

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

STEVE RICKETTS)	
)	
COMPLAINANT)	
)	CASE NO. 2021-00182
V.)	
)	
LOUISVILLE GAS AND ELECTRIC COMPANY)	
)	
DEFENDANT)	

MOTION TO DISMISS COMPLAINT
AND SUPPORTING MEMORANDUM

Pursuant to 807 KAR 5:001, Section 5, Louisville Gas and Electric Company (“LG&E” or “Defendant”) moves the Kentucky Public Service Commission (“Commission”) to dismiss the Complaint with prejudice based on its own controlling precedent. In the alternative, the Commission should dismiss it without prejudice because the subject matter of the Complaint is not ripe for decision.

Background

In its 2019 Regular Session, the Kentucky General Assembly revised Kentucky’s net metering laws.¹ In lieu of a one-for-one kilowatt hour credit to compensate customer-generators for excess energy delivered to a retail electric supplier’s system, the General Assembly required compensation in the form of a dollar-denominated bill credit.² Instead of a balancing of kilowatt hours, “net metering” was redefined as the difference between the dollar value of the electricity fed into the electric grid over a billing period by a customer-generator priced at a rate determined

¹ 2019 Ky. Acts Ch. 101.

² KRS 278.466(4).

by the Commission and the dollar value of electricity consumed by the eligible customer-generator over the same period based upon the applicable rate in the retail electric supplier's tariff.³ If an eligible customer-generator's bill credit exceeded the amount to be billed to the customer in a billing period, the amount of the credit in excess of the customer's bill would be carried forward to the customer's next bill.⁴ The General Assembly exempted from this new framework eligible electric generating facilities in service "prior to the effective date of the initial net metering order by the commission" establishing a net metering dollar-denominated compensation rate. For these exempted facilities, the net metering tariff provisions in place when the eligible customer generator began taking net metering service remain in effect for 25 years.⁵

On November 25, 2020 in Case No. 2020-00350,⁶ LG&E applied to the Commission for an adjustment of its rates. As part of its application, it proposed a new net metering rate schedule, Rider NMS-2, and renaming its existing Rider NMS to Rider NMS-1. Service under Rider NMS-1 would be limited to eligible electric generating facilities for which the customer has executed a written *Application for Interconnection and Net Metering* prior to the issuance of a final Commission order on the proposed Rider NMS-1 and Rider NMS-2. A customer receiving service under Rider NMS-1 would receive a one-for-one kWh credit for electricity produced onto LG&E's grid for 25 years after the effective date of the rates established in these proceedings, regardless of whether premises were sold or conveyed during that time period. Rider NMS-2 is the successor net metering rate. It would provide for a dollar-denominated bill credit for customer generators

³ KRS 278.465(4).

⁴ KRS 278.466(4).

⁵ KRS 278.466(6).

⁶ *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 (Ky. PSC filed Nov. 25, 2020).

providing electricity to LG&E's grid and would apply to all net metering customers not eligible for Rider NMS-1.

Complainant is the co-owner and general manager of Solar Energy Solutions, Inc., a Kentucky limited liability company that installs solar facilities in Kentucky.⁷ Solar Energy Solutions is a member of the Kentucky Solar Industries Association ("KSIA"),⁸ a nonprofit association that intervened in Case No. 2020-00350 on behalf of, and to represent the interests of, its members. Complainant, himself, is a former KSIA director.⁹ Marty Partymiller, another member-owner of Solar Energy Solutions, is KSIA's president.¹⁰ When making his decision to expand his generation facility, Complainant had considerable knowledgeable of and experience with solar generation facilities and the laws governing them and of the proceedings in Case No. 2020-00350. He is a sophisticated consumer of net metering.

On April 23, 2021, Complainant filed his formal complaint ("Complaint").¹¹ Complainant alleges he is an LG&E residential customer taking service under LG&E's current net metering rider, Rider NMS, "and currently has a 10.02 kW DC solar generating facility at his residence ..."¹² Complainant further alleges he, through an agent, submitted an application to LG&E on April 8, 2021, seeking approval "to add 4.44 kW DC and 3.80 kW AC to his existing system for a total inverter power rating of 11.40 kW AC," which LG&E approved on April 19, 2021.¹³ According to the Complaint, Complainant's application indicated an expected start-up date of

⁷ Complaint, ¶ 1.

⁸ KSIA's website lists Solar Energy Solutions as a current member. See <https://kyseia.org/kyseia-membership.php> (last visited July 6, 2021).

⁹ Complainant is listed as a director on KSIA at the time of its formation and on its 2018 annual report to the Kentucky Secretary of State. See <http://web.sos.ky.gov/ftsearch/>.

¹⁰ Case No. 2020-00350, KSIA's Motion to Intervene (filed Dec. 16, 2020) at 2.

¹¹ Case No. 2021-00182, Order Attachment (Ky. PSC July 2, 2021) (hereinafter "Complaint").

¹² Complaint at 1.

¹³ *Id.* at 5.

October 31, 2021, for Complainant’s expanded system.¹⁴ The Complaint further alleges that on April 19, 2021, Complainant’s agent inquired of an LG&E representative whether “LG&E will honor the customer’s expansion in Q3 [presumably the third quarter of 2021] under current net metering guidelines,” to which the LG&E representative replied:

If this installation is completed in Q3, the whole net metering (old and new) would be under the new guidelines. Everything must be installed and operational prior to effective change date. Customer can do maintenance on existing panels (replacing a bad panel) or add batteries after the effective date and not lose grandfathering.¹⁵

Nowhere does the Complaint allege that LG&E has refused or failed to serve any of Complainant’s actually existing and in-service eligible generating facility under LG&E’s current Rider NMS. Instead, the Complaint seeks the following relief, all of which is essentially declaratory:

1. The Commission find and conclude that Ricketts has established a prima facie case;
2. In the event that Defendant LG&E fails to satisfy Mr. Ricketts’ Complaint, that the Commission find and conclude by Order that Ricketts and other similarly situated customer generators seeking to expand their generating facilities to maintain their legacy rights as long as that system does not exceed the statutory 45 kW system size limit;
3. An Order from the Commission requiring LG&E to abide by the conditions of its own Customer Notice for all customers, including Ricketts, that have acted upon the Customer Notice in reliance of that Customer Notice;
4. An Order from the Commission confirming that the Interconnection Application submission date serves as the “in service” date for purposes of retaining legacy rights and determining the effective net metering tariff that applies; and
5. All other relief that Complainant is entitled.¹⁶

¹⁴ *Id.*

¹⁵ *Id.* at 5-6.

¹⁶ *Id.* at 11.

After his Complaint was filed, on May 14, 2021, the Commission issued an Order in Case No. 2020-00174, stating that “the Commission finds that the 25-year legacy period established in KRS 278.466(6) begins to run as of the effective date of a Commission Order establishing a net metering successor rate.”¹⁷ The Commission’s Order also stated that “any modification or installation that materially increases the capacity of an eligible generating facility should be evaluated on the same basis as any other new application.”¹⁸ It further found that “if a customer’s modification of . . . [its] eligible generating facility results in a material increases in capacity, then that customer will no longer be eligible to take service under the NMS I [legacy] tariff.”¹⁹ KSIA was an active intervenor in Case No. 2020-00174.

On June 30, 2021, the Commission issued an order in LG&E’s base rate case, Case No. 2020-00350, which stated the same position regarding the date on which legacy rights under KRS 278.466(6) begin to run:

Based on the plain language of KRS 278.466(6), the Commission finds that the eligible generating facility must be in service prior to the effective date of the Commission’s approval of NMS-2 in order for the eligible customer-generator to be eligible to take service under NMS-1. Here, that date is the effective date of the Commission’s future Order approving the Rider NMS-1 and Rider NMS-2 compensation rates.²⁰

¹⁷ *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 (Ky. PSC May 14, 2021) at 45.

¹⁸ *Id.* at 44.

¹⁹ *Id.* However, if the existing customer can complete and place the expansion into service prior to the effective date of the Commission Order establishing the successor net metering rate, its generating facility would retain the right to be served under the legacy net metering tariff.

²⁰ Case No. 2020-00350, Order at 41 (Ky. PSC June 30, 2021). *See also* Case No. 2020-00349, Order at 38 (Ky. PSC June 30, 2021)(“Based on the plain language of KRS 278.466(6), the Commission finds that the eligible generating facility must be in service prior to the effective date of the Commission’s approval of NMS-2 in order for the eligible customer-generator to be eligible to take service under NMS-1. Here, that date is the effective date of the Commission’s future Order approving the Rider NMS-1 and Rider NMS-2 compensation rates.”).

The Order further states that the Commission’s “future Order approving the Rider NMS-1 and Rider NMS-2 compensation rates” must be issued by September 24, 2021—nearly the end of the third quarter of 2021.²¹ KSIA is an active intervenor in Case No. 2020-00350.

Argument

The Commission has already decided the issues raised in this proceeding in separate but topically related cases – cases in which KSIA was a participating party representing Complainant’s interests. The Commission should adhere to its own controlling precedent and dismiss the Complaint with prejudice. This approach is consistent with principles of *stare decisis*. *In re Hughes & Coleman*, 60 S.W.3d 540, 543-544 (Ky. 2001) (*stare decisis* applies to administrative agencies who must either conform with their own precedents or explain with a reasoned analysis the departure from them) (citations omitted).

First, the Complaint asks for a declaration that existing LG&E customers presently taking service under Rider NMS may at any time expand their existing generating facilities up to a rated capacity of 45 kilowatts and take service under Rider NMS-1. The Commission’s May 14, 2021 Order in Case No. 2020-00174 resolved this issue: net metering customers with KRS 278.466(6) legacy rights may make non-material additions to their generating facilities without losing their legacy rights.²² Regarding the other issue upon which the Complaint seeks a declaration, i.e., that an eligible generating facility be considered “in service” for the purpose of being served under Rider NMS-1 if the customer submits an application for the facility prior to the date of the Commission’s final order regarding Riders NMS-1 and NMS-2, the Commission has firmly decided that issue, as well, holding that a facility must actually be in service—not merely applied

²¹ *Id.* at 39.

²² Case No. 2020-00174, Order at 44 (Ky. PSC May 14, 2021).

for—to have legacy rights under KRS 278.466(6).²³ Therefore, the issues upon which the Complaint asks the Commission to declare its position have already been fully decided, necessitating a dismissal of the Complaint with prejudice.

In the alternative, even accepting all of Complainant’s allegations as true, it is clear that he was not harmed in any respect as of the date on which he filed his Complaint, and indeed he may *never* be harmed as his Complaint contemplates because the Commission has not issued its “future Order approving the Rider NMS-1 and Rider NMS-2 compensation rates” in Case No. 2020-00350, which the Commission may issue at any time before September 24, 2021, and will establish the date on which eligible customer generating facilities must be in service to have legacy rights under KRS 278.466(6). It is therefore unknown whether Complainant will have his contemplated additional generating capacity in service on or before the KRS 278.466(6) legacy rights cut-off date. At this point, what is certain is that Complainant has not been harmed and indeed cannot have been harmed in the way his Complaint contemplates. In other words, his Complaint is unripe and therefore non-justiciable: “An unripe claim is not justiciable.”²⁴ Such claims should be dismissed without prejudice for lack of subject matter jurisdiction.²⁵

Conclusion

Complainant has effectively asked the Commission to issue a declaratory order on issues the Commission has recently and fully decided in a way that is consistent with KRS 278.466 and contrary to what Complainant has asked the Commission to do. Accordingly, the Commission should stand by its precedent and dismiss the Complaint with prejudice.

²³ *Id.* at 45; Case No. 2020-00350, Order at 41 (Ky. PSC June 30, 2021).

²⁴ *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 275 (Ky. Ct. App. 2005).

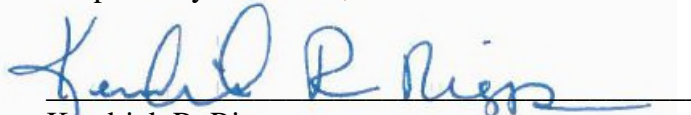
²⁵ *Id.* at 275-76.

In the alternative, the Complainant's claims are unripe because he has not yet been affected by the harm he alleges might occur. Therefore, his Complaint is non-justiciable, and the Commission should dismiss it without prejudice.

Finally, if the Commission finds that Complaint should not be dismissed, LG&E respectfully requests that this matter be held in abeyance pending final Commission action on the proposed Rider NMS-1 and Rider NMS-2 in Case No. 2020-00350 and LG&E be permitted to file an answer ten days following the issuance of that Commission order.

Dated: July 12, 2021

Respectfully submitted,




Kendrick R. Riggs
Stoll Keenon Ogden PLLC
500 West Jefferson Street, Suite 2000
Louisville, Kentucky 40202-2828
Telephone: (502) 333-6000
Fax: (502) 627-8722
kendrick.riggs@skofirm.com

Allyson K. Sturgeon
Managing Senior Counsel
Regulatory and Transactions
LG&E and KU Services Company
220 West Main Street
Louisville, Kentucky 40202
Telephone: (502) 627-2088
Fax: (502) 627-3367
allyson.sturgeon@lge-ku.com

Counsel for Louisville Gas and Electric Company

CERTIFICATE OF SERVICE

In accordance with 807 KAR 5:001, Section 8, I certify that a true and accurate copy of this document was served by electronic mail this 12th day of July 2021 upon Randal A. Strobo at rstrobo@strobobarkley.com and David E. Spenard at dspenard@strobobarkley.com.



K. D. P. Rigs
Counsel for Louisville Gas and Electric Company