

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC INVESTIGATION INTO KENERGY )	CASE NO.
CORP.'S COMPLIANCE WITH KRS 278.160 AND )	2020-00332
ITS NET METERING TARIFF )	

ORDER

On October 13, 2020, the Commission, on its own motion and pursuant to KRS 278.260, established this proceeding to conduct a formal investigation into Kenergy Corp.'s (Kenergy) compliance with and application of Kenergy's Net Metering tariff.

BACKGROUND

On information and belief, the Commission believed that Kenergy was not complying with its Net Metering tariff.

Kenergy's Net Metering tariff provided, in pertinent part that:

Net Metering is available to eligible customer-generators in Kenergy's service territory, upon request, and on a first-come, first-served basis up to a cumulative capacity of one percent (1%) of Kenergy's single hour peak load in Kentucky during the previous year. If the cumulative generating capacity of net metering systems reaches 1% of Kenergy's single hour peak load during the previous year, upon Commission approval, Kenergy's obligation to offer net metering to a new customer-generator may be limited.<sup>1</sup>

The Commission determined that even if Kenergy had reached the one percent threshold, it was a fact to be determined in this proceeding, Kenergy was not making the terms and conditions of service provided for in the Net Metering tariff available to

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<sup>1</sup> Kenergy's Tariff, PSC No. 2 Sheet No. 46.

Kenergy's qualifying customer-generators, and Kenergy had not received Commission approval to limit offering net metering.

Kenergy, in response to the Commission's initiating Order, admitted that it had ceased accepting customers under Schedule 46, Kenergy's Net Metering tariff, instead adding those customers under Schedule 43, Kenergy's. Qualifying Facility tariff.<sup>2</sup> Kenergy stated that when it filed its revised net metering tariff in response to Case No. 2019-00440,<sup>3</sup> it inadvertently did not delete the phrase, "upon Commission approval." Kenergy, however, stated that it relied upon changes to KRS 278.466, effective January 1, 2020, that relieved an electric utility from offering net metering if the net metering system exceeded one percent of a utility's peak load during the calendar year.<sup>4</sup> Kenergy stated that in 2020 its existing net metering systems had exceeded one percent of its peak load.<sup>5</sup> Kenergy proposed to inform its customers than had been placed on Schedule 43 that the customers would have the option to migrate to the net metering tariff. Kenergy also proposed to amend its tariff to remove the phrase, "upon Commission approval," but, until the amendment was approved, would allow qualifying customers to take service under the net metering tariff.<sup>6</sup>

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<sup>2</sup> Kenergy's Response Pursuant to Order of October 13, 2020 (filed Oct. 23, 2020) (Kenergy's Response) at 2.

<sup>3</sup> Case No. 2019-00440, *Electronic Amendment of Jurisdictional Electric Utilities' Net Metering Tariffs to Reflect The Increase in Maximum Rated Capacity from 30 Kilowatts to 45 Kilowatts Pursuant to the Net Metering Act* (Ky. PSC Dec. 9, 2019).

<sup>4</sup> Kenergy's Response at 1.

<sup>5</sup> Kenergy's Response at 2.

<sup>6</sup> Kenergy's Response at 2–3.

On April 5, 2021, Kenergy filed proposed changes to its net metering tariff, which became effective on October 5, 2021. Kenergy's net metering tariff now states, in relevant part, that:

Net Metering is available to eligible customer-generators in Kenergy's service territory, upon request, and on a first-come, first-served basis up to a cumulative capacity of one percent (1%) of Kenergy's single hour peak load in Kentucky during the previous calendar year. If the cumulative generating capacity of net metering systems reaches 1% of Kenergy's single hour peak load during the previous calendar year, Kenergy shall have no further obligation to offer net metering to a new customer-generator at any subsequent time.

Commission Staff issued two sets of requests for information. Documents provided in response to Commission Staff's First Request for Information indicate that Kenergy's net metering capacity exceeded one percent of Kenergy's rural load for all months from August 2020 to August 2021.<sup>7</sup> Commission Staff sought clarification from Kenergy regarding Kenergy's definition of its "rural load."<sup>8</sup> Kenergy stated that "rural load" included "Kenergy's total distribution system load," but did not include direct serve load served by Big River Electric Corporation's (BREC) transmission system or smelter load because "these loads are not supplied by Kenergy's distribution system."<sup>9</sup> Kenergy stated that direct serve loads are served by BREC's transmission system and metered and billed by BREC. Kenergy stated that the smelter's power is supplied and billed by a power

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<sup>7</sup> Kenergy's Response to Commission Staff's First Request for Information (filed Sept. 30, 2021), Attachment A.

<sup>8</sup> Commission Staff's Second Request for Information (Ky. PSC Jan. 28, 2022). (Staff's Second Request).

<sup>9</sup> Kenergy's Response to Staff's Second Request (filed Feb. 4, 2022), Item 1.

marketer.<sup>10</sup> If the loads from BREC's direct serve customers and the smelter's load are included in Kenergy's "rural load," Kenergy's net metering capacity does not exceed one percent of the load in any month.<sup>11</sup>

### DISCUSSION

Kenergy is a non-profit member-owned rural electric cooperative corporation organized under KRS Chapter and is subject to the Commission's jurisdiction pursuant to KRS 278.010(a), KRS 278.040, and KRS 279.210. Kenergy is engaged in the distribution and sale of electric energy to 58,967 customers in Breckinridge, Caldwell, Crittenden, Daviess, Hancock, Henderson, Hopkins, Livingston, Lyon, McLean, Muhlenberg, Ohio, Union, Webster counties, Kentucky.<sup>12</sup> Kenergy is a retail electric supplier,<sup>13</sup> providing exclusive retail electric service<sup>14</sup> in its certified territory pursuant to KRS 278.018(1). KRS 278.018(1) provides, in relevant part, that:

[E]ach retail electric supplier shall have the exclusive right to furnish retail electric service to all electric-consuming facilities located within its certified territory, and shall not furnish, make available, render or extend its retail electric service to a consumer for use in electric-consuming facilities located within the certified territory of another retail electric supplier. . (Emphasis added).

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<sup>10</sup> Kenergy's Response to Staff's Second Request, Item 2.

<sup>11</sup> Kenergy's Response to Staff's Second Request, Item 2, Attachment A.

<sup>12</sup> *Annual Report of Kenergy Corp. to the Public Service Commission of the Commonwealth of Kentucky for the Calendar Year Ended December 31, 2021* at 44 and 52.

<sup>13</sup> KRS 278.010(4) defines a retail electric supplier as, "any person, firm, corporation, association, or cooperative corporation, excluding municipal corporations, engaged in the furnishing of retail electric service.

<sup>14</sup> KRS 278.010(7) defines retail electric service as "electric service furnished to a consumer for ultimate consumption, but does not include wholesale electric energy furnished by an electric supplier to another electric supplier for resale."

No entity, besides Kenergy, may provide retail electric service to any electric-consuming facility located within its territory. This includes any smelters located in Kenergy's territory or BREC's "direct" serve customers. In all of these instances, Kenergy is the retail electric supplier to these customers, and provides them with retail electric service.

Kenergy, in serving its "rural load," purchases wholesale power from BREC to provide retail electric service to Kenergy's customers in Kenergy's territory. Kenergy's status as the retail electric supplier providing retail electric service is not altered even when it purchases wholesale power, pursuant to a contract, on behalf of an individual customer of its customers, such as a smelter.

Kenergy's role as a retail electric supplier in such a transaction has long been recognized by the Commission. For example, in Case No. 2013-00221,<sup>15</sup> BREC and Kenergy filed a joint application for approval of new contracts for electric service to Century Aluminum of Kentucky General Partnership (Century Kentucky) that altered the source from which Kenergy would purchase power in order to provide retail electric service to Century Kentucky. Under the proposed agreement, "EDF would replace Big Rivers as the market participant and would provide wholesale electric service to Kenergy for retail delivery by Kenergy to [Century Kentucky]."<sup>16</sup> (Emphasis added.)

The Commission in discussing the effect of approval of the proposed contracts on Kenergy's status as a retail electric supplier, stated, in relevant part, that:

Kenergy will continue, as it has always been, to be the retail electric supplier providing retail electric service to Century

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<sup>15</sup> Case No. 2013-00221, *Joint Application of Kenergy Corp. and Big Rivers Electric Corporation for Approval of Contracts and for a Declaratory Order* (Ky. PSC Nov. 25, 2014), final Order.

<sup>16</sup> Case No. 2013-00221, Nov. 25, 2014 final Order at 1.

Kentucky. Kenergy will continue to have the exclusive right to furnish, and will furnish, electric service to Century Kentucky's electric facilities as provided for under the provisions of the Territorial Boundary Act, KRS 278.016 to 278.018. As the retail electric supplier, Kenergy will secure power for Century Kentucky from the wholesale power market or by entering into bilateral contracts for power. Kenergy similarly secures power for all of its other retail customers, except that the source of the power secured for all other customers is determined by Big Rivers rather than by Kenergy.

Kenergy owns no transmission facilities, so all of the power it secures for all of its customers is transmitted . . . over Big Rivers' transmission facilities. Under the Century Transaction Agreements, Century Kentucky will not have a unilateral right to enter into power contracts with wholesale power suppliers. Rather, Kenergy will enter into all power contracts to supply Century Kentucky, just as Kenergy currently enters into all power contracts to supply all of its customers other than Century Kentucky.<sup>17</sup> (Emphasis added.)

The Commission concluded that the proposed contracts, "merely create an arrangement for a retail electric supplier, Kenergy, to secure a supply of electricity to serve a retail customer, Century Kentucky, as required by the Territorial Boundary Act."<sup>18</sup>

Kenergy, when determining its load for the purposes of net metering, describes its rural load as "the total load supplied by Kenergy's distribution system at the time of Big Rivers' system peak."<sup>19</sup> Kenergy differentiated this from the other customers in its certified territory explaining that, "[t]he direct serve load is supplied by Big Rivers' transmission system. The direct serve loads are metered and billed by Big Rivers at their

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<sup>17</sup> Case No. 2013-00221, Nov. 25, 2014 final Order at 16-17.

<sup>18</sup> Case No. 2013-00221, Nov. 25, 2014 final Order at 17.

<sup>19</sup> Kenergy's Response to Staff's Second Request, Item 2.

individual peaks, non-coincident with Big Rivers' system peak. The aluminum smelter's market power is supplied by and billed by EDF Trading North America, LLC.”<sup>20</sup>

Kenergy’s division of its load between “rural load” and other customers is at odds with applicable law and Commission precedent. Kenergy is the retail electric supplier for every electric-consuming facility in its territory and its load should be calculated according to all the retail electric service that it provides in its territory, regardless if it is provided via BREC’s transmission system or billed by a third party, etc. Any other conclusion would mean that an entity besides Kenergy is providing retail electric service in Kenergy’s certified territory and is in violation of KRS 278.018.

KRS 278.466, Kentucky’s net metering statute, governs net metering in Kentucky, including a retail electric supplier’s obligation to provide net metering, and when that obligation ends. Relevant to this proceeding, KRS 278.466(1) provides that:

Each retail electric supplier shall make net metering available to any eligible customer-generator that the supplier currently serves or solicits for service. If the cumulative generating capacity of net metering systems reaches one percent (1%) of a supplier's single hour peak load during a calendar year, the supplier shall have no further obligation to offer net metering to any new customer-generator at any subsequent time. (Emphasis added).

Notably, the net metering statute does not differentiate between what Kenergy deems its “rural” load and the load to service other customers, and neither does Kenergy’s net metering tariff.<sup>21</sup> Therefore, in order to calculate Kenergy’s single hour peak load, all retail electric service sales must be included in the calculation. According to Kenergy,

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<sup>20</sup> Kenergy’s Response to Staff’s Second Request, Item 2.

<sup>21</sup> Even if the tariff did make this distinction, it would be invalid as conflicting with KRS 278.466.

when the single hour peak load includes all sales in its territory, the cumulative generating capacity of net metering systems has not exceeded 0.35 percent of its single hour peak.<sup>22</sup>

Even though Kenergy has amended its tariff and it no longer requires Commission approval to cease providing net metering, Kenergy nonetheless must comply with the provisions of KRS 278.466, and must continue to provide net metering until its cumulative generating capacity of net metering reaches one percent of its single hour peak load. Based upon the evidence of record and applicable law, the Commission finds that Kenergy has not met the one percent threshold prescribed in KRS 278.466(1) and Kenergy shall continue to make net metering available to qualifying applicants until the cumulative generating capacity of net metering reaches one percent of its single hour peak load for all sales within Kenergy's territory.

Because Kenergy has mistakenly calculated its cumulative generating capacity of net metering as a percentage of its single hour peak load, it has also mistakenly refused net metering to qualifying customers, instead placing those customers under Kenergy's Qualifying Facility tariff.<sup>23</sup> This violates Kenergy's tariff.

KRS 278.160 codifies the "filed rate doctrine." It requires a utility to file with the Commission, "schedules showing all rates and conditions for service established by it and collected or enforced." It further states that:

No utility shall charge, demand, collect, or received from any person a greater or less compensation for any service rendered than that prescribed in its filed schedules, and no person shall receive any service for any utility for compensation greater or less than that prescribed in such schedule.

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<sup>22</sup> Kenergy's Response to Staff's Second Request, Item 2, Attachment A.

<sup>23</sup> Kenergy's Response at 2.



The Kentucky Court of Appeals has described the filed rate doctrine as:

[T]he proposition that when the legislature has established a comprehensive ratemaking scheme, the filed rate defines the legal relationship between the regulated utility and its customer with respect to the rate that the customer is obligated to pay and that the utility is authorized to collect.... While the doctrine has not been applied by name in Kentucky, its underlying principles are incorporated and recognized in both our statutory and our case law.<sup>24</sup>

Thus, Kenergy's Net Metering tariff sets out the legal relationship between Kenergy and Kenergy's eligible customer-generators. Specifically, because Kenergy has not met the one percent threshold prescribed in KRS 278.466, it should have made net metering available to eligible customer-generators instead of placing those customers under the Qualifying Facility tariff. The Commission, therefore, finds that all eligible customer-generators that Kenergy received service under the Qualifying Facility tariff, and that would have qualified to receive service under the Net Metering tariff, shall receive service under the Net Metering tariff. The Commission also finds that, because Kenergy has charged customer generators pursuant to the incorrect tariff and pursuant to the filed rate doctrine, Kenergy shall refund to the customer-generators the difference between the rates charged under the Qualifying Facility tariff and the rates that should have been charged under the Net Metering tariff.

Finally, the evidence of record shows that Kenergy has misapplied and misinterpreted its tariff and KRS 278.466. Kenergy initially violated its tariff by ceasing to offer net metering without first receiving Commission approval. Kenergy is currently

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<sup>24</sup> *Cincinnati Bell Telephone Co. v. Kentucky Public Service Com'n*, 223 S.W.3d 829, 837 (Ky. App. 2007) (internal citations omitted).

violating its tariff and KRS 278.466 by not offering net metering. Based upon this the Commission finds that Kenergy shall amend its net metering tariff to include language that Kenergy cannot cease providing net metering without first receiving Commission approval.

Based on the foregoing, IT IS THEREFORE ORDERED that:

1. Kenergy's cumulative generating capacity of net metering systems has not reached one percent of its single hour peak load during a calendar year and Kenergy must continue to offer net metering under its Net Metering tariff until the cumulative generating capacity of net metering systems reaches one percent of Kenergy's single hour peak load for all sales within its certified territory during a calendar year.

2. Kenergy, for eligible customer-generators erroneously provided service under the Qualifying Facility tariff, shall provide service to those customers under Kenergy's net metering tariff.

3. For eligible customer-generators erroneously provided service under the Qualifying Facility tariff, Kenergy shall refund to the customer-generators the difference between the rates charged under the Qualifying Facility tariff and the rates that should have been charged under the Net Metering tariff.

4. Within 30 days of the date of entry of this Order Kenergy shall file, via the Commission's electronic Tariff Filing System, revisions to Kenergy's Net Metering tariff to require Commission approval prior to ceasing to provide net metering.

5. This case is closed and removed from the Commission's docket.

PUBLIC SERVICE COMMISSION

  
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Chairman

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Vice Chairman

  
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Commissioner



ATTEST:

  
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