

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC INVESTIGATION OF THE	)	CASE NO.
SERVICE, RATES AND FACILITIES OF	)	2021-00370
KENTUCKY POWER COMPANY	)	

ORDER

On October 27, 2023, Kentucky Power Company (Kentucky Power) filed a motion requesting that the Commission provide Kentucky Power with notice of the issues and evidence the Commission will consider at a formal hearing scheduled to begin on January 31, 2024, and to amend the procedural schedule to allow for the parties to file written testimony and propound discovery on those issues.

BACKGROUND

The Commission opened this proceeding on September 15, 2021, to conduct a formal investigation of Kentucky Power's provision of service, its rates, and its facilities. The Commission entered Orders on September 15, 2021; September 27, 2021; October 8, 2021; October 28, 2021; November 22, 2021; December 3, 2021; February 3, 2022; and January 10, 2023 that addressed, among other things, the Commission's concerns regarding Kentucky Power's provision of service, its rates, and its facilities. The Order entered on June 23, 2023, stated that, consistent with the purpose of this proceeding to investigate Kentucky Power's ability to meet its legal obligation to provide adequate, efficient and reasonable service pursuant to KRS 278.030(2), Kentucky Power should show cause why it should not be subject to the remedy for failure to provide adequate

service in its service territory under KRS 278.018(3) and why it should not be subject to an assessment of civil penalties under KRS 278.990 for Kentucky Power's alleged violation of KRS 278.030, which requires a utility to provide adequate, efficient and reasonable service to the utility's customers.

On July 21, 2023, Kentucky Power filed a response to the June 23, 2023 Order, arguing that the June 23, 2023 Order was based on an incorrect premise that Kentucky Power failed to provide adequate service. Kentucky Power asserted that it provided adequate service through a combination of owned generation, contracted capacity resources, and participation in PJM Interconnection, LLC (PJM).<sup>1</sup> In its response, Kentucky Power discussed its capacity obligation under PJM's capacity construct, arguing that PJM secures capacity in a quantity sufficient to meet PJM's higher summer peak and that PJM has sufficient capacity and energy to meet PJM's winter peak, including Kentucky Power's demand, as a winter peaking utility.<sup>2</sup> Kentucky Power further discussed its approach to energy market purchases, including its purchase strategy for the winter of 2022/2023.<sup>3</sup> Among other things, Kentucky Power argued that it does not have a statutory requirement in Kentucky to own generation or contract for energy to meet customers' needs, and that Kentucky Power's reliance on the PJM market provides Kentucky Power with sufficient capacity and access to energy to meet customer needs.<sup>4</sup> Kentucky Power filed affidavits from an American Electric Power Service Corporation

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<sup>1</sup> Kentucky Power's Response to Order (filed July 21, 2023).

<sup>2</sup> Kentucky Power's Response to Order at 4.

<sup>3</sup> Kentucky Power's Response to Order at 5–12.

<sup>4</sup> Kentucky Power's Response to Order at 15.

(AEP) executive and from an executive with two other utilities that are subsidiaries of Kentucky Power's parent entity, AEP.

On August 25, 2023, Kentucky Power filed a motion to dismiss the show cause action for its alleged failure to provide adequate service in its service territory under KRS 278.018(3); the motion was denied by Order entered September 27, 2023.

#### LEGAL STANDARD

This case was initiated under KRS 278.250, which authorizes the Commission to investigate the condition of any jurisdictional utility, and KRS 278.260, which authorizes the Commission to investigate the rates or service of a jurisdictional utility on the Commission's own motion.

KRS 278.030(2) establishes an obligation for every jurisdictional utility to furnish adequate, efficient and reasonable service to the utility's customers. KRS 278.010(14) defines adequate service as follows:

"Adequate service" means having sufficient capacity to meet the maximum estimated requirements of the customer to be served during the year following the commencement of permanent service and to meet the maximum estimated requirements of other actual customers to be supplied from the same lines or facilities during such year and to assure such customers of reasonable continuity of service.

KRS 278.010 defines a retail electric supplier, such as Kentucky Power, as an entity engaged in the furnishing of retail electric service. Under KRS 278.016 and KRS 278.017, Kentucky is divided into geographical areas within which each retail supplier provides retail electric service. KRS 278.018(1) states that each retail electric supplier shall have the exclusive right to further retail electric service to all electric-consuming facilities located within the retail electric supplier's certified territory.

KRS 278.018(3) states:

The [C]ommission may, after a hearing had upon due notice, make such findings as may be supported by proof as to whether any retail electric supplier operating in a certified territory is rendering or proposes to render adequate service to an electric-consuming facility and in the event the [C]ommission finds that such retail electric supplier is not rendering or does not propose to render adequate service, the [C]ommission may enter an order specifying in what particulars such retail electric supplier has failed to render or propose to render adequate service and order that such failure be corrected within a reasonable time, such time to be fixed in such order. If the retail electric supplier so ordered to correct such failure fails to comply with such order, the [C]ommission may authorize another retail electric supplier to furnish retail electric service to such facility.

KRS 278.990(1) provides that a utility and the utility's officers, agents, and employees may be subject to the assessment of a civil penalty up to \$2,500 per occurrence per party, upon a finding by the Commission of a willful violation of a statute or regulation the Commission enforces or a Commission Order.

#### KENTUCKY POWER'S MOTION

In its motion, Kentucky Power asserted that due process requires that Kentucky Power be provided the opportunity to know and test the evidence upon which the Commission will make its determination and be afforded the opportunity to make a contrary presentation. Kentucky Power contended that Commission Staff propounded certain data requests regarding distribution and transmission planning, and distribution reliability that are beyond the scope of "generation and energy related allegations" contained in the June 23, 2023 Order.<sup>5</sup> Kentucky Power asserted that the June 23, 2023 Order limited the issue under investigation to Kentucky Power's alleged failure to have

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<sup>5</sup> Kentucky Power's Response to Order at 2.

“sufficient capacity to serve customer’s energy needs following the expiration of the Rockport Unit Power Agreement (UPA) in December 2022.”<sup>6</sup>

Kentucky Power asserted that due process requires the Commission to provide sufficient notice and opportunity for: (1) Kentucky Power to know all evidence the Commission will rely upon; (2) sufficient opportunity to test or refute the evidence upon which the Commission will rely; (3) sufficient opportunity to present its own evidence, including any necessary context or additional information that would inform the evidence relied upon by the Commission; (4) the Commission provide Kentucky Power with notice of its intention to rely on evidence from past proceedings; and (5) for an opportunity for Kentucky Power to test that evidence in the new context of these show cause proceedings and offer evidence of its own in response.<sup>7</sup>

Kentucky Power argued that the current procedural schedule denies it the opportunity to sufficiently address the issues in this proceeding because Kentucky Power is limited to responded to discovery prior to a formal hearing. Kentucky Power requested the opportunity for Kentucky Power, the intervening parties, the Attorney General and Kentucky Industrial Utility Customers, Inc. (KIUC), to file simultaneous written direct testimony in response to the issues presented; to propound discovery on other parties in response to the written testimony, and to file simultaneous rebuttal testimony.<sup>8</sup> Kentucky Power proposed the following amended procedural schedule: (1) Kentucky Power’s responses to initial data requests be filed on November 9, 2023, which is the same as

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<sup>6</sup> Kentucky Power’s Response to Order at 2.

<sup>7</sup> Kentucky Power’s Response to Order at 3.

<sup>8</sup> Kentucky Power’s Response to Order at 5-6.

current procedural schedule; (2) the parties to file simultaneous direct testimonies on December 22, 2023; (3) supplemental data requests from Commission Staff, the Attorney General, and KIUC to Kentucky Power, and initial data requests to the Attorney General and KIUC on December 29, 2023;<sup>9</sup> (4) responses to supplemental and initial data requests on January 12, 2024; (5) simultaneous rebuttal testimonies on January 19, 2024; and (6) the formal hearing be held as scheduled on January 31, 2024, and February 2, 2024.<sup>10</sup>

Kentucky Power stated that it confirmed with counsel for the Attorney General and KIUC that they do not object to the proposed revised procedural schedule.<sup>11</sup> Kentucky Power further stated that the Attorney General and KIUC took no position at this time as to any other aspect of Kentucky Power's motion.<sup>12</sup>

### DISCUSSION AND FINDINGS

Addressing the procedural schedule first, the Commission determined separately from this motion that the procedural schedule should be amended to allow time for Kentucky Power to receive the responses to the 2023 All-Source Purchase Power Agreement (PPA) request for proposals (RFP) for additional capacity resources, which the Commission will ask for in a separate data request. Further, according to Kentucky Power's response to Commission Staff's First Show Cause Issue Requests for Information, Item 2, Kentucky Power will make final bid selection(s) and start negotiations

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<sup>9</sup> State offices are closed on December 29, 2023 and December 30, 2023.

<sup>10</sup> Kentucky Power's Response to Order at 6.

<sup>11</sup> Kentucky Power's Response to Order at 6.

<sup>12</sup> Kentucky Power's Response to Order at 6.

on January 31, 2024. The Commission will want to review the evaluation(s) and bid selection in the context of this proceeding. Given this, the Commission grants Kentucky Power's request and will amend the procedural schedule to permit Kentucky Power, the Attorney General, and KIUC the opportunity to file direct testimony, respond to discovery on that testimony, and to file rebuttal testimony.

The Commission disagrees with the timeframe of the proposed schedule because it allows the parties six weeks to prepare and file written direct testimony on December 22, 2023; limits Commission Staff's and other parties' review of the testimony, and preparation and issuance of data requests to two business days;<sup>13</sup> allows the parties two weeks to prepare and file responses to the data requests; and allows only seven business days to review the rebuttal testimony before the January 31, 2024 hearing. Instead of the schedule proposed by Kentucky Power, the Commission finds that the amended procedural schedule attached as an Appendix to this Order should be followed.

Based on the above, the Commission finds that the hearing scheduled for January 31, 2024, should be rescheduled by separate Order, and that the procedural schedule established on September 14, 2023, should be stricken and the amended procedural schedule as an Appendix to this Order should be followed.

Regarding Kentucky Power's request for notice of the evidence to be considered, in *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292 (1937), a landmark due process case, the U.S. Supreme Court found that due process required

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<sup>13</sup> December 29 and 30, 2023 are State holidays in which executive branch agencies are closed.

notice of the evidence being considered and an opportunity to confront and rebut the evidence presented.<sup>14</sup>

The Commission notes that the purpose of this show cause proceeding is to gather evidence. As set forth in the June 23, 2023 Order, the Commission is gathering evidence whether Kentucky Power is meeting its legal obligation to provide adequate electric service in its service territory, which includes the legal obligation to have sufficient capacity to serve customers' energy needs. The Commission further notes that a due process issue does not exist unless the Commission enters an Order deciding an issue for which the Commission did not provide notice or afford an opportunity to be heard. The evidence that Kentucky Power asserted it is entitled to know is being and continues to be gathered in an open, transparent manner in the processing of this show cause proceeding and is not limited to only the testimony provided at a formal hearing. Further, Kentucky Power will continue to be afforded the opportunity to challenge and rebut the evidence gathered in this proceeding through scheduled procedural events, a hearing, and briefing. For these reasons, the Commission denies Kentucky Power's request for notice because notice is being and continues to be given in this proceeding.

Regarding Kentucky Power's concern regarding Commission Staff's data requests, consistent with KRS 278.110, Commission Staff is not a party to a case but instead has a statutory role of assisting the Commission in an advice-giving function. Under 807 KAR 5:001, Section 4(12), Commission Staff's role includes issuing requests

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<sup>14</sup> The due process issue presented in *Ohio Bell Telephone Co.* was that a regulatory agency rendered a decision without identifying the evidence upon which the agency relied in its determination and without placing the evidence into the case record. The regulatory agency ordered the regulated utility to make customer refunds based upon the unknown evidence. See *Ohio Bell Telephone Co.*, 301 U.S. at 300.



for information to any party to a case. Data requests, whether issued by Commission Staff or another party, are one type of case document that provides notice to the parties regarding issues in a case.

Finally, Kentucky Power requested to know if there were other cases that the Commission would consider in reaching a decision on the show cause proceeding. Given Kentucky Power's reference to its 2019 Integrated Resource Plan (IRP) in its response to the June 23, 2023 Order in its response to Commission Staff's First Show Cause Request for Information, the Commission finds that Kentucky Power's 2019 IRP, Case No. 2019-00443, and Kentucky Power's most recent IRP, Case No. 2023-00092, should be incorporated by reference into this proceeding.<sup>15</sup>

IT IS THEREFORE ORDERED that:

1. Kentucky Power's motion is granted in part and denied in part.
2. Kentucky Power's request to amend the procedural schedule is granted.
3. Kentucky Power's request to be provided with the evidence the Commission will consider is denied.
4. The procedural schedule established on September 14, 2023, for procedural events occurring after November 9, 2023, is stricken and replaced with the amended procedural schedule attached as an Appendix to this Order.
5. The formal hearing scheduled for January 31, 2024, and February 1, 2024, is canceled and will be rescheduled by separate Order.

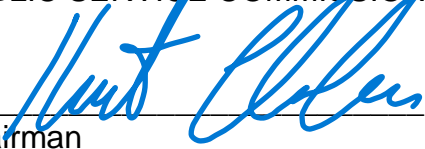
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<sup>15</sup> Case No. 2023-00092, *Electronic 2022 Integrated Resource Planning Report of Kentucky Power Company* (filed March 20, 2023); Case No. 2019-00443, *Electronic 2019 Integrated Resource Planning Report of Kentucky Power Company* (Ky PSC June 4, 2021).

6. The records of Case Nos. 2019-00443 and 2023-00092 are incorporated by reference into the record of this proceeding.

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PUBLIC SERVICE COMMISSION

  
Chairman

  
Vice Chairman

  
Commissioner

ENTERED  
DEC 01 2023  
KENTUCKY PUBLIC SERVICE COMMISSION <sup>rCS</sup>

ATTEST:

  
Executive Director

APPENDIX

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE  
COMMISSION IN CASE NO. 2021-00370 DATED DEC 01 2023

Kentucky Power and Intervenors shall file, in verified form, their  
respective written testimony no later than ..... 12/22/2023

All supplemental requests for information to Kentucky Power and  
Intervenors, respectively, shall be filed no later than ..... 01/17/2024

Kentucky Power and Intervenors shall file their respective  
responses to supplemental requests for information no later than ..... 02/07/2024

Kentucky Power and Intervenors shall file, in verified form,  
their respective rebuttal testimony no later than ..... 02/21/2024

Public Hearing to be held in the Richard Raff Hearing Room  
at the offices of the Public Service Commission at 211 Sower Boulevard,  
Frankfort, Kentucky, for the purpose of cross-examination  
of witnesses of Kentucky Power and Intervenors..... To be scheduled

Post-Hearing Briefs, if any ..... To be scheduled

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