

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)
CERTIFICATE OF PUBLIC CONVENIENCE)
AND NECESSITY TO DEPLOY ADVANCED) CASE NO. 2020-00349
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)

KENTUCKY UTILITIES COMPANY AND
LOUISVILLE GAS AND ELECTRIC COMPANY’S
REPLY TO THE KENTUCKY SOLAR INDUSTRIES ASSOCIATION, INC.’S AND
THE JOINT INTERVENORS’ RESPONSES TO KENTUCKY UTILITIES COMPANY
AND LOUISVILLE GAS AND ELECTRIC COMPANY’S
PETITION FOR RECONSIDERATION

Kentucky Utilities Company (“KU”) and Louisville Gas and Electric Company (“LG&E”) (collectively “the Companies”) hereby reply to the responses of the Kentucky Solar Industries Association, Inc. (“KYSEIA”) and the Joint Intervenors to the Companies’ Petition for Reconsideration filed with the Kentucky Public Service Commission (“Commission”) on October

15, 2021 (“KYSEIA Response” and “JI Response,” respectively).¹ In the interest of brevity, the Companies are addressing only certain discrete issues raised in the KYSEIA Response and the JI Response; the Companies continue to support fully and ask the Commission to act upon all the issues raised in the Companies’ October 15, 2021 Petition for Reconsideration.

1. The Authorities Cited by KYSEIA Support Rather than Undermine the Companies’ Due Process Claims Regarding Avoided Generation Capacity Costs and Several NMS-2 Rate Components.

KYSEIA incorrectly asserts that the Companies lack a due process claim regarding the avoided generation capacity cost component of the Commission’s prescribed QF rates and NMS-2 rates, as well as the avoided transmission capacity cost, avoided distribution capacity cost, and avoided environmental compliance cost components for NMS-2.² Far from being an issue of a mere concern over a “clerical aspect of reducing the cost to writing,” the Companies have asserted a substantial due process violation; namely, the failure of the Commission’s September 24, 2021 Order in these proceedings (“QF-NMS Order”) to specify the calculation methodologies, show the calculations, and clearly and specifically identify the evidence supporting the prescribed rates and rate components.³ For example, the QF-NMS Order states with regard to calculating avoided generation capacity costs, “The Commission adopts the use of a simple cycle CT as the proxy for avoided generation capacity,” but nowhere does the QF-NMS Order state the source of the “simple cycle CT” data used in the Commission’s undisclosed calculations.⁴ Without disclosing the

¹ The Joint Intervenors are Mountain Association, Kentuckians for the Commonwealth, Kentucky Solar Energy Society, and Metropolitan Housing Coalition. *Electronic Application of Kentucky Utilities Company for an Adjustment of Its Electric 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*, Case No. 2020-00349, Joint Intervenors’ Petition for Rehearing (Ky. PSC Oct. 14, 2021); *Electronic Application of Louisville Gas and Electric Company for an Adjustment of Its 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*, Case No. 2020-00350, Joint Intervenors’ Petition for Rehearing (Ky. PSC Oct. 14, 2021).

² KYSEIA Response at 8-10.

³ *Id.* at 8.

⁴ QF-NMS Order at 34.

evidence and calculations upon which the Commission relied, *no party to these proceedings can know or contest the evidence upon which the Commission relied or the calculation methodologies used*, much less evaluate the accuracy of those calculations. Similarly, the QF-NMS Order states that the Companies should implement an ELCC method for valuing the resource’s capacity contribution, but it does not state that the Commission has employed an ELCC methodology or any particulars of that methodology.⁵ And the QF-NMS Order states that the Commission has determined that “LG&E/KU will have a capacity need in 2025, not 2028,” and that “the Commission ... will adjust the avoided cost rates accordingly,” but provides no data or calculation of what those adjustments were.⁶ Clearly, the Companies have had no opportunity to exercise their due process rights concerning the determination of such rates when the evidence, the calculation methodologies, and the actual calculations themselves were not disclosed in the QF-NMS Order.

Thus, contrary to KYSEIA’s assertions,⁷ the due process errors raised here are precisely the same as those that concerned the U.S. Supreme Court in *Ohio Bell Telephone Company v. Public Utilities Commission of Ohio*.⁸ In that case, the Supreme Court addressed the establishment of rates based on unclear, unspecified evidence:

From the standpoint of due process — the protection of the individual against arbitrary action — *a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out.* When price lists or trade journals or even government reports are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof, there is at least an opportunity in connection with a judicial review of the

⁵ *Id.* at 35.

⁶ *Id.* at 36-37.

⁷ KYSEIA Response at 8-10.

⁸ 301 U.S. 292 (1937).

decision to challenge the deductions made from them. The opportunity is excluded here. The Commission, withholding from the record the evidential facts that it has gathered here and there, contents itself with saying that in gathering them it went to journals and tax lists, as if a judge were to tell us, “I looked at the statistics in the Library of Congress, and they teach me thus and so.” *This will never do if hearings and appeals are to be more than empty forms.*⁹

The QF-NMS Order’s announcing that its avoided generation cost rates are based on a “simple cycle CT as the proxy,” the values of which are not stated or cited, as well as an unspecified “ELCC methodology” and unknown generation capacity values beginning in 2025 rather than 2028, puts the Companies and all other parties in these proceedings in exactly the same position the Supreme Court described above.¹⁰ This is true not only for the avoided generation capacity cost rates but also for the other cost components the Companies cited in their Petition for Reconsideration.¹¹ In short, KYSEIA ignores the relevant law as declared by the U.S. Supreme Court and affirmed by Kentucky’s courts when it asserts that the QF-NMS Order does not violate the Companies’ due process rights.¹² Therefore, KYSEIA’s argument on this point should be rejected, and the Commission should grant the Companies’ reconsideration requests on these issues.

2. The Commission Has Full Authority to Accept and Consider the Companies’ Petition for Reconsideration.

The Joint Intervenors take issue with the Companies’ Petition for Reconsideration as such, asserting that only petitions for *rehearing* are permitted under KRS 278.400.¹³ But contrary to the Joint Intervenors’ position, the Commission has entertained numerous petitions for reconsideration

⁹ *Id.* at 302-03.

¹⁰ *Id.* at 302.

¹¹ See Companies’ Petition for Reconsideration at 20-21; QF-NMS Order at 50-54 and 56-57.

¹² See, e.g., *Utility Reg. Comm’n v. Ky. Water Service Co., Inc.*, 642 S.W.2d 591, 593 (Ky. App. 1982) (“Due process requires, at a minimum, that persons forced to settle their claims of right and duty through the judicial process be given a meaningful opportunity to be heard. . . . It has been said that no hearing in the constitutional sense exists where a party does not know what evidence is considered and is not given an opportunity to test, explain or refute.”).

¹³ JI Response at 1-2.

over the course of decades.¹⁴ Just last year, the Commission addressed a petition for reconsideration and clarification by the Companies and granted rehearing on several issues.¹⁵ About ten years ago, in a Kenergy rate proceeding the Commission issued two orders within three weeks of each other granting Kenergy's petitions for reconsideration.¹⁶ Nearly 40 years ago, the Commission addressed the merits of a petition for reconsideration that the Commission construed as "seek[ing] 'rehearing' on a final Order on Rehearing," ultimately denying the petition on substantive grounds.¹⁷ Moreover, non-utility parties have also filed petitions for reconsideration.¹⁸ Therefore, petitions for rehearing, including those filed explicitly under the authority of KRS

¹⁴ See, e.g., *Application of Louisville Gas and Electric Company for an Adjustment of Its Electric and Gas Rates, a Certificate of Public Convenience and Necessity, Approval of Ownership of Gas Service Lines and Risers, and a Gas Line Surcharge*, Case No. 2012-00222, Order (Ky. PSC Oct. 24, 2012) ("The Commission has reviewed LG&E's and Hess' opposing motions for reconsideration of the October 2, 2012 Order granting Hess limited intervention in this matter. ... The Commission, having considered the arguments made by both LG&E and Hess, and being otherwise sufficiently advised, finds that its October 2, 2012 Order relating to Hess' intervention in this matter should stand as written."); *Tariff Filing of Louisville Gas and Electric Company to Establish Prepaid Gas and Electric Service*, Case No. 2000-00548, Order (Ky. PSC Apr. 27, 2001); *Application of Central Kentucky Cellular Telephone Company for Issuance of a Certificate of Public Convenience and Necessity to Construct an Additional Cell Facility in the Lexington, Metropolitan Statistical Area (Athens/Pure Gold Cell Facility)*, Case No. 1992-00170, Order at 1-2 (Ky. PSC Feb. 11, 1993) ("On January 28, 1993, Intervenor Thomas Puckett filed a petition for reconsideration, pursuant to KRS 278.400, of the Commission's January 8, 1993, Order. ... After consideration of the petition for reconsideration and the record in this proceeding, and being otherwise sufficiently advised, the commission finds that Mr. Puckett has presented no additional evidence that could not with reasonable diligence have been offered in the two prior hearings in this case, August 7, 1992 and September 25, 1992. Therefore, the requested rehearing should be denied."); *Application of Right Beaver Gas Company for a Rate Adjustment Pursuant to the Alternative Rate Filing Procedure for Small Utilities*, Case No. 10404, Order at 1 (Mar. 15, 1989) ("[T]he Commission is of the opinion and finds that Right Beaver's Petition for Reconsideration on the issue of construction refunds should be granted.").

¹⁵ *Electronic Application of Louisville Gas and Electric Company and Kentucky Utilities Company for Approval of a Solar Power Contract and Two Renewable Power Agreements to Satisfy Customer Requests for a Renewable Energy Source under Green Tariff Option #3*, Case No. 2020-00016, Order (Ky. PSC June 18, 2020).

¹⁶ *Application of Kenergy Corp. for an Adjustment in Existing Rates*, Case No. 2011-00035, Order at 2 (Ky. PSC Dec. 5, 2011) ("Kenergy's Petition for Reconsideration is granted."); Case No. 2011-00035, Order at 2 (Ky. PSC Dec. 22, 2011) ("Having reviewed the amended petition and being otherwise sufficiently advised, the Commission finds that Kenergy has established good cause to reconsider the matter. ... Is it therefore ordered that Kenergy's Amended Petition for Reconsideration is granted.").

¹⁷ *Adjustment of Rates of General Telephone Co.*, Case No. 8859, Order (Ky. PSC June 28, 1984).

¹⁸ See, e.g., *Application of Kentucky-American Water Company for a Certificate of Public Convenience and Necessity Authorizing Construction of the Northern Division Connection*, Case No. 2012-00096, Attorney General's Petition for Reconsideration (Ky. PSC Mar. 19, 2013); *Joint Petition of Kentucky-American Water Company, Thames Water Aqua Holdings GmbH, RWE Aktiengesellschaft, Thames Water Aqua US Holdings, Inc., Apollo Acquisition Company, and American Water Works Company, Inc., for Approval of a Change in Control of Kentucky-American Water Company*, Case No. 2002-00317, Attorney-General's Objection to, with Motion for Reconsideration of, the 16 October 2002 Order of the Public Service Commission (Ky. PSC Oct. 24, 2002).

278.400, are undeniably standard practice before the Commission, and the Commission routinely addresses them on their merits. Indeed, the Companies are unaware of a single instance of the Commission denying a petition for reconsideration solely because it was styled as a petition for reconsideration. The Commission should address the Companies' Petition for Reconsideration on its merits and disregard the Joint Intervenors' arguments to the contrary.

The Commission should similarly disregard the Joint Intervenors' argument that the Commission should deny the Companies' Petition for Reconsideration because it does not present new evidence but rather presents arguments that the QF-NMS Order is legally flawed.¹⁹ First, KRS 278.400 does not restrict rehearing or reconsideration only to addressing new evidence; rather, it *permits* the introduction of such evidence: "Upon the rehearing any party *may* offer additional evidence that could not with reasonable diligence have been offered on the former hearing."²⁰ Moreover, the first sentence of KRS 278.400 states, "After a determination has been made by the commission in any hearing, any party to the proceedings may ... apply for a hearing *with respect to any of the matters determined.*"²¹ The Commission routinely makes legal determinations in its orders after hearing; to suggest that the only matters the Commission may consider on rehearing are newly discovered evidence is to ignore the plain text of the first sentence of KRS 278.400.

Second, the Commission has repeatedly granted rehearing on grounds other than newly discovered evidence.²² For example, last year the Commission granted rehearing on a number of issues the Companies raised in their petition for reconsideration and clarification regarding the

¹⁹ JI Response at 5-6.

²⁰ Emphasis added.

²¹ Emphasis added.

²² See, e.g., *Electronic Tariff Filing of Hyden-Leslie County Water District*, Case No. 2021-00071, Order (Ky. PSC Sept. 15, 2021).

Companies' 100 MW solar power purchase agreement, none of which involved newly discovered evidence.²³ Therefore, in addition to being consistent with the plain text of KRS 278.400, granting reconsideration or rehearing under KRS 278.400 on grounds other than newly discovered evidence is consistent with Commission practice, including quite recent practice.

Third, the Joint Intervenors' proposed rehearing standard is prejudicial to Joint Intervenors' rehearing petition. There is no newly discovered evidence addressed in the Joint Intervenors' rehearing petition and, unlike the Companies' petition, the Joint Intervenors' petition does not assert legal error; rather, it asserts only that the Joint Intervenors would prefer a higher avoided cost of carbon based on evidence already in the record.²⁴ Thus, if the Commission were to deny the Companies' Petition for Reconsideration on the grounds advanced by the Joint Intervenors, it would necessarily have to deny of the Joint Intervenors' petition on the same grounds. Of course, the Commission should deny neither petition on such grounds for the reasons already stated.

3. Contrary to the JI Response's Assertions, The Companies Timely Filed their Petition for Reconsideration.

The Joint Intervenors erroneously argue that the Commission must dismiss the Companies' Petition for Reconsideration as untimely filed because it was filed 21 days after the Commission issued the QF-NMS Order and the Companies had only 20 days to file their petition because the order was delivered electronically, not by mail.²⁵ This argument selectively ignores the clear and unequivocal language of KRS 278.400 and KRS 278.380. KRS 278.400 provides that a petition for rehearing of a Commission order may be filed within 20 days of service of that order and that "[s]ervice of a commission order is complete three (3) days after the date the order is mailed." KRS 278.380, which addresses delivery of Commission orders, provides: "When service of a

²³ Case No. 2020-00016, Order (Ky. PSC June 18, 2020).

²⁴ See Joint Intervenors' Petition for Rehearing.

²⁵ JI Response at 3-5.

commission order is by electronic transmission, *mailing shall be deemed to have occurred on the date the transmission of the order is completed.*” Pursuant to KRS 278.380, service of the QF-NMS Order occurred on September 27, 2021. The Companies’ filed their petition for rehearing 18 days later on October 15, 2021 – well within the statutory time period.

Just over a month ago, the Commission issued an order granting a petition for rehearing that was filed 23 days after the final order on which the utility sought rehearing (and notably did not involve newly discovered evidence).²⁶ The circumstances surrounding that petition are virtually identical to those here: (1) electronic filing procedures had been used in the proceeding; (2) the utility had waived its right to service of Commission orders by U.S. Mail and consented to delivery of orders by electronic transmission; (3) the Commission order for which rehearing was sought was delivered electronically; and (4) the petition was filed more than 20 days but less than 24 days after transmission of the order. Far from dismissing the petition for untimeliness, the Commission explicitly stated that the petition was *timely filed*:

KRS 278.400 permits any party to a proceeding to apply to the Commission for rehearing with respect to the issues determined within 20 days of the service of the Commission’s order. Service of a Commission Order is complete three days after the date the order is mailed. Hyden-Leslie District’s application for rehearing was timely filed.²⁷

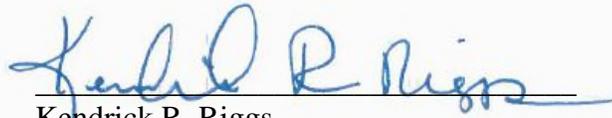
Therefore, the Joint Intervenors’ assertion that the Commission should dismiss the Companies’ Petition for Reconsideration for being untimely filed is baseless, and the Commission should address the Companies’ petition on its merits.

²⁶ Case No. 2021-00071, Order at 1 (Ky. PSC Sept. 15, 2021) (“This matter is before the Commission upon an application for rehearing filed by Hyden-Leslie County Water District (Hyden-Leslie District) on August 27, 2021, in which Hyden-Leslie District requests rehearing of the Commission’s final Order issued on August 4, 2021.”).

²⁷ *Id.* at fn. 1.

Dated: October 27, 2021

Respectfully submitted,



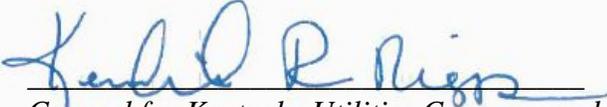
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CERTIFICATE OF COMPLIANCE

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 October 27, 2021; and that there are currently no parties in these proceedings that the Commission has excused from participation by electronic means.



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