

**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 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)

Case No. 2020-00174

REPLY OF KENTUCKY POWER COMPANY IN SUPPORT OF MOTION FOR REHEARING

Mark R. Overstreet
Katie M. Glass
STITES & HARBISON PLLC
421 West Main Street
P.O. Box 634
Frankfort, Kentucky 40602-0634
Telephone: (502) 223-3477
Facsimile: (502) 779-8349
moverstreet@stites.com
kglass@stites.com

Christen M. Blend (*pro hac vice*)
Hector Garcia-Santana (*pro hac vice*)
Tanner S. Wolffram (*pro hac vice*)
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
Telephone: (614) 716-1915 (Blend)
cblend@aep.com
hgarcia1@aep.com
tswolffram@aep.com

COUNSEL FOR
KENTUCKY POWER COMPANY

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I. Introduction

Intervenors' arguments do not change the need for rehearing of the Commission's May 14, 2021 Order ("Order") in accordance with the Company's Motion for Rehearing. First, net metering customers rely on the Company's system for approximately one-half of the year. Yet, using the billing period as the netting period, as imposed by the Order, fails to account for this reality and denies the Company the ability to recover "all costs necessary to serve its eligible customer-generators, including but not limited to its fixed and demand-based costs." KRS 278.466(5). Despite the intervenors arguments, the two time-of use netting periods proposed by the Company are directly tied to cost causation, as they instead account for the reality that net metering customers cause just as much costs as non-net metering customers when the sun is not shining.

Second, the plain language regarding legacy rights for net metering customers contained in KRS 278.466(6) is unambiguous. KYSEIA and Joint Intervenors' argument that the General Assembly was required to include language of exclusivity such as "only to" or "except for" in order to limit legacy rights only to NMS II customers whose systems are in service prior to the Order is unsupported by logic and longstanding principles of statutory interpretation.

Third, no party challenges or refutes the Company's avoided cost rate calculations contained in the Motion for Rehearing, and the Commission should grant rehearing to correct the mathematical errors and update the rates for NMS II excess generation accordingly.

Fourth, although KYSEIA and Joint Intervenors argue that the Company had ample opportunity to cross-examine their witnesses regarding their proposed avoided cost "principles," the intervenors misapprehend the Company's argument. The Company was not given notice or opportunity to examine or refute the extra-record evidence impermissibly relied upon by the Commission in developing and calculating the actual rates imposed for several avoided cost

components. The Company requests rehearing to present evidence responding to, and develop a record demonstrating the inaccuracy of those avoided cost rates.

Fifth, the battery storage issue is properly addressed in this case. The addition of battery storage constitutes a material change to the system and thus affects the legacy rights under the Company's net metering tariffs.

Finally, KYSEIA and Joint Intervenors fail to refute the simple fact that allowing net metering customers to retain the RECs associated with their generation, while compensating these same customers for the Commission's calculation of the avoided carbon costs and costs of environmental compliance, constitutes double counting.

For these reasons, stated in more detail below, rehearing is required..

II. Law and Argument

A. Use Of The Billing Period As Tariff NMS II's Netting Period Plainly And Simply Results In NMS II Customers Not Contributing To All Costs That It Takes To Serve Them As Required By Statute.

Joint Intervenors argue that the Company failed to link its proposed netting periods to cost-causation, and also cast the Company's proposed netting periods as some kind of gimmick to "artificially constrain[] the times of day during which the net-metering customer could redeem the compensatory credits..."¹ Both KYSEIA and Joint Intervenors further allege that KRS 278.466 "provides no mandate for netting periods."² The argument is a red herring: the statute clearly provides that "each retail electric supplier shall be entitled to implement rates to recover from its eligible customer-generators *all costs necessary to serve its eligible customer-*

¹ Response of Joint Intervenors Mountain Association, Kentucky Solar Energy Society, and Kentuckians for the Commonwealth in Opposition to Motion of Kentucky Power Company for Rehearing ("Joint Intervenors Response") at 6 (June 10, 2021).

² Kentucky Solar Industries Association, Inc. Response to Kentucky Power Company's Motion for Rehearing ("KYSEIA Response") at 1 (June 10, 2021); Joint Intervenors' Response at 7.

generators...”³ The Commission’s use of the billing period as the netting period for Tariff NMS II leaves the Company unable to recover “all costs necessary to serve” NMS II customers as required by KRS 278.466(5).⁴

The Company demonstrated that the practical result of using the billing period as the netting period results in the Company being unable to recover all costs necessary to serve net metering customers in the most straightforward way possible in its Motion for Rehearing. The Company showed that although a typical net metering customer relies *completely* on the Company’s system every night of every month, or about half of every month and therefore half of every year, the use of the billing period for the netting period fails to account for, and in fact masks this reality.

For example, at night, when a solar customer-generator’s system is not producing any electricity, that customer relies entirely on the Company’s system, and the Company’s cost to serve that net metering customer during that time is no different than its costs to serve other non-net metering customers. During the day, when a net metering customer produces excess generation and therefore is not receiving energy from the Company’s system, the cost to serve that net metering customer is lower. The mere fact that a solar net metering customer may generate enough excess generation during the day to effectively “cover” all the generation it requires at night does not permit the Company to recover its costs. The fixed monthly cost of interconnecting a customer to the system alone is \$35.⁵ Use of the two time-of-use netting periods accounts for this reality. Use of the billing period as the netting period masks this reality

³ KRS 278.466(5) (emphasis added).

⁴ Motion for Rehearing at 3-6.

⁵ Vaughan Direct Testimony at 15.

and imposes on the Company the requirement to serve net metering customers without recovering “all costs.”

The Company illustrated this point with actual billing examples.⁶ By netting over the billing period, a net metering customer who generates a total of 1,365 kWh in a typical month⁷ will have no billing energy and 125 kWh of excess generation, resulting in cost recovery of only \$5.⁸ KYSEIA casts aspersions on the Company’s billing illustration because the Company’s counsel utilized the 783 kWh excess generation amount contained in Company Witness Vaughan’s Direct Testimony rather than the 547 kWh export amount set forth in Mr. Vaughan’s Rebuttal Testimony for purposes of the example in the Company’s Motion for Rehearing.⁹ However, using the 547 kWh amount contained in Mr. Vaughan’s Rebuttal Testimony yields the same result.

Using the numbers included in Exhibit AEV-R5 to Company Witness Vaughan’s Rebuttal Testimony, under the Company’s netting proposal, the typical solar net metering residential customer with test year average usage of 1,240 per month would have approximately 648 kWh of billing energy charged at the Tariff R.S. rate, and 547 kWh of excess generation, receiving the export rate, in the billing period.¹⁰ This would equate to the following billing under the scenarios set forth in the Company’s motion:

⁶ Motion for Rehearing at 5-6.

⁷ See *id.* at Ex. AEV-3, “Typical NMS Solar System” Column at total line.

⁸ *Id.* (1,365 kWh – 1,240 kWh = 125 kWh); KPCo. Mot. for Rehearing at 5.

⁹ KYSEIA Br. at 2.

¹⁰ Vaughan Rebuttal Test. at Ex. AEV-R5.

- Using the Company’s proposed time-of-use netting periods and export rate:

R.S. Service Charge:	\$17.50 ¹¹
R.S. Energy Charge (648 kWh @ \$0.11038) ¹²	\$71.53
<u>N.M.S. II Excess Generation Credit (547 kWh @ \$0.03553)¹³</u>	<u>(\$19.43)</u>
Total Bill:	\$69.60

- Using the Company’s proposed time-of-use netting periods and the Commission’s flawed net export rate established in the May 14, 2021 Order, the Company recovers barely more than just the \$35 fixed monthly cost of interconnection alone:

R.S. Service Charge:	\$17.50 ¹⁴
R.S. Energy Charge (648 kWh @ \$0.11038) ¹⁵	\$71.53
<u>N.M.S. II Excess Generation Credit (547 kWh @ \$0.09746)¹⁶</u>	<u>(\$53.31)</u>
Total Bill:	\$35.72

- Using the Commission’s billing period netting period and flawed net export rate, the Company recovers less than the \$35 fixed monthly cost of interconnection alone:

R.S. Service Charge:	\$17.50 ¹⁷
R.S. Energy Charge (126 kWh ¹⁸ @ \$0.11038) ¹⁹	\$13.90
<u>N.M.S. II Excess Generation Credit (0 kWh @ \$0.09746)²⁰</u>	<u>(\$0.00)</u>
Total Bill:	\$31.40

- Using the Commission’s billing period netting period and the corrected net export rate (as set forth in Exhibit B to the Motion for Rehearing) still does not permit the Company to recover “all costs necessary to serve eligible customer generator[s]”:

¹¹ See P.S.C. Ky. No. 12 Original Sheet No. 6-1.

¹² *Id.*

¹³ Vaughan Rebuttal Test. at R34, Ex. AEV-R5.

¹⁴ See P.S.C. Ky. No. 12 Original Sheet No. 6-1.

¹⁵ *Id.*

¹⁶ See Order at 3.

¹⁷ See P.S.C. Ky. No. 12 Original Sheet No. 6-1

¹⁸ See Vaughan Rebuttal Test. at Ex. AEV-R5, “Typical Res Customer” Column and “Typical NMS Solar System” Column at total lines. (1,240 kWh – 1,114 kWh = 126 kWh)

¹⁹ *Id.*

²⁰ See Order at 3.

R.S. Service Charge:	\$17.50 ²¹
R.S. Energy Charge (126 kWh ²² @ \$0.11038) ²³	\$13.90
<u>N.M.S. II Excess Generation Credit (0 kWh @ \$0.06359)²⁴</u>	<u>(\$0.00)</u>
Total Bill:	\$31.40

Although mischaracterizing the Company’s presentation of record evidence on rehearing as “not reliable” and “departing from the evidence,” KYSEIA tellingly avoids the fact that the conclusion remains the same regardless of the example customer used: setting the netting period as the billing period results in Kentucky Power being unable to recover its costs necessary to serve NMS II customers and violates KRS 278.466(5).

Moreover, in the summer months, it is likely that solar net metering customers will generate even more electricity than the example provided in Company’s Witness Vaughan’s typical customer examples, resulting in the Company not recovering *any* costs (using either the billing example provided for illustration in the Company’s Motion for Rehearing or the one KYSEIA raised in its Response to the Company’s Motion) and further exacerbating the problem with using the billing period as the netting period.

The Company’s proposed time-of-use netting periods are based on cost-causation and allow the Company to recover all costs necessary to serve net metering customers. The Commission itself recognized that “time-of-use netting periods can more granularly match customer loads to customer generation. . . .”²⁵ It is the Commission’s revisions to the tariff and imposition of the billing period as the netting period, however, that are not based on cost

²¹ See P.S.C. Ky. No. 12 Original Sheet No. 6-1

²² See Vaughan Rebuttal Test. at Ex. AEV-R5, “Typical Res Customer” Column and “Typical NMS Solar System” Column at total lines. (1,240 kWh – 1,114 kWh = 126 kWh)

²³ *Id.*

²⁴ See Motion for Rehearing at 15.

²⁵ Order at 24.

causation. Therefore, as set forth in the Company’s Motion and further clarified here, the Commission’s Order amends Tariff NMS II in a way that fails to comply with KRS 278.466(5). The Commission should grant rehearing to correct this error.

B. KRS 278.466(6) Is Unambiguous And Leaves No Room To Depart From Its Clear Legislative Command.

KRS 278.466(6) provides that “an eligible electric generating facility in service prior to the effective date of initial net metering order” remains subject to the “net metering tariff provisions in place when the eligible customer-generator began taking net metering service, including the one-to-one (1:1) kilowatt-hour denominated energy credit provided for energy fed into the grid...” “for a twenty-five (25) year period, regardless of whether the premises are sold or conveyed during that twenty-five year period.” The Commission’s May 14, 2021 Order impermissibly expands this grandfather provision²⁶ by granting NMS II customers, that is, customers taking service after the effective date of the Commission’s “initial net metering order,” the same rights provided by statute.

The Joint Intervenors and KYSEIA argue that KRS 278.466(6) serves only to guarantee pre-initial metering rate order customers the right to continue taking service under the then existing tariff for a 25-year period. It does not, they contend, limit the Commission’s plenary ratemaking authority.²⁷ Rather, both argue that the General Assembly was required to limit

²⁶ The Joint Intervenors take umbrage at the use of the term “grandfather clause.” Joint Intervenors Brief at 2 n. 1. Notwithstanding the historical use of “grandfather clauses” to avoid the requirements of the Fifteenth Amendment, the term “grandfather clause” is accepted legal shorthand that finds recent and repeated acceptance by federal and Kentucky courts alike. *See e.g. Murr v. Wisconsin*, 582 U.S. ___, 137 S.Ct. 1933, 1936 (2017); *Sunrise Coop., Inc. v. USDA*, 891 F.3d 652, 655 (6th Cir. 2018); *Shockey Tours, Inc. v. Miller Transp., Inc.* 984 S.W.2d 95, 96 (Ky. 1998).

²⁷ KYSEIA Brief at 2-4; Joint Intervenors Brief at 10-14.

affirmatively the General Assembly’s authority by including language of exclusivity such as “only to” or “except for.”²⁸ The Joint Intervenors and KYSEIA err.

KYSEIA principally relies upon *Pub. Serv. Com’n of Ky. v. Commonwealth*²⁹ for its expansive reading of KRS 278.466(6). There, the Attorney General argued that the Commission’s Order approving Duke Kentucky’s economic development rider violated KRS 278.170 because it provided discounted rates to classifications other than those enumerated in KRS 278.170(2).³⁰ The Supreme Court rejected the Attorney General’s argument noting that the Court would be required to “read out” of Chapter 278 both KRS 278.170(1), which proscribed unreasonable preferences, and KRS 278.030(3), which authorizes utilities to make “suitable and reasonable classifications of its service, patrons and rates” thereby rendering the statutes meaningless.³¹ Finally, the Court explained that its construction of KRS 278.170(2) “comports with the interpretation employed by the PSC over the last twenty years.”³²

Here, limiting KRS 278.466(6) to its plain meaning will not render any other provision of Chapter 278 meaningless. There are no other provisions of Chapter 278 that grant legacy rate design rights to customers or that address the issue of legacy rights. Moreover, the text of KRS 278.466(6) makes clear the General Assembly understood that legacy rights were limited to net metering customers taking service prior to the effective date of the initial net metering order. Indeed, the reference to “including the one-to-one (1:1) kilowatt-hour denominated energy credit provided for energy fed into the grid...” of KRS 278.466(6) can be read no other way because

²⁸ KYSEIA Brief at 3.

²⁹ 320 S.W.2d 660 (Ky. 2010).

³⁰ *Id.* at 666-667.

³¹ *Id.* at 667-668.

³² *Id.* at 668.

the statute was amended in 2019 to eliminate the one-to-one metering preserved by the legacy rights language of the statute.³³

KYSEIA's and the Joint Intervenors' reliance on *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) likewise is misplaced. First, this is a case of first impression; there is no 20-year (or lesser period) of interpretation by the Commission of the 2019 legislation as was the case in *Pub. Serv. Com'n of Ky. v. Commonwealth*.³⁴ More fundamentally, Chevron Deference applies only where the statutory language is ambiguous.³⁵ Here, KRS 278.466(6) is unambiguous and leaves no room for departing from its clear legislative command.

Finally, the conjecture – and it is nothing more than that – by KYSEIA and Joint Intervenors that the multiple net metering billing regimes required by the Commission's decision to expand legacy rights will not impose unreasonable burdens on Kentucky Power is weak tea indeed. The Commission at a minimum should grant rehearing to permit the development of a full record on the question.

C. No Party Challenges Or Refutes The Company's Avoided Cost Rate Corrections In The Motion For Rehearing.

In its Motion, the Company demonstrated that the Commission's calculation of avoided generation capacity, transmission capacity, and distribution capacity is incorrect due to mathematical errors common to all three avoided cost component calculations.³⁶ The Company explained that the error affects multiple components and calculated costs and offered as evidence its Exhibit B to the Motion, a workpaper prepared by Company Witness Vaughan, which

³³ See 2019 KY. ACTS Ch. 101, Section 2.

³⁴ 320 S.W.3d at 668.

³⁵ *Ky. OSHRC v. Estill Cnty. Fiscal Court*, 503 S.W.3d 924, 928 (Ky. 2016).

³⁶ Motion for Rehearing at 14-16.

addresses and corrects the error. Correction of the calculation error as set forth in Exhibit B results in the following residential and commercial export rates:³⁷

Corrected Residential Export Rate: \$0.06359

Corrected Commercial Export Rate: \$0.06971

Critically, no party challenged the Company's corrections contained in Exhibit B or the Company's demonstration that the Commission's calculations were incorrect. As such, the Commission should grant rehearing to correct this mathematical error and should update the rates for NMS II excess generation accordingly.

D. The Commission Impermissibly Relied On Extra-Record Evidence, Outside Of The Avoided Cost "Principles" Suggested By The Intervenors, In Creating The Rates Contained In The Order.

The Joint Intervenors argue that the Commission should disregard the Company's argument that it was not granted an opportunity to address many of the issues and avoided cost components the Commission introduced for the first time in its Order. While the intervenors argue that the Company had plenty of notice and opportunity to confront their witnesses and evidence, the intervenors misapprehend the Company's argument. The Commission relied on more than just the intervenors' suggested avoided cost "principles" in creating the avoided cost rate components. This is obvious because the intervenor witnesses only suggested that certain qualitative metrics and avoided cost "principles" be considered; they never provided any actual objective evidence or supporting rate calculations, much less those adopted by the Commission.

For example, the Commission calculated avoided cost rates for avoided energy costs, avoided generation capacity costs, avoided transmission capacity costs, avoided distribution capacity costs, avoided carbon costs, and environmental compliance costs that differed from

³⁷ *Id.* at 15-16

those supported by the Company. The Commission rejected the Company's evidence on each of these costs. Considering that none of the intervenors ever offered any quantifiable evidence or actual avoided cost calculations, the Commission relied on its own evidence in calculating each of these costs. Kentucky Power therefore was not afforded the opportunity to address certain issues related to these avoided cost components before they were calculated and ordered by the Commission because the Commission did so based upon information outside of this record and after the close of evidence in this case. Most notably are the Commission's calculations of avoided generation capacity, transmission capacity, and distribution capacity costs, which the Company has argued were erroneously calculated in the Motion for Rehearing and herein. Had the Company had notice and a fair opportunity to address these calculations prior to the Commission's Order, the Company would have addressed the calculation errors prior to entry of the Order. However, the Company was not afforded the opportunity and instead had to request rehearing on the issue.

As a further example, "[t]o estimate the avoided distribution capacity cost, the Commission scaled Kentucky Power's modified avoided transmission capacity cost by both rate base and deferrable distribution scalars. The rate base was used to reflect the larger investment in distribution as compared to transmission."³⁸ The Commission makes no citations to the record in making these statements in support of setting the avoided distribution capacity cost at \$0.01046. Kentucky Power was deprived of the opportunity to address this issue, and several others, as it was introduced for the first time in the Commission's Order.

The Commission should grant rehearing and find that the Company's avoided cost rate is fully supported by the record in this case. Alternatively, the Commission should grant rehearing

³⁸ Order at 34.

to permit Kentucky Power to present evidence responding to, and develop a record demonstrating the inaccuracy of, the Commission's new, novel, and unsupported avoided distribution capacity, carbon, and environmental compliance cost elements.

E. The Commission Should Address The Battery Storage Issue In This Case.

Joint Intervenors argue that the issue of whether battery storage constitutes a material change to the system is better addressed in the pending interconnection guidelines case (Case No. 2020-00302).³⁹ Whatever the other advantages of addressing battery storage in the interconnection guidelines case, the Company is required to implement its net metering tariffs now, and should not and cannot await the resolution of the issues sometime in the future.

F. KYSEIA and Joint Intervenors Fail To Fairly Address The Fact Of Double-Counting.

Joint Intervenors and KYSEIA attempt but ultimately fail to overcome the irrefutable. Allowing net metering customers to retain the RECs associated with their generation, while compensating these same customers for the Commission's calculation of the avoided carbon costs and costs of environmental compliance, twice picks the pockets of the Company and its non-net metering customers. KYSEIA, while noting that the avoided cost of environmental compliance reflects the Commission's calculation of coal ash remediation, never addresses the fact that net metering customers are being compensated a second time by retaining the RECs. KYSEIA then doubles down on its failure to address the Company's argument by arguing an apparent non-sequitur: the double-counting may not make any difference because "the May 14, 2021 Order does not specify whether the monetary credit offsets the monthly service charge."⁴⁰

³⁹ Joint Intervenors Response at 22.

⁴⁰ KYSEIA Response at 6.

Joint Intervenors argue that the RECs represent the environmental value of the net metering customers' generation to society. But that misses the point. Neither society, the Company, nor its non-metering customers receive the monetized value of the claimed benefit to society while also being paid the Commission's calculation of the avoided costs associated with that value.

III. Conclusion

For the foregoing reasons, Kentucky Power Company respectfully submits that the Commission should grant rehearing to address, correct, or clarify each of the issues identified above and in its Motion for Rehearing.

Respectfully submitted,



Mark R. Overstreet
Katie M. Glass
STITES & HARBISON PLLC
421 West Main Street
P.O. Box 634
Frankfort, Kentucky 40602-0634
Telephone: (502) 223-3477
moverstreet@stites.com
kglass@stites.com

Christen M. Blend (*pro hac vice*)
Hector Garcia-Santana (*pro hac vice*)
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American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
Telephone: (614) 716-1915 (Blend)
cblend@aep.com
hgarcia1@aep.com
tswolffram@aep.com

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KENTUCKY POWER COMPANY