

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matters 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
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

O R D E R

This matter arises from petitions for partial rehearing of the Commission's September 24, 2021 Order that, among other things, established rates for Louisville Gas and Electric Company's (LG&E) and Kentucky Utilities Company's (KU) (jointly, LG&E/KU) qualifying facilities (QF) and net metering service (NMS 2) tariffs.

On October 13, 2021, the Attorney General of the Commonwealth of Kentucky, by and through the Office of Rate Intervention (Attorney General) and Kentucky Industrial Utility Customers, Inc. (KIUC) (jointly, Attorney General/KIUC), filed a joint motion,

pursuant to KRS 278.400, requesting partial rehearing of the September 24, 2021 Order on three issues: (1) expressly stating that the rate schedule for QFs larger than 100 kilowatts (kW) is the starting point for contract negotiations; (2) requiring an evidentiary hearing for contracts between QFs and electric utilities; and (3) explaining how the Commission will implement revised Public Utilities Regulatory Policies Act (PURPA) regulations. On October 20, 2021, Kentucky Solar Industries Association, Inc. (KYSEIA) and Mountain Association, Kentuckians for the Commonwealth, Kentucky Solar Energy Society, and Metropolitan Housing Coalition (collectively, Joint Intervenors) filed their respective responses to the Attorney General/KIUC's petition.

On October 14, 2021, Joint Intervenors filed a petition for partial rehearing of the September 24, 2021 Order on two issues: (1) clarify that Joint Intervenors provided avoided carbon cost calculations; and (2) approve the avoided carbon cost valuation recommended by Joint Intervenors. On October 20, 2021, KYSEIA filed a response to the Joint Intervenors' petition. On October 22, 2021, LG&E/KU filed a joint response to the Joint Intervenors' petition.

Attorney General/KIUC's and Joint Intervenors' respective petitions for rehearing now stand submitted for a decision.

#### LEGAL STANDARD

KRS 278.400, which establishes the standard of review for motions for rehearing, limits rehearing to new evidence not readily discoverable at the time of the original hearings, to correct any material errors or omissions, or to correct findings that are unreasonable or unlawful. A Commission Order is deemed unreasonable only when "the

evidence presented leaves no room for difference of opinion among reasonable minds.”<sup>1</sup> An order can only be unlawful if it violates a state or federal statute or constitutional provision.<sup>2</sup>

By limiting rehearing to correct material errors or omissions, and findings that are unreasonable or unlawful, or to weigh new evidence not readily discoverable at the time of the original hearings, KRS 278.400 is intended to provide closure to Commission proceedings. Rehearing does not present parties with the opportunity to relitigate a matter fully addressed in the original Order.

#### ATTORNEY GENERAL/KIUC’S MOTION FOR REHEARING

Attorney General/KIUC requested rehearing on three issues regarding QF contracts and implementation of revised PURPA regulations. KYSEIA and Joint Intervenors filed their respective responses requesting that Attorney General/KIUC’s petition for rehearing be denied in its entirety.

#### Rate Schedule for QFs Over 100 kW

Attorney General/KIUC requested rehearing for the Commission to clarify the September 24, 2021 Order and expressly recite language from Commission regulation 807 KAR 5:054, Section 7(4) that the standard rate schedule for QFs with a capacity larger than 100 kW form the basis for negotiating a final purchase price with LG&E/KU.

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<sup>1</sup> *Energy Regulatory Comm’n v. Kentucky Power Co.*, 605 S.W.2d 46 (Ky. App. 1980).

<sup>2</sup> *Public Service Comm’n v. Conway*, 324 S.W.3d 373, 377 (Ky. 2010); *Public Service Comm’n v. Jackson County Rural Elec. Coop. Corp.*, 50 S.W.3d 764, 766 (Ky. App. 2000); *National Southwire Aluminum Co. v. Big Rivers Elec. Corp.*, 785 S.W.2d 503, 509 (Ky. App. 1990).

As a basis for their request, Attorney General/KIUC explained that Commission regulation 807 KAR 5:054, Section 7(4) provides that the rate schedule for the purchase of output of a QF with capacity larger 100 kW:

[S]hall be used only as the basis for negotiating a final purchase rate with qualifying facilities after proper consideration has been given to factors affecting purchase rates listed in subsection (5)(a) of this section. Negotiated rates shall be just and reasonable to the electric customer of the utility, in the public interest and nondiscriminatory.

Attorney General/KIUC argued that expressly including the regulatory language in the September 24, 2021 Order would be consistent with Kentucky and PURPA mandates and serve as an important consumer protection to ensure that the QF output purchase price is not higher than avoided cost and that retail rates are just and reasonable.

In its response, KYSEIA argued that Attorney General/KIUC failed to identify any error in the September 24, 2021 Order regarding the absence of regulatory language regarding large QF rate schedules serving as an initial basis for contract negotiations. KYSEIA further argued that Attorney General/KIUC request the Commission to affirm that administrative regulations “state what they actually state and govern what they actually govern.”<sup>3</sup> KYSEIA contended that rehearing should be denied because Attorney General/KIUC alleged no error, and thus failed to satisfy the burden of proof to grant rehearing.

In their response, Joint Intervenors adopted KYSEIA’s response and requested that the Attorney General/KIUC’s petition for rehearing be denied in its entirety.

#### Hearings in QF Contract Review Proceedings

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<sup>3</sup> KYSEIA Response to Attorney General/KIUC’s Petition for rehearing (filed Oct. 20, 2021) at 3.

Attorney General/KIUC requested rehearing for the Commission to require that an evidentiary hearing be scheduled for all QF contract review proceedings. Attorney General/KIUC cited to a Pennsylvania state court decision in support of their argument that all contracts between QFs and LG&E/KU should be subject to an evidentiary hearing to protect the due process rights of parties granted intervention in QF contract review proceedings. Attorney General/KIUC asserted that QF resources have a direct impact on retail customer rates and that there is no statutory cap on the rates that QFs could receive for the sale of energy to LG&E/KU. For these reasons, Attorney General/KIUC claimed that QF contract proceedings should be subject to the same procedures as a general rate case, including the requirement for an evidentiary hearing.

In its response, KYSEIA argued that Attorney General/KIUC's rehearing request seeks to improperly revise an administrative regulation through a rate case Order, rather than through rule-making, by creating a *pro se* rule applicable to all administrative procedures for QF contract review. KYSEIA further argued that Attorney General/KIUC failed to identify any due process issues under the existing practices for QF contract review. KYSEIA asserted that the Commission has plenary authority to schedule an evidentiary hearing in a QF contract review proceeding, and that there is sufficient precedential, statutory, and regulatory guidance regarding due process for parties that are granted intervention. For these reasons, KYSEIA contended that rehearing should be denied because Attorney General/KIUC failed to satisfy the burden of proof to grant rehearing.

In their response, Joint Intervenors adopted KYSEIA's response and requested that the Attorney General/KIUC's petition for rehearing be denied in its entirety.

### Implementation of Revised PURPA Regulations

Attorney General/KIUC requested rehearing of the September 24, 2021 Order, arguing that the Order failed to state how the Commission will implement revised PURPA regulations. Attorney General/KIUC asserted that 16 U.S.C. 824a-3(f)(1) requires the Commission to implement the revised regulations no later than December 31, 2021, and that the Order was silent on this issue.

In its response, KYSEIA argued that Attorney General/KIUC's request for the Commission to explain how it will implement revised PURPA regulations is not a matter to be heard on rehearing in this proceeding, and therefore the request should be denied.

In their response, Joint Intervenors adopted KYSEIA's response and requested that the Attorney General/KIUC's petition for rehearing be denied in its entirety.

### JOINT INTERVENORS' MOTION FOR REHEARING

Joint Intervenors requested rehearing on two issues related to avoided carbon cost calculations. KYSEIA filed a response requesting that the Commission grant rehearing on the issues raised by Joint Intervenors. LG&E/KU filed a response requesting that the Commission deny Joint Intervenors' petition in its entirety.

### Clarify that Joint Intervenors Provided Avoided Carbon Cost Calculations

In their petition, Joint Intervenors requested that the Commission clarify a reference in the September 24, 2021 Order regarding the data provided by Joint Intervenors. Joint Intervenors requested rehearing to correct the record to reflect that they provided a range of numeric values for avoided carbon cost in their supplemental post-hearing brief.

In their respective responses, neither KYSEIA nor LG&E/KU addressed this issue.

### Approve Joint Intervenors Avoided Carbon Cost Valuation

Joint Intervenors requested that the Commission grant rehearing to consider the recommended avoided carbon cost values recommended by Joint Intervenors in their supplemental post-hearing brief. Joint Intervenors argued that the values they recommended in their supplemental post-hearing brief “better reflect the urgency of the climate crisis” and are more fair, just and reasonable than the avoided carbon cost valuation approved by the Commission in the September 24, 2021 Order.

In its response, KYSEIA argued that rehearing should be granted, asserting that the avoided carbon cost that it recommended is likely underestimated.

In their response, LG&E/KU argued that the Commission already considered the evidence of record concerning avoided carbon cost component. LG&E/KU asserted that rehearing should be denied because Joint Intervenors did not identify a legal basis to grant rehearing nor did it present new evidence that could not have been otherwise provided during the pendency of this proceeding.

### DISCUSSION AND FINDINGS

#### Attorney General/KIUC’s Petition for Rehearing

##### 1. Rate Schedule for QFs Over 100 kW

Although they failed to state the legal basis for their request for rehearing, Attorney General/KIUC appear to request rehearing on this issue based upon a material error or omission in the September 24, 2021 Order. The Commission concurs with KYSEIA that Attorney General/KIUC failed to explain how the absence of express language that a binding regulation would operate as enacted could result in a material error or omission under these facts. Commission regulation 807 KAR 5:054, Section 7(4) controls this

matter. There is no provision in 807 KAR 5:054 that would permit the Commission to deviate from the regulatory requirement that large QF rate schedules are an initial basis for contract negotiations to establish a purchase price for QF energy. Nor did Attorney General/KIUC provide any evidence that the Commission indicated, explicitly or implicitly, that it would abrogate this regulation.

For the above reasons, we find that Attorney General/KIUC failed to meet their burden of proof that the Commission should have expressly recited the regulatory language of 807 KAR 5:054, Section 7(4) in the September 24, 2021 Order, and therefore rehearing is denied for this issue.

## 2. Hearings in QF Contract Review Proceedings

Attorney General/KIUC failed to state the legal basis for their request for rehearing to require an evidentiary hearing in all QF contract review proceedings. Although Attorney General/KIUC raise due process concerns, they did not identify any Constitutional provision, statute, regulation, order, or Commission practice that is unlawful or adversely impacts a party's due process rights. Nor did Attorney General/KIUC identify a material error or omission in the September 24, 2021 Order on this issue. Instead, Attorney General/KIUC cite to a Pennsylvania court decision that is not persuasive and does not implicate the Commission's authority to schedule an evidentiary hearing.

807 KAR 5:054 provides for an evidentiary hearing under certain conditions, but does not otherwise limit the Commission's ability to schedule a hearing in a QF contract review proceeding. The Commission concurs with KYSEIA that the Commission can schedule an evidentiary hearing in conjunction with the Commission's plenary authority to regulate utility rates and service. Further, there are no provisions in 807 KAR 5:054

that prevent a person from moving to intervene in a QF contract review proceeding or preclude a party granted intervenor status from requesting that an evidentiary hearing be held. The Commission concludes that Attorney General/KIUC's generalized allegations regarding potential due process issues are not based in the law or Commission practices.

For the above reasons, the Commission finds that Attorney General/KIUC failed to meet their burden of proof that the Commission should grant rehearing to establish a requirement that an evidentiary hearing must be scheduled in all QF contract review proceedings, and therefore rehearing is denied for this issue.

### 3. Implementation of Revised PURPA Regulations

Attorney General/KIUC failed to set forth the legal basis for their request for rehearing to require the Commission to explain how the recently revised PURPA regulations will be implemented. The Commission concurs with KYSEIA that this issue is not appropriately before the Commission on rehearing because it is not a matter that was adjudicated in this proceeding and was not determined in the September 24, 2021 Order. Setting aside that this matter is not appropriately before the Commission on rehearing, given the importance of the revised PURPA regulations, deciding how the Commission will implement the revised PURPA regulations in a case limited to two utilities is not as efficient as addressing this issue in an administrative case in which all stakeholders and affected utilities can participate. The Commission intends to open an administrative case to address the issue, which is the more appropriate format for this matter.

For the above reasons, the Commission finds that Attorney General/KIUC failed to meet their burden of proof that the Commission should address in this proceeding how

the revised PURPA regulations will be implemented, and therefore rehearing is denied for this issue.

Joint Intervenors' Petition for Rehearing

1. Clarify that Joint Intervenors Provided Avoided Carbon Cost Calculations

Joint Intervenors failed to state the legal basis for their request for rehearing, but appear to assert that the Commission made a material error in the September 24, 2021 and mischaracterized Joint Intervenors' contributions to the case record. In the September 24, 2021 Order, the Commission noted that, in its post-hearing brief, Joint Intervenors provided recommendations regarding avoided cost components, but did not provide recommended values.

The Commission denies rehearing, finding that the September 24, 2021 Order did not contain a material error, for the following reasons. In the June 30, 2021 Order, the Commission expressly requested that the parties file, among other things, their recommendations and calculations for avoided cost components for QF and NMS 2 rates because the record did not contain sufficient evidence for the Commission to reach a decision. Joint Intervenors provided testimony on applicable methodologies but no actual values until after the close of evidence.<sup>4</sup> Joint Intervenors could have filed the requested avoided cost value between the June 30, 2021 Order and the August 27, 2021 date to respond to post-hearing data requests. Instead, Joint Intervenors did not tender the requested valuation until minutes before this matter was submitted for a decision, which

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<sup>4</sup> Regulation 807 KAR 5:001, Section 11(4) establishes that evidence cannot be received by the Commission after the close of testimony, unless ordered by the Commission. Although hearing testimony closed on August 18, 2021, the Commission's August 19, 2021 Order that established post-hearing dates allowed for the Commission to receive evidence through August 27, 2021, when responses to post-hearing data requests were due.

deprived other parties and the Commission the opportunity to fully and timely evaluate the proposed value range.<sup>5</sup> Further, that the Commission allowed Joint Intervenors to file an errata sheet to include an exhibit containing workpapers referenced but inadvertently omitted from Joint Intervenors' supplemental post-hearing brief does not affect our decision regarding rehearing. Had Joint Intervenors included the exhibit in the brief, the Commission's decision on this matter would be the same.

For the reasons set forth above, the Commission concludes that Joint Intervenors failed to meet their burden of proof that the September 24, 2021 Order contained a material error, and therefore Joint Intervenors' request for rehearing is denied.

## 2. Approve Joint Intervenors Avoided Carbon Cost Valuation

Joint Intervenors failed to set forth the legal basis for their request for rehearing for the Commission to approve the avoided carbon cost valuation proposed by Joint Intervenors. As discussed above, Joint Intervenors failed to file the avoided carbon cost valuation until after the close of evidence, and thus the proposed valuation range is not properly in the case record. Further, Joint Intervenors seek to relitigate a Commission determination that was fully litigated by the parties, particularly those who timely filed evidence into the record, and was based on substantial evidence of the record. In the September 24, 2021 Order, the Commission set forth in detail the reasons underlying the Commission's finding regarding avoided carbon cost. Joint Intervenors have not provided

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<sup>5</sup> According to Commission records, Joint Intervenors filed their post-hearing supplemental brief at 11:27:24 p.m. on September 7, 2021, and this matter was submitted for a decision at 12:01 a.m. on September 8, 2021. See <https://psc.ky.gov/Case/ViewCaseFilings/20-349>. Also see Order (Ky. PSC Aug. 19, 2021) at ordering paragraph 7.

any basis to conclude that the finding was unlawful, unreasonable, or contained a material error or omission.

For the above reasons, the Commission finds that Joint Intervenors failed to meet their burden of proof for rehearing on the Commission's finding regarding the avoided carbon cost, and therefore rehearing is denied for this issue.

IT IS THEREFORE ORDERED that:

1. Attorney General/KIUC's petition for rehearing is denied.
2. Joint Intervenors' petition for rehearing is denied.
3. This matter shall remain open pending the final determination on matters for which LG&E/KU were granted rehearing by Order entered August 12, 2021.

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By the Commission

Commissioner Marianne Butler did not participate in the deliberations or decision concerning this case.



ATTEST:

A handwritten signature in blue ink that appears to read "Linda E. Bridwell".

Linda E. Bridwell  
Executive Director

Case No. 2020-00349  
Case No. 2020-00350

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