

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.
POST-HEARING RESPONSE BRIEF**

Comes now the Kentucky Solar Industries Association, Inc. (KYSEIA), by and through counsel, and, pursuant to the Commission's April 8, 2021 Order, files this Post-Hearing Response Brief. The Commission should deny Kentucky Power Company's proposed Net Metering Service (NMS II) tariff; further, the Commission should expressly reject, as unlawful and unreasonable, Kentucky Power Company's "material change" argument for terminating legacy rights created by KRS 278.466(6).

ARGUMENTS IN RESPONSE

1. Kentucky Power Company Has the Burden of Proof. KRS Chapter 278 Does Not Create a Rebuttable Presumption for the Company's Evidence.

Kentucky Power Company along with KIUC and the KY OAG, without pointing out a statutory provision of KRS Chapter 278, administrative regulation in Title 807 KAR Chapter 5, or Commission Order that KYSEIA has failed to follow, argue that KYSEIA

should be faulted for failure to file its own excess energy compensation rate.¹ As the Commission has already stated, Kentucky Power Company has the burden of proof, and the Commission has no duty to refute evidence submitted to it.² KRS 278.190(3), Commission precedent, and Kentucky judicial precedent make clear that the burden of proof in this instance is upon the Company, and KYSEIA does not carry a burden of proof.³ The Company wants to introduce a “rebuttable presumption” for its evidence that is expressly refuted by statute, Commission precedent, and case law.

Moreover, KYSEIA submits that the record does not contain reasonable and reliable evidence upon which KYSEIA could base an excess energy compensation rate. Kentucky Power Company concedes that it did not perform separate load research on its net metering customers and lacks the necessary metering technology to do so.⁴ It further argues that it did not, for example, perform separate load study research for its outdoor lighting and street lighting.⁵ Finally, it points to net metering information developed for customers in non-Kentucky Power Company customers in Virginia, a separate jurisdiction.⁶

KYSEIA is not required to weigh in on the sufficiency or insufficiency of the Company’s evidence in support of its other rate design proposals such as outdoor lighting or street lighting. There is no requirement that KYSEIA contests all aspects of the Company’s Application in order to contest the insufficiency of the evidence for net

¹ KPC Brief (Apr. 21, 2021), pages 1, 23, and 24; KIUC/KY OAG Brief (Apr. 21, 2021), pages 1, 3, and 4.

² Order (KY PSC Feb. 22, 2021), pages 26 and 27.

³ Case No. 8836, *Notice of Adjustment of Rates of Kentucky-American Water Company* (KY PSC Dec. 20, 1983), Order at page 9; *Energy Regulatory Commission v. Kentucky Power*, 605 S.W.2d 46, 50 (Ky. App. 1980).

⁴ KPC Brief (Apr. 21, 2021), page 5.

⁵ *Id.*

⁶ *Id.*, page 6.

metering proposal. The Company's argument is not that the technology to conduct the study does not exist. Its reliance upon the Virginia information refutes this point. Rather, the argument, condensed down, is that it did not want deploy technology for a study in Kentucky or otherwise develop the evidence that it deemed fit to develop for its Virginia customers. At issue are the Company's Kentucky net metering customers not those in Virginia. There is no justification for the absence of reliable net metering load research on the Company's Kentucky net metering customers. Notwithstanding the lack of any burden for KYSEIA to do so, KYSEIA is not required to present a proposal based upon unreliable evidence supplied by the Company.

2. The Legislature Expressly Created Legacy Rights for Eligible Electric Generating Facilities Currently in Service.

Kentucky Power Company, without identifying any actual language in KRS 278.466 or Senate Bill 100,⁷ has created a "major modification" test for divesting eligible electric generating facilities of their legacy rights. Neither KRS 278.466 nor Senate Bill 100 create such a test or divestment mechanism. The legislative intent is clearly and expressly to preserve legacy rights not to extinguish them, as the Company proposes.

The Company offers the existing "Interconnection Net Metering Guidelines – Kentucky," as controlling on this point.⁸ The obvious problem is that the current interconnection guidelines were approved approximately a decade prior to the passage of Senate Bill 100. Thus, the legacy rights provisions of KRS 278.466(6) did not exist when the Commission approved the interconnection guidelines; therefore, no reading of

⁷ 2019 Ky. Acts ch. 101.

⁸ KPC Brief (Apr. 21, 2021), at pages 13 and 14 citing the guidelines developed and approved in Public Service Commission Administrative Case No. 2008-00169.

the guidelines can be alleged to address a statutory right that would not be created until approximately a decade later.

The existing interconnection guidelines do not address this issue nor do they create a divestment mechanism for a statutory right that did not exist nor was even contemplated at the time of their approval. While KYSEIA agrees that all utilities should have the ability to take steps to further customer and system safety, the application process under the current interconnection guidelines is a wholly separate matter from legacy rights. In order to harmonize the existing interconnection guidelines, which the Commission is currently in the process of revising, with the legislative intent for KRS 278.466(6), the proper reading is that they do not address legacy rights let alone divest them in contravention of KRS 278.466(6).

3. The Argument by KIUC and the Kentucky Attorney General that the Net Metering Law Has Changed is Factually Accurate But Fails to Acknowledge that the 1:1 Rate Can Only Be Replaced by a Rate that is Fair, Just, and Reasonable.

KIUC and the Kentucky Attorney General do not fully discuss the one-to-one (1:1) energy credit rate. Specifically, there is no judicial opinion through which a tariff containing the 1:1 rate has been set aside as unfair (unlawful or unreasonable). On this point, KYSEIA objects to the characterization that the existence of the 1:1 rate has to date been unfair, in any way, in the context of the requirement for a utility to charge and collect “fair, just and reasonable rates.” The 1:1 rate has been a lawful rate, and its continuation pursuant to KRS 278.466(6) is lawful, KIUC’s and Kentucky Attorney General’s protests notwithstanding.

What has taken place is the Legislature has changed the law. On a going-forward basis, for certain new net metering customers taking service under a net metering tariff,

a new rate is to be established by the Commission. While KYSEIA agrees that Senate Bill 100 clearly contemplates a change in the export rate as applied to new net metering customers, Senate Bill 100 did not specify a new rate *per se* to replace the 1:1 rate, a different burden of proof, a rebuttable presumption, or otherwise change the process through which the Commission investigates and determine rates under KRS Chapter 278 including the consequences of an applicant that fails to carry its burden of proof. What Kentucky law requires is the presentation by the utility applicant of sufficient evidence, a requirement that has not been met in the instant case.

4. Kentucky Power Company's Remaining Recriminations Are Meritless.

The record in the instant case, including the briefing, is already very comprehensive. KYSEIA reiterates its prior arguments, incorporating them by reference, that the Company's evidence remains unreliable and insufficient. Nonetheless, three other points from the Kentucky Power Company memorandum require express comment.

Contrary to the Company's suggestions, KYSEIA does not advocate for the Commission to ignore Senate Bill 100 much less deny it. In particular, Mr. Inskeep's testimony is for the Commission to change the Company's tariff upon a Commission determination that changes are required to comply with statutory changes through Senate Bill 100, the recent net metering act.⁹ What Mr. Inskeep does not recommend is an approval of a tariff in the absence of a cost-of-service study or cost support for its net metered customers, a tariff that does not produce fair, just, and reasonable rates.¹⁰

⁹ KYSEIA Inskeep Supplemental Testimony (Feb. 25, 2021), page 4.

¹⁰ *Id.*

KYSEIA argues that KRS Chapter 278, including its net metering provisions, requires the Commission to establish “fair, just and reasonable rates.”¹¹ The difference in position stems from the fact that the Company believes that the Commission must approve a rate in the absence of sufficient evidence. Senate Bill 100 does not create such a mandate. The Company seems of the view that any rate other than “1:1” is acceptable and something other than 1:1 must be approved in this proceeding while KYSEIA asserts that the replacement rate must be “fair, just, and reasonable,” a demonstration that has yet to take place because the Company has not presented sufficient reliable evidence.¹²

Dr. McCann testimony is for a proper balancing of risks, benefits, and commitments. Kentucky Power Company does not demonstrate that the Commission lacks the plenary authority to consider policy objectives identified by Dr. McCann. In fact, the Commission and the Courts have long recognized the Commission’s plenary authority for balancing risks, benefits, and commitments through economic development rates despite no specific statutory instruction to do so.¹³ The Company merely disagrees with Dr. McCann’s conclusions and recommendations.

Kentucky Power Company, for some reason, references *Ratliff v. Redmon*, 396 S.W.2d 320, 325 (Ky. 1965) as instructive. An examination of the case reveals that it does not pertain to the Kentucky Public Service Commission or KRS Chapter 278. *Ratliff* is a worker’s compensation case. The sentence that follows the Company-supplied quote

¹¹ KRS 278.030(1).

¹² While the Company has not met its burden from an evidentiary and legal standpoint, KYSEIA is not opposed to further direction from the Commission on how to establish fair, just, and reasonable compensation rates under the net metering paradigm.

¹³ *Administrative Case No. 327 – An Investigation Into the Implementation of Economic Development Rates by Electric and Gas Utilities* (KY PSC Sept. 24, 1990); see, for comparison, *Kentucky Public Service Commission v. Commonwealth ex rel. Conway*, 324 S.W.3d 373 380 (Ky. 2010).

from the case puts the matter into much better context. Specifically, in the next sentence the Court conveys: “There is nothing different or distinct about classifying junk metal.”

The point, unexplained by the Company, that the Court was conveying in *Ratliff* is that the appellant in that case, the Workmen’s Compensation Board, could not argue that classifying junk metal is an occupation that is distinct from running “a profitable junk business.”¹⁴ Comparatively, in the instant case, Kentucky’s net metering law has a variety of express requirements and distinctions set forth through a specific framework. Here, the Commission and the parties have been engaged in an extended investigation into the requirements of Kentucky’s net metering law which are certainly not trivial, as the Company implies by throwing into the mix the analysis of classifying junk metal as it compares to running a junk yard.

Actually, the following sentence is the most fitting quote from *Ratliff*: “[W]hen the curtain of conclusions and abstract contentions is removed, there is no substantial conflict in the evidence in this case.”¹⁵ The Commission rejected the Company’s curtain of conclusions and abstract contentions through its January 13, 2021 Order and its February 22, 2021 Order on rehearing. There remains no substantial conflict in the evidence in the instant case. The Company still fails to offer sufficient reliable and reasonable evidence in the additional proceedings to carry its burden of proof.

WHEREFORE, KYSEIA respectfully submits this Response and requests the Commission deny Kentucky Power Company’s proposed NMS II tariff and “material change” test.

¹⁴ *Ratliff v. Redmon*, 396 S.W.2d 320, 325 (Ky. 1965).

¹⁵ *Id.*, at 327.

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 26th day of April 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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