

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC PETITION OF KENERGY CORP.	)	CASE NO.
FOR A DECLARATORY ORDER	)	2023-00309

**KENTUCKY SOLAR INDUSTRIES ASSOCIATION, INC.’S  
RESPONSE TO KENERGY CORP.’S  
PETITION FOR A DECLARATORY ORDER**

**AND, IN THE ALTERNATIVE,  
REQUEST FOR REHEARING**

Comes now the Kentucky Solar Industries Association, Inc. (KYSEIA), by and through counsel and pursuant to the Kentucky Public Service Commission’s October 30, 2023 Order in the instant case, to submit its written response to Kenergy Corp’s (“Kenergy”) *Verified Petition for Declaratory Order* (“Petition”). The Petition should be dismissed without prejudice. KYSEIA also tenders, in the alternative, that if the Petition is not dismissed, its request for rehearing of the Order which denied KYSEIA’s Motion to Intervene. In response to the Petition and in support of rehearing, KYSEIA respectfully submits the following:

**1. Preliminary Statement of Law**

The Petition was submitted pursuant to 807 KAR 5:001, Section 19. Subsection 1 of this administrative regulation states:

The commission may, upon application by a person substantially affected, issue a declaratory order with respect to the jurisdiction of the commission, the applicability to a person, property, or state of facts of an order or administrative regulation of the commission or provision of KRS Chapter 278, or with respect to the meaning and scope of an order or

administrative regulation of the commission or provision of KRS Chapter 278.

Through use of the term “may,” there is no requirement that the Commission issue a declaratory order; therefore, no person has a right to obtain an Order. Critical to seeking an Order, there must be, among other things, a “person substantially affected” and a “state of facts” for review which can support a declaration.

807 KAR 5:001, Section 19(2) parts (b) through (d) require:

- (b) [The application] Contain a complete, accurate, and concise statement of the facts upon which the application is based;
- (c) Fully disclose the applicant's interest;
- (d) Identify all statutes, administrative regulations, and orders to which the application relates

KYSEIA may reference other statutes, administrative regulations, Orders, or provisions of law as part of its arguments.

## **2. Arguments and Comments**

### **2.1 Kenergy’s Petition is not ripe and should be dismissed.**

Kenergy’s Petition, on its face and through its plain language, fails to present a matter that is ripe or otherwise proper for the adjudication sought by Kenergy. Specifically, Kenergy alleges that it has “received inquires about members who desire to install solar equipment on their property.”<sup>1</sup> Kenergy does not allege that it has received (or encouraged or even advised as necessary) any formal application for service for which it now seeks to *preemptively* deny service for the reasons alleged in the Petition.

---

<sup>1</sup> Petition (filed Sept. 13, 2023), page 2.

Kenergy alleges that for two (2) inquiries, “the solar generating capacity is significant.”<sup>2</sup> Separate from failing to demonstrate that an application for service has been tendered (or is even expected) for either of the properties that are the subjects of the alleged inquiries, Kenergy simply alleges that, perhaps, these could be an issue. Specifically, Kenergy alleges: “In order to properly install such solar facilities as are described above [related to the two (2) alleged inquiries] in compliance with Tariff 46,<sup>3</sup> the pertinent distribution lines may require upgrades (emphasis added).”<sup>4</sup>

Kenergy does not fall within the scope of a “person substantially affected” in the absence of an actual application for service in combination with a demonstration that the pertinent distribution lines, in fact, require upgrades based upon the facts presented through the application(s). At best, Kenergy is a person *potentially* affected by a hypothetical application that may be filed and which, in turn, may require an upgrade.

Kenergy, through its Petition, fails to demonstrate itself as a “person substantially affected” and, further, fails to present a “state of facts” sufficient to support a request for the Commission to exercise its discretion in favor of adjudicating or declaring through 807 KAR 5:001, Section 19(1) abstract or hypothetical matters.<sup>5</sup> For this reason alone, it

---

<sup>2</sup> Petition (filed Sept. 13, 2023), page 2.

<sup>3</sup> *Kenergy Corp. of Henderson, Kentucky, Classification of Service and Rules and Regulations for Furnishing Electric Service to All or Portions of: Breckenridge, Caldwell, Crittenden, Daviess, Hancock, Henderson, Hopkins, Livingston, Lyon, McLean, Ohio, Muhlenberg, Union, and Webster Counties in Kentucky, Schedule 46 – Net Metering (“Schedule 46”).*

<sup>4</sup> Petition (filed Sept. 13, 2023), page 3.

<sup>5</sup> *See, for comparison*, 40 KAR 1:020, Section 4 (Official opinions [of the Attorney General] will be rendered ... only in response to questions relating to current factual situations; they will not be rendered in response to moot, hypothetical, or abstract questions...).

should be dismissed. Kenergy's Petition is akin to a strategic lawsuit against public participation ("SLAPP suit") through which Kenergy seeks to act adversely against its members (in the absence of the latter) who are alleged to have inquired about service that may result in a need to consider an aspect of Schedule 46 (a tariff provision which is not demonstrated as in an actual controversy).

**2.2 Kenergy's Petition demonstrates that it has not exhausted or otherwise completed its duties under Schedule 46.**

Kenergy's Petition fails to fully discuss applications for service under Tariff 46. Specifically, while Kenergy discusses Schedule Sheets 46B and 46C, Kenergy fails to identify or discuss Schedule 46D.<sup>6</sup> Kenergy, therefore, neglects to mention, among other things, the following tariff provision:

If the generating facility does not meet all of the above listed criteria, Kenergy, in its sole discretion, may either: 1) approve the generating facility under the Level 1 Application if Kenergy determines that the generating facility can be safely and reliably connected to Kenergy's system; or 2) deny the Application as submitted under the Level 1 Application.<sup>7</sup>

The immediately foregoing tariff provision, therefore, confirms that exceedance of the fifteen (15) percent metric identified by Kenergy in its Petition is not the end of the analysis nor does it suggest that service should be denied. The above language in Schedule 46D confirms that the fifteen (15) percent metric is a screening mechanism that does not conclusively determine safety or reliability. (The failure to disclose this material fact concerning its own tariffs, of itself, warrants dismissal.)

---

<sup>6</sup> Schedule 46, P.S.C. Ky. No. 2, First Revised Sheet No. 46D, effective Apr. 30, 2009.

<sup>7</sup> *Id.*

Setting aside for the moment that Kenergy does not possess the power to abuse its discretion or otherwise act arbitrarily or capriciously through Schedule 46D, Kenergy does not allege that it is in possession of all the relevant facts for a determination concerning whether the generating facility can be safely and reliably connected to Kenergy's system. Moreover, Kenergy does not allege that it has conducted this type of review based upon an application that has been reviewed under the process set forth and required by Kenergy's tariffs. Kenergy, based upon inquiries, alleges that upgrades *may* be needed. The allegation is not the product of the process required by Schedule 46.

A complete reading of Kenergy's tariff provisions (including Schedule 46D) for net metering demonstrates that the applicable framework for deciding interconnection is not whether there may be a problem but, instead, whether the generating facility can be safely and reliably connected to Kenergy's system. Kenergy's Petition does not include its required Schedule 46D review and analysis.

Also missing from the Petition is evidence of compliance with the following tariff provision:

If the Application is denied, Kenergy will supply the Customer with reasons for denial. The Customer may resubmit under Level 2 if appropriate.<sup>8</sup>

Separate from the fact that there is no application that has been reviewed, Kenergy fails to supply with its Petition any evidence that it has supplied the members seeking to interconnect with specific reasons why it seeks to deny the interconnections under the conditions as alleged by Kenergy. Again, the Petition is a preemptive move by Kenergy

---

<sup>8</sup> *Id.*

that would allow Kenergy to simply ignore its tariffs so that it can obtain an adjudication against these members in their absence.

To properly exhaust procedures required by Kenergy's own tariff provisions, Kenergy should wait until it receives applications from its members and thereafter review the applications to determine (1) if upgrades are required and (2) whether the generating facility can be safely and reliably connected to Kenergy's system even if there is an exceedance of the fifteen (15) percent metric. If there is a basis for denying service, the basis should be documented and supplied to the customer.<sup>9</sup> Thus, Kenergy should be required to follow clear tariff provisions before it seeks an adjudication via a declaratory order of a matter that is alleged to have the potential ("may") to occur. In the absence of exhaustion of its own tariff provisions, Kenergy's Petition should be dismissed.

Additionally, the Petition fails to satisfy 807 KAR 5:001, Section 19(2)(b) in that it fails to contain a complete, accurate, and concise statement of facts because it omits Schedule 46D (which explains that the fifteen (15) percent metric is a screening device whose exceedance does not require denial of service). For this reason, the Petition should be dismissed.

### **2.3 Kenergy seeks a declaratory order for a matter that it can address through the filing of revised tariff pages.**

Part of Kenergy's proposed resolution is stated as follows:

[A] proposed solar generating facility that causes a 15% or greater increase in a line section's most recent annual one hour peak load is cause to deny the connection of the proposed solar facility to Kenergy's system.<sup>10</sup>

---

<sup>9</sup> *Id.* ("If the Application is denied, Kenergy will supply the Customer with the reasons for denial. The Customer may resubmit under Level 2 if appropriate.")

<sup>10</sup> Petition (filed Sept. 13, 2023), pages 3 and 4.

To the extent that Kenergy seeks the declaration of a *per se* rule of denial, then Kenergy fails to mention that this proposed resolution conflicts with its Commission-approved tariffs (discussed above in **Section 2.2**). If the proposed connection fails the fifteen (15) percent screening metric, Kenergy reserves for itself the discretion to approve the connection of the proposed solar facility to the Kenergy system.<sup>11</sup> Kenergy, therefore, seeks a declaration concerning its Commission-approved tariffs when the proper procedural mechanism for addressing this matter is through filing revised tariffs.

To the extent that Kenergy does not seek the declaration of a *per se* rule of denial, then the matter is already addressed through Kenergy's existing tariffs (and requires no declaration). If Kenergy is unhappy with the plain language of its existing Commission-approved tariffs, then it should file revised tariffs.

Kenergy, therefore, is not seeking a declaration concerning a statute, administrative regulation, or Order of the Commission. Kenergy is seeking a revision of its existing tariff provisions. Revision of tariffs is comprehensively addressed in 807 KAR 5:011 and is the proper procedural avenue for Kenergy to advance its efforts.

**2.4 The matters raised by Kenergy through its Petition concern matters already pending before this Commission and are inappropriate for a new separate docket.**

Through an Order entered on September 24, 2020, the Commission opened an investigation into interconnection and net metering guidelines.<sup>12</sup> Kenergy is seeking to bypass that proceeding to obtain a preemptive adjudication against some of its members

---

<sup>11</sup> Schedule 46, P.S.C. Ky. No. 2, First Revised Sheet No. 46D, effective Apr. 30, 2009.

<sup>12</sup> Case No. 2020-00302, *Electronic Investigation of Interconnection and Net Metering Guideline*, Order (Ky. P.S.C. Sept. 24, 2020).

through the Petition in the instant case. Kenergy also takes antagonistic positions in the two (2) pending actions.

Kenergy, through Big Rivers Electric Corporation (“Big Rivers”), is participating in Case No. 2020-00302.<sup>13</sup> In comments filed on its behalf in Case No. 2020-00302, Kenergy states:

It is necessary for a utility to be able to require compliance with new standards, and to adopt rules and interconnection standards consistent with those standards, to keep up with innovations in the renewable energy field.<sup>14</sup>

KYSEIA agrees that it is important to keep up with innovations in the renewable energy field. KYSEIA disagrees with the premise that the Petition filed by Kenergy is a reasonable effort to consider those innovations. In fact, the Petition is calculated to divorce the innovations from request for a declaration. Completely absent from Kenergy’s Petition is any discussion of changes in consideration of the fifteen (15) percent metric since April 30, 2009, the effective date of Schedule 46B through D.

The 15% threshold is based on a rationale that unintentional islanding, voltage deviations, protection miscoordination, and other potentially negative impacts are negligible if the combined DG generation on a line section is always less than the minimum load.<sup>15</sup>

During review of PV interconnection requests in regions with a high level of PV deployment, the 15% interconnection screen often triggers the need for supplemental studies. In many cases, even when PV penetration is substantially above

---

<sup>13</sup> Case No. 2020-00302, Joint Brief of Big Rivers Electric Corporation and its Members (filed Apr. 19, 2021).

<sup>14</sup> *Id.*, page 3.

<sup>15</sup> Michael Coddington, et al., *Updating Interconnection Screens for PV System Integration*, National Renewable Energy Laboratory, Technical Paper, NREL/TP-5500-54063 (Feb. 2012), page 2.

15%, the supplemental review does not identify any necessary system upgrades. There are many circuits across the United States and Europe with PV penetration levels well above 15% where system performance, safety, and reliability have not been materially affected.

These observations offer some indication that the existing 15% screen is conservative and is not an accurate method of determining the hosting capability (ability to add more PV without system upgrades) of a particular feeder. The following short-term, mid-term, and long-term approaches may be considered as possible steps to improve interconnection procedures for distribution-connected PV systems.<sup>16</sup>

Thus, in one docket, Kenergy urges consideration of innovations in the renewable energy field (which is clearly currently permissible for Kenergy through Schedule 46D) and in the instant docket Kenergy wants to rely upon select tariff provisions (other than Schedule 46D) with an effective date nearly fifteen (15) years old. These facts further underscore the problems with Kenergy seeking a declaration based upon hypothetical facts, a set of facts that does not contain an application, review, and determination under the entirety of Kenergy's existing tariff schedules. Kenergy is asking the Commission to engage in unfairly limited piece-meal rulemaking separate from the docket that is already considering these issues through an open and comprehensive review process.

If Kenergy is not seeking general rulemaking, then Kenergy is clearly seeking the adjudication of the rights of specific members to a set of facts presumed by Kenergy (facts not developed or proven). Kenergy is, then, seeking the resolution of a possible complaint without a complete set of facts or the participation of the complainant. Such a member-specific adjudication of rights upon a specific set of facts implicates Due Process, and the Petition by Kenergy fails to satisfy Due Process as to these members.

---

<sup>16</sup> *Id.*, pages 5 and 6 (footnotes omitted).

As noted in the above argument, prior to seeking a declaration concerning a member's request to interconnect, consistent with Due Process, Kenergy should be required to demonstrate that it has formally reviewed and acted upon the matter through the process set forth in its own Commission-approved tariffs and has developed a complete and accurate set of facts. Here, the review, at best, is an undocumented process by Kenergy through which the utility declines to take formal action.<sup>17</sup>

Applications are reviewed and processed by Kenergy as either a Level 1 or Level 2 application.<sup>18</sup> The fifteen (15) percent metric identified by Kenergy in its Petition states the following:

For interconnection to a radial distribution circuit, the aggregated generation on the circuit, including the proposed generating facility, will not exceed 15% of the Line Section's most recent annual one hour peak load. A line section is the smallest part of the primary distribution system the generating facility could remain connected to after operation of any sectionalizing devices. recent annual one hour peak load.<sup>19</sup>

Schedule 46 also states: "No construction of facilities by Kenergy on its own system will be required to accommodate the generating facility."<sup>20</sup> Kenergy is properly charged with knowledge of its own tariff provisions, and Kenergy is (or should be) well-

---

<sup>17</sup> Kenergy, through its own admissions, is clearly acting upon pre-applications reviewing applications for net metering service in a process that is not described or authorized by its tariffs.

<sup>18</sup> *Id.* Note: Kenergy fails to clearly disclose whether the inquiries concern possible applications for service and review under the Level 1 or the Level 2 process. The fifteen (15) percent metric identified by Kenergy in its Petition is applicable only to the Level 1 process. Kenergy has not taken formal action to state that a Level 2 process applies.

<sup>19</sup> Schedule 46, P.S.C. Ky. No. 2, First Revised Sheet No. 46C, effective Apr. 30, 2009.

<sup>20</sup> Schedule 46, P.S.C. Ky. No. 2, First Revised Sheet No. 46D, effective Apr. 30, 2009.

aware of the fact that its own tariff provisions already contain one of the resolutions proposed by the Petition, that upgrades required for the purpose of allowing net metering shall be borne by the customer-generator.<sup>21</sup>

Kenergy states that it served a copy of the Petition upon the Kentucky Attorney General. Kenergy does not state that it served a copy of the Petition upon any member who has applied for service, that it has served a copy of the Petition upon any member who has inquired about service, or that it has served a copy of the Petition upon either of the two (2) members who are alleged by Kenergy to have inquired about service and who are further alleged by Kenergy to seek service that would exceed the fifteen (15) percent metric which may require upgrades for the purpose of net metering. Kenergy is seeking to adjudicate the rights of members without demonstrating that it has made any attempt to allow the interests of those seeking to interconnect to be advanced.

Again, if Kenergy wants to engage in a debate concerning rulemaking, Case No. 2020-00302 is the proper forum. If Kenergy is unhappy with its own tariffs, 807 KAR 5:011 is the proper avenue for seeking relief. If Kenergy seeks a member-specific adjudication, then Kenergy is required by its Commission-approved tariffs and Due Process to follow its Commission-approved tariffs and take formal action and make formal and reviewable determinations. The pending Petition is not the proper forum for any of Kenergy's concerns, and the Petition should be dismissed.

**2.5 There are no grounds supporting a declaration concerning KRS 278.466(9)**

---

<sup>21</sup> Petition (filed Sept. 13, 2023), pages 3 and 4.

Through its Corrections to Petition,<sup>22</sup> Kenergy “specifically” identifies KRS 278.466(9).<sup>23</sup> The statutory provision states:

Any upgrade of the interconnection between the retail electric supplier and the customer-generator that is required by commission-approved tariffs for the purpose of allowing net metering shall be made at the expense of the customer-generator.

Kenergy does not suggest any ambiguity in KRS 278.466(9). The plain language of the statute speaks for itself and does not require further declaration by this Commission.<sup>24</sup> The declaration has already conclusively been provided by The General Assembly, and Kenergy does not allege otherwise.

Second, the Petition (even as corrected) does not allege that the pertinent distribution lines require upgrades; instead, it states that they “may” require upgrades.<sup>25</sup> Thus, there is no demonstration by Kenergy that there is a need for an upgrade, and KRS 278.466(9) has not been demonstrated as in controversy. Aside from the lack of any ambiguity, there is no need for a declaration concerning KRS 278.466(9) because the statute has not been demonstrated as applicable to this set of facts.

Third, KRS 278.466(9) does not set forth the fifteen (15) percent screening metric. (Additionally, the screening metric is not set forth through the Commission’s administrative regulations.) The fifteen (15) percent screening metric is contained in Kenergy’s

---

<sup>22</sup> Corrections to Petition (filed Nov. 2, 2023).

<sup>23</sup> *Id.*

<sup>24</sup> The Commission cannot declare an unambiguous statute to mean anything other than its plain language.

<sup>25</sup> Petition (filed Sept. 13, 2023), page 3.

Commission-approved tariffs. The significance of this fact is that there is no direct relationship between the screening metric and the statute. The lack of direct connection between the screening metric and the statute is confirmed by the portion of Kenergy's Commission-approved tariff through which Kenergy obtained the discretion to approve a connection if Kenergy determines that the generating facility can be safely and reliably connected.<sup>26</sup> Before Kenergy considers the cost-assignment of any upgrades, Kenergy should determine whether there are any required upgrades.

If Kenergy determines that upgrades are required and that the upgrades are for the purpose of allowing net metering, then KRS 278.466(9) speaks for itself and requires no declaration. What Kenergy is trying to do is obtain a declaration concerning the assignment of cost without making the foundational determination of whether the statute is even applicable. KRS 278.466(9) does not require a declaration.

**3. KYSEIA requests, in the alternative, a rehearing of the Order denying KYSEIA's Motion to Intervene.**

Through an Order entered on October 30, 2023, the Commission denied KYSEIA's Motion to Intervene.<sup>27</sup> In the event (alternative) that the Commission does not dismiss Kenergy's Petition (for any or all of the above-stated or any other reason(s)), KYSEIA respectfully requests that the Commission rehear its October 30, 2023 Order denying KYSEIA's intervention. Kenergy's Petition fails to offer a complete set of facts and law necessary for an adjudication through a declaratory Order, and KYSEIA and its members have an interest in the adjudication that Kenergy seeks.

---

<sup>26</sup> Schedule 46, P.S.C. Ky. No. 2, First Revised Sheet No. 46D, effective Apr. 30, 2009.

<sup>27</sup> Order (Ky. P.S.C. Oct. 30, 2023).

KRS 278.400 authorizes applications for rehearing, and this request is timely-filed. KYSEIA respectfully submits that a motion to intervene is a procedural matter (the right to participate) distinct from the substantive merits of the underlying proceeding for which intervention is sought. To this end, KYSEIA recited its interest in participating in the matter through its motion and did not address the substantive merits of the Petition. Thus, KYSEIA's motion to intervene was not an offer of evidence upon the Petition itself because at the time of the motion KYSEIA was not a party to the action and not yet authorized to submit evidence into the record. KYSEIA's Response tendered through this pleading is authorized by the Commission's October 30, 2023 Order and does not implicate the additional evidence provision of KRS 278.400.

#### **4. Summary and Conclusion**

Kenergy wants to beat its net metering members to the punch and resolve a complaint case in the absence of the formal actions required by Kenergy's Commission-approved tariff provisions and without the participation of any complainants. Kenergy's Petition is flawed and should be dismissed for the above-stated reasons. The conditions for the issuance of a declaratory order through 807 KAR 5:001, Section 19 have not been demonstrated as satisfied; furthermore, there are other clear and appropriate avenues for Kenergy to advance its interests regarding interconnection for net metering service.

WHEREFORE, KYSEIA respectfully submits this Response and asks that Kenergy's Petition be dismissed without prejudice, and in the alternative, grant KYSEIA's request for Rehearing of the Order denying KYSEIA intervention.

Respectfully submitted,

/s/ David E. Spenard

Randal A. Strobo  
David E. Spenard  
STROBO BARKLEY PLLC  
730 West Main Street, Suite 202  
Louisville, Kentucky 40202  
Phone: 502-290-9751  
Facsimile: 502-378-5395  
Email: rstrobo@strobobarkley.com  
Email: dspenard@strobobarkley.com

*Counsel for KYSEIA*

#### **Notice And Certification For Filing**

Undersigned counsel provides notice that the electronic version of the paper has been submitted to the Commission by uploading it using the Commission's E-Filing System on this 13<sup>th</sup> day of November, 2023, in conformity with the Commission's April 14, 2023 Order of procedure in the instant case. Pursuant to the Commission's Orders in Case No. 2020-00085, *Electronic Emergency Docket Related to Novel Coronavirus Covid-19*, the paper, in paper medium, is not required to be filed.

/s/ David E. Spenard

#### **Notice And Certification Concerning Service**

No party has been excused from the electronic filing procedures in the instant proceeding.

/s/ David E. Spenard