

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC JOINT APPLICATION OF)	
AMERICAN ELECTRIC POWER COMPANY, INC.,)	
KENTUCKY POWER COMPANY AND LIBERTY)	CASE NO.
UTILITIES CO. FOR APPROVAL OF THE)	2021-00481
TRANSFER OF OWNERSHIP AND CONTROL OF)	
KENTUCKY POWER COMPANY)	

ORDER

On May 26, 2022, the Attorney General of the Commonwealth of Kentucky, by and through the Office of Rate Intervention (Attorney General) and Kentucky Industrial Utility Customers, Inc. (KIUC) (jointly, Attorney General/KIUC) filed, pursuant to KRS 278.400, a joint motion for rehearing of the May 4, 2022 Order that approved Liberty Utilities Co.'s (Liberty) acquisition of Kentucky Power Company (Kentucky Power). Attorney General/KIUC alleged there were several material omissions, which are described below.

On June 2, 2022, Kentucky Power and its parent, American Electric Power Company, Inc. (AEP), and Liberty (collectively, Joint Applicants) filed a joint response to the motion for rehearing. The matter now stands submitted for a decision on the written record.

LEGAL STANDARD

KRS 278.400, which establishes the standard of review for motions for rehearing, limits 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. A Commission Order is deemed unreasonable only when "the

evidence presented leaves no room for difference of opinion among reasonable minds.”¹
An Order can only be unlawful if it violates a state or federal statute or constitutional provision.²

By limiting rehearing to correct material errors or omissions, and findings that are unreasonable or unlawful, or to weigh new evidence not readily discoverable at the time of the original hearings, KRS 278.400 is intended to provide closure to Commission proceedings. Rehearing does not present parties with the opportunity to relitigate a matter fully addressed in the original Order.

ARGUMENTS

Attorney General/KIUC requested a rehearing on four issues: (1) requiring Joint Applicants to file a written acceptance or rejection of the Order; (2) the ratemaking treatment for \$30 million transmission regulatory liability; (3) requiring AEP to deposit \$45 million with Liberty; and (4) calculation of Rockport Settlement 2023 “make whole” provision. Attorney General/KIUC asserted generally that the failure to address these issues are material omissions from the May 4, 2022 Order.

Joint Applicants disputed that Attorney General/KIUC satisfied the legal standard for rehearing. Joint Applicants argued that Attorney General/KIUC sought to relitigate issues already litigated and adjudicated, or issues that Attorney General/KIUC could have raised during the pendency of this case, but did not. Joint Applicants contended that the motion for rehearing should be denied.

¹ *Energy Regulatory Comm’n v. Kentucky Power Co.*, 605 S.W.2d 46 (Ky. App. 1980).

² *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).

Written Acceptance or Rejection of Order

Attorney General/KIUC asserted that the omission of a requirement or a deadline for Joint Applicants to file a written acceptance or rejection of what Attorney General/KIUC termed as “conditions” in the May 4, 2022 Order was a material omission. Attorney General/KIUC did not identify the conditions that they requested to be accepted or rejected. Attorney General/KIUC argued that without such a requirement, the Commission and the parties do not have certainty whether Joint Applicants accept or reject the May 4, 2022 Order’s conditions. Attorney General/KIUC further argued that the Commission established a requirement in previous transfer cases for the parties to file written agreement to be bound by conditions established by the Commission.³

Joint Applicants argued that the written acceptance of the May 4, 2022 Order is unnecessary because the Order is binding on the Joint Applicants and must be implemented when the transaction closes. Joint Applicants further argued that the act of closing the transaction signals acceptance and thus no further action is required given that the parties must be given notice within five days of the transaction closing in accordance with the May 4, 2022 Order. Joint Applicants maintained that the two cases cited by Attorney General/KIUC as precedent for requiring written notice are inapplicable to the facts here. Joint Applicants explained that those cases involved Commission modification of commitments made in settlement agreements that included revisions,

³ See Case No. 2010-00204, *Joint Application of PPL Corporation, E.On Attorney General, E.On US Investments Corp., E.On U.S. LLC, Louisville Gas and Electric Company and Kentucky Utilities Company for Approval of an Acquisition of Ownership and Control of Utilities* (Ky. PSC Sept. 30, 2010), Order at 6 and Appendix C; Case No. 2011-00124, *Joint Application of Duke Energy Corporation, Cinergy Corp., Duke Energy Ohio, Inc., Duke Energy Kentucky, Inc., Diamond Acquisition Corporation, and Progress Energy, Inc. for Approval of the Indirect Transfer of Control of Duke Energy Kentucky, Inc.* (Ky. PSC Aug. 2, 2011); and Case No. 2011-00124, Order (Ky. PSC Oct. 28, 2011) (The Commission approved a rewording of one commitment).

additions, and deletions made by the Commission, and thus there was a question whether the parties would close the transaction or, as allowed in the settlement agreements, terminate the settlement agreements based upon the Commission's modification of settlement terms. Joint Applicants distinguished that, in this proceeding, the May 4, 2022 Order approving the transaction does not involve a settlement agreement, is not conditional, and is binding on the parties.

Ratemaking Treatment of \$30 Million Transmission Regulatory Liability

In the May 4, 2022 Order, the Commission required Kentucky Power to record a \$30 million regulatory liability reflective of Kentucky Power customers' annual transmission subsidization of other AEP operating companies. Attorney General/KIUC argued that the Commission should provide more detail on the ratemaking treatment explaining how the regulatory liability will be returned to customers, such as the rate mechanism and the period over which the regulatory liability will be returned to customers.

Joint Applicants argued that this issue is more appropriately addressed in a future rate case. Joint Applicants further argued that establishing a regulatory asset or liability in one proceeding and addressing the ratemaking treatment in a later proceeding is consistent with accounting practices and Commission practice and allows for a comprehensive review of the circumstances at the time that the ratemaking treatment is determined.

Require AEP to deposit \$45 million with Liberty

In the May 4, 2022 Order, the Commission required AEP to refund an amount over five years reflecting the \$15 million annual subsidization of transmission costs paid by Kentucky Power customers under AEP, \$30 million of which is addressed above. The

Commission suspended the final three years conditioned on Joint Applicants, immediately and actively seeking the best solution for Kentucky Power and its customers regarding Kentucky Power's participation in PJM Interconnection, LLC (PJM). Attorney General/KIUC argued that the Order contained a material omission by failing to require AEP to record a \$45 million regulatory liability or escrow account or make a similar contribution prior to closing with Liberty to reflect the amount that would otherwise have been included in the regulatory liability during the three year suspension. Attorney General/KIUC argued that such a provision is necessary because the Commission will "arguably lose jurisdiction over AEP" once the transaction closes, and therefore if the contingency is triggered, the funds would be available to be refunded to Kentucky Power customers.

Joint Applicants noted that the May 4, 2022, Order is binding on all parties and that the terms of the transmission credit must be decided and implemented upon closing of the transaction. Joint Applicants argued that, because the Order is binding on all parties, it is unnecessary to create an additional mechanism to ensure compliance with the May 4, 2022 Order.

Calculation of Rockport Settlement 2023 Make Whole Provision

Attorney General/KIUC asserted that the Commission's failure to make a finding on the Attorney General/KIUC's recommendation in their joint brief regarding the Make Whole calculation contained in the Rockport Settlement is a material omission. Attorney General/KIUC argued that the issue directly impacts rates and is related to the acquisition, and thus is appropriate to be decided on rehearing. Attorney General/KIUC further argued that, as they asserted in briefing, with Liberty's acquisition of Kentucky Power, the

2023 per book earnings will include transaction and integration expenses that should not otherwise be included in the calculation of the Rockport make whole provision.

Joint Applicants argued that this issue is more appropriately addressed in a future case that permits the Commission to conduct a comprehensive review of ratemaking treatment of related costs. Joint Applicants noted that in a previous case, the Commission stated that it would conduct a review of the appropriate amortization period and recovery mechanism in a separate proceeding initiated by the Commission.⁴ Joint Applicants stated that if the separate proceeding is not initiated by the time that Kentucky Power files its next rate case, the issue could be considered in that rate case, which would provide comprehensive information of the circumstances that exist at that time.

DISCUSSION AND FINDINGS

Written Acceptance or Rejection of Order

As noted above, Attorney General/KIUC did not identify which of the Commission's conditions required written notice of acceptance or rejection. The Commission's approval of the proposed transaction in the May 4, 2022 Order, with modifications, does not require any party's specific acceptance or rejection. In the event the closing and transfer occurs, each and every Joint Applicant is bound by the terms of this Commission's order.

Under Attorney General/KIUC's terminology, if Joint Applicants were to "reject" the terms of the May 4, 2022 Order, that would occur in the context of rehearing under KRS

⁴ See Case No. 2020-00174, *Electronic Application of Kentucky Power Company for (1) A General Adjustment of Its Rates for Electric Service; (2) Approval of Tariffs and Riders; (3) Approval of Accounting Practices to Establish Regulatory Assets and Liabilities; (4) Approval of a Certificate of Public Convenience and Necessity; and (5) All Other Required Approvals and Relief* (Ky. PSC Jan. 13, 2021) Order at 64–65.

278.400 or an appeal for judicial review under KRS 278.410. However, the time to appeal has run without an appeal filed.

Joint Applicants do not have the option of closing the transaction without complying with the Commission's determinations set forth in the body and ordering paragraphs of the May 4, 2022 Order. Under KRS 278.390, if the Joint Applicants do not comply with the May 4, 2022 Order, the Commission has jurisdiction to ensure compliance by initiating a separate proceeding to investigate the potential violation of a Commission Order. Upon a finding of a violation, Joint Applicants may be subject to civil penalties under KRS 278.990. Although Attorney General/KIUC state that the Commission "arguably" loses jurisdiction over AEP once the proposed transfer occurs, no argument to that effect has been made by any party. Nevertheless, as it relates to the Commission's orders in this matter, and AEP's compliance with those orders, the law is clear the Commission maintains jurisdiction.

To the degree that Attorney General/KIUC are referring to the commitments that Joint Applicants proffered during the processing of this case under oath as an appendix to Peter Eichler's rebuttal testimony,⁵ the Commission concurs with Joint Applicants that the cited cases do not apply to the facts of this case because the May 4, 2022 Order is not conditional, the transaction does not involve a settlement agreement, and the Order is binding on the parties. Requiring written acceptance or rejection of the May 4, 2022 Order is unnecessary.

⁵ Peter Eichler Rebuttal Testimony (filed Mar. 18, 2022), Exhibit PE-R4.

For the above reasons and based upon the motion, response, and case record, the Commission finds that Attorney General/KIUC failed to meet its burden of proof and rehearing on this issue is denied.

Ratemaking Treatment of \$30 Million Transmission Regulatory Liability

The Commission notes that Attorney General/KIUC provided only a conclusory statement that the Commission should address the ratemaking treatment for the \$30 million transmission regulatory liability. Consistent with Commission precedent and practice, the Commission will address how the regulatory liability amount will be returned to customers in a future rate-related case.⁶ Based upon Attorney General/KIUC's failure to provide reasoning to support a finding that the Commission made a material omission by not addressing ratemaking treatment for the \$30 million regulatory liability, the Commission finds that Attorney General/KIUC failed to meet its burden of proof on this issue and thus rehearing is denied for this issue.

Require AEP to deposit \$45 million with Liberty

In the May 4, 2022 Order, the Commission found that "AEP should refund an amount reflecting the \$15 million annual subsidizations over five years but will suspend three years of the refund conditioned on AEP actively seeking the best solution" regarding Kentucky Power's future participation in PJM.⁷ Joint Applicants acknowledged that each of them must comply with "the terms of the transmission credit upon closing of the

⁶ See Case No. 2012-00127, *Application of Kentucky Utilities Company for an Order Approving Its Calculation of the Acquisition Savings Sharing Deferral Methodology for 2011* (Ky. PSC July 2, 2012), Order at 2.

⁷ May 4, 2022 Order at 51. See also May 4, 2022 Order at ordering paragraph 3.

transaction.”⁸ Given that the May 4, 2022 Order is binding on Joint Applicants, the Commission concurs with Joint Applicants that an additional mechanism to ensure compliance is unnecessary. For this reason, the Commission finds that Attorney General/KIUC failed to meet its burden of proof and rehearing is denied for this issue. The Commission cautions Joint Applicants that they must provide the Commission with detailed information how they complied with this Order requirement regarding the suspended refund amount when they provide notice of closing. As previously noted, post-closing, the Commission maintains sufficient jurisdiction over the Joint Applicants, including AEP, to ensure ongoing compliance with its May 4, 2022 Order.

Calculation of Rockport Settlement 2023 Make Whole Provision

In Case No. 2020-00174, the Commission stated that it would address the Rockport regulatory asset calculation, including a determination of the appropriate amortization period and recovery mechanism, and Kentucky Power’s ability to use the savings from the expiration of the Rockport UPA to earn its Commission-approved return on equity in calendar year 2023 in a subsequent matter that the Commission will initiate on its own motion. This determination remains in effect. The Commission is not persuaded by Attorney General/KIUC’s assertion that this issue should be addressed in this transfer case. The Commission concludes that the issue raised by Attorney General/KIUC is better addressed in a separate proceeding, as originally planned, so that a comprehensive review can be conducted. For this reason, the Commission finds that Attorney General/KIUC failed to meet its burden of proof, and rehearing is denied for this issue.

⁸ Joint Applicants’ Response (filed June 2, 2022) at 4.

CONCLUSION

For the reasons set forth above, the Commission finds that Attorney General/KIUC failed to meet its burden of proof, and therefore Attorney General/KIUC's motion for rehearing is denied.

IT IS THEREFORE ORDERED that:

1. Attorney General/KIUC's motion for rehearing is denied.
2. This case is closed and removed from the Commission's docket.

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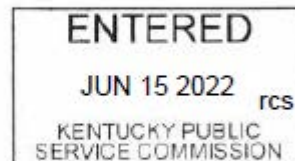
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