granted Domtar's Motion For Contract Extension Without An Original Hearing.

It is not necessary to address the substantive arguments of Big Rivers/Kenergy because their Petition is barred by statute. A request for a new hearing can only be made when there has already been an original hearing. That has not occurred here. Consequently, Big Rivers/Kenergy now have only two options: 1) appeal; or 2) file for approval of a permanent QF standby rate before the Commission-imposed deadline of September 2023.

The plain language of the Commission rehearing statute, KRS 278.400, limits applications for rehearing to cases in which an original hearing has already been held. That statute provides that “[a]fter a determination has been made by the commission **in any hearing**, any party to the proceedings may, within twenty (20) days after the service of the order, apply for a hearing with respect to any of the matters determined.” Likewise, it provides that “[n]otice of the hearing shall be given **in the same manner as notice of an original hearing**” and that “[u]pon the rehearing any party may offer additional evidence that could not with reasonable diligence have been offered **on the former hearing.**” In this case, no hearing was held. The Commission rehearing statute is therefore inapplicable.

To the extent Big Rivers/Kenergy wish to challenge the Commission's March 27, 2023 Order, they should do so by an appeal under KRS 278.410. Appeals are from Commission

¹⁰ *In the Matter of Electronic Application of Kentucky-American Water Company for an Adjustment of Rates*, Case No. 2018-000358, Order (Aug 8, 2019) at 2.

¹¹ *Id.*

Orders, whether or not there has been a hearing. KRS 278.410 provides that “[a]ny party to a commission proceeding or any utility affected by an order of the commission may bring an action against the commission in the Franklin Circuit Court to vacate or set aside the order or determination on the ground that it is unlawful or unreasonable.” KRS 278.410 is not limited to instances in which a hearing was held.

Big Rivers/Kenergy also have the option to file for approval of a permanent cost-based LICSS rate sooner than the Commission-imposed deadline of September 2023.

II. The Commission’s Order Was Lawful, Reasonable, And Should Be Upheld.

A. Big Rivers’/Kenergy’s Constitutional Arguments Are Not Properly Raised Before An Administrative Agency And Are Incorrect On The Merits.

Big Rivers/Kenergy claim that the Commission’s Order was arbitrary and unsupported by evidence in violation of Section 2 of the Kentucky Constitution.¹² Big Rivers/Kenergy likewise claim that the Commission’s Order was unreasonably discriminatory in violation of Section 3 of the Kentucky Constitution and the Equal Protection Clause of the 14th Amendment to the U.S. Constitution.¹³

It is well-settled that “*an administrative agency cannot decide constitutional issues.*”¹⁴

The constitutional issues raised by Big Rivers/Kenergy can only be addressed on appeal.

¹² Petition at 2-4. Section 2 of the Kentucky Constitution provides that “*Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.*”

¹³ *Id.* Section 3 of the Kentucky Constitution provides that “*All men, when they form a social compact, are equal; and no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services; but no property shall be exempt from taxation except as provided in this Constitution, and every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration or amendment.*”

¹⁴ *Commonwealth v. DLX, Inc.*, 42 S.W.3d 624,626 (Ky. 2001); *In the Matter of Application of Northern Kentucky Water District for an Adjustment of Rates, Issuance of Bonds, and Tariff Changes*, Case No. 2010-00094, Order (January 7, 2011) at 7, fn 24; *In the Matter of Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company for the Construction of Transmission Facilities in Jefferson, Bullitt, Meade, and Hardin Counties, Kentucky*, Case No. 2005-00142, Order (September 8, 2005) at 4.

Nevertheless, those arguments are incorrect on the merits. The Commission’s Order was not arbitrary nor was it unsupported by the evidence. The Commission clearly explained its rationale in the Order, stating that *“allowing a long-standing contract to expire and forcing Domtar onto a tariff that has only been approved on a pilot basis would not result in a fair, just, and reasonable rate.”*¹⁵ Additionally, the Commission held that *“there is no evidence of a change in Domtar’s circumstances that would justify”* moving Domtar to the pilot LICSS tariff.¹⁶ Hence, the Order was well-grounded in the facts presented in this case.

B. The Commission’s Order Did Not Result In Unjust, Unreasonable, Or Discriminatory Rates.

Big Rivers’/Kenergy’s claims that the Commission’s Order resulted in unjust, unreasonable, and discriminatory rates in violation of KRS 278.030 and KRS 278.170 are unfounded.¹⁷ Big Rivers’/Kenergy’s claims rely upon a yet unproven allegation that Domtar’s long-standing contract rates do not cover the fixed costs associated with providing standby service.¹⁸ But Domtar has operated for decades pursuant to those contract rates, which fully compensate Big Rivers/Kenergy for the costs of serving it. And over that decades-long period, Big Rivers/Kenergy accepted those electric rates as fair, just, reasonable, and non-discriminatory and planned their systems around Domtar’s QF cogeneration facility. Not until an opportunity to seek to move Domtar to the pilot LICSS tariff rates presented itself did Big Rivers/Kenergy challenge the rates.

¹⁵ Order at 5.

¹⁶ *Id.*

¹⁷ Petition at 2-5.

¹⁸ *Id.* at 4-5.

The Commission's Order did not alter Domtar's long-standing rates. It simply maintained the status quo, continuing rates already found to be just, reasonable, and non-discriminatory pursuant to KRS 278.030 and KRS 278.170.

The claim that standby service to Domtar is not covering Big Rivers' fixed costs is contradicted by the utility's 2022 actual earnings. Big Rivers' currently authorized TIER of 1.30 was established in Case No. 2013-00199 and resulted in net margins at that time of \$13.1 million.¹⁹ That rate case factored in all the costs and revenues of providing standby service to Domtar. However, Big Rivers' 2022 actual TIER was 1.93, or net margins of \$43.3 million.²⁰

2022 actual net margins were more than three times the utility's authorized net margins. These very healthy earnings were the result of the hard work of Big Rivers' management in mitigating the loss of the smelter load, including providing service to the new Nucor facility in Brandenburg, Kentucky. Domtar appreciates and respects that hard work which has benefited all customers. But under these circumstances, imposing a \$3.4 million (20.9%) rate increase on a single customer is not reasonable.

C. The Commission Afforded Big Rivers/Kenergy Adequate Due Process.

Big Rivers/Kenergy claim that the Commission did not provide them adequate due process.²¹ Yet Big Rivers/Kenergy had multiple opportunities to present the merits of their case. That the Commission ultimately disagreed with Big Rivers/Kenergy is not a procedural infirmity. Nor did Big Rivers/Kenergy file any request in this proceeding for the discovery, testimony, and hearing that they now claim is necessary. And as their Joint Response to Domtar's Motion for Contract Extension expressly recognizes,²² Big Rivers was well-aware of the impending April 1,

¹⁹ *In the Matter of Application of Big Rivers Electric Corporation for a General Adjustment in Rates Supported by a Fully Forecasted Test Period*, Case No. 2013-00199, Order (April 25, 2014) at 32.

²⁰ Case No. 2023-00038, Application Exhibit B at page 5 of 12.

²¹ Petition at 5-6.

²² Joint Response at 2.

2023 deadline for a Commission determination in this proceeding and contested even holding an Informal Conference to address these issues.

Big Rivers/Kenergy cite KRS 278.260, KRS 278.270, and KRS 278.180 in claiming that a hearing was required in this proceeding. But KRS 278.270 is applicable only in instances when the Commission finds that existing rates violate a provision of KRS 278 and then changes the rate. KRS 278.180 (as its heading – “*Changes in rates, how made*” – reflects) likewise applies only to rate changes. But the Commission did not change Domtar’s standby rate. It simply maintained the status quo rates until a permanent standby service rate could be established. Those statutes regarding rate changes are therefore inapplicable.

With respect to KRS 278.260, Big Rivers/Kenergy ignore the Motion for Contract Extension, which was cited in the Commission’s Order.²³ A hearing is not required on every motion filed before the Commission. 807 KAR 5:001, Section 9(1) allows the Commission to forego a hearing in instances when it is “*unnecessary for the protection of substantial rights or not in the public interest...*” While the Complaint formally opened this proceeding, the Commission acted upon Domtar’s Motion for Contract Extension, not its Complaint.

D. The Commission’s Order Complied With The Filed Rate Doctrine.

Big Rivers’/Kenergy’s claims that the Commission’s Order violated the filed rate doctrine by extending the standby rate are misplaced.²⁴ As an initial matter, it is well within the Commission’s authority to extend the terms of a utility service contract, and the Commission has done so multiple times before.²⁵

²³ Order at 3

²⁴ Petition at 6-7.

²⁵ *In the Matter of Electronic Application of Southern Water & Sewer District for Approval of UMG Contract Extension*, Case No. 2020-00076, Opinion (March 27, 2020); *In the Matter of Water Purchase Contract Between Kentucky Turnpike Water District Division II...*, Case No. 98-150, Order (April 2, 1998); *In the Matter of Tariff Filing of Kenergy Corp. for Acceptance and Expedited Implementation of Extension Agreements to Special Retail Contracts for the Sale of Tier 3 Energy*, Case No. 2008-000514, Order (December 22, 2008).

The filed rate doctrine provides that *"when the legislature has established a comprehensive ratemaking scheme, the filed rate defines the relationship between the regulated utility and its customer with respect to the rate that the customer is obligated to pay and that the utility is authorized to collect."*²⁶ Once the Commission establishes a rate by order, that order *"shall continue in force until the expiration of the time, if any, named by the commission in the order, or until revoked or modified by the commission, unless the order is suspended, or vacated in whole or part, by order or decree of a court of competent jurisdiction."*²⁷

The filed rate doctrine (codified in KRS 278.160) is aimed at ensuring that the only rates charged by utilities are those that have been approved by the Commission. Here, the Commission approved continuation of the long-standing electric rates to Domtar pursuant to its ratemaking authority under KRS 278. That is now the filed rate for Domtar.

E. The Commission Did Not Unlawfully Shift The Burden Of Proof In This Proceeding.

Contrary to Big Rivers'/Kenergy's claims, the Commission did not unlawfully shift the burden of proof in this proceeding.²⁸ Through its pleadings in this case, Domtar provided substantial evidence (supported by affidavit) justifying continuation of its long-standing standby rate until a permanent standby service rate can be established. Domtar explained in detail the history of its electric rates, how those rates function, Big Rivers' decades-long opportunity to plan around Domtar's QF cogeneration facility, the adverse rate impacts that would occur as a result of abruptly moving Domtar on to the pilot LICSS rate, and the lack of cost-based support for such a move. Big Rivers/Kenergy simply failed to adequately refute this evidence.

²⁶ *In the Matter of Application of Big Rivers Electric Corporation for a General Adjustment in Rates*, Case No. 2011-00036, Order (January 29, 2013) at 13.

²⁷ *Id.* (citing KRS 278.390).

²⁸ Petition at 7-8.

Respectfully submitted,

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