

1 C. The March 27 Order unlawfully approves rates without affording
2 Big Rivers and Kenergy due process in violation of KRS 278.180,
3 KRS 278.260, and KRS 278.270;

4 D. The March 27 Order unlawfully requires Big Rivers and Kenergy
5 to charge rates that differ from the rates on file with the
6 Commission;

7 E. The March 27 Order violates the filed rate doctrine, arbitrarily
8 approves certain terms of a terminated contract, and is
9 unreasonable and unlawful; and

10 F. The Commission erred by unlawfully shifting the burden of proof.

11 Each of these issues is discussed in more detail below.

12 **A. The March 27 Order is arbitrary, unreasonable, unreasonably**
13 **discriminatory, and unsupported by the evidence in violation**
14 **of KRS Chapter 278, Sections 2 and 3 of the Kentucky**
15 **Constitution, and the equal protection clause of the 14th**
16 **Amendment to the U.S. Constitution.**

17 In the March 27 Order, the Commission stated that the Order was not “a
18 comment on the appropriateness of the contract.”¹ As such, there is insufficient
19 evidence supporting continuing certain terms of that contract. The March 27 Order
20 is therefore unreasonable and unlawful.

21 Additionally, by continuing certain terms of Domtar’s retail electric
22 service agreement, the Commission approved rates different than the LICSS
23 rates that otherwise would be the applicable rate for standby service to

¹ March 27 Order at p. 5.

1 Domtar. The March 27 Order notes that one of the Commission’s criticisms
2 of the LICSS tariffs was that Maintenance Power Service and Backup Power
3 Service are priced the same,² yet the Commission inexplicably continues the
4 rates from a terminated contract that also price maintenance power and
5 backup power service the same.³ For this reason, the March 27 Order is
6 arbitrary, not supported by substantial evidence, unreasonable, and
7 unlawful.

8 The March 27 Order is also unreasonably discriminatory. KRS
9 278.170(1) prohibits unreasonable discrimination as to rates or service, but
10 the March 27 Order fails to explain why Domtar should pay rates for backup
11 service that are different from rates applicable to other large industrial
12 customers with their own generation. The LICSS tariffs were not
13 approved for a single customer. In fact, the tariff language approved by
14 the Commission on a pilot basis makes clear that the LICSS tariffs were
15 “to provide a default rate for Supplemental, Maintenance, and Backup Power
16 for any large industrial customers on the BREC system who install their own
17 generation; who request Supplemental, Maintenance, and Backup Power
18 Service; and who do not have a special contract that provides rates for

² See *id.* at p. 2.

³ See Section 8 of the Second Amendment and Restated Agreement for Electric Service between Kenergy and Domtar.

1 Supplemental, Maintenance, and Backup Power Service” (emphasis added).⁴
2 Big Rivers and Kenergy even made clear during the Commission’s review of
3 the LICSS tariffs that Domtar could be moved to that tariff.⁵ Treating
4 Domtar differently than other any other large industrial customers subject
5 to the LICSS tariffs results in unreasonable discrimination.

6 For the foregoing reasons, the March 27 Order violates KRS
7 278.030, KRS 278.170, Sections 2 and 3 of the Kentucky Constitution, and
8 the 14th Amendment to the U.S. Constitution.

9 **B. The March 27 Order unlawfully denies Big Rivers and Kenergy**
10 **the right to collect fair, just, and reasonable rates.**

11 KRS 278.030(1) provides, “Every utility may demand, collect and
12 receive fair, just and reasonable rates for the services rendered or to be
13 rendered by it to any person.” In approving the interim LICSS rates, the
14 Commission recognized that large industrial customers self-supplying a
15 portion of their power needs should contribute to the embedded fixed costs of
16 having the transmission and generation capacity available to provide backup
17 and maintenance power service.⁶ However, in this case, the Commission
18 approved rates under which Domtar will continue to be entitled to up to 62

⁴ *In the Matter of: Electronic Tariff Filing of Big Rivers Electric Corporation and Kenergy Corp. to Implement a New Standby Service Tariff*, P.S.C. Case No. 2021-00289 (March 3, 2022), at p. 1.

⁵ *See id.*, Response Brief of Big Rivers Electric Corporation, at p. 9, l. 15 – p. 10, l. 5; *id.*, Joint Response of Big Rivers and Kenergy to Item 2 of the Commission’s Staff’s First Request for Information; *id.*, Joint Response of Big Rivers and Kenergy to Item 6 of Kimberly-Clark Corporation’s Second Set of Data Requests.

⁶ *See, e.g., id.*, Order (March 3, 2022), at pp. 18-19.

1 MW of backup power service without paying for the associated fixed costs.
2 The March 27 Order is therefore arbitrary, unreasonable, unlawful, and
3 unsupported by substantial evidence.

4 **C. The March 27 Order unlawfully approves rates without**
5 **affording Big Rivers and Kenergy due process in violation of**
6 **KRS 278.180, KRS 278.260, and KRS 278.270.**

7 The Commission “is a creature of statute and has only such powers as have
8 been granted to it by the General Assembly.”⁷ KRS 278.270 requires that

9 *[w]henver the commission, upon its own motion or upon complaint as*
10 *provided in KRS 278.260, and **after a hearing had upon***
11 ***reasonable notice**, finds that any rate is unjust, unreasonable,*
12 *insufficient, unjustly discriminatory or otherwise in violation of any of*
13 *the provisions of this chapter, the commission shall by order prescribe a*
14 *just and reasonable rate to be followed in the future. (Emphasis*
15 *added.)*

16 Similarly, KRS 278.260 states, “[N]o order affecting the rates or service complained
17 of shall be entered without a formal public hearing.” These provisions of KRS
18 Chapter 278, as well as other statutes and the Commission’s regulatory framework,
19 protect due process and provide the Commission the opportunity to make a
20 determination informed by evidence.

21 Unfortunately, in this case, the Commission imposed reduced rates without
22 affording Big Rivers or Kenergy the opportunity to conduct discovery, present
23 testimony, or cross examine Domtar’s witnesses at a hearing in violation of KRS
24 278.260 and KRS 278.270.

⁷ *Boone Cnty. Water & Sewer Dist. v. Pub. Serv. Comm'n*, 949 S.W.2d 588, 591 (Ky. 1997).

1 Further, KRS 278.180 prohibits the Commission from ordering a rate
2 change without providing the statutory notice to the affected utilities. In ordering
3 a rate change in the March 27 Order without providing the statutory notice to Big
4 Rivers and Kenergy, the Commission also unlawfully denied Big Rivers and
5 Kenergy due process.

6 **D. The March 27 Order unlawfully requires Big Rivers and**
7 **Kenergy to charge rates that differ from the rates on file with**
8 **the Commission.**

9 KRS 278.160(2) provides, in pertinent part, “No utility shall charge, demand,
10 collect, or receive from any person a greater or less compensation for any service
11 rendered or to be rendered than that prescribed in its filed schedules, and no person
12 shall receive any service from any utility for a compensation greater or less than that
13 prescribed in such schedules.”

14 Section 15(b) of the retail electric service agreement under which Domtar was
15 taking service until March 31, 2023, provided, in pertinent part:

16 This Agreement shall have a primary term of three (3) years, provided
17 that (i) the term of this Agreement shall automatically be extended for
18 successive one-year terms following the primary term unless one Party
19 has given the other Party written notice of non-renewal at least one (1)
20 year prior to the end of the primary term or any automatic extension of
21 the term....⁸

22 Kenergy exercised this provision and terminated the retail agreement
23 effective March 31, 2023. Because Domtar’s contract is no longer in effect, and
24 because the parties were unable to negotiate other rates for standby service, the

⁸ Second Amended and Restated Agreement for Electric Service between Kenergy and Domtar, Section 15(b).

1 only rates in effect and on file with the Commission for such service to Domtar are
2 the rates in the LICSS tariffs, which the Commission has approved on a pilot basis.
3 Thus, the March 27 Order requires that Big Rivers and Kenergy provide service at
4 rates in violation 278.160(2).

5 **E. The March 27 Order violates the filed rate doctrine,**
6 **arbitrarily approves certain terms of a terminated contract,**
7 **and is unreasonable and unlawful.**

8 As noted above, Domtar’s retail electric agreement contained a termination
9 provision that was properly exercised by Kenergy. In the March 27 Order, the
10 Commission commanded, “The contract between Domtar and Kenergy shall remain
11 in effect until further order of the Commission.”⁹ But clearly, not all provisions of
12 Domtar’s retail electric service agreement remain in effect. The Commission has
13 retroactively and arbitrarily removed the termination provisions from the filed
14 contract after Kenergy had exercised its termination rights, and consequently, the
15 March 27 Order violates the filed rate doctrine and is unreasonable and unlawful.

16 **F. The Commission erred by unlawfully shifting the burden of**
17 **proof.**

18 As the Commission has recognized, “In a formal complaint filed pursuant to
19 807 KAR 5:001E, Section 20, the complainant bears the burden of proof.”¹⁰ In the
20 March 27 Order, the Commission states, “From the case record, there is no evidence
21 of a change in Domtar’s circumstances that would justify the change. The

⁹ March 27 Order at p. 5.

¹⁰ *In the Matter of: Katrina Marie Trusty v. Clark Energy Cooperative, Inc.*, Case No. 2022-00298 (Jan. 20, 2023), at p. 2.

1 Commission finds that allowing a long-standing contract to expire and forcing
2 Domtar onto a tariff that has only been approved on a pilot basis would not result in
3 a fair, just and reasonable rate.”¹¹ But Kenergy and Big Rivers do not bear the
4 burden of justifying the change. The LICSS tariffs are the applicable filed rates for
5 standby service to Domtar. Domtar, as the complainant, has the burden of proving
6 the LICSS tariffs were no longer fair, just, and reasonable. The Commission erred
7 in shifting the burden of proof to Kenergy and Big Rivers.

8 **II. Conclusion**

9 As the March 27 Order noted, Big Rivers’ and Kenergy’s LICSS tariffs were
10 approved on a pilot basis, following extensive discovery and a hearing.¹² Yet,
11 March 27 Order rejected the LICSS tariffs and instead, arbitrarily prescribed
12 reduced rates for service to Domtar that are different than the filed rates, that fail
13 to compensate Big Rivers or Kenergy for providing standby power service, that are
14 not supported by substantial evidence, that unreasonably discriminate between
15 similarly situated customers, and that are not fair, just, and reasonable. And in
16 doing so, the Commission failed to afford Big Rivers or Kenergy due process,
17 violated the filed rate doctrine, and unlawfully shifted the burden of proof.

18 Therefore, the March 27 Order violates KRS Chapter 278, Sections 2 and 3
19 of the Kentucky Constitution, and the 14th Amendment to the U.S. Constitution,
20 and Big Rivers and Kenergy respectfully request the Commission grant rehearing

¹¹ March 27 Order at p. 5.

¹² *Id.* at p. 2.

1 of the Order and deny Domtar’s request to approve the continued use of rates from
2 its terminated retail electric service agreement.

3 Moreover, since the filed rates applicable to standby service to Domtar since
4 April 1, 2023, are the rates contained in the LICSS tariffs, Domtar should be
5 ordered to pay any difference between the rates it was charged pursuant to the
6 Commission’s March 27 Order and the rates it should have been charged under
7 the LICSS tariffs.

8 WHEREFORE, for the reasons set forth above, Big Rivers and Kenergy
9 respectfully request that the Commission grant the petition for rehearing, dismiss
10 Domtar’s Complaint, and to order Domtar to pay any difference between the rates
11 it was charged pursuant to the Commission’s March 27 Order and the rates it
12 should have been charged under the LICSS tariffs.

13 On this, the 13th day of April, 2023,
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