COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC INVESTIGATION INTO KENERGY CORP.'S COMPLIANCE WITH KRS 278.160 AND ITS NET METERING TARIFF	)))	CASE NO. 2020-00332

O R D E R

On August 19, 2022, Kenergy Corp. (Kenergy) file a petition, pursuant to KRS 278.400, requesting rehearing of the Commission's August 11, 2022 Order regarding the Commission investigation into Kenergy's practices related to net metering. This matter now stands submitted for a decision.

LEGAL STANDARD

KRS 278.400, which establishes the standard of review for motions for rehearing, limits any new evidence on rehearing to 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]

[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).

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.

DISCUSSION AND FINDINGS

In the rehearing petition, Kenergy, asserted that there is new evidence available that could not have been available earlier with reasonable diligence. Kenergy further asserted that the petition is necessary to update the record and allow the Commission to reconsider and alter its August 11, 2022 Order.[3]

Kenergy explained that, as a rural cooperative, it would be wasteful to build the infrastructure necessary to serve large industrial customers. Thus, according to Kenergy, two large aluminum smelters in Kenergy's territory receive power directly from Big Rivers Electric Corporation's (BREC) transmission system.[4] Kenergy admitted that it is the only retail electric supplier in its territory, but notes that none of the energy consumed by the smelters or other direct serve customers is received from Kenergy's system. Kenergy stated that the direct serve customers contribute very little to Kenergy's net revenue, and the revenue they do pay does not pay for the fixed cost of Kenergy's distribution plant because the direct load customers do not use Kenergy's distribution system[5]. On the

[3] Kenergy's Petition for Rehearing (Petition for Rehearing) filed August 19, 2022, at 1.

[4] Petition for Rehearing at 1.

[5] Petition for Rehearing at 2.

other hand, the customers that do receive power from Kenergy's system pay for the fixed cost through customer and volumetric charges.[6]

Kenergy then discussed what it perceives as a problem with its net metering rate pursuant to Schedule 46 of Kenergy's tariff, the problem of the "one to one" rate for net metering customers. Under the "one to one rate," net metering customers, according to Kenergy, use Kenergy's system without paying their full share of the fixed cost. Kenergy, when it stopped offering net metering, placed customers with generation on Schedule 43 of Kenergy's tariff, which compensates customer generators at a lower rate, but compensates in cash, instead of a bill credit as with net metering customers.[7]

Kenergy claimed that since its response to the September 30, 2021 response to data requests, the Hawesville aluminum smelter has idled, dropping annual usage from 343 MW to 4 MW for 2022.[8] Kenergy stated that prior to the idling, total smelter usage was 720MW, but now is 381 MW and pointed out that direct serve customers pay less than four percent of Kenergy's gross margin, with the rural customers paying the large majority of it.[9] Kenergy stated that as of December 2021 the met metering load compared to all megawatt sales from Big Rivers through Kenergy was 1.31 percent, which, apparently, excludes the direct serve customers.[10]

Kenergy argued that the Commission erred by "confusing sales with load." Kenergy asserted that the net metering statute references "load" and not sales, and that

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[6] Petition for Rehearing at 2–3.

[7] Petition for Rehearing at 3.

[8] Petition for Rehearing at 3.

[9] Petition for Rehearing at 4.

[10] Petition for Rehearing at 4.

"load" is not defined in Kentucky statutes or case law. Kenergy, in support of its argument cited to a federal case in which Kenergy, citing to a footnote, claims the Federal Electric Regulatory Commission (FERC) defines load as "that which uses the system."[11]

Kenergy argued that as the smelters and the direct serves do not use the Kenergy distribution system, therefore, their sales should not be used to calculate load pursuant to KRS 278.466. Kenergy asserted that equating sales with load places "more and more members who can afford such solar systems onto a program subsidized by rural members who cannot afford to purchase such systems."[12] This, according to Kenergy, places an undue hardship on the poorest of Kenergy's rural class.

Kenergy, in the alternative, requested that if Commission does not change its position, that it allow net metering customers the option of remaining on Schedule 43, the Qualifying Facilities tariff, due to the higher kilowatt limit and because excess energy is paid in dollars and not bill credits.

DISCUSSION

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[11] Petition for Rehearing at 4. The full text of the footnote is as follows:

> In the years leading up to the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, investment in electric transmission projects declined "while the electric load using the nation's grid more than doubled," Promoting Transmission Investment Through Pricing Reform, 116 FERC ¶ 61,057, at P. 10 (July 20, 2006) [hereinafter Order No. 679], *order on reh'g*, 117 FERC ¶ 61,345 (Dec. 22, 2006), *order on reh'g*, 119 FERC ¶ 61,062 (Apr. 19, 2007). Utility companies constructing new transmission facilities faced substantial risks, not the least of which was that after expending considerable funds, the company would have to abandon the project for reasons beyond its control and could not recover its investment. The Energy Policy Act directed the Federal Energy Regulatory Commission to establish incentive-based rules in order to reduce such risks and encourage investment in transmission facilities. *See id.* at PP. 1–14.

San Diego Gas & Electric Company v. FERC, 913 F.3d 127, 144 n.2 (D.C. Cir. 2019).

[12] Petition for Rehearing at 4.

The relevant statute is KRS 278.466(1), which states:

> Each retail electric supplier shall make net metering available to any eligible customer-generator that the supplier currently serves or solicits for service. If the cumulative generating capacity of net metering systems reaches one percent (1%) of a supplier's single hour peak load during a calendar year, the supplier shall have no further obligation to offer net metering to any new customer-generator at any subsequent time.

Kenergy is correct to the extent that no regulation or statute defines “load,” but is not correct that “load” should exclude direct serve customers. The statute states that a “retail electric supplier” shall make net metering available until net metering capacity is one percent of the “supplier’s single hour peak load.” Kenergy, as discussed in the August 11, 2022 Order in this matter, is the retail electric supplier to all entities within its territory, not BREC, and to exclude the load from the direct serve customers would require a conclusion that BREC, or some other entity, was supplying the load to the direct serve customers, a violation of KRS 278.018(1). There is no support that load should only be defined as that which is served from Kenergy’s system.

It is worth noting that BREC, of which Kenergy is a member cooperative and from which Kenergy buys its energy, when calculating “Member Load,” uses sales to all categories, including direct serve and residential.[13] BREC, when discussing its total system load, divides the load into member load and non-member sales:

> The total system includes Member load and Non-Member Sales. Member requirements consist of the Rural system requirements, Direct Serve energy, and transmission losses. The Rural System includes retail classes: Residential, General Commercial and Industrial (“GCI”), Large Commercial and Industrial (“LCI”), Irrigation, and Street &

[13] *See*, Case No. 2020-00299, *Electronic 2020 Integrated Resource Plan of Big Rivers Electric Corporation*, Big Rivers 2020 Integrated Resource Plan (BREC IRP) (filed Sept. 21, 2020) at 20.

> Highway. The Direct Serve class contains consumers that are directly served from the transmission system.[14]

While BREC does distinguish between different types of system characteristics when discussing a cooperative member's load, it still considers direct serve customers to be part of the cooperative member's total load. This is the proper method by which to calculate a retail electric supplier's load.

Kenergy relies on a footnote in a federal circuit court opinion purporting to show that FERC defines load as "that which uses the system." Kenergy's reliance is misplaced, as the footnote does not define "load."[15] Furthermore, while FERC does not define "load," it does define "load serving entity" as a "distribution utility or an electric utility that has a service obligation."[16] Kenergy is the only entity authorized to provide service in its territory and is obligated to provide that service and serve its load. As such, Kenergy serves whatever load that is in its territory, including direct serve customers.

Kenergy also raised issues with the policy of net metering that are immaterial to the Commission's decision. The Commission was only applying the undisputed facts to a plain reading of the law. Kenergy asserted economic arguments, asserting that the rates the direct serve customers pay do not pay for use and maintenance of the distribution system, but these are disagreements with the General Assembly's net metering policy and not the Commission. Kenergy also complained of the net metering customers' one to one recovery.

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[14] Big Rivers IRP at 44.

[15] The United States Supreme Court, in the context of FERC, simply defines load as "an industry term for the amount of electricity used," *FERC v. Electric Power Supply Ass'n*, 577 U.S. 260, 267 (2016), *as revised* (Jan. 28, 2016) and not that which "uses the system."

[16] 16 U.S.C.A. § 824q.

It is immaterial whether the direct serve customers pay for the fixed costs, as the General Assembly in KRS 278.466 did not carve out direct serve customers from definition of load and does not relieve a utility from providing net metering simply because it disagrees with the financial impact. Additionally, KRS 278.466(5) allows for an adjustment of net metering rates to allow the utility to recover those fixed costs of which Kenergy complained, an option that Kenergy may pursue.

Kenergy's argument regarding the smelters' reduced load is immaterial to the application of KRS 278.466. Peak load, pursuant to KRS 278.466(1), is calculated based upon a calendar year. A mid-year reduction in load is not used for calculating a utility's peak load, and certainly is not newly discovered evidence that warrants a grant of rehearing.

Finally, Kenergy's request that net metering customers be allowed to remain on Schedule 43 raises an issue that the Commission finds needs addressing: notice to the net metering customers that were erroneously placed on Schedule 43. The August 11, 2022 Order did not provide that Kenergy notify the customers erroneously placed on Schedule 43 of Kenergy's error, which was an oversight by the Commission. The Commission, therefore, finds that in addition to the requirements set forth in the August 11, 2022 Order, Kenergy shall notify, in writing, each net metering customer erroneously placed on Schedule 43 that the Commission has ordered a refund and that those customers be placed on Schedule 46. If a net metering customer upon receiving such notice affirmatively decides to remain on Schedule 43, that is the customer's prerogative.

The Commission, based upon the petition and the case record, finds that Kenergy has failed to meet its burden that: the Commission's August 11, 2022 Order in this

proceeding was unlawful or unreasonable; there is new material evidence on rehearing not readily discoverable at the time of the Commission decision; or there were any material errors or omissions in the August 11, 2022 Order. Accordingly, the Commission finds that Kenergy's Petition for Rehearing should be denied.

IT IS THEREFORE ORDERED that:

1. Kenergy's Petition for Rehearing is denied.

2. Kenergy shall provide written notice to each net metering customer erroneously placed on Schedule 43 that the Commission has ordered a refund and that those customers be placed on Schedule 46.

3. This case is closed and removed from the Commission's docket.

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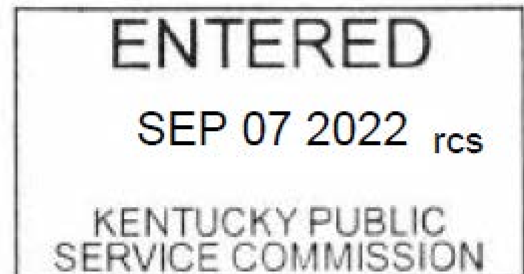

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