

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF KENTUCKY)	
POWER COMPANY FOR (1) A GENERAL)	
ADJUSTMENT OF ITS RATES FOR ELECTRIC)	
SERVICE; (2) APPROVAL OF TARIFFS AND)	
RIDERS; (3) APPROVAL OF ACCOUNTING)	CASE NO.
PRACTICES TO ESTABLISH REGULATORY)	2020-00174
ASSETS AND LIABILITIES; (4) APPROVAL OF)	
A CERTIFICATE OF PUBLIC CONVENIENCE)	
AND NECESSITY; AND (5) ALL OTHER)	
REQUIRED APPROVALS AND RELIEF)	

**KENTUCKY SOLAR INDUSTRIES ASSOCIATION, INC.
RESPONSE TO KENTUCKY POWER COMPANYS'
MOTION FOR REHEARING**

Comes now the Kentucky Solar Industries Association, Inc. (KYSEIA), by and through counsel, and files this Response to Kentucky Power Company's (KPC and Company) Motion for Rehearing. The Commission should deny Kentucky Power Company's request for the Commission to rehear its May 14, 2021 Order.

ARGUMENT

While the Company relies upon KRS 278.466(5) in support of its argument that the Commission is legislatively mandated to approve the two time-of-use netting periods proposed by the Company,¹ Kentucky Power Company fails to point out any express language in KRS 278.466(5) establishing a two time-of-use netting periods framework as the statutorily mandated methodology or prohibiting the use of monthly netting.

¹ KPC Motion for Rehearing (June 3, 2021) argument B 1 a, pages 3 through 6.

The cornerstone of the Company's argument on this point is that its "Witness Vaughan testified, 'the fixed monthly cost associated with connecting [a] customer to the distribution system [alone] is \$35.'"² The Company fails to point to any finding of the Commission that confirms this allegation. There is no presumption of correctness that applies to Witness Vaughan's testimony. As has been noted numerous times in this proceeding, the Commission has no duty to refute the Company's evidence.³ Further, the Company's evidence has been contested through cross-examination as well as the presentation of evidence into the record by other parties.⁴

Also, the Company neglects to mention that it uses a single billing period rather than an annual analysis for its billing discussion. Thus, the discussion is incorrectly premised upon the argument that there will be excess generation every month of the year. Further, it neglects to mention that, among other things, the excess generation amount (783 kWh) in its Motion for Rehearing differs from Witness Vaughn's Rebuttal Testimony which shows 547 of kWh exports rather than 783 kWh.⁵ The presentation of information in the Motion for Rehearing is simply not reliable as the Company has chosen to depart from its own evidence to create the appearance of excess generation credit in the analysis when the typical customer would have billable kWh.⁶ The Company's own evidence does not support its own arguments. There is no demonstrable reason for rehearing.

The Company's argument that KRS 278.466(6) does not authorize grandfathering (or legacy rights) to NMS II customers fails to identify any ground for rehearing under

² KPC Motion for Rehearing (June 3, 2021) page 4.

³ Order (Ky PSC Feb. 22, 2021) page 26.

⁴ KYSEIA notes that the May 14, 2021 Order does not specify whether the monetary credit offsets the monthly service charge. For this reason, the bill comparison offered by the Company may not correspond to the actual methodology established by the Commission.

⁵ Vaughan Rebuttal (Nov. 9, 2020) Exhibit AEV R5 [PDF 265 of 273].

⁶ *Id.*

Kentucky law.⁷ The Company argument that the Commission may not grant legacy status to NMS II customers is based upon a theory that legacy rights “apply only” to NMS I customers.⁸ A review of the plain language of KRS 278.466(6) reveals that the General Assembly clearly sought to provide legacy rights to eligible customer-generators taking service before the effective date of the initial net metering order; however, the statutory provision does not contain “only to” or “no legacy protections shall be offered except for” language indicating any limitation or exclusivity concerning legacy rights. *Public Service Commission of Kentucky v. Commonwealth*, 320 S.W.3d 660, 668 (Ky. 2010) (discussing the requirement language of limitation or exclusivity to limit a benefit in KRS Chapter 278).

The Company’s allegations that additional legacy protections will introduce “unnecessary complexity and practical problems in the administration of Tariff NMS II”⁹ demonstrate the Company’s general displeasure but fail to state any error in the Commission’s May 14, 2021 Order or establish any grounds for rehearing. The Company’s arguments on this point have no merit, and the request for rehearing should be denied.

The Company’s argument that extending legacy rights to NMS II customers would violate Sections 27 and 28 of the Kentucky Constitution is meritless.¹⁰ Notwithstanding the fact that an agency cannot decide constitutional issues,¹¹ the Commission’s actions were wholly within the Kentucky Constitution. The authority of the Public Service Commission is plenary. *Kentucky Public Service Commission v. Commonwealth ex rel.*

⁷ KPC Motion for Rehearing (June 3, 2021) argument B 1 b (i), pages 7 and 8.

⁸ KPC Motion for Rehearing (June 3, 2021) page 7.

⁹ KPC Motion for Rehearing (June 3, 2021) page 8.

¹⁰ KPC Motion for Rehearing (June 3, 2021) argument B 1 b (ii), pages 9 through 12.

¹¹ *W.B. v. Com., Cabinet for Health and Family Services*, 388 S.W.2d 108, 112 (Ky. 2012).

Conway, 324 S.W.3d 373 (Ky. 2010). The Commission cannot be charged with error in implementing the provisions of Chapter 278 through authorizing additional legacy rights in the absence of language of limitation or exclusivity that expressly limits the provision of legacy protections, and no such language of limitation or exclusivity has been identified by the Company. See *Public Service Commission of Kentucky v. Commonwealth*, 320 S.W.3d 660, 668 (Ky. 2010).

Rather than discuss the applicable case law, the Company spins a tale of double-barreled intrigue that has no particular relevance for analyzing the May 14, 2021 Order. For example, *South Central Bell Telephone Co. v. Utility Regulatory Commission*, 637 S.W.2d 649 (Ky. App. 1982) holds, unremarkably enough, that the Commission must use the correct statute to impose a penalty, so that case is not even remotely close to the facts at issue in the May 14, 2021 Order. The Supreme Court of Kentucky has, post-*South Central Bell*, already considered arguments similar to those offered by Kentucky Power Company in the context of free and reduced rate service and expressly rejected them as not presenting any concerns as to the Commission's exercise of authority. See *Public Service Commission of Kentucky v. Commonwealth*, *supra*.

The General Assembly was well-aware of *Public Service Commission of Kentucky v. Commonwealth*, 320 S.W.3d 660 (Ky. 2010) when it enacted Senate Bill 100.¹² If the Legislature had sought a limitation on legacy rights in KRS 278.466(6) as urged by the Company, it would have included language of limitation or exclusivity. It did not. The Company's request for rehearing should be denied.

¹² 2019 Ky. Acts ch 101 (also known as "Senate Bill 100").

The Company's due process argument is without merit.¹³ Through discovery and cross-examination, the Commission certainly provided notice of the issues in this proceeding. In fact, in an unusual procedural step, the Commission advised the Company that it had not been convinced that "avoided costs" was a valid rate in its January 13, 2021 Order and conducted additional proceedings, which included discovery and cross-examination, to allow the development of a robust record.¹⁴ The Company offers vague and conclusory allegations and arguments about "extra-record information" without any specificity of what it is discussing or why it is prejudicial.¹⁵ In fact, the Company itself limits its discussion of generation, transmission, and distribution capacity to calculation errors. The record of this proceeding readily rebuts the Company's due process claim that, somehow, the Company was not allowed to weigh in on any of the issues or the components of the export rates.

What the Commission declined to do is manage the Company's presentation of evidence.¹⁶ The Commission is the trier of fact, and the Company has the burden of proof.¹⁷ The Commission was not required to limit its development of fair, just and reasonable rates to only the rates proposed by the Company and the evidence selected by the Company. The Commission has the authority to consider the evidence and arguments of the other parties, which were subject to discovery and cross-examination by the Company, as well as evidence upon which the Commission may properly take administrative notice.

¹³ KPC Motion for Rehearing (June 3, 2021) argument B 2 a, pages 12 and 13.

¹⁴ Order (Ky PSC Jan. 13, 2021).

¹⁵ KPC Motion for Rehearing (June 3, 2021) page 13.

¹⁶ Order (Ky PSC Feb. 22, 2011).

¹⁷ *Id.*

The Company's double compensation argument on environmental compliance cost does not present grounds for rehearing.¹⁸ The basis for the component is forward-looking costs of coal ash remediation that are avoided by each incremental kWh of clean energy. There is simply no double-count. KYSEIA notes that the May 14, 2021 Order does not specify whether the monetary credit offsets the monthly service charge. For this reason, the bill comparison offered by the Company may not correspond to the actual methodology.

The Company's arguments concerning avoided generation capacity, transmission capacity, and distribution capacity cost components are meritless.¹⁹ Of particular note, the Commission clearly rejected the total system production or full system project rather than exported production in its rate calculation.²⁰ The Company's calculation in support of rehearing simply repackages the result of its total system production approach under a different guise. Furthermore, the use of the net metering shape discount, used by both the Commission and the Company, already pro-rates the capacity compensation based on the exported percentage because the net metering shape discount weights the contribution to peak based upon the percent of system production during an hour that constitutes an export.²¹ There are no grounds for rehearing.

The Company's battery storage argument is without merit.²² Battery storage is outside of the definition of an "eligible electric generating facility."²³ KYSEIA incorporates by reference its discussion in its Memorandum Brief filed April 21, 2021. The

¹⁸ KPC Motion for Rehearing (June 3, 2021) argument B 2 b, pages 13 and 14.

¹⁹ KPC Motion for Rehearing (June 3, 2021) argument B 1 c, pages 14 through 16.

²⁰ Order (Ky. PSC May 14, 2021) page 30.

²¹ *Id.*, at footnote 98.

²² KPC Motion for Rehearing (June 3, 2021) argument B 3, pages 16 and 17.

²³ KRS 278.465(2).

Commission's May 14, 2021 Order explains why battery storage should not be considered a material change that results in a change in NMS I legacy status.

Likewise, the Company's "material" versus "incidental" increase argument is without merit.²⁴ While the Commission could have established a *per se* test, the Commission chose to establish a materiality test, which is a choice wholly within its discretion. As with fair, just and reasonable rates, adequate service, and ordinary extension in the usual course of business, the framework by reference to materiality announced by the Commission is inherently reasonable and wholly appropriate because a *per se* rule would be too inflexible and impracticable.

The Company's adoption of absolutism is a thinly veiled attempt to extinguish legacy rights for NMS customers for every possible reason, no matter how immaterial. The Commission's Order, in pertinent part, concerns the impact of modifications or installations on net metering legacy rights. The Company's stated goals of safety, adequate service, and planning can be accomplished without divesting legacy rights. Further, there is nothing in Senate Bill 100 suggesting the divestment framework urged by the Company. There is no need for rehearing.

CONCLUSION

KYSEIA continues to assert that the Company failed to meet its burden of proof required for Commission approval of its proposed rates including, for among other reasons, that Kentucky Power Company did not conduct an evaluation of the cost to serve its distributed generation customers.²⁵ More importantly, the Commission advised the Company that it had not been convinced that "avoided costs" was a valid rate in its

²⁴ KPC Motion for Rehearing (June 3, 2021) argument B 4, pages 17 through 19.

²⁵ KYSEIA Brief (Dec. 14, 2020) page 12 and 13.

January 13, 2021 Order. The Commission exercised its plenary authority to develop fair, just and reasonable rates in the face of an overwhelming evidentiary failure by the Company due to the latter's decision to double-down on "avoided costs." There are no reasons for rehearing, and the Company's Motion for Rehearing should be denied.

WHEREFORE, KYSEIA respectfully requests the Commission deny Kentucky Power Company's Motion for Rehearing.

Respectfully submitted,

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NOTICE AND CERTIFICATION FOR FILING

Undersigned counsel provides notice that the electronic version of the paper has been submitted to the Commission by uploading it using the Commission's E-Filing System on this 10th day of June 2021, and further certifies that the electronic version of the paper is a true and accurate copy of each paper filed in paper medium. Pursuant to the Commission's March 16, 2020, and March 24, 2020, Orders in Case No. 2020-00085, *Electronic Emergency Docket Related to the Novel Coronavirus Covid-19*, the paper, in paper medium, will be filed at the Commission's offices within 30 days of the lifting of the state of emergency.

/s/ David E. Spenard

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NOTICE REGARDING SERVICE

The Commission has not yet excused any party from electronic filing procedures for this case.

/s/ David E. Spenard
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