

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matters of:

ELECTRONIC APPLICATION OF KENTUCKY )	
UTILITIES COMPANY FOR AN ADJUSTMENT )	
OF ITS ELECTRIC RATES, A CERTIFICATE )	
OF PUBLIC CONVENIENCE AND NECESSITY )	CASE NO.
TO DEPLOY ADVANCED METERING )	2020-00349
INFRASTRUCTURE, APPROVAL OF CERTAIN )	
REGULATORY AND ACCOUNTING )	
TREATMENTS, AND ESTABLISHMENT OF A )	
ONE-YEAR SURCREDIT )	

ELECTRONIC APPLICATION OF LOUISVILLE )	
GAS AND ELECTRIC COMPANY FOR AN )	
ADJUSTMENT OF ITS ELECTRIC AND GAS )	
RATES, A CERTIFICATE OF PUBLIC )	CASE NO.
CONVENIENCE AND NECESSITY TO DEPLOY )	2020-00350
ADVANCED METERING INFRASTRUCTURE, )	
APPROVAL OF CERTAIN REGULATORY AND )	
ACCOUNTING TREATMENTS, AND )	
ESTABLISHMENT OF A ONE-YEAR SURCREDIT )	

**KENTUCKY SOLAR INDUSTRIES ASSOCIATION, INC.  
RESPONSE TO PETITION FOR REHEARING  
OF THE ATTORNEY GENERAL AND  
KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC.  
COMBINED WITH  
RESPONSE TO JOINT INTERVENORS' PETITION FOR REHEARING**

Comes now the Kentucky Solar Industries Association, Inc. (KYSEIA), by and through counsel, and, pursuant to 807 KAR 5:001 Section 5(2) files its Response to the Petition for Rehearing filed by the Attorney General (“OAG”) and Kentucky Industrial Utility Customers, Inc. (“KIUC”) combined with KYSEIA’s Response to the Joint Intervenors’ Petition for Rehearing

concerning the Commission's September 24, 2021, Order in the instant proceedings. The Commission should deny the OAG and KIUC Petition for Rehearing. The Commission should grant the Joint Intervenors' Petition for Rehearing.<sup>1</sup>

**I. THE OAG AND KIUC FAIL TO IDENTIFY ANY ERROR WITH THE COMMISSION'S SEPTEMBER 24, 2021, ORDER THROUGH IDENTIFYING THE ABSENCE OF A RECITATION OF LANGUAGE IN 807 KAR 5:054 SECTION 7(4).**

The OAG and KIUC seek an Order on rehearing from the Commission that includes a confirmation that the duly promulgated administrative regulations of the Commission bearing upon the Companies' LQF tariffs, in fact bear upon these tariffs, and that the provision of service by KU and LG&E under their respective LQF tariffs is subject to the Commission's administrative regulations governing the subject-matter. The OAG and KIUC complain that the Commission did not expressly recite a portion of 807 KAR 5:054 Section 7(4) in its September 24, 2021.

There is no allegation of error supporting this request for rehearing. Instead, the basis for confirming the otherwise evident applicability of 807 KAR 5:054 Section 7(4) is language from the Commission's January 13, 2021, Order in Case No. 2020-00174,<sup>2</sup> the recent Kentucky Power Company application for a general adjustment in rates.

The OAG and KIUC do not identify any portion of the September 24, 2021, Order which even insinuates that the Commission is, somehow, abrogating 807 KAR 5:054. Moreover, the OAG and KIUC request for rehearing fails to identify any infirmity in the language in the pre-

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<sup>1</sup> KYSEIA will, by separate pleading, file a response to the Joint Petition of Kentucky Utilities Company ("KU") and Louisville Gas and Electric Company ("LGE" also, collectively "Companies") for Reconsideration of the September 24, 2021 Order.

<sup>2</sup> Case No. 2020-00174, *In the Matter of: Electronic Application of Kentucky Power Company for (1) 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 Certificate of Public Convenience and Necessity; and (5) All Other Required Approvals and Relief,* (Ky P.S.C. Jan. 13, 2021), Order at 100 (hereinafter "Case No. 2020-00174").

Case No. 2020-00349 and Case No. 2020-00350 LQF tariffs of KU and LG&E (respectively) or the tariffs for each utility proposed by the Companies in the instant cases. There is no identifiable error to correct in the Order or the tariffs. The grievance of the OAG and KIUC is that the September 24, 2021, Order does not affirm a provision of an existing administrative regulation to their satisfaction.

Again, the OAG and KIUC have alleged no error on this issue. Instead, they seek an Order on rehearing through which the Commission acknowledges that its administrative regulations do, in fact, state what they actually state and govern what they actually govern. To the extent that there are “stakeholders” who are unaware of an alleged issue that is not associated with any claim of infirmity with the Companies’ LQF tariffs or error in the September 24, 2021, Order (and which is difficult to reconcile with the standard for rehearing of a Commission Order), the matter is functionally benign, and should be denied.

**II. THE COMMISSION SHOULD DENY THE OAG AND KIUC REQUEST FOR THE COMMISSION TO REVISE 807 KAR 5:054 THROUGH A RATE CASE ORDER.**

The OAG and KIUC attack the September 24, 2021, Order regarding the Commission’s existing process for hearings under 807 KAR 5:054. Unlike their (previously discussed) benign request for an extension of the September 24, 2021, Order to include an unnecessary statement that the administrative regulations of the Commission have the force and effect of administrative regulations of the Commission, the OAG and KIUC, through this argument, request creation of a *per se* rule that the Commission conduct an evidentiary hearing for each QF contract with all electric utilities.<sup>3</sup>

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<sup>3</sup> OAG and KIUC Petition for Rehearing, pages 3 and 4.

The request for rehearing on this point is not simply a request to extend the discussion in the September 24, 2021, Order. It is unmistakably a request for the Commission to revise 807 KAR 5:054 and announce a new statement of general applicability, policy, or procedure, memorandum, or other form of action through a rate case adjudication rather than through proper rule-making.<sup>4</sup>

The OAG and KIUC concede that the hearing requirement that they seek is a new hearing *other than* the hearing currently required (or as they state - “compelled”) through KAR 5:054 Section 7(4),<sup>5</sup> the latter being the only hearing required by this administrative regulation and only required in instances in which “the electric utility and qualifying facility cannot agree on the purchase rate.” The request for the revision of 807 KAR 5:054 to add a new procedural feature of general applicability to all electric utilities in all instances should be denied.

Additionally, a *per se* rule requiring hearings in all instances involving a qualifying facility contract is not necessary or advisable. The Commission has plenary authority to hold any *other* hearings found necessary for a qualifying facility contract. It is the expectation that the Commission will hold such *other* hearings on contracts between qualifying facilities and electric utilities as part of the Commission’s normal practices in tailoring the scrutiny of matters within its jurisdiction on a case-by-case basis rather than through an inflexible one size fits all *per se* rule-based approach.<sup>6</sup> It is unremarkable that the Commission’s current administrative regulation addressing this matter did not adopt the *per se* approach sought by the OAG and KIUC.

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<sup>4</sup> See KRS 13A.100.

<sup>5</sup> OAG and KIUC Petition for Rehearing, page 3. 807 KAR 5:054 Section 7(4) stated, in pertinent part: “If the electric utility and qualifying facility cannot agree on the purchase rate, then the commission shall determine the rate after a hearing.”

<sup>6</sup> For example, consider a scenario in which the Commission required an “on-the-record hearing with full due process safeguards for intervenors” (the standard sought by the OAG and KIUC) if this requirement was placed upon all applications submitted under KRS 278.300, a regulatory matter which is, at minimum, no less influential in causing “direct and substantial impacts on retail rate customer rates” as contracts between qualifying facilities and electric utilities.

As noted by the Commission, “PURPA is a ‘program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.’”<sup>7</sup> The Commission has, consistent with PURPA, established a regulatory program to meet the needs of the Commonwealth.

The OAG and KIUC position that an on-the-record hearing in all instances is advisable to satisfy due process is based upon Pennsylvania state court judicial precedent. Setting aside the fact that the OAG and KIUC do not demonstrate any current due process problems in Kentucky under the Commission’s existing practices with respect to 807 KAR 5:054, they do not demonstrate the Pennsylvania precedent as particularly persuasive. There is ample Kentucky precedent, statutory, and administrative regulation guidance available to and employed by the Commission and intervenors to guide and instruct on due process.

More importantly, the reference to a Pennsylvania state court precedent is not binding upon the Commonwealth of Kentucky, including its administrative agencies.<sup>8</sup> In Kentucky, we are not required to agree with or follow Pennsylvania in structuring our regulatory programs.

In construing a statute, text book authority and cases from other jurisdictions, although informational and persuasive, are not decisive. *Collins v. Kentucky Tax Commission*, Ky., 261 S.W.2d 303 (1953). Although our legislature may adopt a statute which is identical or very similar to one in another state, we are not necessarily required to adopt the construction and application placed on the statute in the foreign jurisdiction.<sup>9</sup>

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<sup>7</sup> Case No. 2020-00174, (Ky P.S.C. Jan. 13, 2021), Order at 99.

<sup>8</sup> Kentucky (including its administrative agencies) as a sovereign separate from Pennsylvania is fully competent to construe the requirements of federal law. See, for comparison, *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) (“The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court’s interpretation of federal law give way to a (lower) federal court’s interpretation. In our federal system, a state trial court’s interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located.”).

<sup>9</sup> See *Epsilon Trading Co. v. Revenue Cabinet*, 775 S.W.2d 937, 941 (Ky. App. 1989).

The above principle of Kentucky law applies to this Commission's administration of its own regulatory programs. Kentucky is not required to match the structure in Pennsylvania.

The lack of identification of any actual problem with the Commission's investigative procedures and fairness to parties on this point by the OAG and KIUC is telling. There is no due process problem for the Commission to solve. For all the foregoing reasons, the rehearing relief sought by the OAG and KIUC on this point, the introduction of a new *per se* hearing rule, should be denied.

**III. THE OAG AND KIUC REQUEST FOR THE COMMISSION TO CLARIFY ITS INTENTIONS REGARDING NEW PURPA REGULATIONS IS NOT A MATTER SUPPORTING REHEARING.**

The OAG and KIUC request for the Commission to clarify its intentions regarding new PURPA regulations is not a matter that demonstrates any error or reason to rehear the September 24, 2021, Order. The OAG and KIUC seek to argue, through rehearing of a Commission rate case Order, a matter that does not change the Commission's Order even if their underlying allegation concerning PURPA is correct. It is not a rehearing matter for these proceedings.<sup>10</sup>

**IV. THE JOINT INTERVENORS' REQUEST FOR REHEARING IS CONSISTENT WITH A CONCERN PREVIOUSLY CONVEYED BY KYSEIA.**

KYSEIA did not file a request for rehearing. In reviewing the Joint Intervenors' request for rehearing on the carbon cost export rate, nonetheless, KYSEIA notes that its own position through testimony and briefing for the instant applications is that KYSEIA's recommendation likely underestimates the carbon cost stack. Because of this previously acknowledged concern,

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<sup>10</sup> The Commission is currently undertaking a review of its regulations and seeking public comment on that review. As suggested above, this rulemaking undertaking is the appropriate forum for addressing changes to regulations in light of amended PURPA regulations and the interpretation of those regulations. See PSC's *Proposed Regulations and Amendments to Regulations*, <https://psc.ky.gov/home/pscregulations>, last visited October 20, 2021.

KYSEIA supports the Joint Intervenors' request to rehear the carbon cost export rate because its position did significantly underestimate the cost.

WHEREFORE, for the foregoing reasons, KYSEIA respectfully requests that the Commission deny the OAG and KIUC Petition for Rehearing and grant the Joint Intervenors' Petition for Rehearing. (KYSEIA will, by separate pleading, respond to the Companies' Joint Petition for Reconsideration.)

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 20<sup>th</sup> day of October 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, March 24, 2020, and July 22, 2021 Orders in Case No. 2020-00085, *Electronic Emergency Docket Related to the Novel Coronavirus Covid-19*, the paper, in paper medium, is not required to be filed.

/s/ David E. Spenard  
David E. Spenard

## **NOTICE REGARDING SERVICE**

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

/s/ David. E. Spenard  
David E. Spenard