

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

In the Matter of:

Electronic Tariff Filing Of Kentucky Power)	
Company To Update Its Purchase Power Adjustment)	Case No. 2023-00318
Rates)	

MOTION OF KENTUCKY POWER COMPANY FOR PARTIAL REHEARING

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I. INTRODUCTION

Pursuant to KRS 278.400 and other applicable law, Kentucky Power Company (“Kentucky Power” or the “Company”) respectfully submits this motion for rehearing of the Public Service Commission of Kentucky’s (“Commission”) June 14, 2024 Order (the “Order”). As set forth below, the Commission’s Order requires rehearing for three main reasons. First, the Commission’s statements within the Order concerning the amount of the Tariff P.P.A. Under-Recovery Regulatory Asset to be recovered through securitization appear inconsistent with its findings in the orders in Case No. 2023-00159. Second, the Commission’s factual findings with respect to how the Tariff P.P.A. rate, and the associated true-up, are calculated (which underpin the Commission’s denials in this case) are incorrect and are not supported by record evidence. Finally, the modifications to the Tariff P.P.A. rate calculation ordered by the Commission appear to effectively eliminate, without notice to Kentucky Power or customers, the true-up mechanism in the Commission-approved Tariff P.P.A. The effective elimination of the true-up provision, including the requirement to write-off any over- or under-recovery, could also have the effect of preventing the recovery of over \$10 million of prudently-incurred, FERC-approved costs.

The Commission should grant rehearing to correct each of these issues and, because of the materiality of the issues raised on rehearing to Kentucky Power’s financial condition, the Company requests expedited review on rehearing.

II. 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 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.

III. MOTION FOR PARTIAL REHEARING

A. Factual and Procedural Background

1. Tariff P.P.A, generally.

The Commission initially approved Tariff P.P.A. in October 2013.⁶ Since its inception, Tariff P.P.A. has authorized Kentucky Power to collect the net cost of any power purchases not recovered through the Company’s Fuel Adjustment Clause, subject to periodic adjustment and Commission review and approval. Beginning in January 2018 and through January 15, 2024, the Commission authorized Kentucky Power to track and collect through Tariff P.P.A. 80%, and later

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)).

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 Case No. 2012-00578, Order at 43 (Ky. P.S.C. Oct. 7, 2013); *id.* at Appendix A, Exhibit 5.

100%, of the Company’s FERC-approved net annual PJM load-serving entity Open Access Transmission Tariff (“PJM LSE OATT”) expense above or below a level of such costs included in the Company’s base rates.⁷ The Commission further authorized Kentucky Power to defer and later collect through Tariff P.P.A. certain costs that Kentucky Power incurred pursuant to its FERC-approved Rockport Unit Power Agreement with AEP Generating Company (the “Rockport UPA”).⁸

The Commission-approved Tariff P.P.A. includes a true-up mechanism, which on a cumulative basis, should result in collection of actual costs authorized for recovery through rates. As a result of the authorized true-up mechanism for Tariff P.P.A., and consistent with Financial Accounting Standards Board (FASB) Accounting Standards Codification (ASC) 980, Regulated Operations, Kentucky Power defers the cumulative monthly difference between actual Tariff P.P.A. revenues and actual costs authorized for recovery through Tariff P.P.A. as a regulatory asset (“Tariff P.P.A. Under Recovery Regulatory Asset”) or regulatory liability (“Tariff P.P.A. Over Recovery Regulatory Liability”). This deferral—a regulatory asset or regulatory liability—is a timing difference between incurred costs and revenues, and is commonly referred to as under/over recovery. In contrast, base rates are established using a historic test year and ratemaking adjustments to reflect an ongoing level of costs, without true-up.

2. The Tariff P.P.A. annual filing and the Company’s requests in this proceeding.

⁷ Case No. 2017-00179, Order at 53-54 (Ky. P.S.C. Jan. 18, 2018) (authorizing 80% tracking and recovery of FERC Jurisdictional Transmission Costs); Case No. 2020-00174, Order at 63 (Ky. P.S.C. Jan. 13, 2021) (authorizing 100% tracking and recovery of FERC Jurisdictional Transmission Costs); Case No. 2023-00159, Order at 37 (Ky. P.S.C. Jan. 19, 2024) (approving KPCo’s proposal to discontinue the tracking and recovery through Tariff P.P.A. of FERC Jurisdictional Transmission Costs).

⁸ Case No. 2017-00179, Order at 37-40 (Ky. P.S.C. Jan. 18, 2018) (authorizing deferral of Rockport UPA expense); *id.* at 66 (expressly recognizing that the Rockport UPA is a FERC-approved agreement); Case No. 2022-00283, Order at 12-13 (Ky. P.S.C. Dec. 8, 2022) (authorizing recovery of the Rockport Deferral Regulatory Asset through Tariff P.P.A. over five years).

Kentucky Power makes an annual filing to establish Tariff P.P.A. rates based on a rate calculation formula. Through the annual filing, the Company essentially establishes reasonable proxy rates for the period the rate is to be in effect.

Prior to Kentucky Power requesting to modify the Tariff P.P.A. rate calculation formula in this proceeding, the true-up component of the rate calculation was not resulting in collection of actual costs authorized for recovery through Tariff P.P.A. rates. Rather, the true-up component of the rate calculation was calculated by comparing proxy revenues from the prior annual filing to actual historic revenues collected, without consideration of actual costs authorized for recovery. Thus, during periods in which actual Tariff P.P.A. revenues were less than the actual costs incurred and authorized for recovery pursuant to the terms of Tariff P.P.A., those costs were not reflected in Tariff P.P.A. rates established based on the approved rate calculation form, and were instead accumulated in the Tariff P.P.A. Under Recovery Regulatory Asset for future recovery. A significant under-recovery accumulated several years in a row. As of May 31, 2023, the amount of the cumulative under-recovery in the Tariff P.P.A. Under Recovery Regulatory Asset was approximately \$50.5 million. Without a change to the way the Tariff P.P.A. rate calculation worked, or some other avenue of recovery, those costs would remain unrecovered, and additional under-recovered costs going forward would continue to grow and not be recovered. Indeed, as the Company demonstrated in its response to AG-KIUC 1-4⁹ in this proceeding, the balance of the Tariff P.P.A. Under Recovery Regulatory Asset grew from approximately \$50.5 million as of May 2023 to approximately \$52 million as of June 2023.

Therefore, in this proceeding, the Company requested a simple change to the true-up component of the Tariff P.P.A. rate calculation in order to fix this issue. The Company proposed

⁹ Filed October 26, 2023.

to use the cumulative Tariff P.P.A. Under/Over Recovery Regulatory Asset/Liability balance at the end of June of the current year (which represents the cumulative under/over-collection based on actual revenues *and* costs) as amount to be trued-up, instead of the prior rate calculation method which does not result in collection of actual costs authorized for recovery. The Company’s request would not change the Tariff P.P.A; rather it would modify the Tariff P.P.A. rate calculation form in order to comply with the Commission-authorized tariff and fully recover both actual costs incurred and intended to be recovered.¹⁰

In addition to this modification, Kentucky Power proposed to use a Tariff P.P.A. under/over-recovery balance of zero for purposes of establishing Tariff P.P.A. rates, in order to reflect the removal of those costs from recovery through Tariff P.P.A., and that those costs instead would be securitized and collected through the Securitization Financing Rider,¹¹ as approved in Case No. 2023-00159.¹²

Kentucky Power also proposed two “phases” of the Tariff P.P.A. rate in order to reflect, at the appropriate times, separate proposed and approved changes to the Tariff P.P.A. rate.¹³ Included in these phases was the reflection of 1) the crediting of the Rockport Fixed Cost Savings for the period December 6, 2022 through December 31, 2022 (the “stub period”), 2) new base rates approved by the Commission in Kentucky Power’s most recent rate case, Case No. 2023-00159,

¹⁰ See 20230920_KPCo_PPA_2023-08-15_Update 1.xlsx, Tab “PPA Form 1.0,” Updated Lines 12 and 13 (filed Aug. 15, 2023, and filed into the record of this proceeding September 20, 2023).

¹¹ See 20230920_KPCo_PPA_2023-08-15_Update 1.xlsx, Tab “PPA Form 1.0,” Updated Line 13 (filed Aug. 15, 2023, and filed into the record of this proceeding September 20, 2023).

¹² See Orders, *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) A Securitization Financing Order; And (5) All Other Required Approvals And Relief*, Case No. 2023-00159 (Ky. P.S.C. January 11, 2024 “Financing Order”) (Ky. P.S.C. January 19, 2024 (“2023 Rate Case Order”)).

¹³ See 20230920_KPCo_PPA_2023-08-15_Update 1.xlsx, Tab “PPA Form 1.0,” Tab “PPA Form 2.0 P1,” and Tab “PPA Form 2.0 P2.” (filed Aug. 15, 2023, and filed into the record of this proceeding September 20, 2023).

and 3) collection of the Rockport Offset True-Up amounts contemplated in Case No. 2022-00283¹⁴ and which Kentucky Power currently is seeking to implement in Case No. 2024-00016.¹⁵ These phases are separate from the Company's request to modify the Tariff P.P.A. rate calculation to resolve the unrecovered costs issue, and they were included to actually reflect the implementation of other proposals at the correct time.

3. Securitization and recovery of the Tariff P.P.A. Under-Recovery Regulatory Asset.

The Company requested to set the Tariff P.P.A. under-recovery balance to zero for purposes of establishing Tariff P.P.A. rates so that those amounts could be recovered through the Securitization Financing Rider approved in January 2024 in Case No. 2023-00159. That request was based on the Company's understanding that the Commission's January 11, 2024 Financing Order in Case No. 2023-00159 authorized Kentucky Power to securitize and recover the total Tariff P.P.A. under-recovery amount as of the date of securitization, such that after securitization the under/over amount to be collected through Tariff P.P.A. going forward would indeed start from zero.

In Case No. 2023-00159, the Company proposed to securitize and recover the total "Tariff P.P.A. Under-Recovery Regulatory Asset," the balance of which as of May 31, 2023, was approximately \$50.5 million.¹⁶ The Company included the amount of the regulatory asset as of May 31, 2023 because the securitization statute, specifically KRS 278.672(1), allowed

¹⁴ *In The Matter Of: Electronic Investigation Of Kentucky Power Company Rockport Deferral Mechanism*, Case No. 2022-00283.

¹⁵ *In The Matter Of: Electronic Application Of Kentucky Power Company For: (1) Approval Of The Rockport Offset True-Up Amount; (2) Approval To Collect The Rockport Offset True-Up Through Tariff Purchase Power Adjustment; And (3) All Other Required Approvals And Relief*, Case No. 2024-00016.

¹⁶ Case No. 2023-00159, Application at 17-19, *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) A Securitization Financing Order; And (5) All Other Required Approvals And Relief* (June 28, 2023).

securitization of regulatory assets “existing and with a value calculated as of June 30, 2023, as...(b) Having a cumulative total value of greater than two hundred and seventy-five million (\$275,000,000) for multiple regulatory assets.”¹⁷ Because Tariff P.P.A. revenues and costs as of June 30, 2023 were not known at the time the application was filed in that case, the expected amount of the Tariff P.P.A. Under-Recovery Regulatory Asset that was included with the application represented the May 2023 actual balance.¹⁸

In its January 11, 2024 Financing Order in Case No. 2023-00159, the Commission authorized the Company to issue securitized bonds “in an aggregate principal amount equal to the Securitizable Balance at the time of issuance plus certain up-front financing costs.”¹⁹ The Commission recognized that the Tariff P.P.A. Under-Recovery Regulatory Asset “is a regulatory asset resulting from accrual accounting for a rider with a true-up provision, not a regulatory asset explicitly approved by the Commission to defer expenses for future recovery,” and confirmed that it was a securitizable regulatory asset, and thus includable in the Securitizable Balance.²⁰ The January 11, 2024 Financing Order further recognized that “[t]he deferred costs for regulatory assets comprising the Securitizable Balance are described, with estimates,” in Table I of the Financing Order,²¹ and that the amount of each regulatory asset identified in Table I represented the regulatory asset’s “expected balance as of June 30, 2023.”²²

¹⁷ Emphasis added.

¹⁸ See Case No. 2023-00159, Application at 19, *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) A Securitization Financing Order; And (5) All Other Required Approvals And Relief* (June 28, 2023).

¹⁹ Financing Order at 49 (emphasis added); see also *id.* at 44, 97-98.

²⁰ *Id.* at 96; see also *id.* at 3 (defining “Securitizable Balance”).

²¹ *Id.* at 11 (emphasis added).

²² *Id.* at 12-13.

4. The Commission's June 14, 2024 Order.

The Commission's June 14, 2024 order ("Order") in this proceeding granted in part and denied in part Kentucky Power's proposed 2024-2025 Tariff P.P.A. rate.

The Commission held that that the "proposed treatment of the Rockport Fixed Cost Savings for the stub period should be accepted," and that it would "appropriately credit the stub period over the Phase 1 rates."²³ Kentucky Power does not seek rehearing on this issue.

The Commission also found that the "change to the over/under recovery calculation should be denied."²⁴ In support of that finding, the Commission stated that:

The Commission does not agree with this change as it compares the wrong periods for the calculation. Kentucky Power stated that the change was necessary because currently the under-recovery grows every month, however that is the expected result of declining billing determinants and inclining expenses. Further, Kentucky Power is referring to the regulatory asset balance for the under-recovery, which is never truly settled due to the use of historical billing determinants that are consistently lower each year. Kentucky Power calculates the regulatory asset balance by comparing the current year's revenues, which are based on the previous year's expenses, to the current year's expenses. The Commission finds that Kentucky Power should use forecasted billing determinants to calculate the Tariff P.P.A. rates on a going forward basis. The Commission also finds that Kentucky Power should write off the portion of the over/under recovery from the previous year that will not be recovered through Tariff P.P.A. when Kentucky Power makes its annual filing. These changes together should lessen the total under-recovery and prevent the regulatory asset from growing each year in a way that is not recovered through the Tariff P.P.A. Because Kentucky Power included the 2023 under-recovery in the regulatory asset to be securitized, with the exception of June 2023, and does not propose an under-recovery in this filing, no changes are required to the proposed Tariff P.P.A. rates at this time.²⁵

Because the under-recovery balance continued to grow and be accumulated in the Tariff P.P.A. Under-Recovery Regulatory Asset between May 2023 and May 2024, as explained in more

²³ Order at 6.

²⁴ *Id.*

²⁵ *Id.* at 6-7.

detail below, the Commission's Order appears to direct the Company write off the approximately \$10.3 million that accumulated during that time.

Kentucky Power seeks rehearing on this issue for each of the reasons set forth below.

B. The Commission should grant rehearing to clarify its characterization of Case No. 2023-00159 in the Background section of the Order.

The Commission's characterization of its January 11, 2024 Financing Order in Case No. 2023-00159 in the Background section of the June 14, 2024 Order²⁶ is ambiguous and appears inconsistent with the Financing Order. As detailed in Section III.A.3 above, the Financing Order authorizes Kentucky Power to securitize the balance of the regulatory assets identified in the Financing Order, including the Tariff P.P.A. under-recovery balance, as of the date of issuance of the securitized bonds.

Kentucky Power seeks rehearing on this issue in order to resolve any ambiguity and to correct the statements in the Order to be consistent with the findings in the Commission's Financing Order in Case No. 2023-00159. Thus, the Company respectfully submits the following proposed revisions to the June 14, 2024 Order to harmonize the Order's characterization of the Financing Order and the Financing Order itself:

1. The Commission should modify the first full paragraph of Page 4 of the June 14, 2024 Order as follows:

In Case No. 2023-00159, Kentucky Power requested that its cumulative under-recovery regulatory asset for Tariff P.P.A., ~~through May 2023~~as of the date of issuance of the securitized bonds, be part of the regulatory assets for which it sought securitization. Approval to seek securitization was granted.

2. In the event that the Commission does not grant the Company's request to modify the Order with respect to the apparent elimination of the true-up mechanism in Tariff P.P.A., as

²⁶ *Id.* at 4.

discussed below in Section III.D., the Commission also should modify Ordering Paragraph 4 on Page 7 of the Order as follows:

From the date of its next effective Tariff P.P.A. rates, Kentucky Power shall write off any remaining Tariff P.P.A. under/over recovery that will not be recovered through the Tariff P.P.A. rates or securitization.

C. The Commission should grant rehearing to correct its findings with respect to how the Tariff P.P.A. rate was historically calculated.

The Commission should grant rehearing to correct its findings with respect to how Tariff P.P.A. operates, including how the rate was calculated and true-up, consistent with the Commission-approved Tariff P.P.A. and the evidentiary record in this case. Specifically, the Commission’s Order holds, “Tariff P.P.A. is calculated on historical expenses, so there is no true-up for expenses because they are finalized before the filing is made,”²⁷ and “Kentucky Power calculates the regulatory asset balance by comparing the current year’s revenues, which are based on the previous year’s expenses, to the current year’s expenses.”²⁸ These holdings, which underpin the Commission’s denials in this case, are factually inaccurate and are not based upon the record evidence.

When determining the proxy (or estimated) Tariff P.P.A. rate for the forthcoming year, Kentucky Power used estimated revenues *and* expenses. However, when calculating the true-up to be collected or credited through rates, the Company only compared actual revenues to estimated revenues and collected or credited that amount through the true-up. Under the previous formula, any variance of actual costs from estimated costs was not reflected in rates. Because under-recovered costs were not reflected in rates for multiple years, the Tariff P.P.A. Under Recovery Regulatory Asset grew year-over-year.

²⁷ *Id.* at 6.

²⁸ *Id.* at 6-7.

Although the Commission’s Order seemingly recognizes the fact that the current Tariff P.P.A. rate calculation does not fully recover all expenses actually incurred and authorized for recovery, the Commission’s Order appears to attribute that failure to its conclusion that the expenses are increasing year-over-year,²⁹ and not to the fact that the current formula lacks the necessary function to effect their recovery. Indeed, regardless of whether the expenses are increasing year-over-year or not, they are recoverable and are intended to be recovered through the Commission-approved Tariff P.P.A. true-up mechanism.³⁰ Absent the Tariff P.P.A. rate calculation formula issue, they otherwise would have and should have been recovered pursuant to their accumulation in the under-recovery balance.

The Order next appears to offer an alternative solution, which Kentucky Power did not propose, to the Tariff P.P.A. rate calculation formula issue by ordering Kentucky Power to “use forecasted billing determinants to calculate the Tariff P.P.A. rates on a going forward basis.”³¹ In conjunction with that holding, the Commission orders Kentucky Power to “write off the portion of the over/under recovery from the previous year that will not be recovered through Tariff P.P.A. when Kentucky Power makes its annual filing.”³² Reading these two mandates together, the Commission’s Order appears to eliminate the Tariff P.P.A. true-up mechanism altogether, given that Kentucky Power would be required to use forecasted billing determinants and then write-off the balance that was not recovered through Tariff P.P.A. (which Kentucky Power understands to mean the over- or under-recovery regulatory liability/asset from the previous year). Under this

²⁹ *See id.* at 6 (“[C]urrently the under-recovery grows every month, however that is the expected result of declining billing determinants and inclining expenses. Kentucky Power is referring to the regulatory asset balance for the under-recovery, which is never truly settled due to the use of historical billing determinants that are consistently lower each year...”)

³⁰ *See* Tariff P.P.A., No. 13 Original Sheets No. 31-2 and 31-3 (eff. Jan. 16, 2024).

³¹ Order at 7.

³² *Id.*

construct, after any write-off, there would never be any amounts to either credit to or recover from customers via a true-up.³³

As set forth above, the Commission’s findings with respect to this issue are not factually accurate or based upon record evidence, and the Commission should grant rehearing to either correct the findings consistent with Kentucky Power’s descriptions herein, or to take the evidence necessary to correct the findings.

D. The Order’s modifications to Tariff P.P.A. are inconsistent with Kentucky law.

The Commission’s orders to “use forecasted billing determinants to calculate the Tariff P.P.A. rates on a going forward basis,” and to “write off the portion of the over/under recovery from the previous year that will not be recovered through Tariff P.P.A. when Kentucky Power makes its annual filing,” when read together, appear to eliminate the Tariff P.P.A. true-up mechanism. If implemented as directed, after any write-off, there would never be any amounts to either credit to or recover from customers via a true-up.³⁴ The Commission should grant rehearing on this issue to modify these holdings for several reasons.

1. The Commission’s Order is unlawful and unreasonable because it disallows utility expenses without reasoned explanation.

Under Kentucky law, “parties subject to the regulatory authority of the Commission” are protected “from arbitrary and capricious action.”³⁵ Commission decisions must therefore be

³³ Attached as **EXHIBIT 1** to this motion is an illustrative example of the over/under recovery under Tariff P.P.A. showing how the over/under recovery works currently, how the Company proposed to update the over/under recovery in this proceeding, and the Company’s interpretation of the Commission’s directive in its June 14, 2024 Order.

³⁴ As written, the Commission’s order to write off the portion of the over/under recovery from the previous year that will not be recovered through Tariff P.P.A. when Kentucky Power makes its annual filing, means that if there is an over-recovery, then customers would be due no refund. The Commission’s Order, therefore, could be read as incentivizing the Company to over-forecast rather than risk having to write off any under-recovery.

³⁵ *Pub. Serv. Comm’n of Kentucky v. Dewitt Water Dist.*, 720 S.W.2d 725, 728 (Ky. 1986).

supported by “substantial evidence”³⁶ and “determined by applying a reasonableness analysis.”³⁷ The Order fails to meet these bars.

Kentucky’s basic ratemaking principles allow utilities to recover their prudently incurred costs.³⁸ The Order nonetheless directs Kentucky Power to write-off more than \$10 million of prior-year deferred costs without reasoned explanation. The Commission does not question either that Kentucky Power has a right to recover those costs or that they are prudent. Nor would anything in the record support findings to the contrary. Rather, the Commission’s only explanation is to state the truism that the write-off “should lessen the total under-recovery and prevent the regulatory asset from growing....”³⁹ Although the write off, like any disallowance, would assuredly have this effect, this description of the impact of the Commission’s Order is no justification for the disallowance itself.

Because the Order provides no justification for the directive to write off under-recoveries going forward, it is unlawful and unreasonable. The Commission must grant rehearing and allow Kentucky Power to recover its costs.

2. The Commission’s Order fundamentally alters Tariff P.P.A. by eliminating, without notice to Kentucky Power or its customers, the existing true-up mechanism.

The Commission’s Order goes beyond the relief requested by Kentucky Power in this proceeding. Kentucky Power requested to make a simple modification to the Tariff P.P.A. rate calculation formula in order to effect the true-up provision present in the Commission-approved Tariff P.P.A. Instead, the Commission’s requirement to forecast Tariff P.P.A. rates, in conjunction

³⁶ *Pub. Serv. Comm’n of Kentucky v. Com.*, 320 S.W.3d 660, 665 (Ky. 2010).

³⁷ *Louisville/Jefferson Cnty. Metro Gov’t v. TDC Grp., LLC*, 283 S.W.3d 657, 661 (Ky. 2009).

³⁸ *See, e.g.*, K.R.S. 278.030(1); Case No. 2021-00004, Order at 9 (May 3, 2022) (“[T]he Commission’s review involves whether the costs were prudently incurred.”).

³⁹ Order at 7.

with the requirement to write off any over or under recovery, has the effect of impermissibly eliminating the true-up provision of Tariff P.P.A. altogether, and makes Tariff P.P.A. operate instead like base rates.

The Commission's Order eliminates the true-up mechanism without notice to the Company or its customers, in violation of well-established due process principles. Section 2 of the Kentucky Constitution and the due process clause of the Fourteenth Amendment to the United States Constitution guarantee all litigants before the Commission the right to know the issues and evidence being considered, and the opportunity to put on evidence to support their position and to test, explain, and/or refute any evidence to the contrary.⁴⁰ Kentucky Power was provided no notice that the Commission was considering making such a drastic alteration to the existing true-up mechanism and to Tariff P.P.A., generally. The Commission was required to provide Kentucky Power with such notice, and its failure to do so renders the Commission's order unlawful and unreasonable in violation of state and federal law.⁴¹

The Commission should grant rehearing to cure these violations by amending its Order consistent with Kentucky Power's proposals in this proceeding to modify the Tariff P.P.A. rate calculation formula.

3. The Commission's Order violates the filed rate doctrine and the rule against retroactive ratemaking.

The Commission's elimination of the true-up mechanism and fundamental alterations to Tariff P.P.A., without notice to Kentucky Power of its intention to do so, impermissibly violate the filed rate doctrine and the rule against retroactive ratemaking.

⁴⁰ *Kentucky American Water Co. v. Commonwealth ex rel. Cowan*, 847 S.W.2d 737, 741 (Ky. 1993); *Utility Regulatory Comm'n v. Kentucky Water Service Co., Inc.*, 642 S.W.2d 591, 593 (Ky. App. 1982); *Wagoner v. Blair Fork Coal Co.*, 534 S.W.2d 250 (Ky. 1976).

⁴¹ *Id.*

“The filed rate doctrine forbids utilities from charging rates other than those properly filed with the Commission.”⁴² “A corollary to the filed rate doctrine is the rule against retroactive ratemaking, which prohibits the Commission from adjusting current rates to make up for a utility’s over- or undercollection in prior periods.”⁴³ The Commission has interpreted KRS 278.160 as codifying the filed rate doctrine and emphasized that it is “strictly enforced.”⁴⁴ It has also recognized the rule against retroactive ratemaking as a “a fundamental rule of utility rate-making” that mandates “rates are exclusively prospective in application because rate-making is a legislative act.”⁴⁵

These principles are grounded in the purpose of the Commission’s ratemaking authority, which is to provide “stability and notice to all entities involved in the rate process.”⁴⁶ It is “[a] pervasive and fundamental rule underlying the utility rate-making process is that ‘rates are exclusively prospective in nature.’ The rationale for this rule is that the Commission acts in a legislative capacity when exercising its rate-making authority.”⁴⁷ Similarly, under the filed rate doctrine, a utility’s “filed rate”—i.e., “the rate approved by the PSC”—cannot “be altered retroactively by the [Commission].”⁴⁸ Rather, “the filed rate can only be lawfully altered prospectively.”⁴⁹

⁴² *Cogentrix Energy Power Mgt., LLC v. FERC*, 24 F.4th 677, 681 (D.C. Cir. 2022).

⁴³ *Id.* (internal quotes omitted).

⁴⁴ *In the Matter of: Americconnect, Inc. Investigation into the Alleged Violations of KRS 278.020 and KRS 278.160*, 95-220, 1996 WL 34588289 (Ky. P.S.C. June 26, 1996).

⁴⁵ *Id.*

⁴⁶ *Cincinnati Bell Tel. Co. v. Kentucky Pub. Serv. Comm’n*, 223 S.W.3d 829, 838 (Ky. App. 2007).

⁴⁷ *In the Matter of: City of Franklin Complainant*, No. 92-084, 1996 WL 34589769 (Ky. P.S.C. Jan. 18, 1996) (quoting *New England Telephone And Telegraph Co. v. Pub. Util. Comm’n*, 358 A.2d 1 (R.I. 1976)).

⁴⁸ *Cincinnati Bell*, 223 S.W.3d at 839.

⁴⁹ *Id.* (citing KRS 278.270).

The current, Commission-approved Tariff PPA, and all of its contents including the existing true-up mechanism, represent the filed rate. By effectively eliminating the true-up mechanism in Tariff P.P.A. and requiring Kentucky Power to write off more than \$10 million of FERC-approved costs (*see* Section III.E. below), the Commission’s Order violates the filed rate doctrine. The Commission orders Kentucky Power to calculate the Tariff P.P.A. rate in a manner different than that stated in the Commission-approved Tariff P.P.A. currently on file with the Commission. It further orders Kentucky Power to write off prudently-incurred costs that the Commission has approved to be recovered through that same Commission-approved tariff. For the same reasons, the Commission’s Order violates the rule against retroactive ratemaking by altering the tariff in such a way as to retroactively disallow \$10 million of prudently-incurred, FERC-approved costs.⁵⁰

Both the filed rate doctrine and the rule against retroactive ratemaking preclude such overstepping by the Commission, and the Commission should grant rehearing to amend its Order to cure such violations.

E. Absent modification, the Commission’s Order to write-off the under-recovery balance constitutes an unsupported disallowance, results in a trapping of FERC-jurisdictional costs, and violates federal law.

The Commission’s Order also violates federal law because Kentucky Power incurred the costs it must “write off” as a result of FERC-approved tariffs or contracts. Under the Supremacy Clause, the Commission must allow Kentucky Power to pass through those costs and may not second-guess their reasonableness.

⁵⁰ *See* Section III.E.

Section 201(b) of the Federal Power Act (FPA) “vests in [FERC] exclusive jurisdiction”⁵¹ over “the transmission of electric energy in interstate commerce and ... the sale of electric energy at wholesale in interstate commerce[.]”⁵² One consequence of FERC’s exclusive jurisdiction is that “States may not bar regulated utilities from passing through to retail consumers FERC-mandated ... rates.”⁵³ That is because FERC’s “regulation ... pre-empt[s] review by state utility commissions of FERC-approved rates,”⁵⁴ and “[o]nce FERC sets ... a rate, a State may not conclude in setting retail rates that the FERC-approved ... rates are unreasonable.”⁵⁵ Accordingly, “trapping federally mandated costs” is forbidden.⁵⁶

The seminal case on the pre-emptive effect of FERC-approved expenses is *Nantahala Power & Light Co. v. Thornburg*, where the Supreme Court held that the North Carolina Utilities Commission (“NCUC”) was preempted from altering a FERC-approved wholesale power arrangement at retail.⁵⁷ Reviewing filed rate doctrine and preemption principles, the Court noted that “a state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price.”⁵⁸ This, the Court explained, “give[s] effect to Congress’ desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority.”⁵⁹ As applied to

⁵¹ *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 153 (2016).

⁵² 16 U.S.C. § 824(b)(1).

⁵³ *Miss. Power & Light Co. v. Miss. ex rel Moore*, 487 U.S. 354, 372 (1988).

⁵⁴ *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986); *see also* Case No. 2021-00370, Order at 2 (Feb. 3, 2022) (“[O]nce a rate or contract is FERC-jurisdictional, a state is preempted from ruling on or altering that FERC-approved rate or cost allocation methodology.”).

⁵⁵ *Nantahala*, 476 U.S. at 966.

⁵⁶ *Miss. Power & Light Co.*, 487 U.S. at 372.

⁵⁷ *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953.

⁵⁸ *Id.* at 965.

⁵⁹ *Id.* at 966.

Nantahala, the Court found that because the utility could “not fully recover its costs of purchasing at the FERC-approved rate if NCUC’s order is allowed to stand,” the order was impermissible.⁶⁰

Appalachian Power Co. v. Public Service Commission of West Virginia provides a textbook application of *Nantahala*.⁶¹ In that case, the Fourth Circuit considered whether the West Virginia Public Service Commission had authority to consider the prudence of a FERC-approved transmission agreement and disallow recovery of \$1.6 million under it.⁶² The Court quickly answered “no.”⁶³ Finding that “the prudence inquiry the PSC wishes to make is not different from the FERC inquiry into the justness and reasonableness of the” transmission agreement, the court concluded that the “[t]his duplication is impermissible because the issue of the [agreement’s] merits falls within FERC’s exclusive jurisdiction....”⁶⁴ The Court added that “[a]llowing the states to make the kind of prudence inquiry urged in this case” both “would pose the potential for direct conflict with FERC pronouncements [and] also would ... undermine the purposes of federal law.”⁶⁵ Put simply, because the PSC’s decision was “fundamentally at odds with the scheme Congress has established in the FPA,” it “violat[ed] ... the supremacy clause.”⁶⁶

The Commission’s decision here, directing Kentucky Power to write off its under-recovery, is pre-empted because it would trap FERC-approved costs. It is not disputable that FERC costs are recovered through Tariff P.P.A.⁶⁷ Tariff P.P.A. allows Kentucky Power to recover “100% [of]

⁶⁰ *Id.* 970.

⁶¹ *Appalachian Power Co. v. Public Service Commission of West Virginia*, 812 F.2d 898 (4th Cir. 1987).

⁶² *Id.* at 900-01.

⁶³ *Id.* at 903.

⁶⁴ *Id.* at 904.

⁶⁵ *Id.*

⁶⁶ *Id.* at 905.

⁶⁷ Tariff P.P.A., No. 12 Original Sheet No. 35-1 (eff. Jan. 28, 2022); Tariff P.P.A., No. 13 Original Sheet No. 31-3 (eff. Jan. 16, 2024).

[t]he net annual PJM load-serving entity Open Access Transmission Tariff Charges”⁶⁸ and also Rockport UPA costs.⁶⁹ Moreover, Kentucky Power’s submissions in this proceeding show that the Company’s under-recoveries up to January 15, 2024 are driven primarily by FERC expenses.⁷⁰ Because Kentucky Power has been authorized to recover FERC-approved costs through Tariff P.P.A., “Kentucky Power is entitled under law to recover [them] through rates charged to Kentucky Power ratepayers.”⁷¹ A Commission order denying recovery and instead requiring those amounts to be written off directly conflicts with FERC’s determination and is preempted. Rehearing is required to allow Kentucky Power to recover its FERC-approved costs, as required by federal law.

IV. CONCLUSION

For the foregoing reasons, Kentucky Power Company respectfully submits that the Commission should grant rehearing to address the issues identified above and that, because of the materiality of these issues to Kentucky Power’s financial condition, rehearing should occur on an expedited basis.

⁶⁸ Case No. 2020-00174, Order at 60 (Jan. 13, 2021); *see also* Case No. 2017-00179, Order at 53 (Jan. 18, 2018) (“Due to the volatility of the OATT charges and credits, the Commission finds the proposal to include the PJM LSE transmission charges and credits to the costs recoverable through Tariff P.P.A., as modified in the Settlement, reasonable with one modification.”).

⁶⁹ Tariff P.P.A., No. 12 Original Sheet No. 35-1 (eff. Jan. 28, 2022); Case No. 2017-00179, Order at 38 (Jan. 18, 2018) (“This Rockport Deferral Regulatory Asset ... will be recovered through Kentucky Power’s Tariff P.P.A. over five-years starting in December of 2022....”).

⁷⁰ *See, e.g.*, Case No. 2023-00318, Kentucky Power Company’s Third Revised Tariff Sheet 35-2 (Tariff P.P.A.) and Third Revised Tariff Sheet 38-1 (Tariff D.R.), attached [20230920 KPCo PPA 2023-08-15 Update 1.xlsx](#) at sheet PPA Form 3.0a.

⁷¹ Case No. 2021-00370, Order at 3 (Feb. 3, 2022).

Respectfully submitted,



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COMPANY

EXHIBIT 1

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For Illustrative Purposes Only

Current Rider Design						
Year	Cost Proxy for Rate Calculation	True-Up for Rate Calculation	Calculated Rider Revenue Requirement	Actual Cost	Actual Revenue	Actual (Over)/Under Recovery Cumulative <u>Regulatory Asset</u> (Not Yet Recovered in Rates)
A	B = E (Prior Year)	C = D - F (Prior Year)	D = B + C	E	F	G = E - F + G (Prior Year)
0				\$ 100,000,000		
1	\$ 100,000,000	\$ -	\$ 100,000,000	\$ 110,000,000	\$ 99,000,000	\$ 11,000,000
2	\$ 110,000,000	\$ 1,000,000	\$ 111,000,000	\$ 115,000,000	\$ 112,000,000	\$ 14,000,000
3	\$ 115,000,000	\$ (1,000,000)	\$ 114,000,000	\$ 120,000,000	\$ 113,000,000	\$ 21,000,000
4	\$ 120,000,000	\$ 1,000,000	\$ 121,000,000	\$ 125,000,000	\$ 122,000,000	\$ 24,000,000
5	\$ 125,000,000	\$ (1,000,000)	\$ 124,000,000	\$ 130,000,000	\$ 123,000,000	\$ 31,000,000
6	\$ 130,000,000	\$ 1,000,000	\$ 131,000,000	\$ 135,000,000	\$ 131,000,000	\$ 35,000,000
1-6 Total	\$ 700,000,000	\$ 1,000,000	\$ 701,000,000	\$ 735,000,000	\$ 700,000,000	

\$

Proposal in 2023-00318						
Year	Cost Proxy for Rate Calculation	True-Up for Rate Calculation	Calculated Rider Revenue Requirement	Actual Cost	Actual Revenue	Actual (Over)/Under Recovery Cumulative <u>Regulatory Asset</u> (Fully Recovered in Rates on Lag)
A	B = E (Prior Year)	C = G (Prior Year)	D = B + C	E	F	G = E - F + G (Prior Year)
0				\$ 100,000,000		
1	\$ 100,000,000	\$ -	\$ 100,000,000	\$ 110,000,000	\$ 99,000,000	\$ 11,000,000
2	\$ 110,000,000	\$ 11,000,000	\$ 121,000,000	\$ 115,000,000	\$ 122,000,000	\$ 4,000,000
3	\$ 115,000,000	\$ 4,000,000	\$ 119,000,000	\$ 120,000,000	\$ 118,000,000	\$ 6,000,000
4	\$ 120,000,000	\$ 6,000,000	\$ 126,000,000	\$ 125,000,000	\$ 127,000,000	\$ 4,000,000
5	\$ 125,000,000	\$ 4,000,000	\$ 129,000,000	\$ 130,000,000	\$ 128,000,000	\$ 6,000,000
6	\$ 130,000,000	\$ 6,000,000	\$ 136,000,000	\$ 135,000,000	\$ 136,000,000	\$ 5,000,000
1-6 Total	\$ 700,000,000		\$ 731,000,000	\$ 735,000,000	\$ 730,000,000	

\$

Understanding of June 14, 2024 Order						
Year	Cost Proxy for Rate Calculation	Prior Year True-Up for Rate Calculation	Calculated Rider Revenue Requirement	Actual Cost	Actual Revenue	Actual (Over)/Under Recovery Cumulative <u>Expense</u> (Written Off; Not Recovered)
A	B = Forecast	C = Not Applicable	D = B	E	F	G = E - F + G (Prior Year)
1-6	\$ 700,000,000	\$ 1,000,000	\$ 701,000,000	\$ 735,000,000	\$ 700,000,000	\$ 35,000,000
7	\$ 135,000,000		\$ 135,000,000	\$ 138,000,000	\$ 134,000,000	\$ 39,000,000
8	\$ 133,000,000		\$ 133,000,000	\$ 136,000,000	\$ 133,000,000	\$ 42,000,000
9	\$ 131,000,000		\$ 131,000,000	\$ 132,000,000	\$ 130,000,000	\$ 44,000,000
10	\$ 134,000,000		\$ 134,000,000	\$ 133,000,000	\$ 135,000,000	\$ 42,000,000
1-10 Total	\$ 1,233,000,000	\$ 1,000,000	\$ 1,234,000,000	\$ 1,274,000,000	\$ 1,232,000,000	

\$