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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)	

WRITTEN COMMENTS OF THE KENTUCKY SOLAR INDUSTRIES ASSOCIATION

The Kentucky Solar Industries Association (“KYSEIA”), by counsel and pursuant to 807 KAR 5:001 Section 4(11)(e), submits its written public comments concerning the investigation into Kenergy Corp.’s compliance with KRS 278.160 and its net metering tariff.

BACKGROUND

KYSEIA is a Kentucky trade association of solar business supporters that unites businesses across the solar industry including the contractors responsible for building solar arrays, the developers creating new power plants, the solar manufacturers crafting innovative products, the many businesses that support the industry, and the customers that install solar systems. KYSEIA’s members span the state with active or completed projects across the Commonwealth including within Kenergy’s service area. KYSEIA’S objective is to provide leadership and promote sound policy in Kentucky as the power sector enters the solar age.

KYSEIA members are proud to contribute to Kentucky’s vital energy sector and are eager to contribute to energy diversity within the Commonwealth, while continuing to create in-state jobs, providing consumers a choice in their energy supply, and vitalizing local economic development. KYSEIA has been intimately involved in net metering tariffs, policy, and legislation in Kentucky for several years.

On October 13, 2020, the Commission initiated this case to conduct a formal investigation into Kenergy's compliance with and application of Kenergy's net metering tariff.¹ The Commission believes that Kenergy is not complying with its Net Metering tariff, which requires Commission approval before limiting its obligation to offer net metering to a customer generator if Kenergy's cumulative generating capacity of net metering systems reaches one percent (1%) of Kenergy's single hour peak load during the previous year.² The Commission is concerned that, even if Kenergy has reached the one percent (1%) threshold, which is a fact to be determined in this proceeding, Kenergy is not making the terms and conditions of service provided for in the Net Metering tariff available to Kenergy's qualifying customer-generators, and Kenergy has yet to receive Commission approval to limit offering net metering.³

At approximately the same time as the Commission's opening of this investigation, KYSEIA received a complaint from one of its members whose client was denied net metering service from Kenergy when the client attempted to expand his current system size.⁴ Upon knowledge and belief, the basis for the denial was Kenergy's position that it had no obligation to offer net metering service to new customer-generators upon allegedly reaching the one percent (1%) threshold.

¹ Case No. 2020-00332, *Investigation into Kenergy Corp.'s Compliance with KRS 278.160 and Its Net Metering Tariff* (Ky. PSC, Oct. 13, 2020), Order ("Order") at 2.

² *Id.*

³ *Id.*

⁴ At present, that client seeks to keep his identity confidential, but the client will consider providing more information about the denial of net metering service and reveal his identity if the Commission believes that the information will help develop facts that will assist the Commission in fully considering the matter.

The Commission determined that Kenergy may be violating the filed rate doctrine, and that if Kenergy has not met the one percent threshold, or upon reaching the one percent (1%) threshold has not received Commission approval to limit offering net metering, it must make net metering available to eligible customer-generators.⁵ Failure to make net metering available to eligible customers is a *de facto* violation of KRS 278.160.⁶ If the Commission finds that Kenergy has violated KRS 278.160 by not complying with the net metering tariff, the Commission may impose penalties pursuant to KRS 278.990, and take any further action deemed necessary pursuant to KRS 278.270 and KRS 278.280.⁷ The Commission required Kenergy to file evidence that it has met the one percent (1%) threshold and respond to the allegation that Kenergy has violated its Net Metering tariff.⁸

Kenergy filed its Response on October 23, 2020. Kenergy claims that service under its “Schedule 46 [Kenergy’s net metering tariff]⁹ to net metering systems as of January 1, 2020, exceeded 1% of Kenergy’s peak in 2019 in August.”¹⁰ Citing KRS 278.466, Kenergy states it “in good faith believed that the statute ceased Kenergy’s obligation to provide schedule 46 net

⁵ Order at 3.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ See *Kenergy Corp., Classifications of Service and Rules and Regulations for Furnishing Electric Service to All of Portions of Breckenridge, Caldwell, Crittenden, Daviess, Hancock, Henderson, Hopkins, Livingston, Lyon, McLean, Ohio, Muhlenberg, Union, and Webster Counties in Kentucky*, P.S.C. KY. No. 2, Eighth Revised Sheet (“*Kenergy Tariff*”), No. 46.

¹⁰ Case No. 2020-00332, *Investigation into Kenergy Corp.’s Compliance with KRS 278.160 and Its Net Metering Tariff* (Ky. PSC, October 23, 2020), Kenergy Response (“Response”) at 1.

metering,” and that “pursuant to Commission Order of December 9, 2019, in 2019, in 2019-00440, Kenergy amended its tariff effective January 1, 2020, to put the new 45 kW limit in place under Schedule 46.”¹¹ Kenergy also appears to claim, citing *Cincinnati Bell Tel. Co. v. Ky, P.S.C.*, 223 S.W.3d 829 (Ky. App. 2007), that KRS 278.466 relieves it from offering service under its net metering tariff to qualified customer generators once it meets the one percent (1%) threshold without having to first amend its tariff, and that the only reason it needs Commission approval to amend its tariff is that the tariff itself requires such an approval. Kenergy claims the required approval results solely from the utility’s inadvertently failure to delete “upon Commission approval” from the Schedule 46 tariff.¹²

Despite its failure to amend its net metering tariff, Kenergy admits it has “declined new Schedule 46 metering systems in 2020,” because, allegedly, “its existing net metering systems have exceeded 1% of its peak load.” *Id.* Kenergy admits to adding ten Schedule 43 [Small Power Production or Cogeneration (100 KW or Less)]¹³ systems since allegedly reaching the one percent peak threshold. However, Kenergy claims that “Schedule 46 should be amended to ‘delete upon Commission approval.’”¹⁴ Kenergy also filed an amended tariff with its Response.

Kenergy also states that it will “notify its Schedule 43 members who would otherwise have been eligible for Schedule 46 that they have the option to migrate to Schedule 46” and that it “has

¹¹ *Id.*

¹² *Id.* at 3.

¹³ See *Kenergy Tariff*, No. 43.

¹⁴ *Id.*

pending requests for net metering installations that it will place under Schedule 46.”¹⁵ Kenergy also requests that the Commission approve its amended tariff, allow the ten Schedule 43 members to migrate to Schedule 46, and to allow the pending net metering applicants to come onto the system under Schedule 46 provided they meet the requirements of Schedule 46.¹⁶ Kenergy, thereafter claims - with no factual basis, description of methodology, cost benefit analysis, calculations, or any supporting materials – that the “cost to Kenergy’s members of the subsidy to net metering systems from January 2019 through September 2020 was \$73,867.”¹⁷ In support of its Response, Kenergy attached Exhibit A, which appears to be a table of Kenergy system monthly peaks from 2019, and then an unsubstantiated statement that “Kenergy’s solar installations currently use [sic] 3.1 MWs.” Kenergy’s discussion of an alleged subsidy does not appear to fall within the scope of the Commission’s investigation.

As of the date of these Comments, the Commission has taken no further action in this case.

1. DENYING NET METERING SERVICE WITHOUT NOTICE TO CUSTOMERS AND WITHOUT AMENDING THE NET METERING TARIFF VIOLATES KRS 278.160.

KYSEIA agrees with the Commission that Kenergy is not complying with its Net Metering tariff, which requires Commission approval before limiting its obligation to offer net metering to a customer generator if Kenergy’s cumulative generating capacity of net metering systems reaches one percent (1%) of Kenergy’s single hour peak load during the previous year. Kenergy has provided no evidence that it has met the one percent (1%) statutory cap other than an unsourced

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

table allegedly showing monthly peaks and an unsourced sentence alleging “Kenergy’s solar installations currently use [sic] 3.1 MWs.”

The closing of a net metering service tariff to new customer generators is authorized, upon proper request and proof of facts, pursuant to KRS 278.466(1). The Commission, acting within its plenary authority, may test the credibility of the evidence offered in support of a request to close the tariff. The information supplied by Kenergy is not a sufficient evidentiary basis to support a change in rates or service. Neither the calculation of peak capacity nor the supporting material were provided. Kenergy does not reveal what types of solar installations are currently using 3.1 MWs, and specifically if those solar installations are customer generators, which are the only solar customers used to determine if the utility has reached the one percent (1%) statutory cap. KYSEIA supports the Commission’s full investigation into whether Kenergy met the one percent (1%) threshold, as the documentation thus far provided does not reliably establish that it has.

While KYSEIA acknowledges that the Commission, as a creature of statute, cannot ignore a statutory mandate, there is no tension between the intent of KRS 278.466(1) and a requirement of a formal approval process through which a utility seeks a change in its rates and service to accord with a statutory mandate. If it had been the General Assembly’s intent to permit an electric utility to unilaterally terminate its obligation to offer net metering to any new customer-generators without prior approval, then it would have made clear that intent through the language of KRS 278.466(1), specifically by including the phrase “without prior Commission approval.”¹⁸

Unless an authority is expressly denied, the Commission has the implicit and necessary powers, the plenary authority, to require any utility subject to its jurisdiction to demonstrate,

¹⁸ See, for comparison, KRS 278.015(2) which expressly authorizes a water district to increase its rates without prior Commission approval in response to a wholesale supplier increasing its rates.

through sufficient and reliable evidence, that a change in the utility's rates or service is authorized and appropriate. This is a manifest purpose of KRS Chapter 278. An interpretation of KRS 278.466(1) as requiring a satisfactory demonstration of an exceedance of the one percent (1%) threshold prior to and as a condition of closing a net metering tariff to additional applicants is an implicit and necessary construction through which the Commission implements the provisions of KRS Chapter 278. Again, there is no tension between KRS 278.466(1) and a requirement of a prior approval for a change in rates or service pursuant to KRS 278.466(1).

Kenergy never proposed a change to its net metering tariff to change its terms of service under the tariff, and the Commission never approved the same, prior to Kenergy denying potential customer generators service. KYSEIA agrees with the Commission that failure to make net metering available to eligible customers is a *de facto* violation of KRS 278.160. KRS 278.160 requires, in pertinent part:

- (1) Under rules prescribed by the commission, each utility shall file with the commission, within such time and in such form as the commission designates, schedules showing all rates and conditions for service established by it and collected or enforced. The utility shall keep copies of its schedules open to public inspection under such rules as the commission prescribes.
- (2) No utility shall charge, demand, collect, or receive from any person a greater or less compensation for any service rendered or to be rendered than that prescribed in its filed schedules, and no person shall receive any service from any utility for a compensation greater or less than that prescribed in such schedules.

Kenergy failed to file with the Commission a schedule showing the new rates and conditions associated with any new net metering tariff violating (1) above. Kenergy also denied service to potential customer generators that is currently prescribed in its net metering tariff violating (2) above. KYSEIA urges the Commission to hold Kenergy accountable for these

violations. KYSEIA also respectfully requests the Commission to use its investigation of Kenergy's violations as an opportunity to provide guidance to other utilities providing net metering service concerning: (1) how to determine if a utility has reached the one percent (1%) statutory cap, (2) how a utility should provide notice to customer generators, potential customer generators, and the Commission that it is approaching the one percent (1%) cap and its plan for ending net metering service to new customer-generators, and (3) how a utility is required to process applications and provide service under the existing net metering tariff until that one percent cap (1%) is reached and the Commission approves a closing of the tariff to new customer-generators.

2. KENERGY MUST BE REQUIRED TO PROVIDE SATISFACTORY EVIDENCE THAT THE CUMULATIVE GENERATING CAPACITY OF NET METERING SYSTEMS HAS REACHED ONE PERCENT (1%) OF ITS SINGLE HOUR PEAK LOAD.

As stated above, Kenergy has provided scant evidence that the cumulative generating capacity of net metering systems in its service area has reached one percent (1%) of a single hour peak load during a calendar year. Again, Kenergy provided no calculations or supporting materials. As stated above, KYSEIA supports the Commission's investigation to determine if Kenergy has, in fact, reached the one percent (1%) statutory cap.

In view of Kenergy's lack of an adequate and reliable evidentiary basis, the Commission should provide guidance regarding how, specifically, the one percent (1%) cap will be calculated for the purposes of determining when the cap has been reached. The Commission should also consider using this investigation to explain the minimum evidentiary support necessary to support a request to terminate offering net metering service to new customer-generators.

3. THE COMMISSION SHOULD USE THIS PROCEEDING AS A MEANS OF PROVIDING GUIDANCE TO UTILITIES OFFERING NET METERING SERVICE, IN ADDITION TO DETERMINING ISSUES PERTINENT TO KENERGY, OF THE APPROPRIATE AND REASONABLE NOTICE AND FILING REQUIREMENTS OF A THE UTILITY APPROACHING THE ONE PERCENT (1%) STATUTORY CAP.

KYSEIA addressed this issue in its Comments provided in Case No. 2019-00256, *Electronic Consideration of the Implementation of the Net Metering*.¹⁹ At that time, the Commission did not take specific action on the issue. However, the actions of Kenergy give the Commission an opportunity to provide a significant measure of guidance, based upon a case in controversy, on how a utility providing net metering service should provide notice to customer generators and potential customer generators that it is approaching the one percent (1%) threshold and its plans for seeking Commission approval to terminate offering net metering service to new customer-generators.

Prior to December 31, 2019, KRS 278.466(1) provided:

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 the previous year, the obligation of the supplier to offer net metering to a new customer-generator may be limited by the commission.** (Emphasis added).

Effective January 1, 2020, as amended by Senate Bill 100, KRS 278.466 (1), now states:

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).

Senate Bill 100 revised the circumstances in which a retail electric supplier is no longer obligated to offer net metering service to any new customer-generators. Now, upon reaching the

¹⁹ Case No. 2019-00256, *Electronic Consideration of the Implementation of the Net Metering, KYSEIA EQ Comments* (October 15, 2019), pages 4-6, and *KYSEIA Strobo Barkley Comments* (October 16, 2019), pages 23-28.

one percent (1%) statutory cap, upon Commission approval, a supplier is no longer obligated to offer net metering to any new customer-generators.

Electric utilities providing net metering service are in a transition period that has many moving parts. Regarding applications for new net metering service, until the Commission finds that the one percent (1%) threshold has been satisfied and issues an order approving the closure of net metering service to new customer-generators as of a date certain through a replacement tariff, a utility should be required to continue to accept and process net metering applications for eligible customer-generators. The postmarked date, and for digital correspondence the timestamp date, of a net metering application should be used to establish or otherwise identify timely-submitted applications prior to the closure of net metering service to additional customer-generators.

Utilities offering net metering service should also be encouraged to establish transparent reporting requirements so that stakeholders have clear and up-to-date information about a utility's current operating net-metering capacity and single-hour peak load used in this calculation. As readily demonstrated by the facts of the current investigation, such requirements would have been quite useful with regards to Kenergy. During this transition period, each retail electric utility should be encouraged to keep its customers, and potential applicants for net metering service, informed regarding its provision of net metering service and relevant information through its website, publications, and other communications. Such an approach will minimize customer confusion and help customers understand when and how the statutory cap is reached. This can be achieved, in the transition period, by:

- Each retail electric supplier including in its annual report to the Commission, as a separate line item, the cumulative generating capacity of net metering systems as a percentage of the supplier's single hour peak load during the calendar year.
- At the time that the eligible customer-generator begins taking net metering service, the utility shall verify and record the rated capacity of the eligible electric generating

facility. The rated capacity amount verified and recorded by the utility shall be the amount used by the utility for purposes of determining the cumulative generating capacity of its net metering systems.

- Each utility offering net metering filing monthly progress reports that clearly identify both the total existing net-metered capacity on their system and the total capacity in pending net metering applications, as well as a calculation showing the overall remaining capacity available to customers based on the utility's one percent (1%) cap, and file a specific written notice to the Commission upon the cumulative generating capacity of its net metering customers reaching or exceeding 0.9 percent of a retail electric supplier's single hour peak load during a calendar year.
- Each utility offering net metering make the foregoing information readily available on the utility's website so customers can easily find information on the current status of net metering in their utility service area.
- When a utility reaches 0.9 percent of a retail electric supplier's single hour peak load during a calendar year, based on submitted net metering applications, requiring utilities to increase its reporting frequency on its website from a monthly to a weekly basis to allow potential customers and solar installers the ability to more accurately forecast when specifically the utility could reach its cap.
- For each electric utility required by 807 KAR 5:058 to file an Integrated Resource Plan with the Commission, the plan should include a specific discussion of the utility's net metering systems, the cumulative generating capacity of net metering systems, single peak hour load, and projections of growth in the capacity of net metering systems and the single peak hour load over the course of the period covered by the plan.²⁰
- Emphasizing that the closing of net metering service is through issuing and filing revised tariffs with the Commission which state that the net metering tariff is no longer available for new customer generators and which establishes a new method of interconnection for new customer generators.

Public utility commissions in other states have taken similar action. For example, the Indiana Utilities Regulatory Commission directed utilities in August 2019 to begin filing more frequent reports on net metering participation, establish net metering queues, post queue information on the utility's webpage, and update the queue information monthly as part of its

²⁰ See, for example, Case No. 2017-00384, *Integrated Resource Plan of Big Rivers Electric Corporation*, (Ky. PSC Oct. 1, 2019) at 46.

implementation of Senate Enrolled Act 309 of 2017, which provided for a limited amount of capacity under its existing net metering program.

KYSEIA urges the Commission, as part of this transition period, to communicate the above discussion and recommendations as a means provide customers and potential customers of utilities providing net metering service with reasonable access to information, particularly notice of when the utility's cumulative generating capacity of net metering customers reaches or exceeds 0.9 percent of a retail electric supplier's single hour peak load during a calendar year.

4. THE COMMISSION SHOULD REQUIRE KENERGY TO PROVIDE SUPPORTING CALCULATIONS, STUDIES, AND MATERIALS RELATED TO ITS CLAIM THAT COST TO KENERGY'S MEMBERS OF THE "SUBSIDY" TO NET METERING SYSTEMS FROM JANUARY 2019 THROUGH SEPTEMBER 2020 WAS \$73,867.

In its Response, Kenergy, without adequate evidentiary support, claims that the "cost to Kenergy's members of the subsidy to net metering systems from January 2019 through September 2020 was \$73,867."²¹ The observation seems an apparent attempt by Kenergy to justify denying net metering service in violation of its own tariff and Kentucky statues and regulations. Any claim of a subsidy is irrelevant to the Commission's investigation of a violation of KRS 278.160 and Kenergy's net metering tariff. The termination of offering net metering service to new customer-generators is a matter that is distinct from issues concerning the rate for compensation under Kentucky's net metering provisions.

Notwithstanding the lack of relevance of the claim to this investigation, Kenergy provides no description of methodology, cost benefit analysis, calculations, or any other supporting materials justifying this alleged "subsidy." The filing of this information into the record by Kenergy is troublesome. While a full investigation by the Commission of the alleged subsidy is a

²¹ Response at 3.

claim for another proceeding, the Commission should consider requiring Kenergy to provide such supporting materials and calculations in support of its allegation as a matter of public interest to all net metering stakeholders.

CONCLUSION

Kenergy should be held accountable for violating its own tariff and KRS 278.160. Additionally, it has failed to provide an adequate evidentiary basis for concluding that the cumulative generating capacity of its net metering customers has exceeded one percent (1%) of its single hour peak load during a calendar year. KYSEIA supports the Commission's full investigation into this matter

In addition, KYSEIA urges the Commission to provide guidance to utilities providing net metering service concerning (1) the procedure to determine if a utility has reached the one percent (1%) statutory cap and the evidence to support a request for Commission approval to terminate offering net metering service to new customer-generators, (2) the provision of notice to customer generators, potential customer generators, and the Commission that it is approaching the one percent (1%) cap and plan to seek Commission approval to terminate offering net metering service as outlined above, and (3) require utilities to process applications and provide service under the existing net metering tariff until that one percent (1%) cap is reached; and (4) if the one percent (1%) cap is alleged to have been reached, require a utility to apply to amend, and the Commission approve, a new tariff before net metering service can be denied to eligible customers.

KYSEIA appreciates the opportunity to provide the Commission with written comments regarding this case and on policies and procedures related to the one percent (1%) statutory cap. KYSEIA hopes that the Commission finds these comments of assistance and looks forward to the

opportunity to again assist the Commission by providing more detailed comments in further proceedings when necessary or as requested by the Commission.

WHEREFORE, the KYSEIA submits its Written Comments concerning the investigation into Kenergy Corp.'s compliance with KRS 278.160 and its net metering tariff into the record of the instant case.

Respectfully submitted,



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