

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

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)	Case No. 2023-00159
Regulatory Assets And Liabilities; (4) A)	
Securitization Financing Order; And (5) All Other)	
Required Approvals And Relief)	

**MOTION OF KENTUCKY POWER COMPANY FOR REHEARING OF
JANUARY 10, 2024 FINANCING ORDER**

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I. INTRODUCTION

Kentucky Power Company (“Kentucky Power” or the “Company”) filed an application for a securitization financing order as part of its June 29, 2023 application for a general adjustment of rates for electric service. The Public Service Commission of Kentucky’s (“Commission”) Order entered January 10, 2024, and served upon Kentucky Power January 11, 2024 (“Financing Order”), granted the Company’s application for a securitization financing order and imposed certain requirements governing the process for Kentucky Power’s placement of the securitized bonds.

Kentucky Power appreciates the time, effort, and attention the Commission put into reviewing the Company’s securitization request and the Commission’s grant of approval to securitize the regulatory assets requested for the benefit of Kentucky Power’s customers. Kentucky Power is eager to continue the process and pass those benefits back to its customers as soon as possible and is working diligently to review and implement the requirements of the Financing Order. As part of that review, Kentucky Power has identified some issues for which rehearing or clarification is required.

Kentucky Power does not seek rehearing regarding any of the Commission’s determinations as to the costs permitted to be securitized, or most of the other approvals and requirements contained in the Financing Order. Rather, Kentucky Power respectfully avers that certain findings in the Financing Order have the effect of granting powers to the Commission, Commission Staff, and/or the Commission’s Financial Advisor that are not provided by or that contravene KRS 278.670 *et seq.* (“Securitization Act”). Kentucky Power seeks to eliminate these findings from the Financing Order to ensure that the more important components of the Financing Order cannot be subject to challenges over non-critical findings, when such challenges might impair the implementation of the securitization to the detriment of Kentucky Power customers. Other of the Commission’s findings and requirements in the Financing Order have the effect of

unintentionally and unnecessarily burdening or complicating an already complex process, resulting in delays and increased costs to the detriment of Kentucky Power’s customers.

Kentucky Power will have the greatest chance of promptly, efficiently, and most cost-effectively placing the securitized bonds and passing securitization benefits back to customers if the modifications and clarifications requested herein are approved. Kentucky Power therefore respectfully submits this Motion for Rehearing pursuant to KRS 278.400 and other applicable law. It is necessary and appropriate for the Commission to grant rehearing for the reasons set forth below.

II. LAW AND ARGUMENT

A. Standard for Rehearing.

KRS 278.400 authorizes “any party to the proceedings” to apply for rehearing of a Commission order within 20 days of service of the order. The Commission interprets the statute as “limit[ing] rehearing to new evidence not readily discoverable at the time of the original hearings, to correct any material errors or omissions, or to correct findings that are unreasonable or unlawful.”¹ A Commission order is deemed unreasonable if “the evidence presented leaves no room for difference of opinion among reasonable minds.”² An order is unlawful if it “violates a state or federal statute or constitutional provision.”³ The statute requires and the Commission expects “the parties to Commission proceedings to use reasonable diligence in the preparation and

¹ Order at 1-2, *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 (Ky. P.S.C. October 25, 2023).

² *Id.* at 2 (quoting *Energy Regulatory Comm’n v. Kentucky Power Co.*, 605 S.W.2d 46 (Ky. App. 1980)).

³ *Id.* (quoting *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)).

presentation of their cases and ... to prevent piecemeal litigation of issues.”⁴ The Commission nevertheless enjoys the discretion to grant rehearing to consider new arguments,⁵ particularly where the argument could not reasonably have been raised before. These bases support rehearing here.

B. Certain of the requirements ordered in the Financing Order exceed the authority granted to the Commission by the Securitization Act.

Administrative agencies are statutory creatures,⁶ and as such, any exercise of authority by an agency must be grounded in statute.⁷ An agency is authorized to administer the law as written,⁸ and an agency may not by regulation or other action impose requirements in excess of, or contrary to, those set out in statute.⁹ Nor may an agency alter a statutory definition¹⁰ or employ

⁴ Order at 4, *In the Matter of: Application Of Kentucky-American Water Company For A Certificate Of Public Convenience And Necessity Authorizing Construction Of The Northern Division Connection*, Case No. 2012-00096 (Ky. P.S.C. January 23, 2014).

⁵ Order at 2, *In the Matter of: America’s Tele-Network Corp.’s Alleged Violation of KRS 278.535*, Case No. 2000-00421 (Ky. P.S.C. March 23, 2001) (limiting scope of rehearing to new arguments raised in petition).

⁶ *Dep’t for Natural Res. & Env’tl. Protection v. Stearns Coal & Lumber Co.*, 563 S.W.2d 471, 473 (Ky. 1978); *Natural Res. and Env’tl. Protection Cabinet v. 500 Associates, Inc.*, 204 S.W.3d 121, 132 (Ky. Ct. App. 2006).

⁷ *South Central Bell Telephone Co. v. Utility Regulatory Comm’n*, 637 S.W.2d 649, 653 (Ky. 1982) (“legislative grant of power to regulate rates will be strictly construed and will neither be interpreted by implication nor inference”).

⁸ *Johnson v. Correll*, 332 S.W.2d 843, 845 (Ky. 1960)

⁹ *Faust v. Com., Tourism Development Cabinet*, 142 S.W.3d 89, 98 (Ky. 2004) (in excess of statutes); *Natural Res. & Env’tl. Protection Cabinet v. Pinnacle Coal Corp.*, 729 S.W.2d 438, 439 (Ky. 1987) (contravention of statute); *Dep’t for Env’tl. Protection and Natural Res. v. Stearns Coal & Lumber Co.*, 563 S.W.2d 471, 473 (Ky. 1978) (requirement in excess of statute); *Ruby Construction Co., Inc. v. Dep’t of Revenue*, 578 S.W.2d 248, 252 (Ky. Ct. App. 1978) (contravention of statute); *Winston Ford Const. Co., Inc. v. Maggard*, 560 S.W.2d 562, 564 (Ky. Ct. App. 1978) (contravention of statute).

¹⁰ *Sladon v. Shawk*, 815 S.W.2d 404, 405-06 (Ky. Ct. App. 1991).

administrative procedures or remedies not granted by statute.¹¹ Any reasonable doubts concerning an agency's authority to exercise a power is to be resolved against its existence.¹²

1. Directing the placement of the bonds.

KRS 278.674(5)(a) states that “the designated commission staff and any financial advisor providing advice to commission staff shall: (a) Have no authority to direct how the electric utility places the bonds to market...” Instead, KRS 278.674(4)(a) states that the designated representative of the Commission Staff and the Financial Advisor are to provide “input to and collaboration with [Kentucky Power] during the process undertaken to place the secured bonds to market.”

The expansive and broad rights granted to the Commission Staff and its Financial Advisor in the Financing Order contradict that statutory restriction, notwithstanding attempted curative statements in the Financing Order that the activities of designated Commission Staff and the Financial Advisor do not constitute directing the placement of securitized bonds.¹³

The rights that the Financing Order affords the Commission Staff and the Financial Advisor that exceed statutory authority include the direct participation in and approval of the process for selecting significant transaction participants, including equal rights to select underwriters and counsel to underwriters; the right to participate in and have joint decision making over the structuring, marketing, and pricing of the bonds; and in the approval of all drafts of the primary transaction documents.¹⁴ Specifically with respect to underwriters and underwriters' counsel, the

¹¹ *Revenue Cabinet v. Cherry*, 803 S.W.2d 570, 572-73 (Ky. 1990); *Flying J Travel Plaza v. Com.*, 928 S.W.2d 344, 347 (Ky. 1996) (“the authority of the agency is limited to the direct implementation of the functions assigned to the agency by the statute.”).

¹² *United Sign, Ltd. v. Com.*, 44 S.W.3d 794, 798 (Ky. Ct. App. 2000); *Northern Ky. Emergency Medical Services, Inc. v. The Christ Church Hosp. Corp.*, 875 S.W.2d 896, 898 (Ky. Ct. App. 1993).

¹³ Financing Order at 82.

¹⁴ *Id.* at 103, 116-117.

selections of those entities are the method of placing the bonds. The Commission’s grant of equal rights to its agents in making these decisions gives authority to the Commission Staff and Financial Advisor that, under the Securitization Act, those entities do not have. Commission Staff and the Financial Advisor would be empowered to direct how Kentucky Power places the bonds because Kentucky Power would be required to accept the direction of the Commission’s Staff and Financial Advisor or the transaction could not move forward. The Commission’s grant of such rights over participant selection goes beyond what KRS 278.674(4)(a) and 278.674(5)(a) permit and therefore impermissibly exceeds the authority granted to the Commission by statute.

In addition to the decision making rights over transaction participants, the Financing Order also grants Commission Staff and the Financial Advisor expansive approval rights during the issuance process, including the right to (a) “participate visibly, and in advance, in all aspects of structuring, marketing, and pricing the securitized bonds approved in [the] Financing Order,”¹⁵ (b) “be joint decision makers in all aspects of the structuring, marketing, and pricing of the securitized bonds,”¹⁶ and (c) “review, advise, and approve as [therein] set forth with respect to the proposed forms of all Basic Transaction Documents.”¹⁷ By granting these rights for direct participation and approval of the bond issuance process from start to finish, the Commission effectively gives Commission Staff and the Financial Advisor the power to direct Kentucky Power on how to place the bonds to market – power that under the Securitization Act, Staff and the Financial Advisor do not have. Again, if Kentucky Power does not follow Commission Staff’s and the Financial Advisor’s directions, Kentucky Power cannot move forward with the transaction.

¹⁵ *Id.* at 113.

¹⁶ *Id.* at 117.

¹⁷ *Id.* at 114 (emphasis added).

The Commission's grant of such rights over the issuance process goes beyond what KRS 278.674(4)(a) and 278.674(5)(a) permit and therefore impermissibly exceeds the authority granted to the Commission by statute.

In addition, based on American Electric Power Company, Inc.'s ("AEP") past securitization experience, the rights granted in the Financing Order described above are likely to lead to an unnecessarily drawn-out transaction process. If the transaction process is unnecessarily drawn out, in addition to the incurrence of additional fees over time (and thus greater financing costs to securitize), the risk of not closing the transaction also would increase. Such risk may, among other things, manifest itself in (a) the inability of the transaction parties to reach agreement as to a demand from the Financial Advisor on a certification, opinion, disclosure document, or investor presentation; (b) the inability of a Commission-selected transaction participant to perform critical services as quickly or effectively as a participant with an existing relationship with Kentucky Power; and (c) the unavailability of valuable underwriters who are being asked to market bonds in a specific manner that may be contrary to such underwriter's process and market standards. A main priority for Kentucky Power during this process has been, and will continue to be, to ensure that Kentucky Power customers receive the greatest benefit possible, as soon as possible, from the securitization process. Narrowly tailoring the requirements of the Financing Order in line with the Securitization Act to produce the most efficient process possible will ultimately benefit Kentucky Power customers.

Kentucky Power thus requests rehearing on the authority granted to the Commission, Commission Staff, and/or the Financial Advisor in the Financing Order, and respectfully requests that the Commission modify the Financing Order provisions described above to 1) eliminate Commission Staff's and the Financial Advisor's joint decision making authority to direct the

placement of the bonds, and 2) instead grant rights only of input and collaboration, as provided in KRS 278.674(4)(a). Kentucky Power most certainly encourages input and collaboration from Commission Staff and the Financial Advisor in order to improve and confirm the securitization process. However, Kentucky Power's main goals are for the process to proceed in accordance with Kentucky law and to bring the greatest benefit of securitization to Kentucky Power customers as quickly as possible. The modifications requested herein will have the effect of bringing the Financing Order into compliance with the requirements of the Securitization Act and will minimize unnecessary delays and increased costs in the process.

2. Bond classification and presentation.

KRS 278.670(16) defines "securitization" to mean "a structured process where interests in debt instruments or other receivable income are packaged, underwritten, and sold as asset-backed marketable securities ..." ¹⁸ Since Bloomberg's reclassification of utility recovery bonds as asset-backed securities in August 2022, utility recovery bonds have been marketed as asset-backed securities in some instances, as corporate bonds in others, and as municipal bonds when applicable.

The Commission nonetheless ordered in the Financing Order that the bonds must be presented to investors as corporate bonds rather than leaving the marketing decision to the underwriters and Kentucky Power as required by the Securitization Act. This directive is inconsistent with KRS 278.670(16) and again goes against the prohibition in KRS 278.674(5)(a) restricting the Commission Staff and the Financial Advisor from directing the placement of securitized bonds. Therefore, this aspect of the Financing Order also impermissibly exceeds the authority granted to the Commission by statute.

¹⁸ (Emphasis added).

In addition, given Bloomberg's reclassification of utility recovery bonds noted above, ordering Kentucky Power to market the bonds as corporate bonds despite their classification by some investors as asset-backed securities in the market creates marketing and closing risk. For example, Kentucky Power would be required to present the bonds as something different than they are viewed and classified by some investors and rating agencies. Thus, the Commission's directive may result in the unavailability of valuable underwriters who may refuse to market bonds in a specific manner that may be contrary to such underwriter's process and market standards. These excluded underwriters may include the most qualified underwriters, who have the best access to purchasers in the bond markets, and therefore can canvas the market most effectively to obtain the best pricing. If qualified underwriters exclude themselves from the process because they would be forced to market bonds in a manner that does not follow market practice or their internal guidance, rather than having the ability to approach whichever market will ensure the lowest cost, then higher costs can be expected, to the detriment of Kentucky Power customers.

Kentucky Power thus requests rehearing and respectfully submits that the Commission should modify the Financing Order to be consistent with KRS 278.670(16) to provide flexibility to Kentucky Power and the underwriters to decide whether the securitized bonds are presented as asset-backed securities or corporate bonds.

3. Post-issuance review.

KRS 278.678(8) states that upon the earlier of the transfer of the securitized property or issuance of the bonds, the financing order is irrevocable and, other than the true-up adjustments, the Commission cannot "reduce, impair, postpone, terminate, or otherwise adjust securitized surcharges approved in the financing order." The definition of "securitized surcharge" in KRS 278.670(2) includes "the amounts authorized by the Commission to repay, finance, or refinance securitized costs and financing costs..."

Although the Financing Order states that the Commission may not modify the securitized surcharges for excess costs, the Financing Order nonetheless provides the Commission with a 120-day period after the issuance of any series of securitized bonds to disallow up-front financing costs at its discretion based on whether the “lowest cost standard” was satisfied. This grant of authority to disallow costs post-closing contradicts the plain language of KRS 278.678(8), which mandates that the Commission cannot “reduce, impair, postpone, terminate, or otherwise adjust securitized surcharges.”

There also are practical implications if these provisions are implemented. While the Financing Order states that the securitized surcharge would not be adjusted for any excess amounts being disallowed, there is a risk that other parties could conclude that the post-closing disallowance implies an incorrectly calculated securitized surcharge based on financing costs that should not have been included, and thus challenge the amount of the securitized surcharge. The risk that any securitized charges might be subject to challenge would increase the risk profile of the bonds, potentially requiring a higher risk premium from bond purchasers that would increase the cost of the bonds to Kentucky Power’s customers. Given this risk, the disallowance power afforded to the Commission in the Financing Order is both potentially disadvantageous to Kentucky Power’s customers and contrary to KRS 278.678(8)’s restriction on reductions and impairments to the securitized surcharges.

Finally, costs are generally managed through careful selection of transaction participants and budgets, with Commission evaluation of overall costs in advance of the transaction. Kentucky Power expects to collaborate with and act on input from the Commission Staff with respect to transaction participants and budgets, to improve and confirm the securitization process. Thus, in

addition to not being contemplated by the Securitization Act, the disallowance process afforded to the Commission in the Financing Order also is unnecessary.

Kentucky Power thus requests rehearing on these issues of the authority granted to the Commission in the Financing Order and modification of the Financing Order to eliminate the potential disallowance of costs post-closing, as the present Financing Order's post-issuance review process has the effect of exceeding the authority granted to the Commission by KRS 278.670 *et seq.*

4. Securitized bond deferral account.

The Financing Order requires Kentucky Power to establish a Securitized Bond Deferral Account for excess amounts paid to Kentucky Power, including, among other things, disallowed up-front financing costs (as discussed in the section above) and excess servicing and administration fees. The balance in the account is required to grow at Kentucky Power's pre-tax weighted average cost of capital ("WACC"). Amounts in this Securitized Bond Deferral Account would be included as revenue credits in each future base rate case for Kentucky Power but cannot directly or indirectly increase Kentucky Power's net income. However, the Financing order does not provide direction on the method for funding the Securitized Bond Deferral Account, including the source of funds to grow the balance at the pre-tax WACC and whether a segregated account would be needed to hold the amounts allocated to such account. Therefore, clarification is necessary because the ambiguity in the operation of the Securitized Bond Deferral Account creates practical implementation issues that Kentucky Power cannot reconcile absent further direction from the Commission.

Absent such clarification, these requirements ordered by the Commission in the Financing Order effectively constitute an impermissible post-approval reduction or adjustment to the

surcharges approved in the financing order. The Commission’s findings therefore are inconsistent with the provisions of KRS 278.678(8), as discussed in the section above.

C. The Financing Order imposes conditions that will increase costs to Kentucky Power’s customers.

1. The Financing Order places conditions on the selection of counsel that will increase costs to Kentucky Power’s customers.

The Financing Order requires that Kentucky Power use a competitive process for selecting underwriters’ counsel and even Kentucky Power’s counsel to support the implementation of the securitized bond transactions.¹⁹ Such process must be designed and approved by the Commission through its Designated Representative and Financial Advisor.²⁰

The Financing Order further states that “Kentucky Power and the Commission’s Designated Representative, advised by the Financial Advisor, shall have equal rights on decisions regarding the hiring of underwriters and counsel to the underwriters.”²¹ Although the Financing Order describes generally factors to be used in evaluating respondents,²² those factors are broad and unspecific, effectively putting the specific parameters and details concerning the competitive process in the hands of the Commission’s Designated Representative and Financial Advisor.

The grant of equal rights to the Commission’s Designated Representative, advised by the Financial Advisor, in the selection of underwriters and underwriters’ counsel is another example of how the Financing Order is contrary to Securitization Act’s restriction on the Commission Staff directing the placement of securitized bonds (as discussed in Section II.B.1 above). Moreover, the

¹⁹ Financing Order at 52, 109.

²⁰ *Id.* at 52.

²¹ *Id.* at 117.

²² *Id.*

selection of underwriters and underwriters' counsel could impact the overall costs of structuring, marketing, and pricing the securitized bonds – costs that Kentucky Power's customers will bear through the Securitization Rider. It will be critical to select underwriters that have experience with Kentucky Power and its affiliates' prior securitization efforts and counsel that are compatible with Kentucky Power's counsel to minimize delays and increase speed and decrease overall costs. The Financing Order's grant of co-equal rights to the Commission's Designated Representative and the Financial Advisor creates the potential that underwriters and underwriters' counsel could be selected without any relationship to Kentucky Power or any of its affiliates' prior securitization efforts. Selection of underwriters and underwriters' counsel without prior experience working with Kentucky Power or its affiliates on securitization efforts will increase costs as the underwriters and counsel get up to speed.

More concerning is the Financing Order's requirement that a competitive process designed and approved by the Commission through its Designated Representative and Financial Advisor must be used for selecting Kentucky Power's securitization counsel.²³ The selection of Kentucky Power's counsel being subject to the competitive process (and thus subject to the Designated Representative's approval), creates potential conflicts of interest and additional up-front financing costs (and thus greater costs to Kentucky Power's customers) as a new firm could be selected to replace Kentucky Power's current counsel, which has completed significant work and is up to speed on the issues relevant to the bond issuance. Kentucky Power has negotiated a fixed fee arrangement with its existing counsel, though unexpected additional costs resulting from Financial Advisor comments and changes to the proposed financing order are not covered by the fixed fee.

²³ *Id.* at 52, 109.

That new firm would need to become familiarized with the documentation that Kentucky Power's current counsel has already prepared and would need to satisfy AEP requirements for outside counsel engagements.

Kentucky Power thus requests rehearing on the rights granted to the Commission in the Financing Order regarding selection of key transaction participants as the rights granted are outside of standard securitization practice, are inappropriate for the reasons set forth above, and could have the effect of increasing cost to be borne by Kentucky Power's customers. The Commission therefore should modify the Financing Order to: (1) eliminate the Commission's, its Designated Representative's, and its Financial Advisor's control over the competitive selection process set forth in the Financing Order; (2) remove the selection of Kentucky Power's counsel from that process; and (3) clarify the specific parameters that that process should include and consider.

2. The Commission's consent rights over amendments to the Basic Transaction Documents could also increase costs.

In addition to approval rights over all drafts of the Basic Transaction Documents, Ordering Paragraph 7 of the Financing Order provides the Commission with a consent right over all amendments to such documents. Additionally, the Financing Documents provide the Commission with third-party beneficiary rights and the authority to declare an Event of Default under the Sale Agreement (Ordering Paragraph 36), Servicing Agreement (Ordering Paragraph 37) and Administration Agreement (Ordering Paragraph 38).²⁴

Such expansive rights in the Basic Transaction Documents go beyond the customary rights granted to commissions in other states, where only certain consent rights are granted to the

²⁴ See also Financing Order at 103.

commissions (*i.e.*, commission consent is customarily only required if an amendment would increase the ongoing financing costs). The expanded set of rights for the Commission included in the Financing Order potentially interfere with the expected rights of bond investors. These expanded rights have the potential to delay the process while investors evaluate the impacts and may result in increased yield demands from investors to compensate them for providing the Commission with rights that are normally reserved to the investors with uncertain impact. The expanded rights will certainly increase the costs in initial documentation for the transaction as novel rights for the Commission are negotiated and documented. Further, unnecessary Commission involvement in non-substantive amendments may result in unnecessary costs.

Kentucky Power thus requests rehearing on the Consent and Default rights granted to the Commission in the Financing Order as the rights granted are outside of standard securitization practice and have the effect of potentially increasing cost to be borne by Kentucky Power's customers. The Commission therefore should modify the Financing Order to eliminate the Commission's approval rights of the Basic Transaction Documents.

D. The Financing Order places conditions on the selection of Kentucky Power's counsel that infringe upon Kentucky Power's constitutional rights.

The Financing Order's directive regarding Kentucky Power counsel impermissibly infringes on Kentucky Power's constitutional right to choose its own counsel. The Order mandates that:

A competitive process shall be used for selecting underwriters, underwriters' counsel, Kentucky Power's counsel, and other significant transaction participants whose fees will be paid from securitized bond proceeds or from the securitized surcharge unless the Commission's Designated Representative, advised by the Financial Advisor, determines that a competitive process should not be used in

selecting particular transaction participants to create the best value for customers in implementing financing of the Project.²⁵

The Financing Order gives the Commission’s Designated Representative and the Financial Advisor involvement in and power over the selection of Kentucky Power’s counsel that it should not, and otherwise would not, have. Due process protects Kentucky Power’s right to counsel of its choosing, even in a civil matter such as this one.²⁶ In particular, “[t]he right to counsel in civil matters ‘includes the right to choose the lawyer who will provide that representation.’”²⁷ Such a right can be overridden only by a state’s “compelling reasons.”²⁸ No compelling reason exists here. First, no evidence exists and the Commission has no reason to believe that Commission involvement (through its agents) in the selection of Kentucky Power’s counsel in this matter is advised or required. Second, Kentucky Power already uses a “competitive process” in choosing legal counsel on all matters, and Commission involvement in that process is unnecessary and inappropriate—whether in this matter or any other matter. Kentucky Power chooses its legal counsel based on a variety of carefully considered factors, including but not limited to the scope

²⁵ Financing Order at 109 (emphasis added).

²⁶ See, e.g., *Powell v. State of Ala.*, 287 U.S. 45, 69 (1932) (“If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.”); *Adir Intl., LLC v. Starr Indem. and Liab. Co.*, 994 F.3d 1032, 1039 (9th Cir. 2021) (“[C]ourts have generally acknowledged a civil litigant’s Fifth Amendment due process right to retain and fund the counsel of their choice.”); *Texas Catastrophe Property Ins. Ass’n v. Morales*, 975 F.2d 1178, 1181(5th Cir. 1992) (“This Court has construed Supreme Court precedent to find ‘a constitutional right to retain hired counsel.’”); *Gray v. New England Telephone and Telegraph Co.*, 792 F.2d 251, 257 (1st Cir. 1986) (“While right to counsel in the criminal and civil context are not identical, a civil litigant does have a constitutional right, deriving from due process, to retain hired counsel in a civil case.”); cf. *Cole v. U.S. Dist. Ct. For Dist. of Idaho*, 366 F.3d 813, 817 (9th Cir. 2004) (“Parties normally have the right to counsel of their choice, so long as the counsel satisfy required bar admissions . . .”).

²⁷ *Texas Catastrophe*, 975 F.2d at 1181 (quoting *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1257 (5th Cir.1983)); see also *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Com’n*, 837 F.2d 600, 618 (3d Cir. 1988) (“[W]here the right to counsel exists, the due process clause of the fifth amendment does provide some protection for the decision to select a particular attorney.”).

²⁸ *Texas Catastrophe*, 975 F.2d at 1181.

of services required, whether that counsel can provide the required scope of services, the cost for those services, any past experience with that counsel or the quality of past service, and whether any conflicts of interest exist that would impact Kentucky Power or the rendering of those services. For these reasons, the Financing Order also should be amended to avoid infringing on Kentucky Power's due process right to choose its own counsel.

III. CONCLUSION

The Company respectfully submits that rehearing or clarification is warranted on each of the above issues. The rehearing process is appropriate to address such issues, and the Company requests and appreciates the Commission's further consideration of them. Accordingly, for the reasons set forth above, the Commission should modify its Financing Order to address each of the issues identified herein.

Respectfully submitted,



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