

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

**In the Matter of:**

<b>ELECTRONIC TARIFF FILING OF EAST</b>	)	
<b>KENTUCKY POWER COOPERATIVE, INC., AND</b>	)	
<b>ITS MEMBER DISTRIBUTION COOPERATIVES</b>	)	<b>CASE NO.</b>
<b>FOR APPROVAL OF PROPOSED CHANGES TO</b>	)	<b>2023-00153</b>
<b>THEIR QUALIFIED COGENERATION AND</b>	)	
<b>SMALL POWER PRODUCTION FACILITIES</b>	)	
<b>TARIFFS</b>	)	

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**MOTION FOR REHEARING**

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Comes now East Kentucky Power Cooperative, Inc., (“EKPC”) by and through counsel, pursuant to KRS 278.400 and respectfully requests the Kentucky Public Service Commission (“Commission”) to grant rehearing on its October 31, 2023 Order (“October 31<sup>st</sup> Order”) in the above-styled case. In support of this motion, East Kentucky Power respectfully states as follows:

**Background**

On May 3, 2023, EKPC and its 16 owner-member distribution cooperatives filed proposed adjustments to their respective existing tariffs for Qualified Cogeneration and Small Power Production Facilities (“QF Tariffs”). As explained in its filing (“QF Tariff Filing”), EKPC proposed to update the capacity credit amount for resources with dispatchable generation sources

and to reduce its market administration fee.<sup>1</sup> EKPC requested that the proposed revisions to its QF Tariff become effective June 1, 2023.

The Commission issued an Order on May 25, 2023 to investigate the reasonableness of EKPC and its 16 distribution cooperatives' proposed revisions to their proposed QF Tariff Filing, suspending the tariffs for five months from June 1, 2023, up to and until October 31, 2023.<sup>2</sup> The Commission granted intervention to Sierra Club on June 16, 2023. Commission Staff issued data requests to EKPC on June 8, 2023 to which EKPC filed responses on June 26, 2023.

The Commission entered a procedural schedule on July 7, 2023. Commission Staff entered a second set of data requests to EKPC on July 20, 2023 to which EKPC filed responses on July 31, 2023. Sierra Club filed data requests to EKPC on July 21, 2023 and EKPC filed responses on July 31, 2023. The Commission entered an Order scheduling a hearing for September 15, 2023. EKPC filed its witness list on September 1, 2023, its Request for Hearing Notice Publication on September 8, 2023, and its Proof of Publication on September 11, 2023. The Commission entered an Order on September 14, 2023 canceling the hearing on September 15, 2023.

On October 31, 2023, the Commission issued an order (“Order”) on the QF Tariff Filing. Among other things, the Commission: (1) asserted that EKPC has a capacity need beginning in 2028 based on EKPC’s forecast 18-MW winter 2028 capacity deficit (Order, at 6, 9, 11); (2) denied the EKPC capacity rate proposal for all four categories of QFs (dispatchable and non-dispatchable cogeneration and small power production facilities), calculated its own capacity rates based on a

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<sup>1</sup> EKPC and Member Distribution Cooperatives Tariff Filing, *In the Matter of: Electronic Tariff Filing of East Kentucky Power Cooperative, Inc. and its Member Distribution Cooperatives for Approval of Proposed Changes to their Qualified Cogeneration and Small Power Production Facilities Tariffs*, Case No. 2023-00153, at 4 (Ky. P.S.C.) (filed Mar. 3, 2023).

<sup>2</sup> Order, *In the Matter of: Electronic Tariff Filing of East Kentucky Power Cooperative, Inc. and its Member Distribution Cooperatives for Approval of Proposed Changes to their Qualified Cogeneration and Small Power Production Facilities Tariffs*, Case No. 2023-00153, at 4 (Ky. P.S.C.) (May 25, 2023).

single-cycle combustion turbine (“CT”) proxy unit using the National Renewable Energy Laboratory (“NREL”) Annual Technology Baseline (“ATB”) costs, and directed EKPC to reduce the rate pursuant to the resource-specific Effective Load Carrying Capability (“ELCC”) provided by PJM Interconnection, L.L.C. (“PJM”) (Order, at 8-10, 14); (3) approved EKPC’s proposed capacity performance non-performance penalty, and advised EKPC to include language in the QF Tariff that makes any non-dispatchable resource that chooses to take capacity payments responsible for any non-performance penalties (Order, at 14); and (4) approved EKPC’s proposed revised market administration fee of \$0.00011 per kWh (Order, at 14).

### **Relief Requested**

EKPC respectfully seeks rehearing to request that the Commission clarify and, in some cases, modify certain aspects of the Order. First, the Commission concluded that the QF Tariff should include a two-year contract, as well as a five-year contract.<sup>3</sup> EKPC requests that the Commission provide a statutory or regulatory basis for, or identify evidence in the record supporting, the requirement that EKPC include a two-year contract option in its QF Tariff. EKPC is not aware of any such basis or record evidence, and therefore requests that the Commission modify its Order to remove the two-year contract requirement. EKPC is concerned that, with a two-year contract requirement in combination with required QF capacity rates for periods when EKPC has no need for additional capacity, it will incur costs for purchasing QF capacity that will be borne by its owner-members and the retail consumers that they serve.

Second, the Commission previously determined, in 2021, that EKPC’s energy rate applicable to QF purchases is the actual real-time locational marginal price (“LMP”) in PJM. The Order does not address whether the PJM LMP is still the appropriate measure of EKPC’s avoided

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<sup>3</sup> Order, at 13.

cost energy rate for QF purchases governed by the QF Tariff. EKPC did not propose to modify that aspect of its existing QF Tariff. But, for the avoidance of doubt and to obtain regulatory certainty, EKPC seeks clarification that it should continue to use the real-time LMP as the energy rates in its QF Tariff for all types of resources, consistent with EKPC's existing practice and existing QF Tariff.

Third, EKPC requests that the Commission clarify the methodology it used to establish the avoided cost rate for any purchases by EKPC of QF capacity. The Commission apparently calculated the capacity rate using NREL ATB costs, for years 2024 through 2028. But, the Commission provided no discussion of how it made that calculation, and the record is devoid of any evidence that would support such calculations. On rehearing, the Commission should clarify how it derived its numbers. Without evidentiary support in the record, the Commission's decision constitutes reversible error.

The Commission also should modify the Order to set the capacity rate for QF purchases by EKPC to \$0.00 per kW-year for periods in which the Commission found that EKPC has no need for additional capacity. The Commission found that EKPC has no need for additional capacity until winter 2028, at the earliest. The Commission erred in setting a capacity rate that exceeds \$0.00 per kW-year for any period before then. EKPC's retail customers will be harmed if EKPC must pay more than \$0.00 per kW-year during periods when EKPC has no demonstrable need for capacity. Nothing in the Commission's regulations or orders, or indeed in the Public Utility Regulatory Policies Act of 1978, as amended ("PURPA"), requires or permits that result.

Finally, EKPC requests that the Commission clarify that both dispatchable and non-dispatchable generation resources pose a performance risk and therefore should be responsible for any capacity performance penalties imposed for their failure to perform. Language in the

Commission’s Order could be interpreted to mean that only non-dispatchable generation resources pose a performance risk and therefore only non-dispatchable resources should bear the costs of any capacity performance penalties assessed by PJM. That would be wrong – both dispatchable and non-dispatchable resource pose a risk of non-performance, and if such resources do not perform, then they should bear the costs of capacity performance penalties. EKPC requests modification of the Order, if necessary, to make clear that both non-dispatchable and dispatchable generation resources should bear the costs of capacity performance penalties. These are costs that should not be borne by the Kentucky retail consumers that are served by EKPC and its owner-members.

### **Standard for Rehearing**

KRS 278.400 authorizes parties to a proceeding to apply for rehearing of a Commission order within 20 days of service of the order. The Commission will grant rehearing when required to address any errors or omissions in the Commission’s orders,<sup>4</sup> or to provide clarification of its orders.<sup>5</sup>

### **Motion for Rehearing**

**A. EKPC requests that the Commission provide the basis for requiring EKPC to include a two-year contract option in its QF Tariff.**

In the Order, the Commission found that EKPC had not met its burden to demonstrate that its avoided capacity costs are zero because, according to the Commission, “EKPC, and the

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<sup>4</sup> See, e.g., Order, *In the Matter of: Application of Jessamine-South Elkhorn Water District for a Certificate Of Public Convenience and Necessity to Construct and Finance a Waterworks Improvement Project Pursuant to KRS 278.020 and 278.300*, Case No. 2012-00470, at 11 (Ky. P.S.C.) (Jan. 3, 2014).

<sup>5</sup> See, e.g., Order, *In the Matter of: Electronic Application of Kentucky Power Company For (1) A General Adjustment of its Rates for Electric Service; (2) Approval of Tariffs and Riders; (3) Approval of Accounting Practices to Establish Regulatory Assets and Liabilities; (4) Approval of a Certificate of Public Convenience and Necessity; and (5) All Other Required Approvals and Relief*, Case No. 2020-00174, at 29 (Feb. 22, 2021) (granting rehearing to clarify finding in initial order).

evidence of record, demonstrate that there is a capacity need in the near future.”<sup>6</sup> The Commission stated that EKPC failed to provide “robust evidence upon which avoided costs can be calculated” and recommended that EKPC “improve the transparency of its avoided costs that are calculated.”<sup>7</sup> The Commission concluded that, “[c]onsistent with the Commission’s findings . . . , the QF [T]ariff should include a two-year and a five-year contract.”<sup>8</sup>

The Commission identifies no basis in statute or regulation, nor points to any evidence in the record, for requiring EKPC’s QF Tariff to include a two-year contract. As an initial matter, EKPC is uncertain upon which “findings” the Commission is relying to justify its decision to impose a two-year contract requirement. The Commission’s discussion in the Order preceding its imposition of the two-year contract requirement includes several “findings.” But the Commission never says which of those “findings” (or any other findings) it has relied upon to support its decision to require a two-year contract. In that regard, the Commission’s decision is not based on substantial record evidence, and therefore is reversible.

On the merits of the requirement, the Commission also fails to identify any statutory or regulatory basis or record evidence to support its decision to require EKPC to include a two-year contract in the QF Tariff. A Commission order may be set aside if it is determined to be unlawful or unreasonable.<sup>9</sup> A decision is unreasonable if it is not supported by substantial evidence.<sup>10</sup> To

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<sup>6</sup> Order, at 12.

<sup>7</sup> Order, at 12.

<sup>8</sup> Order, at 13.

<sup>9</sup> See, e.g., *Commonwealth v. PSC of Ky.*, 2008 Ky.App.LEXIS 29, at \*10 (Ky. Ct. App. Feb. 1, 2008), *rev’d on other grounds*, 320 S.W.3d 660 (Ky. 2010).

<sup>10</sup> See *id.*

determine whether evidence is substantial, a reviewing body must take into account anything in the record that fairly detracts from its weight.<sup>11</sup>

Here, the Commission cited no record evidence for its decision to require EKPC to include a two-year contract in its QF Tariff, much less provided an explanation for the requirement or the basis for it. Nor is EKPC aware of anything in the record that would support the Commission's decision. The Commission simply included the requirement in its Order, with no elaboration or analysis. Because the decision is not supported by substantial evidence (indeed, any evidence), the decision is unreasonable and should be modified to remove the two-year contract requirement.

Nothing in PURPA or the Commission's implementation regulations established a two-year contract or any other minimum term for a QF contract. Indeed, the Federal Energy Regulatory Commission ("FERC") has determined that neither PURPA nor FERC's regulations require a minimum term for a QF contract.<sup>12</sup> Likewise, in implementing the FERC PURPA requirements, the Commission did not specify a minimum QF contract term, or explain how a two-year contract would be necessary to encourage the development of QFs and otherwise be consistent with "all statutory requirements." In these circumstances, the Commission erred in imposing a two-year contract term for QF purchases, particularly without any explanation or evidentiary support.

EKPC is concerned that the two-year contract requirement, in combination with having to pay QF capacity costs while it has no need for additional capacity, will result in higher and unnecessary costs to EKPC that will be passed on to EKPC's owner-members and the retail

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<sup>11</sup> *See id.*

<sup>12</sup> *See Qualifying Facility Rates and Requirements*, Order No. 872, 172 FERC ¶ 61,041, at P 360 ("declin[ing] to specify a minimum required contract length given that is up to states to decide appropriate contract lengths in a way that accurately calculates avoided costs so as to meet all statutory requirements"), *order on reh'g and clarification*, Order No. 872-A, 173 FERC ¶ 61,158 (2020), *petition granted in part and denied in part sub nom. Solar Energy Industries Assoc. v. FERC*, 80 F.4th 956, 974 (9th Cir. 2023) (declining to hear challenge to FERC's decision in Order No. 872 not to impose a minimum contract term for QF purchases because issue was raised for first time on appeal).

consumers that they serve, with no discernible benefits in return.<sup>13</sup> EKPC thus challenges the Commission’s direction to include a two-year contract option in the QF Tariffs.

In sum, the Commission’s determination requiring EKPC to provide a two-year contract to QFs is not supported by substantial evidence and not required by statute or regulation. Accordingly, EKPC requests that the Commission modify its Order to relieve EKPC of the obligation to include a two-year contract in its QF Tariff.

**B. EKPC requests that the Commission clarify that EKPC should continue to use the real-time LMP for its avoided energy cost rate in its QF Tariff for all types of resources.**

In 2021, EKPC filed revised tariffs setting forth revised rates for the purchase of electric energy and capacity from QFs. In that proceeding, the Commission directed that “EKPC should use the real-time LMP at the time of delivery as the energy rates in its [QF Tariffs], for all types of resources.”<sup>14</sup> The Commission explained that “[t]his methodology reflects the real-time cost that EKPC would otherwise purchase energy for, and thus complies with the relevant legal requirements.”<sup>15</sup> EKPC incorporated these changes into its QF Tariff, which states that the energy rate applicable to QFs is based on “the actual real-time [LMP] for energy set by PJM at the EKPC zonal node during each hour of the day at the time of delivery.”

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<sup>13</sup> As the Commission knows, EKPC and its owner-members are rural electric cooperatives that are owned by the consumers that they serve. As a result, there are no shareholders or investors to “absorb” any higher costs that EKPC incurs pursuant to the Commission’s PURPA implementation requirements. Instead, those higher costs are borne by the retail consumers served by EKPC’s owner-members.

<sup>14</sup> Order, *In the Matter of Electronic Tariff Filing of East Kentucky Power Cooperative, Inc. and Its Member Distribution Cooperatives for Approval of Proposed Changes to Their Qualified Cogeneration and Small Power Production Facilities Tariffs*, Case No. 2021-00198, at 10 (Ky. P.S.C.) (Oct. 26, 2021).

<sup>15</sup> *Id.*



Here, neither the Order itself, nor the energy rate included in the Appendix to the Order, addresses whether EKPC should continue to use the real-time LMP as the energy rates in its QF Tariff. At the same time, neither the Order nor the Appendix identifies a different energy rate, and EKPC presumes that it should continue to use LMP as the energy rate, as set forth in its existing QF Tariff. As in 2021, LMP continues to “reflect[] the real-time cost that EKPC would otherwise purchase energy for, and thus complies with the relevant legal requirements.” For the avoidance of doubt and to provide certainty to EKPC with respect to potential purchases of QF energy, EKPC requests that the Commission clarify that EKPC should continue to use the real-time LMP as the energy rates in its QF Tariff for all types of resources, consistent with EKPC’s existing practice and its existing QF Tariff.

**C. EKPC requests that the Commission clarify its methodology for calculating avoided capacity cost rate.**

EKPC requests that the Commission clarify how it calculated the capacity rates for QF purchases set forth in the Order. As the Commission noted in the Order, EKPC does not consider this data appropriate for calculating its avoided capacity costs, and the data does not accurately capture the capacity that EKPC could actually avoid by purchasing capacity from QF facilities.<sup>16</sup> Nevertheless, the Commission states that EKPC could have used “public, transparent, widely used data sources, such as the NREL ATB . . . , as a source for determining the actual costs for a physical proxy unit to calculate avoided capacity costs.”<sup>17</sup> The Commission ultimately adopted the use of a CT from the NREL ATB as the proxy for determining EKPC’s avoided capacity costs.<sup>18</sup>

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<sup>16</sup> Order, at 7.

<sup>17</sup> Order, at 9.

<sup>18</sup> Order, at 10.

But the Commission failed to address EKPC's concerns regarding the Commission's use of NREL ATB data in calculating EKPC's avoided capacity costs. The Commission never explains in the Order why it considers NREL ATB costs a necessary component in determining EKPC's avoided capacity costs. The Commission simply raised, then disregarded, EKPC's position that it does not consider NREL ATB costs appropriate for calculating its avoided capacity costs. The Commission concluded that "[b]y relating the expected 2032 costs of a new CT to the generation of solar and wind resources [i.e., small power production QFs], this method offers a reasonable proxy of the costs EKPC's ratepayers would be able to forgo by contracting intermittent resources."<sup>19</sup> But the Commission fails to explain how intermittent resources, such as wind and solar QFs, are an adequate substitute for a CT, which is fully dispatchable and available even when the wind is not blowing and the sun is not shining. There is simply no correlation between the two sets of resources, and using the higher cost of a CT as a measure of the price to be paid to intermittent QFs would result in higher costs to EKPC's owner-members and the retail consumers that they serve, all in violation of PURPA's requirement that an electric utility not be required to pay to a QF more than its incremental cost of power.

Moreover, the Commission does not explain how it used the NREL ATB costs to calculate EKPC's capacity rates. Rather, the Commission simply announced that it was using those costs and then apparently determined the capacity prices for each year during the period 2024-2028. The Order also does not state whether a price was separately calculated for each year, or if a single price was calculated and then either escalated or discounted to derive the price for the remaining years.

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<sup>19</sup> Order, at 10.

The Commission’s determination of capacity rates without specifying how the calculation was made is reversible error.

**D. The Commission erred in requiring EKPC to purchase QF capacity at rates greater than \$0.00 per kW-year earlier than winter 2028.**

Regardless of how the Commission calculated the capacity rates for EKPC, the Commission erred in setting a capacity rate that exceeds \$0.00 per kW-year for periods when EKPC has no demonstrable need for capacity. The Commission determined that EKPC will experience a capacity deficiency beginning in 2028.<sup>20</sup> In that finding, the Commission implicitly conceded that EKPC has no need for additional capacity until that time. Certainly the record in this proceeding cannot support a finding that EKPC has a need for additional capacity before then. The Commission nevertheless set EKPC’s capacity rates under the five-year contract of its QF Tariff at values greater than \$0.00 per kW-year for the five-year period leading up to winter 2028, i.e., 2024 through 2028. The Commission’s decision is reversible error.

As a general matter, PURPA requires that the price to be paid by an electric utility to QFs for power purchased from the QFs not exceed the incremental cost to the electric utility of power that it otherwise would generate or purchase itself (i.e., the electric utility’s “avoided cost”).<sup>21</sup> In the context of purchases of QF capacity, avoided cost rates should not include a capacity cost component when the electric utility does not need additional capacity.<sup>22</sup> In that circumstance, the purchase of QF capacity avoids nothing on the part of the utility, and therefore there would be no

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<sup>20</sup> See Order, at 6, 11.

<sup>21</sup> See 16 U.S.C. § 824a-3(b)(2).

<sup>22</sup> Order No. 872, at P 424, n.686 (citing *City of Ketchikan*, 94 FERC ¶¶ 61,293, at 62,061 (2001) (“[A]voided cost rates need not include the cost for capacity in the event that the utility’s demand (or need) for capacity is zero. This is, when the demand for capacity is zero, the cost for capacity may also be zero.”)).

avoided costs to pay to the QF.<sup>23</sup> The Commission’s decision to require EKPC to pay more than \$0.00 per kW-year during periods when EKPC has no demonstrable need for capacity will result in EKPC paying for capacity purchased from QFs at prices that exceed EKPC’s incremental costs, in violation of PURPA. As FERC observed in Order No. 872, “Nothing in PURPA or the legislative history of PURPA suggests that [FERC] should set QF rates so as to facilitate the financing of new QF capacity in locations where no new capacity is needed.”<sup>24</sup>

As a result of the Commission’s decision on capacity rates, EKPC will not be financially indifferent to the purchase of QF capacity.<sup>25</sup> Indeed, the Commission acknowledges that its approach “likely results in higher rates for customers.”<sup>26</sup> Rather, EKPC provided ample evidence that setting a rate greater than \$0.00 per kW-year during periods when EKPC has no need for capacity will harm the retail consumers ultimately served by EKPC and its owner-members.<sup>27</sup> EKPC’s payment of the QF capacity rates will be passed through to its owner-members and, ultimately, to the retail consumers that they serve. At the end of the day, if EKPC is forced to pay capacity rates that exceed its avoided costs, and in particular to purchase capacity that it does not

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<sup>23</sup> See *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128, at 30,870 (“A [QF] may seek to have a utility to purchase more energy or capacity than the utility requires to meet its total system load. In such a case, while the utility is legally obligated to purchase any energy or capacity provided by a [QF], the purchase rate should only include payment for energy or capacity which the utility can use to meet its total system load.”), 30,871 (where “the supplying utility has excess capacity, its avoided costs would include only energy costs”), *order on reh’g*, Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980), *aff’d in part & vacated in part sub nom. Am. Elec. Power Serv. Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev’d in part sub nom. Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402 (1983).

<sup>24</sup> Order No. 872, at P 347.

<sup>25</sup> Order No. 69, at 30,871 (“Under the definition of ‘avoided costs’ . . . , the purchasing utility must be in the same financial position it would have been had it not purchased the [QF’s] output.”).

<sup>26</sup> Order, at 10.

<sup>27</sup> See EKPC and Member Distribution Cooperatives Tariff Filing, *In the Matter of: Electronic Tariff Filing of East Kentucky Power Cooperative, Inc. and its Member Distribution Cooperatives for Approval of Proposed Changes to their Qualified Cogeneration and Small Power Production Facilities Tariffs*, Case No. 2023-00153, at 2 (Ky. P.S.C.) (filed Mar. 3, 2023).

need, EKPC's retail customers will foot the bill through EKPC's rates. And they will receive no discernible benefit from such purchases of QF capacity because EKPC has no need for additional capacity, at least until winter 2028. Certainly there is no record evidence of any such benefit.

The Commission's decision to require the payment of capacity rates in the years up to 2028 is unjust and unreasonable and not in the public interest, in violation of PURPA and the Commission's own implementing rules.<sup>28</sup> Accordingly, EKPC requests that the Commission modify the Order to authorize a capacity rate for purchases of capacity from QFs (if any) beginning no earlier than winter 2028.

**E. EKPC requests that the Commission clarify that both dispatchable and non-dispatchable generation resources pose a capacity performance risk and therefore should bear any non-performance penalties.**

In the Order, the Commission approved "EKPC's proposed non-performance penalty," i.e., the pass-through to the QF that fails to perform and causes EKPC, as the entity offering the QF capacity into the PJM market, to incur non-performance penalties.<sup>29</sup> The Commission stated that:

Non-dispatchable generation resources should have the choice of whether to take a capacity payment, but if they do so, they should also take on the risk of any non-performance; EKPC's members should not be subject to a penalty for non-performance attributable to a QF. Therefore, the Commission finds that EKPC should include language in the tariff-making any resource that chooses to take capacity payments responsible for any non-performance penalties. Along those same lines, the Commission finds that EKPC should include language in the tariff requiring such non-dispatchable resources to provide credit support to cover such non-performance penalties.<sup>30</sup>

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<sup>28</sup> See 18 C.F.R. § 292.304(a)(1) (2023) (requiring rates for purchases by electric utility from QF to be "just and reasonable to the electric consumer of the electric utility and in the public interest"); 807 KAR 5:054, § 7(2) (same).

<sup>29</sup> See Order, at 14.

<sup>30</sup> Order, at 14.

The Commission therefore addresses capacity performance issues associated with non-dispatchable resources, but does not explicitly acknowledge capacity performance issues related to dispatchable resources. EKPC requests that the Commission grant rehearing to clarify that the Commission intended to conclude that both dispatchable and non-dispatchable generation resources pose a capacity performance risk and that therefore both types of resources should be responsible for any non-performance penalties imposed because of their failure to perform.

The PJM tariff rules that provide for non-performance penalties do not distinguish between dispatchable and non-dispatchable resources (or QF vs. non-QF resources, for that matter).<sup>31</sup> With good reason: both types of resources may pose capacity performance issues and therefore both types of resources may incur non-performance penalties. It is understandable that some of the discussion of non-performance penalties should focus on non-dispatchable resources – which by definition cannot change operations to respond to a PJM dispatch directive – and whether they should be held accountable for non-performance penalties when they are dispatched by PJM but fail to perform. EKPC believes that the Commission correctly determined that non-dispatchable resources should bear the responsibility for penalties incurred due to their non-performance.

But EKPC also believes that dispatchable resources likewise should bear the responsibility for penalties imposed for their failure to perform. The same concerns identified by the Commission with respect to non-dispatchable resources – the resources “have the choice of whether to take a capacity payment,” they should consequently “take on the risk of any non-performance,” and the costs of such non-performance should not be borne by EKPC’s members – apply to dispatchable resources. Nor did EKPC’s proposed QF Tariff distinguish between dispatchable and non-dispatchable resources for purposes of the pass-through of PJM non-performance penalties.

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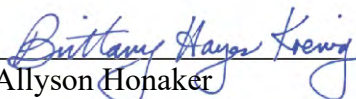
<sup>31</sup> See PJM Interconnection, L.L.C., Open Access Transmission Tariff, Att. DD, § 10A(a).

Accordingly, EKPC assumes that the Commission's omission of dispatchable resources in its discussion of capacity performance risks was inadvertent. Nevertheless, to avoid any doubt and to provide regulatory certainty, EKPC requests that the Commission grant rehearing to clarify that both dispatchable and non-dispatchable resources pose capacity performance risks and that both types of resources should bear the costs of non-performance penalties imposed as a result of their failure to perform in accordance with dispatch instructions.

WHEREFORE, on the basis of the foregoing, East Kentucky Power respectfully requests that the Commission grant rehearing on the issues contained herein.

Dated this 20<sup>th</sup> day of November, 2023.

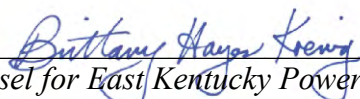
Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

This is to certify that foregoing was submitted electronically to the Commission on November 20, 2023 and that there are no parties that have been excused from electronic filing. Pursuant to prior Commission orders, no paper copies of this filing will be submitted.

  
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*Counsel for East Kentucky Power Cooperative, Inc.*