COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

In the Matter of:

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

JOINT POST-HEARING BRIEF OF
KENTUCKY UTILITIES COMPANY AND
LOUISVILLE GAS AND ELECTRIC COMPANY

Dated: September 7, 2021

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INTRODUCTION

Kentucky Utilities Company ("KU") and Louisville Gas and Electric Company ("LG&E") (collectively, the "Companies") respectfully submit this post-hearing brief to the Kentucky Public Service Commission ("Commission").

ARGUMENT

I. The Companies have carried their burden to demonstrate the reasonableness of forecasted legal expense and remain willing to provide any additional information requested by the Commission, short of privilege waiver, to satisfy the Commission.

The Companies appreciate the opportunity granted by the Commission in its August 12, 2021 Order to present additional evidence in support of their request for recovery of forecasted legal expense. The record as a whole in conjunction with the additional evidence and testimony presented to the Commission at the hearing on August 17, 2021 demonstrates the Companies have met their burden of proof to show the reasonableness of the forecasted legal expense presented in their applications.

The reasonableness of the forecast is supported not only by the base period update and description of specific legal matters and budget of expense by category, but also by extensive evidence and testimony on rehearing from Dan Arbough, Treasurer for the Companies. Mr. Arbough testified in detail about the rigorous process utilized by the Companies to ensure that the forecasted legal expense is reasonable, reliable, made in good faith, and aligns with historical experience and the Companies' expectations of their future legal needs. Nevertheless, to the extent the Commission has additional questions in the form of post-hearing data requests or otherwise, the Companies will respond to all such requests bounded only by the availability of the requested information and their asserted privilege and attorney work product protection.

A. The reasonableness of forecasted legal expense should be judged as a whole just like other forecasted operating expenses, and the Companies have satisfied their evidentiary burden to demonstrate reasonableness of the expense.

The Companies bear the burden to demonstrate that their forecasted legal expense, like any other recurring business expenses, is "just and reasonable" in order to be recovered in a rate case. KRS 278.190(3). The Companies have met and exceeded that evidentiary burden for forecasted legal expense. Particularly with the use of a forecasted test period, as the Companies are expressly authorized to use by KRS 278.192, the reasonableness of the expense should be evaluated in the aggregate, not on a matter-by-matter basis.[1]

The Companies have supplied a heretofore unprecedented amount of evidence supporting the reasonableness of the aggregate forecasted legal expense. The most direct, persuasive evidence is the base period update filed with the Commission before the initial hearing. With the passage of KRS 278.192, the Kentucky General Assembly clearly expressed its objective that in a forecasted test year case, the base period financials would serve as a touchstone for assessing the reasonableness of the company's forecasts.[2] The Commission's regulations affirm this measure, requiring base period and forecasted financials that "detail[] how the utility derived the amount of the requested revenue increase."[3] The record evidence shows that for the combined Companies the forecasted legal expense is nearly 3 percent ***lower than*** the base period actual legal expense:

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[1] Any approach that prejudges the reasonableness of expense for a particular matter on the basis of mere allegations as a means of disallowance is unworkable, bereft of due process, arbitrary, and potentially punitive. *See, e.g.*, *In Re Application of Southern States Utilities*, 1993 Fla. LEXIS 910 (Fla. PSC 1993) (absolute prohibition against recovery of legal fees in any proceeding where a fine may be imposed would be impractical); *South Central Bell Telephone v. Utility Regulatory Comm'n*, 637 S.W.2d 649, 654 (Ky. 1982) (ratemaking may not be used for punitive purposes).

[2] KRS 278.192(2)(a) (requiring any forecast test period filing to include a base period containing at least six months of actual financials and beginning not more than nine months before filing).

[3] 801 KAR 5:001, Section 16(8)(a).

	KU Jurisdictional	LG&E	Total
Base Period Actuals (12 ME 2/28/21)[4]	$5,009,799	$3,020,309	$8,030,108
Forecasted Test Year (12 ME 6/30/22)[5]	$3,984,169	$3,826,975	$7,811,144
% Variance (Base to Forecast)	(25.7%)	21.1%	(2.7%)

The variance between the base period actuals and the forecasted test year is indicative of how events beyond the control of the Companies can influence legal expense. As Mr. Arbough's affidavit states, precisely budgeting forecasted legal expense is inherently difficult due to its variable nature.[6] For example, the litigation of claims is subject to a number of variables such as when claims are made, the fluctuation in a court's docket, the availability of opposing counsel, scheduling depositions and mediations, and a party's interest in settlement. Attachments B-1 and B-2 to Mr. Arbough's affidavit show that some matters for which the Companies expected to incur legal expense in the forecasted test period are already resolved.[7] Other new matters which were not known at the time the Companies filed their rate case applications have arisen.[8] Still other new and unforeseeable claims and matters will continue to arise. However, the Companies' historical experience demonstrates that they will incur these expenses in the aggregate every year at a reasonably predictable level.[9] For these reasons, the variance at this degree does not indicate that

[4] KU Base Period Update, Attachment to Filing Requirement Tab 59 – 807 KAR 5:001 Sec. 16(8)(f) (filed Apr. 14, 2021); LG&E Base Period Update, Attachment to Filing Requirement Tab 59 – 807 KAR 5:001 Sec. 16(8)(f) (filed Apr. 14, 2021).
[5] Filing Requirements, Tab 59 – 807 KAR 5:001 Section 16(8)(f), Schedule F-6 (KU and LG&E).
[6] Joint Petition of Kentucky Utilities Company and Louisville Gas and Electric Company for Partial Rehearing and Clarification of the June 30, 2021 Final Orders ("Joint Petition for Rehearing"), Exhibit B, ¶ 6 (filed July 23, 2021).
[7] Joint Petition for Rehearing, Exhibits B-1 and B-2.
[8] 8/17/21 Hearing, VR 54:45 (Arbough Direct Examination).
[9] Arbough Rehearing Exhibit 1 presented during direct examination of Mr. Arbough on August 17, 2021 shows actual legal expense incurred for both LG&E and KU over the past 5 years, the base period, and then the projected legal expense for the forecasted test period. Mr. Arbough testified on rehearing that while there is some variation from year to year, the charts show that "there is a base number that certainly is spent every year . . . and the numbers, certainly over the past couple of periods, the $8 million plus total number certainly leads me to believe that the $7.8 million in the test period for this case are [sic] reasonable." 8/17/21 Hearing, VR 53:09 (Arbough Direct Examination).

the estimates are unreasonable or unreliable, only that the expense is variable and subject to events beyond the control of the Companies. Given that base period actuals are the most persuasive evidence of the reasonableness of forecasts, then, this portion of the record on its face carries the Companies' burden.

But the Companies' evidence went much further. On rehearing, Mr. Arbough testified extensively about the prudence and multiple levels of review applied to ensure that the Companies' legal expense forecasts are reasonable.[10] Specifically, Mr. Arbough testified that the process is bottom up – starting with the responsible attorney making estimates on individual matters, which then go to the Associate General Counsel for review not in a vacuum, but in the context of counsel's knowledge of the details of pending matters and what the Companies have spent on similar legal matters in the past and in relationship to the overall budget.[11] The forecast is then provided to the Companies' General Counsel for review, who oversees additional scrutiny and adjustments.[12] The legal expense forecasts are then provided to Mr. Arbough's team, which is ultimately responsible for developing the overall budget, where the forecasts are examined, vetted, questioned, and compared against historical experience before they are presented to the Companies' Chief Financial Officer and Chief Operating Officer for final internal approval.[13] The attention and thoroughness devoted to the budgeting process are further evidence that the Companies' legal expense forecasts are in fact reasonable.

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[10] 8/17/21 Hearing, VR 45:00 (Arbough Direct Examination).
[11] 8/17/21 Hearing, VR 45:00 – 47:30 (Arbough).
[12] 8/17/21 Hearing, VR 47:30 (Arbough).
[13] 8/17/21 Hearing, VR 47:40 (Arbough).

B. The Companies' assertion of legitimate work product protection does not prevent the Commission from discharging its statutory duty.

Speaking through its June 30, 2021 Orders and at rehearing, the Commission expressed concern that the Companies' assertion of the work product privilege puts the Commission at odds with its statutory responsibility to determine the reasonableness of rates – or creates a "Catch 22."[14] But it does not. The Commission is not presented with a paradoxical situation with no apparent solution. First, a lawful analysis cannot require the Companies to waive a legitimate claim of privilege in order to recover their reasonably forecasted and prudently incurred expenses.[15] A properly framed inquiry into the reasonableness of the Companies' forecasted legal expense does not depend on an examination of forecasts by matter, but rather on an examination of the forecasts as a whole.[16] The Companies were surprised by the Order because historically the Commission has not undertaken a piecemeal examination of estimated operating expenses in a rate case supported by a forecasted test period. For example, for forecasted operating expenses in FERC Account No. 593 – Maintenance of Overhead Lines – the specific lines that will be subject to future maintenance and the cost of each maintenance activity is inherently difficult to identify with precision. And because these future events and associated costs cannot be predicted with precise certainty, they are budgeted as aggregated projections made reasonably and in good faith based on historical experience. Forecasted legal expenses are no different. The Companies have met and

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[14] 8/17/21 Hearing, VR 1:27:30.

[15] *Application of Kentucky Utilities Company for an Adjustment of Base Rates*, Case No. 2009-00548, Order at 9 (Ky. PSC July 30, 2010); *Application of Louisville Gas and Electric Company for an Adjustment of Electric and Gas Base Rates*, Case No. 2009-00549, Order at 9 (Ky. PSC July 30, 2010) ("[W]hile our proceedings are not governed by either Kentucky's Rules of Evidence or its Rules of Civil Procedure, any privilege so established which shields the disclosure of attorney-client communications ***must be recognized and applied here***.") (emphasis added) (the cases applied the same rule to assertion of attorney work product protection); *Southern California Gas Co. v. Public Utils. Com.*, 784 P.2d 1373, 1381 (Cal. 1990) (public utility commission's duty to determine reasonableness of rates does not have to come at the expense of piecing an applicant's attorney client privilege).

[16] 8/17/21 Hearing, VR 1:28:30.

exceeded that burden. Second, when the Companies learned for the first time in the June 30, 2021 Orders that the Commission wished to make a qualitative inquiry into specific matters to determine whether forecasted legal expense associated with such matters are appropriate, they submitted substantial evidence to satisfy the inquiry.[17] In connection with their petition for rehearing the Companies provided actual spending by company for the previous five years and detailed information about each matter pending at the time the forecast was developed, including where appropriate the venue, parties, nature of the claims, and damages alleged.[18] And on rehearing, Mr. Arbough testified extensively about qualitative details of the specific matters and their actual expenditures to date. To the extent the Commission has further questions on any specific matter based on its description, the Companies will supply the requested information short of waiving their privilege.

Third, if the Commission further reviews the reasonableness of forecasted legal expense for one or more specific matters, there are a number of ways it could do so without insisting the Companies waive their privilege. One such method would be a request for actual, historical, or average legal expenses for past matters of the same nature and type, which would reasonably approximate forecasted expense in a typical case. Another would be to ascertain historical expense incurred on the matter at issue and extrapolate that expense for the forecasted test period.

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[17] 6/30/21 Final Order (KU), pp. 24-25; Joint Petition for Rehearing, Exhibit B (Affidavit of Dan Arbough supporting attachments and attesting why budgeting on a matter by matter basis is challenging); Exhibit B-1 (listing all KU matters then-pending when the forecasted legal expense was developed, by category, with supporting descriptions of those matters including venue, parties, claims, and alleged damages (where applicable and known); Exhibit B-2 (same for LG&E); 8/17/21 Hearing, VR 45:00 (Arbough Direct Examination) (detailed explanation of budgeting process including matter by matter forecasts); Arbough Rehearing Direct Exhibit 1 (setting forth historical actual legal expense by company compared to forecasted test period); Arbough Rehearing Direct Exhibits 2 and 3 and rehearing testimony at VR 59:15 (explaining that Arbough Affidavit Exhibits B-1 and B-2 have been updated to include a listing by matter and where, applicable, the actual base period legal expense for that specific matter.

[18] Joint Petition for Rehearing, Exhibits B-1 and B-2.

In any case, a disallowance of all legal expense is entirely arbitrary and unreasonable.[19] As counsel for Kentucky Industrial Utility Customers, Inc. observed, regardless of potential matter-specific concerns the Commission may have, "I believe the Company is correct on this. There is a four year rate case stay out as part of the order and it is an absolute certainty that the Companies' legal expenses each year of those four years are going to be a lot closer to $7 million than zero".[20]

C. Due process requires further inquiry and opportunity to present evidence if the reasonableness of expense is to be determined on a matter-specific level.

Given that the Commission granted rehearing and will allow the Companies to submit additional post-hearing evidence of the reasonableness of forecasted legal expense, the due process arguments presented in the joint petition for rehearing are presently moot. But the Companies are compelled to address the implication expressed by the Commission and Staff on rehearing that it asked for information needed to evaluate the reasonableness of forecasted legal expense multiple times and did not receive satisfactory responses. This assertion is not in accord with the facts in the record. The Companies' responses to PSC 1-6, which were the subject of discussion at the hearing, supplied significant information about *past* legal expenses. Those requests asked for a "detailed analysis" of professional service expense for the 12 months preceding the base period including "at a minimum . . . the payee, dollar amount, reference (i.e. voucher no., etc.), account charged, hourly rates and time charged to the company according to each invoice, and a description

[19] *Petition of PNM Gas Services v. New Mexico Public Utility Commission*, 1 P.3d 383, 408 (N.M. 2000) (disallowance of all rate case legal expense arbitrary where company presented unrefuted evidence that legal expense was prudently incurred); *In Re Indianapolis Water Co.*, 1991 Ind. PUC LEXIS 348 (Ind. PUC 1991) (refusing to accept recommendation that all test period legal expenses be disallowed because bills were not itemized, found proposed adjustment was not representative of utility's likely legal expense and that such expense was recoverable in rates).
[20] 8/17/21 Hearing, VR 2:06:08.

of the services provided."[21] The Companies responded by providing the following for past legal expense:

<table>
<tr><th>Requirement[22]</th><th>Response</th><th>Excerpt of Response</th></tr>
<tr><td>The payee</td><td>Provided</td><td>Vendor Name
BAKER BOTTS LLP
BAKER BOTTS LLP
BALCH AND BINGHAM LLP</td></tr>
<tr><td>Dollar amount</td><td>Provided</td><td>Total
570
4,834
1,745</td></tr>
<tr><td>Reference (i.e. voucher no.)</td><td>Provided</td><td>Invoice
1661885
1677459
779566</td></tr>
<tr><td>Account charged</td><td>Provided</td><td>Account
923900
923900
923900</td></tr>
<tr><td>Hourly Rates and Time Charged</td><td>"Given the voluminous nature of the request to supply the requested time information, the Company is providing [on a confidential basis] the annual legal fees rate schedule … in lieu of pulling hundreds of invoices."[23]</td><td><table>
<tr><th>Firm</th><th>Timekeeper</th><th>2020 Rate</th><th>Title</th><th>2020 Rate Increase Date</th></tr>
<tr><td>Baker Botts</td><td>Mayo, Kent</td><td rowspan="3">[redacted]</td><td>Partner</td><td>10/1/2020</td></tr>
<tr><td>Baker Botts</td><td>McDonald, Derek</td><td>Partner</td><td>10/1/2020</td></tr>
<tr><td>Baker Botts</td><td>Berge, Megan</td><td>Partner</td><td>10/1/2020</td></tr>
</table></td></tr>
<tr><td>Description of services provided</td><td>Provided</td><td>Line No. Type
1 Legal
2 Legal
3 Legal</td></tr>
</table>

The Companies relied on three essential pieces of information in concluding that this evidence was sufficient proof of historical legal expense heading into the hearing and decision in

[21] KU Response to Commission Staff's First Request for Information, No. 6 and attachments (filed Dec. 15, 2020); LG&E Response to Commission Staff's First Request for Information, No. 6 and attachments (filed Dec. 15, 2020).
[22] All information in this table is excerpted from KU's Response to Commission Staff's First Request for Information, No. 6, and the first three lines of two different attachments thereto. There were 483 total line items for legal invoices provided by KU.
[23] KU Response to PSC 1-6 (filed Dec. 15, 2020); LG&E Response to PSC 1-6 (filed Dec. 15, 2020).

these proceedings. First, the Companies provided an identical level of detail in response to the same request in three consecutive previous forecasted test year rate cases. The response was never challenged or subject to further Commission inquiry in any of those cases, and the forecasted expense was approved as filed in all three.[24] Second, the Commission *never* followed up or requested additional information on this response in these proceedings or otherwise indicated that the response was insufficient, despite the response being served more than four months before the first hearing. Third, the Companies were and are unaware of any case in which the Commission has required a utility to produce the full text of all professional services invoices to satisfy the requirements of 807 KAR 5:001 Section 16(8)(f) or a question in substantially the same form as PSC 1-6.[25]

The first time the Companies were asked to provide information about *future* legal expenses in the forecasted test year was in PSC 5-2, which requested a "detailed analysis" but did not enumerate any specific information that should be included in such an analysis. Again, the Commission did not take exception to the Companies' responses to this data request, which specifically identified all legal matters pending at the time the forecast was developed, grouped by

[24] Joint Petition for Rehearing (Jul. 23, 2021), Exhibit A (containing record on legal expense from Companies' last three rate cases using a forecasted test period).

[25] A review of recent rate adjustment filings from other investor-owned utilities indicates that invoices supporting each line item provided in response to the 807 KAR 5:001 Section 16(8)(f) filing requirement are not routinely requested or provided. *See, e.g., 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, Exhibit U to Application Filing Requirement (filed June 29, 2020), and Response to PSC 2-46 at Attachment thereto (filed July 21, 2020) (itemizing legal invoices in the same manner as the Companies did in these proceedings)*; Electronic Application of Duke Energy Kentucky, Inc. for Authority to 1) Adjust Natural Gas Rates 2) Approval Of A Decoupling Mechanism 3) Approval Of New Tariffs 4) And For All Other Required Approvals, Waivers, And Relief*, Case No. 2018-00261, Response to PSC 1-51 (filed Sept. 14, 2018) (attaching confidential document but indicating that invoices behind each expense line item were not being provided).

category, with a subdivision of the budget for each category.[26] Commission Staff then asked for the first time *at the hearing* for an itemization of forecasted legal fees by matter, to which the Companies, by counsel, asserted an objection on the basis of privilege.[27] At that time and for the first time, the Companies were on notice of the specific request for budgeted legal fees by matter, and at that same time, the Commission was on notice of the Companies' objection to providing the same. At no time before issuance of the June 30, 2021 Order were the Companies aware that their recovery of reasonably forecasted legal expense was imperiled by their failure to provide a *qualitative* legal description of each legal matter, which was never requested to that point. To the extent that the Commission will engage in a matter by matter examination of forecasted legal expense, due process requires that the Companies be permitted the opportunity to submit further evidence of the same.

D. Other Adjustments to the Legal Expense Disallowance

The Commission's disallowance as expressed in its June 30, 2021 Order failed to apply the jurisdictional factor for KU, resulting in a disallowance of approximately $275,000 in non-jurisdictional expense.[28] In addition to reinstating recovery of KU's jurisdictional expense, the disallowance of non-jurisdictional legal expense for KU must be reversed.

Further, while the text in the Final Order in the LG&E case specified the allocated portions for Electric ($2.9M) and Gas ($1.0M) for purposes of the disallowance,[29] the revenue requirement numbers in Appendix E of the Final Order reduces the Electric revenue requirement by $0.96M

[26] KU Response to Commission Staff's Fifth Request for Information, No. 2 and attachment (filed Apr. 1, 2021); LG&E Response to Commission Staff's Fifth Request for Information, No. 2 and attachment (filed Apr. 1, 2021).
[27] 4/26/21 Hearing, VR 16:06:19.
[28] KU Attachment to Filing Requirement Tab 59 – 807 KAR 5:001 Sec. 16(8)(f); KU Final Order at Appendix D. The non-jurisdictionalized value in KU's Schedule F-6 is $4,234,100, which does not equal the $4.26 disallowed by the Commission. The jurisdictionalized value in KU's Schedule F-6 is $3,984,169.
[29] LG&E 6/30/21 Final Order at 27.

and the Gas revenue requirement by $2.88M. Thus, the Electric increase is overstated, and the Gas increase is understated by this clerical error.

II. For Both Qualifying Facility Rates and Net Metering Compensation Rates, the Commission Has a Continuing Statutory Obligation to Ensure Rates Are Based on the Lowest Reasonable Cost, Not on "Value" or What Will Promote Solar Development.

Qualifying facilities ("QFs") and net metering are largely governed by different regulatory and statutory regimes, and the rates for each therefore do not have to be identical. But there are two overarching legal imperatives that equally apply to QF and NMS-2 compensation rates: as discussed below, they must be consistent with providing safe and reliable service at the lowest reasonable cost, and they must result in fair, just, and reasonable rates for *all* customers.[30] Whatever rates the Commission sets in these proceedings will directly affect what *all* customers pay for the service they receive, including the vast majority of customers who will never participate in net metering or have a financial interest in a QF.

A. The Commission's statutory obligation to ensure safe and reliable service at the lowest reasonable cost applies equally to QF rates and NMS-2 compensation rates.

What the Commission has consistently said for decades—and the Kentucky Supreme Court has agreed—is that the Commission has an obligation to ensure utilities provide safe and reliable service at the lowest reasonable cost.[31] In an order in a KU rate case nearly 40 years ago, the Commission stated its "belief that it has an obligation to pursue, for Kentuckians, an energy

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[30] *See* KRS 278.030(1).
[31] *In the Matter of: Application of Kentucky Power Company for Approval of Renewable Energy Purchase Agreement for Wind Energy Resources between Kentucky Power Company and FPL Illinois Wind, LLC*, Case No. 2009-00545, Order of June 28, 2010, p. 5 ("The Commission has long recognized that "least cost" is one of the fundamental principles utilized when setting rates that are fair, just, and reasonable", citing *Public Service Comm'n v. Continental Tel Co*., 692 S.W.2d 794, 799 (Ky. 1985) ([O]ne of the important objectives considered by the commission, that is, providing the lowest possible cost to the ratepayers.)

strategy that represents least cost consistent with appropriate reliability ….”[32] More than 30 years ago, the Commission stated that “LG&E has a statutory obligation under KRS 278.030 to serve its customers at the lowest reasonable cost.”[33] Notably, the statutory text from which the Commission derived that lowest reasonable cost obligation has not changed; the statutory obligation remains.[34] Also more than 30 years ago, the Kentucky Supreme Court criticized the Commission for straying from lowest reasonable cost principles, stating, “The Commission has ignored one of its most important roles, which is to provide the lowest possible cost to the rate payer.”[35] The Commission has issued numerous orders in the intervening years expressing unwavering approval of lowest reasonable cost principles,[36] including most recently in the Companies' Solar PPA proceeding, in which the Commission stated, quoting the Kentucky Supreme Court, “[O]ne of the Commission's ‘most important roles' in administering KRS Chapter 278, ‘is to provide the lowest possible cost to the rate payer.'”[37] There is no ambiguity or uncertainty about it: the Commission has *always* advocated for safe and reliable service at the lowest reasonable *cost*.

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[32] *General Adjustment of Electric Rates of Kentucky Utilities Company*, Case No. 8624, Order at 54 (Ky. PSC Mar. 18, 1983).

[33] *An Investigation of Electric Rates of Louisville Gas and Electric Company to Implement a 25 Percent Disallowance of Trimble County Unit No. 1*, Case No. 10320, Order at 19 (Ky. PSC Oct. 2, 1989).

[34] KRS 278.030 was amended to add current sections (4) and (5), which address energizing service to manufactured and mobile homes, in 2008, but made no changes to sections (1)-(3). See 2008 Ky. Acts ch. 118, sec. 3, available at https://apps.legislature.ky.gov/law/acts/08RS/documents/0118.pdf. Notably, KRS 278.030 did not then and does not now contain the words “lowest reasonable cost.” The Commission found that the text of KRS 278.030 at the time—which again was not altered by the 2008 amendments to the statute—created a statutory obligation for utilities to provide service “at the lowest reasonable cost.” Because that text has not changed, there is no reason for the statutory lowest-reasonable-cost obligation to have changed.

[35] *Public Service Comm'n v. Dewitt Water District*, 720 S.W.2d 725, 730 (Ky. 1986).

[36] *See, e.g.*, *Application of Big Rivers Electric Corp. for a General Adjustment in Its Rates*, Case No. 2009-00040, Order at 2 (Ky. PSC Aug. 14, 2009) (“Big Rivers must be diligent in determining future expenses, as well as capital investments, to ensure that it is providing a high quality of service at the lowest reasonable cost.”); *Application of The Union Light, Heat and Power Company for Certain Findings under 15 U.S.C. Sec. 79Z*, Case No. 2001-00058, Order at 7 (Ky. PSC May 11, 2001) (“The Commission believes that reviewing ULH&P's power supply alternatives will be critical to assuring northern Kentucky that it will have a long-term reliable power supply at the lowest reasonable cost.”).

[37] Case No. 2020-00016, Order at 7 (PSC Ky. Dec. 16, 2020), *quoting Public Service Comm'n v. Dewitt Water District*, 720 S.W.2d 725, 730 (Ky. 1986) (“The Commission has ignored one of its most important roles, which is to provide the lowest possible cost to the rate payer.”).

In sharp contrast, KYSEIA and the Joint Intervenors have advocated for QF and NMS-2 rates that are based on "value of solar" or on data that have nothing to do with the Companies' own actually avoidable costs.[38]

B. The QF and NMS-2 rates the Commission approves for the Companies must account for the market reality that long-term, level-priced, utility-scale solar energy is readily available in Kentucky for less than $0.03/kWh.

To ensure the Companies are able to provide lowest reasonable cost service, they routinely use competitive solicitations (requests for proposals) to acquire the capital equipment and other goods and services they need to serve customers. This is particularly true for generation capacity and energy.[39] With regard to renewable energy, the Companies' recent Solar PPA is the result of exactly such a competitive solicitation process.[40] It demonstrates that utility-scale solar energy (the output of a 100 MW solar facility) is available in Kentucky (and in the Companies' service territories) for less than $0.03/kWh—$0.02782/kWh to be precise—with level 20-year pricing, performance guarantees backed by liquidated damages, and renewable energy certificates ("RECs") that can be sold to offset the energy cost.[41] That pricing is hardly unique: Big Rivers Electric Corporation recently obtained Commission approval for three similar solar contracts with 20-year level pricing of $29.60/MWh (160 MW), $27.30/MWh (40 MW), and $27.30/MWh (60

[38] *See, e.g.,* Barnes Supplemental Direct at 7 ln. 5 (recommending using PJM energy pricing for the Companies' avoided energy cost); Rábago Supplemental Direct at 9 ln. 5-10 (recommending using Hayibo and Pearce value of solar values for Companies' NMS-2 rates "where it [the Commission] cannot confidently move forward with data specific to the Companies."); Owen Supplemental Direct at 9 ln. 12-16 (echoing Rábago concerning using Hayibo and Pearce values).
[39] *See, e.g.,* Sinclair Supplemental Direct at 19 ln. 10-12 ("The Companies would continue to plan and procure future generation as we always have, and should there be a potential need for future generation resources, we would issue a capacity RFP (just as we do today)."); 8/18/21 Hearing, VR 15:04:15-15:05:13 (Seelye).
[40] *See, e.g.,* Companies' Response to KYSEIA PHDR 10(c) ("The $27.82 /MWh for the Rhudes Creek solar PPA was the result of a competitive RFP process and negotiations between the parties.").
[41] *See, e.g.,* Companies' Response to PSC 7-26 ("As the Companies have noted, their recent solar PPA has a 20-year level price of $0.02782/kWh with liquidated damages if the facility fails to meet guaranteed availability, and the Companies will receive all renewable energy certificates ("RECs") from the facility's production.").

MW), and Big Rivers will receive the RECs for all three contracts.[42] The LevelTen PPA Price Index further confirms the reasonableness of these prices going forward, indicating that the most competitive quartile of 10-15 year level-price solar contracts are available for about $0.033/kWh; shorter term contracts are often higher-priced due to the shorter time over which a developer can recover the investment.[43] The summary of all this actual data and experience is that solar energy is available at utility scale in Kentucky for less than $0.03/kWh—not counting offsetting revenue from REC sales. When Kentucky utilities are seeking to obtain solar energy at the lowest reasonable cost, they obtain it competitively and pay less than $0.03/kWh, not more. That is the *most* the Companies' customers should have to pay to obtain solar energy, whether through QFs or net metering energy exports.

The Companies have demonstrated that their originally filed QF and NMS-2 proposals comport with these market realities and lowest reasonable cost principles, and therefore should be approved as fair, just, and reasonable for the customers who must actually pay the costs.[44]

In addition, the alternative pricing methodology proposed for the Commission's consideration by the Companies' witness David S. Sinclair also accounts for these market realities and lowest reasonable cost principles by employing actual data about the Companies' own marginal energy costs and using two capacity pricing models—the Current Market Price method and the Levelized Cost of a CT method—to arrive at the lowest cost for avoided energy and

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[42] *See Electronic Application of Big Rivers Electric Corporation for Approval of Solar Power Contracts*, Case No. 2020-00183, Big Rivers' Filing in Response to Commission Order on Confidential Treatment Application, Exhs. 1-3 and Exh. 4, Direct Testimony of Mark Eacret at 17-23 (PSC Ky. Apr. 23, 2021).
[43] Sinclair Supplemental Direct at 9 ln. 1-7. *See also* Sinclair Supplemental Direct at 17 ln. 14-16 ("The Companies' experience with its last two generation RFPs shows that a longer term results in lower prices for customers because developers have lower costs and risks."); Companies' Response to KYSEIA PHDR 10(c) ("[O]ne of the lessons learned from the Companies' renewable RFP was, 'A longer contract term (20 years) was less expensive than a shorter contract term (15 years)…'"); Companies' Response to PSC 6-32 page 8 of 9 regarding solar PPA pricing data from Berkeley Lab and FERC.
[44] *See, e.g.*, Seelye Rebuttal at 5-49.

generation capacity for each of four categories of generating technologies: fixed-tilt solar, single-axis tracking solar, wind, and other generating technologies (primarily fossil-fueled cogeneration).[45] This approach ensures that the Companies' customers are not paying more for QF or NMS energy and generation capacity than they would pay if the Companies generated the energy or provided the capacity themselves or through market acquisitions. In other words, the Companies' alternative approach ensures customers are no worse off for purchasing energy and capacity from QFs and NMS-2 energy exports. That is the very definition of lowest reasonable cost, which the Commission has said is the Companies' statutory obligation.[46]

C. QF and NMS-2 avoided generation capacity pricing must account for the Companies' capacity sufficiency under reasonably foreseeable conditions until at least 2028, and possibly until 2034.

Also consistent with lowest reasonable cost, both the Companies' original QF and NMS-2 proposed tariff provisions and their alternative pricing methodology recognize that the Companies do not have a current capacity need and are not expected to have such a need until 2028, and possibly not until 2034.[47] The Companies consistently and rationally assign a zero avoided capacity cost to all years when capacity is not needed.[48]

At the hearing, there was discussion about whether an avoided capacity cost should be the stay-open cost of the Companies' generating unit with the highest stay-open cost even when the Companies are capacity sufficient.[49] But it is incorrect to construe the stay-open cost of any unit

[45] *See* Sinclair Supplemental Direct at 3-11.
[46] *An Investigation of Electric Rates of Louisville Gas and Electric Company to Implement a 25 Percent Disallowance of Trimble County Unit No. 1*, Case No. 10320, Order at 19 (Ky. PSC Oct. 2, 1989) ("LG&E has a statutory obligation under KRS 278.030 to serve its customers at the lowest reasonable cost.").
[47] *See, e.g.,* Sinclair Supplemental Direct at 13 ln. 11-13; 8/18/21 Hearing, VR 11:32:30-11:33:10, 11:36:20-11:37:54 (Seelye).
[48] *See, e.g.,* Seelye Supplemental Rebuttal at 16-18.
[49] *See, e.g.,* 8/18/21 Hearing, VR 13:08:50-13:31:55 (Seelye). In the highly unlikely event that purchases from renewable QFs or NMS-2 resources could move forward the retirement of a fossil fuel generating unit, then only fixed operation and maintenance costs would be affected. *See, e.g.,* 8/18/21 Hearing, VR 13:30:52-13:31:30 (Seelye).

to be the Companies' avoided generation capacity cost *at any time* for at least four reasons. First, to set a minimum avoided generation capacity cost for QF or NMS-2 in any year when the Companies are capacity sufficient would ensure that customers would pay *twice* for the stay-open costs of the Companies' highest cost unit to the extent any QFs or NMS-2 customers are paid that generation capacity price, at least until the Companies actually retired that unit. Second, because the Companies are rate-regulated by the Commission—and the Commission has demonstrated it will disallow unnecessary generation capacity costs—the Companies already have strong incentives to ensure there is no lower-priced generation available than the stay-open costs of their highest-cost unit.[50] Third, because all net metering generating facilities and most QFs are renewable generators, and therefore intermittent and unable to produce during large parts of the year, whereas the Companies' units with the highest stay-open costs are fossil-fueled and available to serve nearly all hours of the year, including at night, on cloudy days, windless days, and in the winter, there is almost no realistic chance that adding renewable capacity without significant energy storage would *ever* allow the Companies to avoid the stay-open costs of a fossil-fueled unit.[51] Fourth and finally, when the Companies determine they have a capacity need, they fill that need through competitive solicitations to ensure customers pay the lowest reasonable cost and do not pay twice for the stay-open costs of existing generating facilities. Therefore, the Companies' position that the avoided generating capacity cost should be zero in years when the Companies are

Capital costs that have been incurred, which represent significantly larger percentages of the costs of fossil fuel generating, cannot be avoided through the early retirement of units. Furthermore, the stay-open cost calculation would need to account for the unit's anticipated retirement date, which is likely to be sooner than the expected service life of a new QF or NMS-2 generation facility; beyond that retirement date, the stay-open cost would then arguably be zero, or at most the next-highest stay-open cost. Finally, any such fixed operations and maintenance expenses would need to be discounted to present value dollars and levelized. Thus, any such hypothetical savings would be minimal, and they should still not be counted as avoided generation capacity cost for the reasons explained herein.

[50] *See, e.g.*, *An Investigation of Electric Rates of Louisville Gas and Electric Company to Implement a 25 Percent Disallowance of Trimble County Unit No. 1*, Case No. 10320, Order (Ky. PSC Oct. 2, 1989).

[51] *See, e.g.*, 8/18/21 Hearing, VR 13:08:50-13:13:15 (Seelye).

capacity sufficient is rational, consistent with lowest reasonable cost principles, and ensures customers do not pay twice for the stay-open costs of the Companies' highest cost generating facility.

Finally, there was discussion at hearing concerning a press release from the Companies concerning their current request for proposals for generating capacity, particularly concerning whether the press release indicates that the Companies might have a need for generation capacity before 2028.[52] First, it is important to understand that press releases are neither technical nor legal documents, but are intended to express utility concepts to a lay audience in simplified terms. Second, the press release states, "The utilities are seeking from 300 to 900 megawatts beginning in 2025 to 2028."[53] Because the Companies anticipate a possible capacity shortfall beginning in 2028 if foreseeable but uncertain environmental requirements necessitate certain coal-fired unit retirements, it is only prudent and rational to begin inquiring of the market now what resources could be available on or shortly before the anticipated need date. As the Commission records show, there are usually long negotiation, contracting, planning, procurement, and construction times and delays associated with acquiring significant generating capacity, so inquiring of the market what kinds of generating capacity might be available in the 2025-2028 timeframe is a prudent approach when anticipating a possible capacity need in 2028. Third, there could be other reasons to acquire capacity, and particularly renewable capacity, in the interim, namely to serve the needs of Green Tariff Option #3 customers, and the results of the current RFP might provide attractive options for such customers, who would pay the entire cost of such capacity and energy. Fourth and finally, the press release clearly states, "The request for proposal will allow us the opportunity to evaluate a number of options to ensure that we continue to serve our customers

[52] 8/18/21 Hearing, VR 16:15:20-16:24:00 (Conroy).
[53] 8/18/21 Hearing, PSC Staff Exh. 7 at 1.

energy needs in the most reliable, least-cost fashion *without committing LG&E and KU to any particular business decision*."[54] In other words, the Companies' current RFP is an information-gathering exercise, certainly not a commitment to proceed with anything at any particular time, which is exactly what the press release says. Therefore, nothing about the press release discussed at hearing in any way undermines or casts doubt upon the Companies' stated position in and the volume of evidence they submitted into the record of these proceedings that, based on currently reasonably foreseeable operating conditions, including environmental regulations, the Companies do not expect to have a capacity need until 2028, and possibly not until 2034.

D. The Companies' QF and NMS-2 rates and tariff provisions filed with their applications, as well as the Companies' proposed alternative pricing methodology, comport with lowest reasonable cost principles, are based on the Companies' own avoidable costs and market pricing, and take proper account of the Companies' capacity sufficiency.

In sum, the Companies' approach to their QF tariff provisions and NMS-2 export energy compensation rates has been entirely consistent with and driven by their statutory obligation to provide safe and reliable service at the lowest reasonable cost. The Companies' filed QF and NMS-2 tariff provisions reflect this and should be approved. The Companies' alternative pricing methodology is also a fair, just, and reasonable basis for setting both QF and NMS-2 rates because it too is consistent with lowest reasonable cost principles. And those lowest cost principles—to which the Commission has unflaggingly held for decades and characterized, along with the Kentucky Supreme Court, as a statutory obligation—are equally binding upon the Commission and the Companies for both QF and NMS-2 rates. They ensure that *all* customers pay fair, just, and reasonable rates in accordance with KRS 278.030(1).

[54] *Id.* (emphasis added).

E. Whatever QF and NMS-2 rates and tariff provisions the Commission approves, it must also approve full cost recovery of all QF and NMS-2 costs.

Regardless of whatever QF and NMS-2 rates and tariff provisions the Commission approves, the Commission must allow full cost recovery of the all-in costs of those rates. The Companies believe full recovery of the all-in QF and NMS-2 costs through the Companies' Fuel Adjustment Clause ("FAC") mechanisms is appropriate irrespective of provisions concerning economy or non-economy energy purchases.[55] The Companies will have no choice but to make QF and NMS-2 purchases and pay QF and NMS-2 rates, and they will have no control over the quantity or timing of such purchases, making such costs ideally suited for recovery through an adjustment clause mechanism such as the FAC. In the alternative, to whatever extent the Commission does not approve full, all-in QF and NMS-2 cost recovery through the Companies' FAC mechanisms, the Commission should approve regulatory asset treatment for the difference between the full, all-in cost of QF and NMS-2 purchases and whatever FAC recovery the Commission approves.

III. Federal Law Requires that the Federal Energy Regulatory Commission's Recent Revisions to Its Qualifying Facility Regulations Be Implemented by the Kentucky Public Service Commission.

An issue raised at hearing is the applicability of recently promulgated federal regulations concerning QFs, and more precisely the rules governing when utilities have QF purchase obligations and what rates utilities must pay QFs for their energy and capacity.[56] As explained below, although the new federal regulations do not currently apply in Kentucky, the Commission should consider them in these proceedings because the Commission must implement the new federal regulations in Kentucky no later than December 31, 2021.

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[55] *See, e.g.*, Conroy Rebuttal at 20 ln. 6-8; Companies' Response to JI Second Supplemental DR No. 4.
[56] 8/18/21 Hearing, VR 09:21:30-10:09:00 (Seelye).

The Federal Energy Regulatory Commission ("FERC") issued final revised QF-related regulations via Order No. 872 on September 2, 2020.[57] FERC's rulemaking stated the new regulations had an effective date of December 31, 2020.[58] Pursuant to 16 USC 824a-3(f)(1), the Commission must hold a hearing and implement the new federal QF regulations in Kentucky no later than December 31, 2021.[59]

Because the Commission must implement the new federal QF regulations in Kentucky no later than three months and one week after the Commission must enter its final orders in these rate proceedings, the Companies believe it is reasonable and prudent for the Commission to consider the requirements of the new federal QF regulations as the Commission considers the Companies' QF tariff provisions and rates in these proceedings. Certainly it would be problematic to approve QF tariff provisions and rates for the Companies in these proceedings that would be inconsistent with the new federal QF regulations; to do so would necessitate the Companies' filing new QF tariffs in just a few months' time, which would be highly inefficient and unnecessarily costly for all parties involved.

Regarding what the new federal QF regulations require and the extent to which they are inconsistent with Kentucky's current QF regulation, 807 KAR 5:054, the Companies believe the new federal regulations provide the Commission additional options to set QF prices to ensure that QF purchase rates are "just and reasonable to the electric consumer of the electric utility and in the public interest." And they do so without discriminating against QFs while also ensuring that the

[57] 85 Fed. Reg. 54,628 (Sept. 2, 2020).
[58] 85 Fed. Reg. 54,731 ¶ 753.
[59] 16 USC 824a-3(f)(1) states:

> Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) or revised under such subsection, each State regulatory authority shall, after notice and opportunity for public hearing, implement such rule (or revised rule) for each electric utility for which it has ratemaking authority.

Companies and their customers do not "pay more than the avoided costs for purchases."[60] Two of those new options that could apply to the Companies are the Competitive Price methodology and the Competitive Solicitation Price methodology; the Companies' proposed alternative pricing methodology is arguably a hybrid of those two approaches.[61] But another option that remains in the new federal QF regulations is the multi-factor approach to determining avoided costs set out in 18 CFR 292.304(e)(2), which is substantively identical to the multi-factor approach in 807 KAR 5:054 Section 7(5).[62] Therefore, to the extent the Companies' filed QF tariff provisions or the Companies' alternative pricing methodology (or both) are consistent with 807 KAR 5:054 Section 7(5), they should also be consistent with at least the multi-factor approach in the new federal QF regulations.

But there is an important addition to the new federal QF regulations that does not currently appear in 807 KAR 5:054 yet is consistent with the Companies' alternative pricing approach, namely 18 CFR 292.304(c)(3)(ii), which states that the standard rates for purchases from QFs of any size "[m]ay differentiate among qualifying facilities using various technologies on the basis of the supply characteristics of the different technologies." That is precisely the approach the Companies' alternative pricing methodology takes; it provides pricing for different technologies based on their supply characteristics and the actual costs of those technologies in the marketplace. It is an approach that ensures lowest reasonable costs for the Companies' customers and comports with the federal and state QF requirement that QF rates be "just and reasonable to the electric customer of the utility, in the public interest and nondiscriminatory."[63]

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[60] 18 CFR 292.304 (a)(1)(i) and (ii); 18 CFR 292.304(a)(2).
[61] *See* 18 CFR 292.304(a)(7) and (8).
[62] *Compare* 18 CFR 292.304(e)(2) to 807 KAR 5:054 Sec. 7(5).
[63] *See* 807 KAR 5:054 Sec. 7(2) and (4); 18 CFR 292.304(a)(1).

The Companies would also note that the new federal QF regulations contain a statement that is implicit in Kentucky's current QF regulation but should be made explicit; namely, that QF regulations do not require "any electric utility to pay more than the avoided costs for purchases."[64] As FERC noted in its new QF rulemaking order, Order No. 872:

> This upper limit on QF rates established in section 210(b), equal to a purchasing utility's incremental costs, commonly called "avoided costs," implements *Congress's intent that QFs not be subsidized*. It ensures that the purchasing utility cannot be required to pay more for power purchased from a QF than it would otherwise pay to generate the power itself or to purchase power from a third party.[65]

In other words, there is no justification under current Kentucky QF regulations or the new federal QF regulations for requiring the Companies and their customers to pay more than the Companies' actually avoided costs. And "avoided costs" is a defined term in both the state and federal QF regulations: "'Avoided costs' means incremental costs to an electric utility of electric energy or capacity or both which, if not for the purchase from the qualifying facility, the utility would generate itself or purchase from another source."[66] In short, this is precisely what the Companies' filed QF tariff provisions would accomplish, as would the Companies' alternative pricing methodology; both are consistent with current Kentucky QF regulations and the new federal QF regulations the Commission must implement by December 31, 2021.

IV. The Companies' Proposed QF Rate Methodology Is Consistent with Lowest Reasonable Cost Principles, the Commission's Current QF Regulations, and the Recently Revised Federal QF Regulations, Whereas the Intervenors' Proposals Are Inconsistent with All Such Legal Requirements.

The Companies continue to support their QF tariffs filed with applications in these proceedings as consistent with Kentucky's existing QF regulation, the new federal QF regulations,

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[64] 18 CFR 292.304(a)(2).
[65] 85 Fed. Reg. 54,642 ¶ 14 (emphasis added).
[66] 807 KAR 5:054 Sec. 1(1). *See* 18 CFR 292.304(f).

and decades of Commission precedent. As shown above, the new federal QF regulations and Kentucky's existing QF regulation both contain essentially the same multi-factor approach to setting QF energy and capacity rates, which has not changed in Kentucky since at least 1990.[67] Since then, the Commission has repeatedly approved the Companies' QF tariff provisions in multiple rate cases as part of the Commission's approval of the Companies' overall tariffs, as well accepted the Companies' avoided cost rate filings for QFs every two years.[68] Although the Commission certainly may approve or reject the Companies' proposed changes to their current QF tariff provisions based on the law, it would be inconsistent with decades of Commission precedent issued under the current Kentucky QF regulations to reject wholesale the Companies' QF tariff provisions filed with their applications in these proceedings. The Companies therefore continue to support the QF tariff provisions they filed with their applications in these proceedings.

In the alternative, the Companies' proposed alternative methodology is also consistent with the Commission's QF regulation, the new federal QF regulations, and market realities. As previously discussed, it treats each kind of generating technology appropriately, taking account of the factors set out in 807 KAR 5:054 Section 7(5), and bounds avoided costs by the Companies' own incremental avoided costs, including market realities about the prices of the same technology, comparing solar to solar, wind to wind, and the like.[69] It also fairly compensates QFs who desire to provide capacity before the Companies need it by discounting and levelizing the avoided capacity cost from when the Companies anticipate needing capacity.[70] This approach ensures

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[67] *See* endnote to 807 KAR 5:054 ("(8 Ky.R. 216; 837; eff. 4-7-1982; 16 Ky.R. 1478; 1945; eff. 3-8-1990; Crt eff. 3-27-2019.").

[68] *See* KU Response to PSC 5-14; KU Response to PSC 6-29; LG&E Response to PSC 5-15; LG&E Response to PSC 6-29.

[69] *See, e.g.*, Sinclair Supplemental Direct at Supplemental Exhs. 1-3.

[70] *See, e.g.*, Seelye Supplemental Rebuttal at 16-18.

QFs receive non-discriminatory compensation; they would receive compensation on exactly the same terms the Companies would use to analyze energy and capacity acquisitions. And it therefore ensures customers pay only rates that are just, reasonable, and in the public interest;[71] the Companies' alternative proposal is entirely consistent with FERC's statement that it was "Congress's intent that QFs not be subsidized."[72]

In stark contrast, the QF rates proposed by KYSEIA's witness Justin Barnes are entirely inconsistent with Congress's intent that QF's not be subsidized, as well as the Commission's and the Companies' lowest reasonable cost statutory mandate, Kentucky's current QF regulations, and FERC's new QF regulations. For example, Mr. Barnes's proposal for compensating solar QFs essentially takes the capital cost of a combustion turbine in PJM (of which the Companies are not members and from which they do not acquire capacity), adjusts it by an indefensibly high coincidence factor, and then proposes to recover the entire capital cost over just 791 hours of the year.[73] According to Mr. Barnes, this approach is purportedly "technology neutral"; in fact, it is unreasonably favorable to solar QFs at the expense of the Companies' customers precisely because it is wholly detached—by design—from market realities. As shown in Supplemental Surrebuttal Exhibit DSS-1, compared to the $27.82/MWh 20-year level pricing of the Companies' actual signed PPA for 100 MW of solar output, *Mr. Barnes's proposed solar QF pricing approach is anywhere from 23% to 128% higher than is actually required to obtain a comparable solar resource in the market.* There is no sense in which such a proposal comports with lowest reasonable cost principles or bears any resemblance to the Companies' actual avoided cost. What

[71] *See* 807 KAR 5:054 Sec. 7(2) and (4).
[72] 85 Fed. Reg. 54,642 ¶ 14.
[73] *See* Barnes Supplemental Rebuttal at 18-20; Sinclair Supplemental Surrebuttal at 2-3 and 9-10.

it does do is provide a significant subsidy to QFs, contrary to Congress's intent and at the expense of the Companies' customers.

And this approach highlights the danger of assuming that simply performing mathematical manipulations of the cost of a hypothetical combustion turbine can result in a "technologically neutral" energy or capacity cost unless that math is then bounded by actual market realities for each technology. Mr. Barnes makes no attempt to do such sanity checks against actually avoidable costs even though that is exactly what the current Kentucky QF regulation and the new federal QF regulations require, which is one reason why his proposal is contrary to law and cannot be approved.[74]

Another reason Mr. Barnes's proposed QF rates cannot be approved is his use of a risk-free discount rate, which has no rational relationship to the Companies' actual weighted average cost of capital.[75] That cost of capital, which is the appropriate discount rate for such calculations because it is what customers pay through rates for the Companies' capital, is significantly higher than Mr. Barnes's risk-free rate. It is also almost certainly higher than the cost of capital of any QF; indeed, it is higher than the cost of capital of nearly any entity other than the U.S. government.[76] Therefore, the effect of Mr. Barnes's proposed discount rate, if used to formulate QF rates, would be to compel the Companies' customers to provide QFs a risk-free rate of interest at customers' expense.[77] Because Mr. Barnes's approach is yet again entirely disconnected from the Companies' avoided costs—to the detriment of all customers and contrary to law—the Commission must reject it.

[74] *See, e.g.*, 807 KAR 5:054 Sec. 1(1); 18 CFR 292.304(a) and (b).
[75] Barnes Supplemental Rebuttal at page 28, lines 5-9.
[76] 8/18/21 Hearing, VR 10:04:00-10:04:20 (Seelye).
[77] 8/18/21 Hearing, VR 10:04:30-10:05:30 (Seelye).

Yet another infirmity of Mr. Barnes's approach is that he uses PJM capacity and perhaps energy values in his proposal.[78] This is inappropriate because the Companies are not PJM members.[79] They do not acquire capacity in PJM.[80] They rarely purchase energy at their PJM interface because the energy price at that interface is almost always higher than the Companies' marginal cost of energy, which is why the Companies sell considerably more energy into PJM than they buy from it.[81] In other words, the capacity value he uses to perform his erroneous "technologically neutral" capacity calculations—PJM's Net CONE—has absolutely no relationship to the Companies' avoidable generation capacity costs, and to the extent Mr. Barnes is advocating for using PJM energy prices to set QF energy prices, such prices have no rational relationship to the Companies' avoidable energy costs.[82] Therefore, yet again Mr. Barnes's proposal runs afoul of the current Kentucky and new federal QF regulations because they have nothing to do with the Companies' avoidable costs.

Finally, the Commission must reject Mr. Barnes's proposed QF rates as contrary to lowest reasonable cost principles and the Kentucky QF regulation's requirement that QF rates "be just and reasonable to the electric customer of the utility, in the public interest, and nondiscriminatory."[83] As shown in Supplemental Surrebuttal Exhibit DSS-2, the real-world consequences of following Mr. Barnes's QF pricing recommendations for 1,000 MW of QF capacity would be that the *Companies' customers would pay in present value dollars between*

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[78] As noted in Mr. Sinclair's Supplemental Surrebuttal Testimony, it is not entirely clear what energy price Mr. Barnes advocated for QFs. *See* Sinclair Supplemental Surrebuttal at 3-5. Certainly Mr. Barnes advocated using PJM LMP pricing at the LGEE node for NMS-2 purposes, so it is reasonable to assume he would advocate the same for QF pricing. *See* Barnes Supplemental Direct at 7 ln. 3-14.
[79] *See, e.g.,* Seelye Supplemental Rebuttal at 2 ln. 9-17 and 8 ln. 8-16.
[80] *Id.*
[81] *See* Seelye Supplemental Rebuttal at 23-27; Sinclair Supplemental Rebuttal at 13-15.
[82] The new federal QF regulations do provide for using RTOs' locational marginal prices to set as-available energy prices for QFs, but only for utilities that are RTO members, which the Companies are not. *See* 18 CFR 292.304(6).
[83] 807 KAR 5:054 Sec. 7(2) and (4).

$262.3 million and $590.4 million more over 20 years for solar energy and capacity than the market would require. Those are staggering amounts for customers to overpay, and they likely *understate* the adverse impact of Mr. Barnes's proposal to customers because they assume a $0 REC value, whereas the Companies' recent experience has been that they can sell Brown Solar RECs for about $7.80/REC.[84] Although there was some discussion about whether 1,000 MW or more of potential QFs are really currently in the Companies' transmission interconnection queue, there can be no serious doubt that if the Companies began offering Mr. Barnes's proposed QF rates—with premiums of 23% to more than 120% above current market prices—the Companies would soon have well more than 1,000 MW of solar QFs seeking to contract with the Companies.[85] Therefore, the significant and real practical harm to customers of Mr. Barnes's proposed QF rates, which is wholly contrary to Kentucky's current and the new federal QF regulations, is more than sufficient reason to reject Mr. Barnes's proposal and approve the Companies' QF tariff provisions as filed or to approve the Companies' alternative pricing methodology.

V. The Companies' Proposed NMS-2 Rate Is Consistent with Lowest Reasonable Cost Principles and the Commission's Kentucky Power Methodology, Whereas the Intervenors' Proposals Violate Lowest Reasonable Cost Principles and Are Largely Based on Unreliable Evidence.

As an initial matter, it is important to be clear about what legal standards apply to setting NMS-2 compensation rates in these proceedings. To do so, it is also important to be clear that the Companies' NMS-2 rates apply only to energy that future net metering customers will produce to the Companies' system, not the energy consumed on net metering customers' own premises. Therefore, with regard to such energy, NMS-2 customers stand in the position of vendors to the Companies; they are providing intermittent, as-available energy to the Companies' system to be

[84] *See* Sinclair Supplemental Surrebuttal at 7 ln. 3-4.
[85] 8/17/21 Hearing, VR 8:56:40-9:05:00 (McFarland).

consumed instantly by other customers, just like any other energy produced onto the Companies' system. The question, therefore, is what price should *all* customers pay for such energy produced by NMS-2 customers for consumption by others?

The governing statute, KRS 278.466, provides guidance in this regard. More particularly, KRS 278.466(3) states in its entirety:

> A retail electric supplier serving an eligible customer-generator shall compensate that customer for all electricity produced by the customer's eligible electric generating facility that flows to the retail electric supplier, as measured by the standard kilowatt-hour metering prescribed in subsection (2) of this section. *The rate to be used for such compensation shall be set by the commission using the ratemaking processes under this chapter* during a proceeding initiated by a retail electric supplier or generation and transmission cooperative on behalf of one (1) or more retail electric suppliers.[86]

In other words, the Commission is to use "ratemaking processes under this chapter," i.e., KRS Chapter 278, to set NMS-2 compensation rates. As the Commission stated in an order less than a year ago—quoting the Kentucky Supreme Court—"[O]ne of the Commission's 'most important roles' in administering KRS Chapter 278, 'is to provide the lowest possible cost to the rate payer.'"[87] There is simply no exception to this lowest reasonable cost obligation in KRS 278.465 or 278.466. The Commission's obligation under KRS Chapter 278 with regard to NMS-2 rates "is to provide the lowest possible cost to the rate payer."[88]

A. The Companies agree with, and their NMS-2 proposals comport with, the Commission's seven Kentucky Power avoided cost categories, five of which are equally well avoided by utility-scale solar as by net metering energy exports.

That being established, the Companies agree that the Commission chose seven appropriate avoided cost categories to consider when setting such compensation rates in Kentucky Power

[86] Emphasis added.
[87] Case No. 2020-00016, Order at 7 (PSC Ky. Dec. 16, 2020), *quoting Public Service Comm'n v. Dewitt Water District*, 720 S.W.2d 725, 730 (Ky. 1986) ("The Commission has ignored one of its most important roles, which is to provide the lowest possible cost to the rate payer.").
[88] *Id.*

Company's most recent rate case, which the Commission has also ordered the parties to address in these proceedings. As the Commission required, the Companies have provided evidence concerning and values for all seven avoided cost categories; neither KYSEIA's witness nor either of the Joint Intervenors' two witnesses provided all such values, and the Joint Intervenors' witnesses provided no such values.[89] Rather than retread the ground already addressed extensively in testimony and discovery, the Companies would simply observe this, which no party has contested: at least five of the Commission's seven avoided cost categories—avoided energy cost, avoided generation capacity cost, avoided ancillary services cost, avoided carbon cost, and avoided environmental compliance cost—*are equally well avoided on a kWh-to-kWh basis by utility scale solar energy as by solar energy produced to the Companies' system by net metering customers* (excepting any gross-up required to account for line losses).[90] Therefore, the Commission can know with certainty that a proposed NMS-2 rate is inconsistent with the Commission's statutory lowest reasonable cost obligation if the sum of those five avoided cost components, after adjusting for line losses, exceeds the market price of utility-scale solar reduced by REC revenues.

More to the point, for the Companies that cost is $0.02782/kWh less REC revenues, which at today's REC prices ($0.00780/kWh) produces a net utility-scale solar price of just $0.02002/kWh.[91] This shows that Mr. Barnes's proposed NMS-2 components clearly violate lowest reasonable cost principles; his proposed avoided generation capacity cost component alone ranges from $0.0362/kWh to $0.0401/kWh.[92] Using the values Mr. Barnes provided in Table 10 of his Supplemental Rebuttal testimony, Mr. Barnes provided values for four of the five avoided

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[89] *See, e.g.*, Barnes Supplemental Rebuttal; Owen Supplemental Direct and Rebuttal; Rábago Supplemental Direct and Rebuttal.
[90] 8/18/21 Hearing, VR 15:05:30-15:06:50 (Seelye).
[91] *See* Sinclair Supplemental Surrebuttal at 7 ln. 3-4.
[92] Barnes Supplemental Rebuttal at 32.

cost categories that utility-scale solar would equally well avoid. The total of those four values Mr. Barnes provided for KU comes to $0.0696/kWh and to $0.0682/kWh for LG&E.[93] Those values simply bear no rational relationship to the Companies' actual cost to avoid the same cost components using utility-scale solar; they are more than double (even triple depending on REC prices) what the Companies will pay under their recent Solar PPA with 20-year level pricing. As noted earlier, the Companies are hardly alone in being able to do this, as recently demonstrated by Big Rivers, as well as the LevelTen PPA Price Index. In short, there is no lowest reasonable cost justification for the sum of these five avoided cost components to exceed the Companies' cost of utility-scale solar reduced by expected REC revenues and grossed up for line losses (if any). For that reason alone, to say nothing of the others articulated in the Companies' testimony and discovery responses, the Commission must reject Mr. Barnes's approach to these five avoided cost components.

B. The Companies have provided compelling marginal cost evidence to demonstrate that the transmission and distribution capacity costs they could avoid due to NMS-2 energy exports are indeed zero, and further that such avoided cost values cannot be based on embedded costs, which bear no relationship to genuinely avoidable future costs.

With regard to the two remaining avoided cost components, avoided transmission and distribution capacity costs, again rather than restating what has already been addressed at length in the record of these proceedings, the Companies offer five observations about the appropriate calculation of these components. First, there is no sense in which embedded costs are a reasonable proxy for *avoidable* transmission or distribution costs, which is why the Commission should

[93] *See* Barnes Supplemental Rebuttal at 59. Adding the Energy, Generation Capacity, Ancillary Services, and Carbon values for each of the Companies shown in Mr. Barnes's table results in $0.0696/kWh for KU and $0.0682/kWh for LG&E.

disregard entirely Mr. Barnes's proposed values for these avoided cost components.[94] Neither the ongoing recovery of capital costs already incurred nor the operating and maintenance costs of systems already in place—which are largely fixed and do not vary significantly with demand, particularly not in a 25-year timeframe—provide any information at all about transmission or distribution costs that could be avoided, if any, by NMS-2 energy exports. Second, the only quantity that is relevant in considering avoided costs that can be compensated under NMS-2 is *energy exports* from such customers, not the impact of NMS-1 customers or the impact of NMS-2 customers offsetting their own usage moment to moment. Third, the 1% statutory cap on total net metering capacity and the current 15% net metering constraint on Level 1 net metering capacity per radial distribution feeder,[95] in addition to the actually distributed nature of net metering to date,[96] significantly reduces the likelihood that there would be sufficient NMS-2 energy exports in any location or locations sufficient to create marginal avoidable transmission or distribution capacity costs. Fourth, although there is an understandable desire to simplify in this area and create a highly artificial transmission or distribution capacity cost per kWh, such as by dividing total embedded transmission or distribution costs by some quantity of energy,[97] such an approach again bears *no relationship to actually avoidable costs* on the Companies' transmission and distribution

[94] *See, e.g.*, Barnes Supplemental Direct at 9-11; Seelye Supplemental Direct at 3-6; Seelye Supplemental Rebuttal at 2-3 and 34-43; Wolfe Supplemental Rebuttal at 2-3; McFarland Supplemental Rebuttal at 2-3.
[95] KRS 278.466(1); *Development of Guidelines for Interconnection and Net Metering for Certain Generators with Capacity up to Thirty Kilowatts*, Case No. 2008-00169, Order Appx. A at 3 (Ky. PSC Jan. 8, 2009).
[96] *See, e.g.*, Wolfe Supplemental Direct at 4.
[97] *See, e.g.*, Barnes Supplemental Direct at 10 ("Transmission costs may be calculated based on unit costs derived by dividing net demand-related cost of service by the associated class demand allocator for each Company in order to produce a $/kW amount. This unit cost amount is then multiplied by the effective solar capacity percentage, which de-rates the unit cost according to the solar contribution to peak. This solar unit value is then divided by modeled annual system production per kW to produce a $/kWh rate."); *id.* at 11 ("I have not produced a preliminary analysis of this cost component, but I note that on a conceptual level, the unit cost-based methodology (with gross up for demand losses) that I identify for transmission costs can also be used for distribution costs").

systems.[98] Actually avoidable capacity costs are stepwise rather than linear, they have no relationship to embedded costs, and they require marginal analysis to determine.[99] Fifth and finally, such marginal analysis is exactly what the Companies performed and provided in these proceedings. Contrary to certain assertions at hearing, the Companies' analyses began with their current load forecasts, which already assume future demand side management levels, energy efficiency efforts by customers (including adopting more efficient end-use devices), and the like. Therefore, the Companies' analyses, such as the substation transformer-by-transformer analysis provided in response to PSC 8-14, are truly marginal analyses, and they demonstrate that there is no currently foreseeable marginal avoidable transmission or distribution capacity cost associated with NMS-2 energy exports.[100]

C. The Commission cannot rely upon or draw avoided cost values from the Hayibo and Pearce review paper, which is a collection of hearsay and has no connection to the Companies' own data, systems, or avoidable costs.

Regarding the evidence put forward by the Joint Intervenors' witnesses, in contrast to Mr. Barnes, who at least attempted to calculate values for six of the Commission's seven avoided cost categories, Messrs. Rábago and Owen offered nothing more than rhetoric and a reading list for the Commission. They did not attempt to use any of the Companies' own data to calculate a single avoided cost component; they did not attempt to calculate an NMS-2 compensation rate, notwithstanding multiple rounds of discovery and literally thousands of pages of data provided by the Companies. Instead, in their supplemental testimonies they encouraged the Commission to review a *study of studies* by authors Hayibo and Pearce and to extract from that review paper any

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[98] *See, e.g.,* Seelye Supplemental Direct at 3-6; Seelye Supplemental Rebuttal at 2-3 and 34-43; Wolfe Supplemental Rebuttal at 2-3; McFarland Supplemental Rebuttal at 2-3.

[99] *Id.*

[100] The Companies have been circumspect in saying that it is not the case that there could never be such savings, but based on the best information available today, there is no reason to believe that NMS-2 energy exports could create such savings.

values the Commission liked if it did not find that the Companies had provided sufficient evidence to support their proposed NMS-2 compensation rate.[101] To put it plainly, the Hayibo and Pearce paper is a collection of hearsay at best. Neither Mr. Rábago nor Mr. Owen wrote it, and when directly asked neither could provide any evidentiary link between the paper and the Companies' own systems or costs.[102] Therefore, the Commission must reject the invitation of Messrs. Rábago and Owen to blithely choose a value of its liking from the review paper; to do so would violate Kentucky's residuum rule, which requires that administrative findings of fact rest upon at least a residuum of competent evidence.[103]

D. A jobs and economic development component for NMS-2 rates is beyond the Commission's jurisdiction, and any such component would have to be calculated to account for a multitude of offsetting factors that could result in the component being zero or less.

Regarding the Commission's proposed jobs and economic development component of NMS-2 compensation rates, to put the point plainly, such a component is outside the Commission's jurisdiction.[104] The Commission has long been clear that issues that are arguably related to utility

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[101] *See* Rábago Supplemental Direct at 9 ln. 5-10 (recommending using Hayibo and Pearce value of solar values for Companies' NMS-2 rates "where it [the Commission] cannot confidently move forward with data specific to the Companies."); Owen Supplemental Direct at 9 ln. 12-16 (echoing Rábago concerning using Hayibo and Pearce values).

[102] *See* Joint Intervenors' Responses to Companies' Supplemental DR Nos. 4 and 6.

[103] *See, e.g., Drummond v. Todd Co. Bd. of Ed.*, 349 S.W.3d 316, 321 (Ky. App. 2011):

> In presiding over an administrative proceeding, the hearing officer is permitted to accept hearsay evidence which is reliable, but which would not be admissible in court. *See* KRS 13B.090(1). However, when the time comes to make a factual determination, the residuum rule requires the fact-finder to base a decision on only the competent evidence: "When the evidence is all in, it must be sifted and assorted. The competent separated from the incompetent, and out of the testimony there must come some reliable and substantial evidence, as understood by the common-law rules of evidence upon which a verdict must rest." *Cabe v. City of Campbellsville*, 385 S.W.2d 51, 54 (Ky.1964) (quoting *Valentine v. Weaver*, 191 Ky. 37, 228 S.W. 1036, 1038 (1921)). That means we will affirm a finding of fact only if the competent evidence before the tribunal constitutes substantial evidence.

[104] *See* Conroy Supplemental Direct at 4-10; Conroy Supplemental Rebuttal at 5; KRS 278.040(2); *EnviroPower, LLC v. Public Service Commission of Kentucky*, 2007 WL 289328 at *4 (Ky. App. 2007) (not to be published) ("First, there is the statutory limitation under KRS 278.040(2) that the person seeking intervention must have an interest in the "rates" or "service" of a utility, since those are the only two subjects under the jurisdiction of the PSC."); *The 2011 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company*, Case No.

service but do not affect a utility's costs or ability to serve customers, including health and environmental impacts, are outside the Commission's jurisdiction and cannot be accounted for in rates.[105] To give just one example, less than three years ago the Commission stated:

> KRS Chapter 278 creates the Commission as a statutory administrative agency empowered with "exclusive jurisdiction over the regulation of rates and service of utilities." *The Commission has no jurisdiction over environmental impacts, health, or other non-energy factors that do not affect rates or service. Lacking jurisdiction over these non-energy factors, the Commission has no authority to require a utility to include such factors in benefit-cost analyses of DSM programs.* As LG&E/KU correctly note, it does not follow from their citing in 2014 of the potential avoidance of environmental compliance costs in rates in support of the construction of a 10 MW solar facility that the Commission has jurisdiction in a DSM case to require an analysis of non-energy criteria such as environmental and health factors that have no impact on rates.[106]

The same principle applies to jobs and economic development created by net metering facility installers; surely job creation and economic development resulting from rooftop solar installation are good, but they do not affect the Companies' costs or ability to serve their customers and are therefore outside the Commission's jurisdiction and cannot be accounted for in rates. It is certainly true that the Companies offer demand charge discounts to entities that create jobs and expand the Kentucky economy—which are equally available to all qualifying businesses, including solar-related businesses—but those discounts are temporary, do not vary with jobs created or economic

2011-00140, Order at 4 (Ky. PSC July 8, 2011) ("[I]ssues of environmental externalities, such as air and water pollution from generating electricity and mining fuel to supply the generating plants, are all issues beyond the scope of the Commission's jurisdiction."); *The 2008 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company*, Case No. 2008-00148, Order at 5-6 (PSC Ky. July 18, 2008) ("Notably absent from the Commission's jurisdiction are environmental concerns, which are the responsibility of other agencies within Kentucky state government.").

[105] *Id.*

[106] *Electronic Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company for Review, Modification, and Continuation of Certain Existing Demand-Side Management and Energy Efficiency Programs*, Case No. 2017-00441, Order at 28-29 (Oct. 5, 2018) (emphasis added; internal citation to KRS 278.040(2)).

development achieved, by the Commission's clear directives do not adversely impact the rates other customers pay, and are designed to incentivize increased use of the Companies' existing facilities to exert a downward pressure on rates all customers pay.[107] That stands in stark contrast to a jobs and economic development component of NMS-2 compensation, which would compel all customers to pay NMS-2 customers for jobs and economic development supposedly created by solar installers, which serves only to increase all customers' rates indefinitely. As noted at hearing, it is also true that the Companies take economic development seriously, which is good for the Commonwealth and the Companies' customers, but the Companies do not have the same jurisdictional constraints as the Commission.[108] Moreover, the Companies' interest in economic development does not in any way affect or expand the Commission's jurisdiction.

In addition, it was suggested at hearing that the Companies failed to comply with the Commission's orders in these proceedings by not conducting a study of the jobs and economic impact of net metering.[109] But this insinuation highlights an important point that confirms why this issue is not jurisdictional to the Commission: the Companies have no way of knowing the jobs or economic development impact of rooftop solar installers. They do not possess that information or expertise precisely because it has no impact on their costs or ability to serve customers, and therefore the Companies are not in a better position than anyone else to obtain that information.

What is clear is that to the extent the Commission determines to implement a jobs and economic development component of NMS-2 compensation rates, it must be narrowly tailored and *net* of the appropriate items. For example, it must be limited only to the impacts of NMS-2 customers' export energy, not the value created by NMS-1 customers, other utilities' customers,

[107] *See* Conroy Supplemental Direct at 4-10.
[108] *See, e.g.,* 8/18/21 Hearing, VR 15:41:50-15:44:55 (Conroy).
[109] *See, e.g.,* 8/18/21 Hearing, VR 15:36:45-15:38:50 (Conroy).

and other non-NMS-2 solar industry impacts (including utility-scale solar installations). It must also include the deleterious impacts on other energy-related industries of increasing rooftop solar expansion, and it must attempt to calculate the economic effect of compelling all of the Companies' customers to pay the jobs and economic development component of NMS-2 rates. It is less than certain that when all the appropriate netting is done that the jobs and economic development value would be greater than zero.

E. The Companies' proposed netting interval and bill credit approaches are supported by the plain language of KRS 278.465 and 278.466.

The Companies' proposed netting approach is not only consistent with, but is required by, Kentucky's net metering statutes. KRS 278.465(4) defines net metering as the difference between two dollar values, not two kWh amounts. The two dollar values to be netted are (1) the dollar value of "*all* electricity generated by an eligible customer-generator that is fed back to the electric grid over a billing period and priced as prescribed in KRS 278.466" and (2) the dollar value of "*all* electricity consumed by the eligible customer-generator over the same billing period and priced using the applicable tariff of the retail electric supplier."[110] There is no ambiguity in the statute as applied to the Companies: every kWh that flows to the Companies' grid is priced at the NMS-2 compensation rate and credited to the customer-generator, and every kWh the customer consumes from the grid is priced at the applicable tariff rate and billed to the customer. That interpretation is the only one consistent with KRS 278.466(3), which states, "A retail electric supplier serving an eligible customer-generator shall compensate that customer for *all* electricity produced by the customer's eligible electric generating facility that flows to the retail electric supplier …."[111] There

[110] KRS 278.465(4) (emphasis added).
[111] Emphasis added.

is simply no way to have a netting interval other than instantaneous netting that is consistent with KRS 278.465(4) and 278.466(3).

Indeed, to have a billing period netting interval as Messrs. Barnes and Rábago prefer would require the Commission to ignore the clear statutory directive to net the dollar value of *all* kWh a customer-generator produces to the grid and the dollar value of *all* energy the customer-generator consumes from the utility. They would have the Commission rewrite the statute to include a kWh netting step before the dollar valuing occurs; indeed, in every billing period for every NMS-2 customer, they would effectively have the Commission ignore exactly half of KRS 278.465(4) and rewrite the remaining half to apply the dollar-valuing only to the *net* kWh over a billing period. The Commission should refuse to exceed its lawful authority by imposing a billing-period netting regime in violation of KRS 278.465(4) and 278.466(3).

Finally, the Companies' proposal to apply NMS-2 export energy credits to NMS-2 customers' entire bills is consistent with KRS 278.466. KRS 278.466(4) states in relevant part:

> Each billing period, compensation provided to an eligible customer-generator shall be in the form of a dollar-denominated bill credit. If an eligible customer-generator's bill credit exceeds the amount to be billed to the customer in a billing period, the amount of the credit in excess of the customer's bill shall carry forward to the customer's next bill.

The Companies do not believe there is any text in that provision that requires NMS-2 bill credits to be limited to only the energy-charge portion of the bill. Certainly the General Assembly could have drafted such a provision, but it does not appear in the statutory text. Therefore, the Companies believe that their proposal to apply NMS-2 credits to such customers' entire bills is statutorily permissible, if not required.

VI. Only Minor Tariff Revisions Are Needed to Address the Commission's Concerns Regarding Joint Accounts and Net Metering Credits.

The Companies appreciate the Commission's raising the issue of joint accounts and net metering credits.[112] As the Commission has previously recognized, how to address utility account issues that arise with multiple adults residing at the same location is perennially challenging and given to nearly infinite variation.[113] Over the course of decades, the Companies have developed policies for addressing such issues that are consistent with applicable law and allow them to serve their customers well.[114]

The Companies believe that the handful of tariff revisions recently developed in coordination with Commission Staff and a number of the intervenors through the informal conference process (attached hereto as Appendix A) will allow the Companies to better inform customers about the dynamics of joint accounts, ensure that net metering and Solar Share energy credits appropriately carry forward for joint account holders—all consistent with Kentucky's net metering statutes—and allow the Companies' important customer service and account policies to remain in place. The tariff revisions therefore deserve Commission approval.

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[112] *See, e.g.,* Companies' Responses to PSC 7-2 and 7-39. *See also* Companies' Response to Joint Intervenors 3-8.

[113] *Joint Liability of Husband and Wife for Payment of Utility Bills*, Administrative Case No. 276, Order at 2 (Ky. PSC Sept. 24, 1984):

> After considering the comments as filed, the Commission finds that it is in the best interests of the utility customers to not adopt general regulations at this time but to continue resolving these complaints on a case by case basis. The factual situations that give rise to payment liability problems among family members are virtually infinite, and it is the Commission's opinion that no specific regulation could possibly address even the majority of these problems. Instead, a flexible case by case approach in resolving these complicated situations is often fairer to both the customer and the utility. For these reasons, the Commission will not adopt a specific regulation concerning liability for payment of utility bills at this time.

[114] *See, e.g.,* 8/18/21 Hearing, VR 17:48:45-17:50:15 (Saunders).

VII. The Commission Should Grant the Companies' Requested Relief Concerning the Other Issues on Rehearing Addressed at the Recent Hearing.

With regard to the other matters on rehearing that were addressed during the recent hearing, first, the Companies requested clarification regarding the Final Orders' various reporting requirements with end-of-quarter reporting dates (e.g., June 30 or September 30), where such reports will involve financial results.[115] As the Companies' witness Mr. Conroy stated during the hearing and the Companies stated in their response to the Commission Staff's Post-Hearing Data Request No. 3, the Companies believe providing the requested reporting 30 days after the end of a calendar quarter will align the reporting with the Companies' quarterly financial data that might be included in the reports. The Companies' proposed approach is both in line with other Commission reporting requirements and will ensure the reports have the most up-to-date information,[116] and therefore should be approved by the Commission.

Second, regarding the Companies' request for clarification of the modification the Final Orders made to the Stipulation's rate-case stay-out provision,[117] as was discussed during the recent hearing, KRS 278.190(2) gives the Commission discretion to determine during a rate case suspension period whether a "company's credit or operations will be materially impaired or damaged by the failure to permit the rates to become effective during the period …." Because the Commission may make that determination after an application is filed, there is no need to create an additional 30-day period before the Companies could file an application for emergency rate relief; the existing statutory 30-day notice under KRS 278.180 is sufficient, after which the Commission will be able to review any application and determine if any emergency rate relief is

[115] KU Final Order at 15-16, 56, 62, 63, and 65; LG&E Final Order at 17, 18, 60, 70, 72, and 73.
[116] *See* Companies' Response to PSC PHDR No. 3.
[117] KU Final Order at 12; LG&E Final Order at 14-15.

appropriate. The Companies recognize that the Commission will ultimately determine the reasonableness of the relief sought in its final order on any application for rate relief.[118] Therefore, the Commission should clarify that it did not intend to create an additional 30-day notice or waiting period before the Companies could file for emergency rate relief during the stay-out period.

Third, regarding the TS-2 Pipeline Supplier rate for Tariffs CGS, IGS, AAGS, and DGGS, as discussed during the hearing, the LG&E Final Order contained an incorrect rate, $0.8774, which was the rate that was approved with the GSC filing for service rendered February 1, 2021 through April 30, 2021. The Commission-approved rate in effect from May 1, 2021, through July 31, 2021, was $0.8759, which was not affected by the rate case proceeding. It was also the rate LG&E charged throughout that calendar quarter. LG&E asks the Commission to issue a *nunc pro tunc* Order to correct the incorrect rate in the LG&E Final Order, which did not affect rates charges to customers and is a moot issue regarding the TS-2 Pipeline Supplier rate going forward.

The Companies further ask the Commission to grant the Companies their full rate case expenses in accordance with the Commission's August 12 Orders on the Companies' rehearing requests,[119] and would note that the Companies' actual rate case expenses are higher than the estimated amounts included in the Companies' revenue requirements.[120]

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[118] The procedures for changing rates specified in sections 180, 190 and 192 in KRS Chapter 278 do not contain a preapproval-like requirement. Requiring the Companies to seek Commission preapproval to file an application for rate relief under KRS Chapter 278 runs afoul of *Union Light, Heat & Power Co. v. Public Service Com.*, 271 S.W.2d 361, 365 (Ky. 1954)(Where a statute prescribes the procedures that an administrative agency must follow, the agency cannot add or subtract from those requirements); *Public Service Com. v. Attorney Gen. of Commonwealth,* 860 S.W.2d 296, 298 (Ky. Ct. App. 1993); *Investigation of Thelma Waste Control, Inc., Alleged Violation of KRS Chapter 278*, Case No. 91-057, Order (Ky. PSC Nov. 18, 1991) and could unreasonably delay timely emergency rate relief.
[119] Case Nos. 2020-00349 and 2020-00350, Order on Rehearing at 12 (Ky. PSC Aug. 12, 2021).
[120] *See* Companies' Responses to PSC 1-14(c) (estimated rate case expenses); Companies' August 25, 2021 Supplemental Responses to PSC 1-14(d) (actual rate case expenses).

CONCLUSION

In conclusion, the Companies have clearly demonstrated that their forecasted legal fees are reasonable and should be included in the rates approved in these proceedings.

The Companies ask the Commission to approve the QF and NMS-2 compensation rates and tariff provisions the Companies filed with their applications in these proceedings, or in the alternative should approve rates and tariff provisions consistent with the Companies' alternative methodology. To do so would be consistent with all applicable law, including the Commission's overarching and long-recognized obligation to ensure utilities provide safe and reliable service at the lowest reasonable cost. The Companies respectfully suggest that the Commission must reject the intervenors' QF and NMS-2 proposals as violating lowest reasonable cost principles, being contrary to QF regulations as applicable, and being neither just nor reasonable for *all* of the Companies' customers, who will pay the rates the Commission approves.

Regardless of whatever QF and NMS-2 rates and tariff provisions the Commission approves, the Commission should allow full cost recovery of those rates in their entirety through the Companies' FAC mechanisms. In the alternative, the Commission should approve regulatory asset treatment for the difference between the full, all-in cost of QF and NMS-2 purchases and whatever FAC recovery the Commission approves.

Finally, the Companies believe the Commission should rule on the issues on rehearing addressed at the recent hearing as discussed herein, and the Commission should further grant the Companies their full rate case expenses in accordance with the Commission's August 12 orders on the Companies' rehearing requests.

Dated: September 7, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with the Commission's Order of July 22, 2021 in Case No. 2020-00085 (Electronic Emergency Docket Related to the Novel Coronavirus COVID-19), this is to certify that the electronic filing has been transmitted to the Commission on September 7, 2021; and that there are currently no parties in this proceeding that the Commission has excused from participation by electronic means.

Counsel for Kentucky Utilities Company
and Louisville Gas and Electric Company

Application for Service (Page 97)

All applications for service shall be made in the legal name of the party desiring service. At the request of such party, additional parties may be added to the account to form a joint account (collectively, such parties are "joint account holders"). In such instances, each joint account holder shall bear responsibility for payment for services.

Net Metering NMS-1 (page 57), Metering and Billing

Any ~~such~~ unused excess billing-period credits will be carried forward and drawn on by Customer as needed.

Unused excess billing-period credits existing at the time Customer's service is terminated end with Customer's account and are not transferable between Customers or locations. For joint accounts, unused excess billing period credits will be carried forward as long as at least one joint account holder remains in the same location.

Net Metering NMS-2 (page 58), Energy Rates & Credits

Any bill credits not applied to a Customer's bill in a billing period are "unused excess billing-period credits." Any ~~bill credits greater than the Customer's total bill~~ unused excess billing-period credits will be carried forward ~~to future bills~~ and drawn on by Customer as needed.

Unused excess billing-period credits existing at the time Customer's service is terminated~~,~~ end with Customer's account~~, have no monetary value,~~ and are not transferrable between Customers or locations. For joint accounts, unused excess billing-period credits will be carried forward as long as at least one joint account holder remains in the same location.

Net Metering Level 1 Application, Application for Interconnection and Net Metering

Use this application form only for a generating facility that is inverter based and certified by a nationally recognized testing laboratory to meet the requirements of UL 1741. Note: For joint accounts unused excess billing-period credits carry forward from one to another customer only among joint account holders at the same premise.

Net Metering Level 2 Application, Application for Interconnection and Net Metering

Use this application form when a generating facility is not inverter-based or is not certified by a nationally recognized testing laboratory to meet the requirements of UL 1741 or does not meet any of the additional conditions under Level 1. Note: For joint accounts unused excess billing-period credits carry forward from one to another customer only among joint account holders at the same premise.

Solar Share (page 72.2), Terms and Conditions #7

Unused Solar Energy Credit value is not transferrable between customers or customer accounts. Therefore, a Subscriber's closing a customer account terminates any unused Solar Energy Credit value associated with that account. For joint accounts, unused Solar Energy Credit value will be carried forward as long as at least one joint account holder remains.