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 METERING INFRASTRUCTURE, APPROVAL OF CERTAIN REGULATORY AND ACCOUNTING TREATMENTS, AND ESTABLISHMENT OF A ONE-YEAR SURCREDIT	)	**CASE NO. 2020-00349**

In the Matter of:

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 PETITION OF
KENTUCKY UTILITIES COMPANY AND
LOUISVILLE GAS AND ELECTRIC COMPANY FOR
RECONSIDERATION OF THE SEPTEMBER 24, 2021 ORDER

Pursuant to KRS 278.400, Kentucky Utilities Company ("KU") and Louisville Gas and Electric Company ("LG&E") (collectively "Companies") hereby submit their Joint Petition ("Petition") for Reconsideration of the Commission's Order filed in both of these proceedings on September 24, 2021 ("QF-NMS Order"). The Companies respectfully submit that much of the QF-NMS Order is contrary to both law and the evidence of record in these proceedings. The

Companies therefore ask the Commission to reconsider the QF-NMS Order and issue a new order prescribing QF and NMS-2 rates and an NMS-2 netting approach that are consistent with lowest reasonable cost and the requirements of applicable state and federal QF regulations and KRS 278.465 and 278.466.

In support of their Petition, the Companies state as follows:

I. The Companies Support Renewable Energy, but It Must Be Lowest Reasonable Cost.

The Companies have a proven track record of supporting renewable energy. In addition to the QF and net metering capacity on their system, the Companies' renewable energy efforts range from their venerable hydro plants at Dix Dam and Ohio Falls to the 10 MW Brown Solar Facility, and from their Solar Share Program to their Green Tariff, including their Green Tariff Option #3 that has resulted in a 100 MW solar power purchase agreement ("Solar PPA").[1] In addition, customers such as Fort Knox and Toyota have had onsite generation for many years. Therefore, contrary to the QF-NMS Order's assertion, the Companies are far from in their "infancy" concerning integration of renewable and distributed resources;[2] rather, for many years they have demonstrated clear and continued support for *economical* renewable energy.

The Companies and the Commission have an unambiguous obligation to ensure that utility service is *lowest reasonable cost*, as the Commission has long and repeatedly held in connection with its interpretation of KRS 278.020 and 278.030:

- "[The Commission believes] it has an obligation to pursue, for Kentuckians, an energy strategy that represents least cost consistent with appropriate reliability ...."[3]

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[1] *See Electronic Joint 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 (PSC Ky. Dec. 16, 2020).
[2] *See* QF-NMS Order at 43.
[3] *General Adjustment of Electric Rates of Kentucky Utilities Company*, Case No. 8624, Order at 54 (Ky. PSC Mar. 18, 1983).

- “LG&E has a statutory obligation under KRS 278.030 to serve its customers at the lowest reasonable cost.”[4]

- “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.”[5]

- “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.”[6]

- “The Commission has long recognized that ‘least cost’ is one of the fundamental principles utilized when setting rates that are fair, just, and reasonable.”[7]

- “Utilities operating in the Commonwealth are well aware that one of the Commission’s ‘most important roles’ in administering KRS Chapter 278, ‘is to provide the lowest possible cost to the rate payer.’”[8]

It is well established that the practical construction of a statute by an administrative agency over a long period of time is controlling.[9] Additionally, the Kentucky Supreme Court has agreed that ensuring lowest reasonable costs to customers is of primary importance:

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[4] *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).
[5] *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).
[6] *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).
[7] *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 at 5 (Ky. PSC June 28, 2010), 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.”).
[8] 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.”).
[9] *Paducah Marine Ways, Inc. v. Revenue Cabinet Commonwealth of Ky*., 730 S.W.2d 956, 957 (Ky. App.1987); see also Hagan v. Farris, 807 S.W.2d 488, 490 (Ky. 1991); *GTE v. Revenue Cabinet, Commonwealth of Ky*., 889 S.W.2d 788, 792 (Ky. 1994) (superseded on other grounds by statute) (“This Court has held that interpretation of a statute made by an administrative agency, once made and applied over a long period of time, cannot be unilaterally revoked by the agency.”); *Grantz v. Grauman*, 302S.W.2d 364, 367 (Ky. 1957).

- "[O]ne of the important objectives considered by the commission … [is] providing the lowest possible cost to the ratepayers."[10]

- "The Commission has ignored one of its most important roles, which is to provide the lowest possible cost to the rate payer."[11]

The Companies respectfully submit that the QF-NMS Order conflicts with this requirement in most respects and thus is arbitrary and unlawful. In particular, for both QF and NMS-2 rates, there is no lowest reasonable cost justification for paying more than long-term solar PPA market prices for the sum of all avoided cost components other than line losses, avoided transmission capacity cost, and avoided distribution capacity cost; every fraction of a cent above those market prices is not just a pure subsidy to QFs and NMS-2 generators but is also not a price based on avoided cost when the market price for the same energy is demonstrably less. The price for both QF and NMS-2 sales should not be greater than what the Companies would pay to generate or purchase the power. The QF-NMS Order is therefore arbitrary as disregarding and conflicting with the Commission's lowest reasonable cost obligation under law.

II. The QF Rates Prescribed by the QF-NMS Order Have No Rational Relationship to the Companies' Avoided Costs for Solar Energy and Will Likely Harm Customers.

Rather than restate here all of the QF-related arguments set out in the Companies' Sept. 7 Post-Hearing Brief,[12] simply put, the QF rates prescribed in the QF-NMS Order have no rational relationship to the Companies' actual avoided costs for solar energy and capacity and are therefore unlawful.[13] The Commission's QF regulations, particularly 807 KAR 5:054 Sec. 7(2) and (4), require QF rates to be "based on avoided costs," which 807 KAR 5:054 Sec. 1(1) defines to be "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

[10] *Public Service Comm'n v. Continental Tel Co.*, 692 S.W.2d 794, 799 (Ky. 1985).
[11] *Public Service Comm'n v. Dewitt Water District*, 720 S.W.2d 725, 730 (Ky. 1986).
[12] Companies' Sept. 7, 2021 Joint Post-Hearing Brief at 11-27.
[13] *See, e.g.,* QF-NMS Order at 37-41.

source." The solar PPAs into which the Companies and Big Rivers have recently entered are 20-year contracts with level pricing of less than $30.00/MWh and liquidated damages for non-performance, and which give the utilities or their customers the RECs, recently valued at about $8.00/MWh.[14] Yet the seven-year contract QF rates for solar facilities prescribed in the QF-NMS Order—$40.34/MWh for single-axis tracking and $43.89 for fixed-tilt, both of which are all-in before line losses for transmission-connected projects—are roughly *double* what the Companies and other Commission-jurisdictional utilities have contracted to pay for the full output of utility-scale solar facilities (net of revenues from REC sales at current REC prices of about $8.00/REC). Such excessive QF rates, which lack any connection to the Companies' actual costs of comparable capacity and energy, violate the Commission's QF regulations and must be set aside.

The additional considerations for QF rates set forth in 807 KAR 5:054 Sec. 7(5), which can affect QF rates in addition to avoided costs, do not affect the conclusion that the prescribed QF rates are excessive. The factors listed in 807 KAR 5:054 Sec. 7(5), such as ability to dispatch and reliability, are equally relevant to utility-scale non-QF solar facilities as to solar QFs. If anything, those factors tend to indicate that long-term utility-scale QFs are somewhat more valuable than solar QFs due to the longer, 20-year contract term, which would tend to have a greater effect on potentially avoidable generation capacity costs.[15] Thus, the prescribed QF rates, at least for solar QFs with seven-year contracts, fail to reflect the Companies' avoided costs for

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[14] *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."); *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); Sinclair Supplemental Surrebuttal at 7 ln. 3-4.

[15] *See, e.g.,* Sinclair Supplemental Direct at 17 ln. 13-18, *esp.* 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.").

comparable energy and capacity on the open market, making the prescribed QF rates unlawful under 807 KAR 5:054 Sec. 7(2), (4), and (5).

Moreover, the QF rates prescribed in the QF-NMS Order conflict with the Commission's orders in Case No. 2020-00016 concerning the Companies' recent Solar PPA. Less than a year ago, the Commission stated in its final order in that proceeding:

> Finally, while *the Commission is concerned regarding the potential proliferation of similar energy-only PPAs*, the Commission notes that certain characteristics inherent in this proposal provide a curb against substantial duplication of electric utilities' assets. *As a non-firm energy-only purchase agreement, the PPA cannot be relied upon for generating capacity* used to meet the statutory requirement that electric utilities provide adequate, efficient and reasonable service.[16]

Just like the Companies' recent Solar PPA, any contracts into which the Companies would enter with solar QFs would be for the output of solar facilities, not to purchase or control the facilities themselves; thus, they are equally "energy-only PPAs." Therefore, if the Commission is indeed "concerned regarding the potential proliferation of similar energy-only PPAs," it is inconsistent with this expressed concern to establish solar QF rates that are *nearly double* recent market rates (when accounting for REC values, which QFs will retain). Also, if the Commission believes that "non-firm energy-only purchase agreement[s] … cannot be relied upon for generating capacity," it would contradict that belief to ascribe a non-zero avoided generation capacity cost component to solar QF rates for contracts with *shorter* terms (seven years) than those in recent Commission-approved utility-scale solar PPAs (20 years).[17] Such inconsistency evidences arbitrariness and contradicts the Commission's statement in the same order that "one of the Commission's 'most

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[16] Case No. 2020-00016, Order at 7 (Ky. PSC Dec. 16, 2020) (emphases added).

[17] *See* QF-NMS Order at 27-28; Case No. 2020-00016, Order (Ky. PSC Dec. 16, 2020); 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).

important roles' in administering KRS Chapter 278, 'is to provide the lowest possible cost to the rate payer.'"[18] The Companies therefore urge the Commission to reconsider the QF rates prescribed in the QF-NMS Order and prescribe QF rates that more accurately align with the Companies' actual avoided costs, such as those filed by the Companies.

The Companies further ask the Commission to reconsider the QF rates prescribed in the QF-NMS Order in the context of the applicable federal QF regulations, which state in relevant part, "Nothing in this subpart requires any electric utility to pay more than the avoided costs for purchases."[19] 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.[20]

There is simply no avoiding the reality that QF rates that require solar facilities to receive payments that are *nearly double* market rates necessarily require the Companies 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," and therefore must be reconsidered and revised, particularly in the context of the new federal QF regulations that the Commission must implement before the end of this year.[21]

One practical deleterious effect of the QF-NMS Order's prescribed QF rates, if they are permitted to stand, is that they will likely limit the availability of market-priced utility-scale solar resources for the Companies and their customers in the future. It seems unlikely that a solar developer would offer to provide, for example, 160 MW of solar capacity for a 20-year level price

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[18] Case No. 2020-00016, Order at 7 (Ky. PSC Dec. 16, 2020).
[19] 18 CFR 292.304(a)(2).
[20] 85 Fed. Reg. 54,642 ¶ 14 (emphasis added).
[21] *See* 85 Fed. Reg. 54,628 (Sept. 2, 2020); 16 USC 824a-3(f)(1).

of less than $30/MWh and give the Companies the RECs when the developer could simply break the project into two 80 MW facilities, separate them by 10 miles or more, and compel the Companies to purchase the output of both QF facilities for more than $40/MWh while the developer keeps the RECs.[22] The QF-NMS Order effectively eviscerates any bargaining power the Companies could use for their customers' advantage, meaning the Companies' customers will be forced to overpay for solar energy as a result. On the other hand, to the extent the Companies comply with their lowest reasonable cost obligation and refuse to negotiate QF contracts with large QFs that exceed market prices, they will likely be embroiled in potentially significant litigation before the Commission—litigation that could be avoided simply by having tariffed QF rates that do not exceed market prices. The Commission should therefore reconsider the prescribed QF rates to protect customers consistent with the Commission's lowest reasonable cost obligation.

The QF-NMS Order's determination that the Companies will have a capacity need beginning in 2025 is unsupported by the record, misunderstands the purpose of the Companies' recent request for proposals ("RFP"), and is inconsistent with the Commission's past orders regarding generating resource acquisitions.[23] The Companies' evidence in these proceedings has consistently established that they do not have reason to anticipate a capacity need before 2028, and possibly not until 2034.[24] The Companies' press release introduced by Commission Staff counsel at hearing does not in any way contradict the Companies' evidence.[25] As expressly stated in the press release itself, "The [RFP] … will allow us the opportunity to evaluate a number of options

[22] *See* 18 CFR 292.204(a)(2)(i)(B) ("For purposes of this paragraph (a)(2), for facilities for which qualification or recertification is filed on or after December 31, 2020 there is an irrebuttable presumption that affiliated small power production qualifying facilities that use the same energy resource and are located 10 miles or more from the facility for which qualification or recertification is sought are located at separate sites from the facility for which qualification or recertification is sought.").
[23] QF-NMS Order at 36-37.
[24] *See, e.g.,* Sinclair Supplemental Direct at 13 and DSS-2.
[25] 8/18/21 Hearing, PSC Staff Exh. 7 at 1.

to ensure that we continue to serve our customers' energy needs in the most reliable, least-cost fashion *without committing LG&E and KU to any particular business decision*."[26] In other words, the RFP is an information-gathering exercise, and by its own expressed terms is not a commitment to add capacity at any particular time.

Moreover, it is both unsurprising and prudent for the Companies to seek capacity offers beginning as early as 2025 in anticipation of a possible 2028 capacity need. Capacity projects take years to negotiate, obtain necessary approvals, engineer, and construct; delays in any or all of those stages are common. Also, some capacity offers are sufficiently economical that implementing them prior to an anticipated capacity need results in lower net present value of revenue requirement impacts than waiting to implement a higher-cost alternative closer to the time of the anticipated need. Indeed, that is precisely why the Companies' proposed alternative QF pricing provided lower capacity pricing for contracts beginning in earlier years (e.g., 2022 and 2023) than in later years (e.g., 2025 and 2026) for the same generating technology; obtaining such capacity earlier than needed can still be advantageous to customers if it is at the right price.[27] Thus, it remains prudent to review options that could be available sooner but might not be available later if the pricing is sufficiently attractive that customers would receive net benefits from an early capacity acquisition.

The Commission implicitly recognized exactly this point in its May 3, 2012 order in Case No. 2011-00375, in which it approved the Companies' acquisition of 495 MW of existing combustion turbine capacity in anticipation of a 2016 capacity need.[28] In that order, the

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[26] *Id.* (emphasis added).
[27] *See, e.g.,* Sinclair Supplemental Direct Exh. DSS-3 Table 2 (July 13, 2021).
[28] *Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company for a Certificate of Public Convenience and Necessity for the Construction of a Combined Cycle Combustion Turbine at the Cane Run Generating Station and the Purchase of Existing Simple Cycle Combustion Turbine Facilities from Bluegrass Generation Company, LLC in LaGrange, Kentucky*, Case No. 2011-00375, Order at 15-16 and 20-21 (Ky. PSC May 3, 2012).

Commission noted, "[T]he purchase price of $110 million, or approximately $222/kW, is significantly less expensive than the estimated $850/kW cost to construct a comparable simple cycle gas combustion turbine …."[29] In other words, acquiring those units—even years prior to the anticipated need—was so economical that the Commission approved it because it would result in long-run reduced costs for customers.[30] Therefore, the Companies' recent RFP for generation capacity as early as 2025 was entirely prudent and consistent with the Commission's own past orders, and it is not evidence of a capacity need prior to 2028.

Finally, the QF-NMS Order inaccurately asserts, "[W]hen asked to explain the relationship before the RFP's capacity install year of 2025 or earlier, LG&E/KU could not explain why LG&E/KU claimed 2028 as the first-year capacity was needed."[31] The citation provided to support this assertion (Aug. 18, 2021 at 3:18:21 p.m.) is at the beginning of a question from Commission Staff counsel to the Companies' outside witness W. Steven Seelye. Mr. Seelye repeatedly stated preceding and following the cited portion of the video record that he was *not* the best witness to ask because he was not involved in the RFP process, though he did note that generation often has long lead times, and he further recommended asking the Companies' Vice President for Energy Supply and Analysis, David S. Sinclair, about the RFP.[32] Mr. Sinclair was available to testify and did in fact testify at length earlier in the hearing;[33] it is unclear why the questions were asked of Mr. Seelye rather than Mr. Sinclair. Indeed, the press release later introduced by Commission Staff counsel actually quoted Mr. Sinclair,[34] who had provided a discovery response and testified

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[29] Case No. 2011-00375, Order at 16 (Ky. PSC May 3, 2012).
[30] The Companies ultimately were not able to complete the purchase of the units due to orders by FERC, but the grounds of the Commission's order approving the purchase remain valid.
[31] QF-NMS Order at 36-37.
[32] 8/18/21 Hearing VR 15:16:50-15:19:07 (Seelye).
[33] *See* 8/17/21 Hearing VR 11:19:15-14:26:54 (Sinclair).
[34] Commission Staff Hearing Exh. 7 at 1 (emphasis added; quotation marks in the original):

about the RFP in the first hearing in these proceedings,[35] and who filed testimony in this phase of the proceedings concerning the RFP.[36] That notwithstanding, a witness for the Companies who followed Mr. Seelye at the hearing, Robert M. Conroy, did testify concerning the RFP and plainly stated, "We don't have a capacity need in 2024. If Mill Creek [Unit] 1 retires, we still have sufficient capacity to maintain our reliability margins."[37]

In addition, the record of these proceedings contains the very answer the QF-NMS Order says the Companies could not provide—all in evidence sponsored by Mr. Sinclair, not Mr. Seelye—evidence that supports Mr. Conroy's statement during the hearing. For example, an exhibit sponsored by Mr. Sinclair shows that, even assuming the retirement of 47 MW of small CT capacity and the 300 MW Mill Creek Unit 1 at the end of 2024, the Companies will not fall below the lower end of their target reserve margin range (i.e., below 17%) until 2028, when environmental regulations might require the retirement of Mill Creek Unit 2 and Brown Unit 3.[38] That is consistent with Mr. Sinclair's pre-filed direct testimony, which stated that the Companies did not anticipate replacing the Mill Creek Unit 1 capacity if it retired at the end of 2024 because, "[W]hen Mill Creek Unit 1 is retired at the end of 2024, the summer reserve margin in 2025 is within the target reserve margin range."[39] Nothing in the press release introduced by Commission

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> "These units have enabled us to deliver safe, reliable power to our customers for decades, but they are nearing the end of their life cycles. Keeping them operating would require costly investments, and given their age, it would not be in the best interest of our customers to further invest in these units," *said David Sinclair, LG&E and KU's vice president of Energy Supply and Analysis*. "The request for proposal will allow us the opportunity to evaluate a number of options to ensure that we continue to serve our customers energy needs in the most reliable, least-cost fashion without committing LG&E and KU to any particular business decision."

[35] *See* KU Response to PSC 6-6 (sponsored solely by David S. Sinclair); LG&E Response to PSC 6-6 (sponsored solely by David S. Sinclair); 4/26/21 Hearing VR 16:52:36-16:53:22 (Sinclair in response to questions from Vice Chairman Chandler re RFP and RFP responses).

[36] *See* Sinclair Supplemental Direct at 8 ln. 19-22 ("Since the Companies issued a capacity RFP in January and are currently evaluating potential PPAs with other developers ...."); Sinclair Supplemental Rebuttal at 30 ln. 16-20.

[37] 8/18/21 Hearing VR 16:23:08-16:23:18. (Conroy); *see generally* 16:20:00-16:23:57 (Conroy).

[38] Sinclair Supplemental Direct Exh. DSS-2 at 15, Table 15, "Reserve Margin Need Assuming MC2, BR3 Retirements in 2028 (Scenario 1)."

[39] Sinclair Direct at 26-27.

Staff counsel at hearing contradicts this; nowhere does the press release assert that the Companies anticipate a possible capacity shortfall prior to 2028.

Therefore, not only is the legally required "substantial evidence" lacking to support the QF-NMS Order's use of a 2025 capacity need for the Companies, *there is no evidence at all* to support the determination; rather, all of the evidence on this matter only supports a 2028 capacity need at the earliest. Any determination to the contrary is arbitrary.[40] And the rates it requires must be revised to correct this error.

III. The Netting Approach the QF-NMS Order Prescribes for NMS-2 Is Contrary to KRS 278.465 and 278.466 and Therefore Must Be Corrected.

The netting approach the QF-NMS Order prescribes for NMS-2 is unlawful because it violates the plain terms of KRS 278.465 and 278.466. KRS 278.465(4) defines net metering to be the difference between two dollar-denominated values, *not energy values*:

> "Net metering" means the difference between the:
>
> (a) 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
>
> (b) 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.

Nowhere does the statutory definition require or even permit netting energy values; it is quite clear that *all* energy delivered to a utility's grid in a billing period is to be priced at the rate set by the Commission in accordance with KRS 278.466, and all of the energy consumed from the grid in a billing period is to be priced at the applicable retail rate, and those two *dollar values* are to be netted. 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*

[40] *American Beauty Homes Corp. v. Louisville*, 379 S.W.2d 450, 456 (Ky. 1964).

electricity produced by the customer's eligible electric generating facility that flows to the retail electric supplier …."[41] The statute does *not* say, "A retail electric supplier serving an eligible customer-generator shall compensate that customer for all *net* electricity produced by the customer's eligible electric generating facility that flows to the retail electric supplier …," which is exactly what the General Assembly could have done had it desired the outcome required by the QF-NMS Order. But that is not what the General Assembly prescribed, and it is not within the Commission's lawful authority to act in contravention of a clear, unambiguous statutory requirement.

Further supporting the unambiguous nature of these statutory provisions is the equally unambiguous statutory provision retaining kWh netting and crediting for legacy NMS-1 customers in KRS 278.466(6). That provision states in relevant part:

> For an eligible electric generating facility in service prior to the effective date of the initial net metering order by the commission in accordance with subsection (3) of this section, the net metering tariff provisions in place when the eligible customer-generator began taking net metering service, *including the one-to-one (1:1) kilowatt-hour denominated energy credit provided for electricity fed into the grid*, shall remain in effect at those premises for a twenty-five (25) year period ….

This provision demonstrates clearly that the General Assembly knows how to refer to kWh-denominated energy credits when it desires to do so, and it plainly did not do so concerning net metering for customers to whom KRS 278.466(6) does not apply.

Because there is no ambiguity in these statutory provisions, there is no authority, express or implied, for the Commission to require a netting approach that first nets energy produced to the utility's grid against energy consumed from the grid and then values any difference at either the utility's applicable retail rate or the compensation rate prescribed in accordance with KRS

[41] Emphasis added.

278.466(3).[42] The Kentucky Supreme Court has repeatedly and consistently stated that the Commission is a creature of statute.[43] As such, "The powers of the PSC are purely statutory and it has only such powers as are conferred expressly or by necessity or fair implication,"[44] and, "As a statutory agency of limited authority, the PSC cannot add to its enumerated powers."[45] Perhaps most importantly, Kentucky's highest court has long held that an administrative agency acting outside its statutory authority is contrary to the Kentucky Constitution's prohibition on the exercise of arbitrary power.[46] The Kentucky Court of Appeals has recently reversed administrative agency actions as arbitrary because they were contrary to statutory requirements, stating, "In determining whether an agency's action was arbitrary, the reviewing court should look at three primary factors. The court should first determine whether the agency acted within the constraints of its statutory

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[42] QF-NMS Order at 48.

[43] *See, e.g., Boone County Water v. Public Service Com'n*, 949 S.W.2d 588, 591 (Ky. 1997) ("The PSC is a creature of statute and has only such powers as have been granted to it by the General Assembly."); *South Central Bell v. Utility Reg. Com'n*, 637 S.W.2d 649, 653 (Ky. 1982) ("We have held that the Commission's powers are purely statutory.").

[44] *Boone County Water*, 949 S.W.2d at 591 (Ky. 1997).

[45] *Id.*

[46] *American Beauty Homes Corp. v. Louisville*, 379 S.W.2d 450, 456 (Ky. 1964). *See also Sebastian-Voor Props., LLC v. Lexington-Fayette Urban County Gov't*, 2008 Ky. LEXIS 39 at 17, No. 2006-SC-000732-DG (Ky. Feb. 21, 2008) ("Judicial review of an agency decision is limited to the determination of whether the decision was arbitrary, i.e., whether the action was taken in excess of granted powers, whether affected parties were afforded procedural due process, and whether decisions were supported by substantial evidence."); *Ky. Horse Racing Comm'n v. Motion*, 2018 Ky. App. LEXIS 314 at 15 ("an administrative agency's actions can be deemed arbitrary if it acted outside the scope of their granted powers, acted without proper due process, or lacked substantial evidence to support its decision."); *Ca'Mel v. Louisville/Jefferson Cty. Metro. Gov't Police Dep't*, 2018 Ky. App. Unpub. Lexis 408 at 4 (June 15, 2018) ("Judicial review of the any administrative decision involves an examination of whether the agency: 1) acted in excess off its powers, 2) lacked procedural due process, and 3) lacked support from substantial evidence of record. *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Comm'n*, 379 S.W.2d 450, 457 (Ky. 1964)."); *Roberson v. Commonwealth*, 2010 Ky. App. Unpub. LEXIS 615 at 4 (July 30, 2010) ("Appellate review of administrative decisions is limited to the issue of arbitrariness. *American Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Comm'n*, 379 S.W.2d 450 (Ky. 1964). In determining whether an action was arbitrary, the reviewing court must decide whether: 1) the agency's action was in excess of the powers granted to it; 2) there was a lack of procedural due process; and 3) the action was supported by substantial evidence. *Id.*").

powers or whether it exceeded them."[47] Any Commission order that is contrary to statute therefore must be corrected.

Regarding the netting interval and approach to be used in net metering in Kentucky, there is no ambiguity; KRS 278.465(4) and 278.466(3) provide a clear statutory directive to net the dollar value of *all* kWh a customer-generator produces to the grid in a billing period and the dollar value of *all* energy the customer-generator consumes from the utility in the same billing period. The procedure set out in the QF-NMS Order would rewrite the statute to include a kWh netting step before the dollar valuing occurs; indeed, in every billing period for every NMS-2 customer, it would effectively 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.[48] The QF-NMS Order's NMS-2 netting approach is therefore plainly contrary to statute and arbitrary; it must be corrected to reflect the statutory approach.

IV. The 25-Year Legacy Period the QF-NMS Order Creates for NMS-2 Customers Is Contrary to KRS 278.466(5) and Therefore Must Be Eliminated.

The 25-year legacy period the QF-NMS Order creates for NMS-2 customer-generators, i.e., "customer-generators who take service under NMS 2 should be allowed to take service under the current two-part rate structure and netting period for 25 years," is unlawful because it violates KRS 278.466(5) and is inconsistent with KRS 278.466(6) with regard to the rate-structure component, and it violates KRS 278.465 and 278.466 with regard to netting as discussed in the previous section. With regard to the rate-structure legacy period, KRS 278.466(5) *entitles* utilities

[47] *Cabinet for Health and Family Services v. Appalachian Regional Healthcare, Inc.*, 606 S.W.3d 623, 632-33 (Ky. App. 2019) (reversing Cabinet's refusal to hold dispute resolution or administrative hearings as required by statute and the Cabinet's own regulations). *See also Marcum v. Cabinet for Health and Family Services*, 496 S.W.3d 480, 484-85 (Ky. App. 2016) (noting that "administrative proceedings which affect a party's rights but do not afford an opportunity to be heard could likewise be classified as arbitrary" and holding failure of Cabinet to comply with its regulations regarding acknowledgement of appeal and notice of right to file brief and submit oral argument denied Medicaid applicant right to be heard).
[48] QF-NMS Order at 48.

to establish rates through normal ratemaking processes to recover costs to serve net metering customers, including demand-based costs:

> Using the ratemaking process provided by this chapter, each retail electric supplier shall be entitled to implement rates to recover from its eligible customer-generators all costs necessary to serve its eligible customer-generators, including but not limited to fixed and demand-based costs, without regard for the rate structure for customers who are not eligible customer-generators.

The *only* exception to this entitlement is in KRS 278.466(6), which creates a 25-year legacy right for NMS-1 customers to keep their current net metering arrangements. Nowhere does KRS 278.466 authorize the Commission to create new legacy rights of any kind for customers who do not qualify for the exception set out in KRS 278.466(6) *precisely because such new legacy rights would vitiate the cost-recovery entitlement set out in KRS 278.466(5).* Yet again, Kentucky's highest court has repeatedly held that an administrative agency acting outside its statutory authority is contrary to the Kentucky Constitution's prohibition on the exercise of arbitrary power.[49] Here, the General Assembly created the legacy right it desired to create; it clearly demonstrated it knew how to do so. Had the General Assembly desired to create a legacy right of the kind the QF-NMS Order creates out of whole cloth, it could have done so. But the General Assembly did not do so.

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[49] *American Beauty Homes Corp. v. Louisville*, 379 S.W.2d 450, 456 (Ky. 1964). *See also Sebastian-Voor Props., LLC v. Lexington-Fayette Urban County Gov't*, 2008 Ky. LEXIS 39 at 17, No. 2006-SC-000732-DG (Ky. Feb. 21, 2008) ("Judicial review of an agency decision is limited to the determination of whether the decision was arbitrary, i.e., whether the action was taken in excess of granted powers, whether affected parties were afforded procedural due process, and whether decisions were supported by substantial evidence."); *Ky. Horse Racing Comm'n v. Motion*, 2018 Ky. App. LEXIS 314 at 15 ("an administrative agency's actions can be deemed arbitrary if it acted outside the scope of their granted powers, acted without proper due process, or lacked substantial evidence to support its decision."); *Ca'Mel v. Louisville/Jefferson Cty. Metro. Gov't Police Dep't*, 2018 Ky. App. Unpub. Lexis 408 at 4 (June 15, 2018) ("Judicial review of the any administrative decision involves an examination of whether the agency: 1) acted in excess off its powers, 2) lacked procedural due process, and 3) lacked support from substantial evidence of record. *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Comm'n*, 379 S.W.2d 450, 457 (Ky. 1964)."); *See Roberson v. Commonwealth*, 2010 Ky. App. Unpub. LEXIS 615 at 4 (July 30, 2010) ("Appellate review of administrative decisions is limited to the issue of arbitrariness. *American Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Comm'n*, 379 S.W.2d 450 (Ky. 1964). In determining whether an action was arbitrary, the reviewing court must decide whether: 1) the agency's action was in excess of the powers granted to it; 2) there was a lack of procedural due process; and 3) the action was supported by substantial evidence. *Id.*").

Instead, it created a new entitlement for *utilities* to be able to have separate rates for net metering customers, including rates to recover "demand-based costs," which plainly demonstrates that the General Assembly did not grant explicit or implicit authority for the Commission to create a legacy right that would *prevent* utilities from creating demand charges for net metering customers.

Indeed, the Commission's new legacy right purports to give rights to NMS-2 customers that even NMS-1 customers do not possess. If the Commission approves rate structure changes for non-net-metering customers, similarly situated NMS-1 customers are subject to the new rate structures. But not NMS-2 customers: under the QF-NMS Order's new legacy rights, such customers get to keep their two-part rate structure regardless of what applies to other similarly situated non-NMS-2 customers.[50] That this newly invented legacy right goes beyond what the General Assembly explicitly—and exclusively—provided for NMS-1 customers further evidences that the General Assembly has not granted the Commission the authority it purports to exercise here, authority that circumscribes the clear rights given to utilities in KRS 278.466(5). The creation of such a legacy right—particularly one that is *plainly contrary to statute*—is a fundamentally legislative power the General Assembly has not delegated to the Commission, and the QF-NMS Order's creation of such a legacy right is therefore arbitrary and must be corrected. The Commission should issue an order on reconsideration eliminating the 25-year legacy right for NMS-2 customers.

Finally, in addition to being contrary to law, the QF-NMS Order's 25-year legacy right is administratively problematic on its face. First, the QF-NMS Order states that "eligible customer-generators who take service under NMS 2 should be allowed to take service under *the* current two-

[50] How this legacy right is supposed to apply to NMS-2 customers who do not take service under two-part rates, or who choose to move from one rate structure to another, is unclear and is not addressed in the QF-NMS Order.

part rate structure,"[51] but it is unclear to *which* two-part rate structure the order intends to refer; each of the Companies has several two-part rate schedules. Second, it is unclear whether or how the legacy right would apply to time-of-day energy rates (RTOD-E and GTOD-E); for example, would the time-of-day windows be subject to revision for such customers, or are they set for 25 years for such customers? Third and perhaps most importantly, it is unclear if or how the legacy right is to apply to NMS-2 customers who do not take service under two-part rates at the time they begin taking NMS-2 service or who later choose to take service under three- or four-part rates. Not all NMS-1 customers are Rate RS, GS, VFD, or AES customers; thus, it is unlikely all NMS-2 customers will take service under two-part rate structures, either when they initiate NMS-2 service or afterward. Therefore, there are significant legal and administrative problems with the QF-NMS Order's NMS-2 legacy right, and the Commission should reject it.

V. The QF-NMS Order's NMS-2 Rates Are Inconsistent with Lowest Reasonable Cost Requirements and Therefore Must Be Corrected.

Nothing in Kentucky's Net Metering Statutes permits or requires the Commission to deviate from its lowest reasonable cost obligations; rather, there is a statutory requirement for the Commission to use "ratemaking processes under this chapter [KRS Chapter 278]" to set net metering compensation rates.[52] As noted earlier, 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.'"[53] There is simply no exception to this lowest reasonable cost obligation in KRS 278.465 or 278.466; certainly the Commission cited none in the QF-NMS Order. Therefore, the

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[51] QF-NMS Order at 59 (emphasis added).
[52] KRS 278.466(3).
[53] 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.").

Commission's obligation under KRS Chapter 278 with regard to NMS-2 rates "is to provide the lowest possible cost to the rate payer."[54]

Yet the NMS-2 rates prescribed in the QF-NMS Order clearly and significantly exceed lowest reasonable cost. As the Companies have repeatedly observed—and nobody 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).[55] Therefore, the Commission can know with certainty that their prescribed NMS-2 rates are inconsistent with their lowest reasonable cost obligation because the sum of the Commission's five avoided cost components for each of the Companies, including those adjusted for losses, *is about triple* the market price of utility-scale solar reduced by REC revenues, and it is more than double the market price of utility-scale solar ignoring REC revenues.[56] There is no lowest reasonable cost justification for requiring customers to pay two to three times as much for solar energy generated by new net metering customers as it would cost to acquire the same energy—and avoided the same costs—from a utility-scale solar facility.

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[54] *Id.*

[55] 8/18/21 Hearing, VR 15:05:30-15:06:50 (Seelye).

[56] For the Companies that cost is $0.02782/kWh less REC revenues, which at recent REC prices ($0.00780/kWh) produces a net utility-scale solar price of just $0.02002/kWh. *See* Companies' Response to PSC 7-26; Sinclair Supplemental Surrebuttal at 7 ln. 3-4. 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 MW), and Big Rivers will receive the RECs for all three contracts. *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).

Indeed, by ignoring market prices for comparable energy, the Commission's avoided cost methodology does not result in the lowest reasonable cost for customers; rather, it produces the *maximum* cost-justified NMS-2 net energy compensation rate and requires customers to pay it *as though there were no other lower cost alternative*. Such an approach is wholly inconsistent with the Commission's lowest reasonable cost obligation. Therefore, the prescribed NMS-2 rates must be revised to account for market prices, which result in lower costs for customers than the Commission's avoided cost methodology.

VI. As Promulgated, the QF-NMS Order's QF Avoided Generation Capacity Cost Components and Several of the NMS-2 Rate Components Violate Due Process Requirements Due to Lack of Transparency.

The QF-NMS Order's avoided generation capacity costs (for both QF and NMS-2), as well as its avoided transmission capacity cost, avoided distribution capacity cost, and avoided environmental compliance cost components for NMS-2, all suffer from a fundamental due process problem; namely, because the QF-NMS Order does not include any workpapers or calculations, it is impossible to know how the Commission arrived at the values included in the QF-NMS Order for these rate components. Lacking such transparency violates the Companies' and the other parties' due process rights; without a clear presentation of the evidence upon which the rate components rely and the calculations used to arrive at the rate components, it is impossible to be heard upon such evidence and methodologies,[57] and it is likewise impossible to know whether the values are arbitrary as lacking substantial evidence.[58] As the Supreme Court has put it:

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[57] *See, e.g., Utility Reg. Com'n v. Ky. Water Service Co.*, 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.").

[58] *See, e.g., American Beauty Homes Corp. v. Louisville*, 379 S.W.2d 450, 456 (Ky. 1964) ("Unless action taken by an administrative agency is supported by substantial evidence it is arbitrary."), *citing Thurman v. Meridian Mut. Ins. Co.*, 345 S.W.2d 635 (Ky. 1961); *Comprehensive Home Health Servs. v. Prof'l Home Health Care Agency, Inc.*, 434 S.W.3d 433, 436-437 (Ky. 2013) ("For decades, Kentucky courts have recognized that an administrative agency

> A party is entitled, of course, to know the issues on which decision will turn *and to be apprised of the factual material on which the agency relies for decision so that he may rebut it*. Indeed, the Due Process Clause forbids any agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.[59]

Therefore, at a minimum the Commission must disclose the bases of its determinations of the cited cost components and provide an adequate opportunity for the Companies to review, comment upon, and rebut the basis of those determinations. The Commission did so in the Kentucky Power case, and the failure to do so here demonstrates the omission was arbitrary.[60] Without such disclosure the Companies and other parties cannot be properly heard, and the sufficiency of the evidence upon which the Commission's determinations rest cannot be examined.

VII. The QF-NMS Order Should Have Addressed QF and NMS-2 Cost Recovery.

The QF-NMS Order omitted any mention of cost recovery for the above-market and above-avoided cost rates prescribed in the order, notwithstanding the Companies' discussion of that issue in their post-hearing brief.[61] As the Companies argued in their post-hearing brief, they will have no control over the quantity, pricing, or timing of QF and NMS-2 purchases, making adjustment clause recovery appropriate.[62] Full recovery of the all-in QF and NMS-2 costs through the Companies' Fuel Adjustment Clause ("FAC") mechanisms is therefore appropriate irrespective of

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decision not supported by substantial evidence is arbitrary and cannot be sustained."); *Sebastian-Voor Props., LLC v. Lexington-Fayette Urban County Gov't*, 2008 Ky. LEXIS 39 at 17, No. 2006-SC-000732-DG (Ky. Feb. 21, 2008) ("Judicial review of an agency decision is limited to the determination of whether the decision was arbitrary, i.e., whether the action was taken in excess of granted powers, whether affected parties were afforded procedural due process, and whether decisions were supported by substantial evidence."); *Hilltop Basic Res., Inc. v. County of Boone*, 180 S.W.3d 464, 467 (Ky. 2005) ("The basic principles controlling this case were first set forth in comprehensive fashion over forty (40) years ago *in American Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Comm'n*, 379 S.W.2d 450 (Ky. 1964) by the esteemed and oft-quoted Commissioner Clay.").

[59] *Bowman Transportation v. Arkansas-Best Freight System*, 419 U.S. 281, 287 (1974) (emphasis added), *citing Ohio Bell Telephone Co. v. Pub. Util. Com'n*, 301 U.S. 292 (1937).

[60] *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, Order Appx. B (Ky. PSC May 14, 2021).

[61] *See* Companies' Post-Hearing Brief at 19.

[62] *Id.*

provisions concerning economy or non-economy energy purchases.[63] 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.

VIII. The Commission Erred When it Discounted the Companies' Avoided Cost Analysis Due to its Distributed Energy Resources and Smart Grid Strategies.

The Commission's Orders erroneously suggest that the Companies are not clear-eyed or experienced enough with DER to properly examine the question of avoided cost attributable to distributed generation. The record does not support this conclusion. The Companies themselves are in the best position to assess the impact of DER on their distribution system and develop cost-effective strategies to address the challenges posed by DER and ensure reliability of the system. The Companies have done that and plan to continue to do that through phased implementation of smart grid strategies, including advanced distribution management solutions ("ADMS") and preliminary exploration of the need for a Distributed Energy Resource Management System ("DERMS").

The Companies' implementation of their Distribution Management System ("DMS"), also known as ADMS, was expressly approved by the Commission as part of the Distribution Automation program through the issuance of a Certificate of Public Convenience and Necessity ("CPCN") in the Companies' 2016 base rate cases.[64] The benefits of Distribution Automation and DMS reach far beyond management of distributed energy resources, and the system has already resulted in widespread reliability improvement system-wide that is not tied to management or control of DER. Specifically, by the end of 2020, over 73 percent of the Companies' customers

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[63] *See, e.g.,* Conroy Rebuttal at 20 ln. 6-8; Companies' Response to JI Second Supplemental DR No. 4.

[64] *Electronic Application of Kentucky Utilities Company for an Adjustment of its Electric Rates and for Certificates of Public Convenience and Necessity*, Case No. 2016-00370, 6/22/17 Order, at p.29 (approving of stipulated position, granting CPCN for DA project); *Electronic Application of Louisville Gas & Electric Company for an Adjustment of its Electric Rates and for Certificates of Public Convenience and Necessity*, Case No. 2016-00371, 6/22/17 Order, at p.35 (same).

were being served by Distribution Automation circuits.[65] Implementation of the system has resulted in nearly 33 million avoided customer outage minutes and over 11 total minutes of reduction in System Average Interruption Duration Index ("SAIDI").[66] And the potential reliability benefits of DMS implementation have yet to be fully realized.[67] To date, none of these benefits relate directly to management and control of distributed energy resources, except that the circuit segmentation and fault isolation capability of an advanced distribution automation system can protect customer generators from tripping off the system as part of an outage that would otherwise occur in the absence of an ADMS.[68] The QF-NMS Order's implication that an ADMS is simply a more expensive means to accomplish what smart inverters can do to control voltage on distributed generation resources[69] reflects a fundamental misunderstanding of what the Companies' Distribution Automation and DMS projects are designed to do and the immense benefits they have already provided and will in the future provide to the system.

It is true that DMS can enable advanced monitoring and control of distributed energy resources to ensure the long-term reliability and health of the distribution system through implementation of a DERMS module. While the Companies have budgeted for a minimal investment in 2025 to explore deployment of a DERMS, they do not seek recovery of those dollars in these cases and their tentative plan to evaluate a DERMS in 2025 in no way detracts from the Companies' analysis of the avoided cost (lack of avoided cost) attributable to distributed energy resources. The Companies have not completed a cost benefit study on DERMS and would not incur the expense of implementing DERMS until after such analysis is performed in accordance

[65] LG&E Response to Joint Initial Data Requests of the Attorney General and KIUC Dated January 8, 2021, Response to Request No. 250.
[66] *Id.*
[67] Direct Testimony of John K. Wolfe, Case Nos. 2020-00349 and 2020-00350, at p.8 (filed Nov. 25, 2020).
[68] Supplemental Testimony of John K. Wolfe, Case No. 2020-00349 and 2020-00350, at pp.8-9 (filed July 13, 2021).
[69] 9/24/21 KU Order, at p.2.

with the Companies' capital authorization procedures.[70] Should the Companies determine in the future that a DERMS provides the most reliable and cost-effective solution to managing challenges associated with distributed energy resources, then they will seek recovery for the cost and, if necessary under the prevailing regulations and guidance at the time, seek a CPCN from the Commission for that implementation.

Additionally, a properly configured DERMS does more to manage distributed energy resources than simply regulating voltage of net capacity sent onto the grid. It enables communication between customer-owned generation resources and the distribution grid, improving planning and decision-making and accounting for anomalies like masked load.[71] It can also mitigate the risks of service disruption due to the intermittency of customer owned generation, particularly solar, and improve load flow calculations.[72] DERMS would also enable the Companies to offer ancillary services to customer generators, including curtailment of load, production of a certain amount of generation, and allows for monitoring of net generation output.[73]

The hearing testimony demonstrates that the Companies, in tandem with consideration of DERMS, *are considering and evaluating* the need to set a voltage at the smart inverter owned by customer generators, although not all customer generators currently have smart inverters.[74] Thus, the QF-NMS Order's assertion that the Companies are solely focused on system-wide solutions like DERMS to the exclusion of solutions at the customer inverter level is simply not borne out by the record. Both solutions will likely be required.[75]

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[70] LG&E Response to Metropolitan Housing Coalition, Kentuckians for the Commonwealth, and Kentucky Solar Energy Society's Second Set of Data Requests Dated February 5, 2021, Request No. 21.
[71] Supplemental Testimony of John K. Wolfe, Case No. 2020-00349 and 2020-00350, at p. 10 (filed July 13, 2021).
[72] *Id.*
[73] 8/17/21 Hearing, VR 3:07:00.
[74] 8/17/21 Hearing, VR 3:06:40.
[75] *E.g.* KU Response to Commission Staff's Seventh Request for Information Dated July 22, 2021, Response to Request No. 36; *see also* Supplemental Testimony of John K. Wolfe, Case No. 2020-00349 and 2020-00350, at p.11

In the absence of any affirmative evidence indicating that it is *unreasonable* for the Companies to evaluate implementation of DERMS in the five-year business planning horizon, subject to completion of a cost-benefit analysis, the Commission has simply prejudged the Companies' position and improperly substituted its own judgment for the judgment of the Companies about the best way to tackle future challenges associated with distributed energy resources. This is an impermissible result under Kentucky law, wherein utility management decisions are presumed to be reasonable unless demonstrated otherwise.[76] Consideration of DERMS in the future does not impact the Companies' avoided cost analysis and cannot be used as a basis to discredit that analysis simply because the Commission might do things differently.

CONCLUSION

The Companies are not opposed to renewable energy; indeed, they have a demonstrable track record of supporting it when it is economical and consistent with lowest reasonable cost service. The Companies respectfully submit that the QF and NMS-2 rates set forth in the QF-NMS Order are wholly inconsistent with the Commission's lowest reasonable cost obligations, the prescribed QF capacity rates are contrary to applicable federal and Kentucky QF regulations, and a number of the avoided cost components of QF and NMS-2 lack sufficient transparency to comport with due process requirements. The resulting rates, which far exceed market prices for comparable energy and capacity, will harm the Companies' customers, who will pay the rates the Commission prescribes. In addition, the QF-NMS Order's NMS-2 netting approach is contrary to the express terms of KRS 278.465 and 278.466, and it is therefore outside the Commission's lawful authority to impose.

("Distributed generation alone cannot provide services to the grid such as voltage regulation unless centralized monitoring and control are put in to place through systems such as ADMS, DERMS, SCADA, and AMI.").

[76] *West Ohio Gas Co. v. Ohio Pub. Util. Comm'n*, 294 U.S. 63 (1935), cited approvingly by the Commission in *Application of for Alternative Rate Filing of Fern Lake Company*, Case No. 2013-00172, 2013 Ky. PUC LEXIS 1066, *4 (Ky. P.S.C. Dec. 12, 2013).

Therefore, for these reasons and for the other reasons stated in this petition, as well as the record in these proceedings, Kentucky Utilities Company and Louisville Gas and Electric Company respectfully ask the Commission to reconsider its QF-NMS Order and issue a new order setting forth QF and NMS-2 rates and netting requirements that comport with lowest reasonable cost principles, applicable state and federal QF regulations, and Kentucky's Net Metering Statutes. Absent such relief, the Companies request that the Commission, at minimum, disclose the bases of its determinations of the cited cost components, and provide an adequate opportunity for the Companies to review, comment upon, and rebut the bases of those determinations.

Dated: October 15, 2021

Respectfully submitted,

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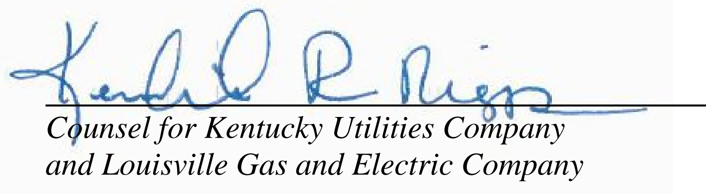
CERTIFICATE OF COMPLIANCE

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 15, 2021, and that there are currently no parties in this proceeding that the Commission has excused from participation by electronic means.



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