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May 18, 2012

PSC STAFF OPINION 2012-010

Hon. Leonard K. Peters
Office of the Secretary
500 Mero Street
Capital Plaza Tower, 12th Floor,
Frankfort, KY 40601

Dear Secretary Peters:

The Commission Staff has reviewed your April 17, 2012 letter requesting a Staff opinion on issues of utilizing purchase power agreements ("PPAs") and lease arrangements for distributed renewable energy systems. Your letter describes four different factual scenarios and asks multiple questions regarding the legal implications that arise under each scenario. The factual scenarios and questions you asked, along with Staff's opinion on each, are set forth below.

Staff's opinion is based on the statutes which are applicable to the Commission's jurisdiction over utilities and are set forth in KRS Chapter 278, as well as the regulations promulgated thereunder as set forth in 807 KAR Chapter 5. As a starting point for this opinion, we note that under KRS 278.040(2), "The jurisdiction of the Commission shall extend to all utilities in this state," and "The commission shall have exclusive jurisdiction over the regulation of rates and service of utilities . . . ." Under KRS 278.010(3), a "utility" is defined as:

> any person except . . . for purposes of paragraphs (a), (b), (c), (d), and (f) of this subsection, a city, who owns, controls, operates, or manages any facility used or to be used for or in connection with:
>
> (a) The generation, production, transmission, or distribution of electricity to or for the public, for compensation, for lights, heat, power, or other uses.

In addition to the statutory exclusion of city owned electric facilities from the Commission's jurisdiction, a federal court ruled in 1979 that electric cooperatives that

distribute power supplied by the Tennessee Valley Authority are not subject to the Commission's jurisdiction.[1]

Scenario No. 1.

A company offers leases to residential and commercial customers for solar arrays and other distributed renewable energy equipment. The customer will pay the company a monthly rate based on the capacity or kilowatt size of the system. The payment is not based on the actual electricity generated from the system, but is reflective of the equipment lease.

a. Is this arrangement in conflict with a utility's exclusive right to sell electricity?

b. Would the company be considered a utility as defined by KRS 278.010(3) or otherwise fall under the jurisdiction of the PSC?

c. Can this system be net metered by the residential or commercial customer?

d. Can the system be interconnected to the utility distribution system?

e. Can the company offering the lease enter into a net meter arrangement with the utility on behalf of the residential or commercial customer?

Response to No. 1.a.

In 1972, the Kentucky General Assembly enacted what is commonly known as the Territorial Boundary Act, KRS 278.016-278.018. That Act established a procedure for setting and certifying electric utility territorial boundaries and provided that "each retail electric supplier shall have the exclusive right to furnish retail electric service to all electric-consuming facilities located within its certified territory . . . ." KRS 278.018(1). The Act also defined "retail electric supplier" to be "any person . . . engaged in the furnishing of retail electric service," and defined "retail electric service" to be "electric service furnished to a consumer for ultimate consumption . . . ." KRS 278.010(4) and (7).

If equipment to be used to generate electricity is leased to a customer under terms that require payments that do not vary based on the actual level of electricity generated, the customer would be engaged in the generation of electricity, but not the company/equipment lessor. In this scenario, the company/equipment lessor would be furnishing equipment, but not furnishing electric service. The company/equipment

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[1] *Tennessee Valley Authority v. Energy Regulatory Comm'n.*, Civ. Action No. 79-0009-P (W.D.Ky. Sept. 27, 1979).

lessor would not be in violation of a utility's exclusive service territory. The customer would not be furnishing electric service to a consumer, but, rather, would be furnishing service to her/himself. A customer who self-generates electricity for her/his own consumption does not violate a utility's exclusive service territory under KRS 278.016-278.018.

Response to No. 1.b.

The company/equipment lessor will own facilities used in the generation of electricity. But the generating facilities are made available on an individual lease basis to customers who choose to enter into such leases, and the customers will then generate their own electricity. The company/equipment lessor will not be generating electricity "to or for the public," as would be necessary to fall within the statutory definition of a utility. In this scenario, the generating facilities owned by the company/equipment lessor are used by the customer, and the electricity generated is by and for the customer's own consumption, not "to or for the public." Thus, the company/equipment lessor would not be a utility and would not be subject to the jurisdiction of the Commission.

However, Staff recognizes that if a company/equipment lessor was engaged in multiple leases, an argument could be made that the owner of multiple generating facilities was actually engaged in the generation of electricity to or for the public. These types of issues are very fact specific, and the Commission has said in a number of prior orders that jurisdictional issue of this nature should be decided on a case-by-case basis.[2]

Response to No. 1.c.

The requirements for net metering are set forth in KRS 278.465 to 278.468. Net metering is defined in KRS 278.465(4) as:

> [M]easuring the difference between the electricity supplied by the electric grid and the electricity generated by an eligible customer-generator that is fed back to the electric grid over a billing period.

Each retail electric supplier must make net metering available to an "eligible customer-generator," which is defined, in pertinent part, as a customer "who owns and operates an electric generating facility." KRS 278.465(1). Since the customer in this scenario does not own the generating facility, but only leases it, the mandatory requirements for net metering under KRS 278.465-278.468 do not apply. However, there is no statute or regulation that prohibits a utility from entering into a cost effective

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[2] *See* Case No. 1999-058, *Petition of Calvert City Power I, L.L.C. for Declaratory Order* (Ky. PSC July 6, 1999); Case No. 2000-075, *Petition of Kentucky Pioneer Energy, L.L.C. for Declaratory Order* (Ky. PSC July 13, 2000).

net metering arrangement with such a customer, either through a special contract or the adoption of a new net metering tariff.

Response to No. 1.d.

The rules for interconnection of a generating facility that is not eligible for net metering under KRS 278.465 to 278.468, are set forth in the Commission's regulations applicable to "qualifying facilities," which are defined in 807 KAR 5:054, Section 1(8) as including both a cogeneration facility and a small power production facility. The latter is further defined, in pertinent part, as "an arrangement of equipment for the production of electricity with a capacity no greater than eighty (80) megawatts . . . and is powered at least seventy-five (75) percent by biomass, waste, renewable resources, or any combination thereof . . . ." 807 KAR 5:054, Section 1(10). Further, under Section 6(6) of that regulation, "An electric utility is required to make any interconnection with a qualifying facility that is necessary for purchase and sale." Thus, in this scenario, generating facilities that utilize at least 75 percent solar or other renewables, and are not greater than 80 megawatts, will be classified as qualifying facilities and are entitled to be interconnected if they choose to sell power to the utility. The qualifying facility is obligated to pay any interconnection costs that exceed those that the utility would have incurred if the qualifying facility's output had not been purchased, and provide adequate equipment to insure the safety and reliability of interconnected operations. 807 KAR 5:054, Section 6(6) and Section 7(6).

Response to No. 1.e.

The company/equipment lessor, acting on behalf of the residential or commercial customer, would not qualify for the net metering provisions of KRS 278.465 to 278.468 because the customer of the retail electric supplier does not own the electric generating facility. (See also Response to 1.c. above.) Further, the company/equipment lessor, as the owner of the solar arrays and other distributed renewable energy equipment, would most likely not qualify as a customer of the retail electric supplier because, under KRS 278.465(1), the generating facility must be on the customer's premises and be used primarily to supply all or part of the customer's own electricity requirements. (See also Response to 2.c. below.)

Scenario No. 2.

A developer wants to install renewable energy systems, such as a solar array or anaerobic digester, on residential and commercial customers' properties. System sizes will vary depending on the customers' needs. The customers will purchase the electricity produced from the project and plan to eventually purchase the system from the developer.

a. Is this arrangement in conflict with a utility's exclusive right to sell electricity?

b. Would the developer be considered a utility as defined by KRS 278.010(3) or otherwise fall under the jurisdiction of the PSC?

c. Can the customer or developer interconnect the system to provide electricity back to the grid as a net metered customer (for systems not greater than 30 kW)?

d. Can the customer or developer interconnect the system to provide electricity back to the grid as a small power producer (for systems greater than 30kW)?

Response to No. 2.a.

A developer who installs any energy system, whether renewal or not, that is used to sell electricity to someone else for consumption would fall within the definition of a "retail electric supplier" and would be furnishing "retail electric service," as those terms are defined under KRS 278.010(4) and (7). The developer would be in violation of a utility's exclusive right to serve under the Territorial Boundary Act. (See also Response to 1.a. above.) The customer's plan to eventually purchase the system from the developer would have no bearing on the legality of the existing arrangement whereby the customer purchases electricity from a developer.

Response to No. 2.b.

A developer who owns facilities used in connection with the generation of electricity, and who sells that electricity to consumers for their consumption, is a utility as defined in KRS 278.010(3)(a) and would be subject to the jurisdiction of the Commission. (See also Response to 4.b. below.)

Response to No. 2.c.

For systems not greater than 30 kW, the customer will not qualify for net metering as provided for under KRS 278.465 to 278.468 because the customer does not meet the generating facility "ownership" requirement set forth in KRS 278.465(1). However, there is no statute or regulation that prohibits a utility from entering into a cost effective net metering arrangement with such a customer, either through a special contract or the adoption of a new net metering tariff. In the event a customer does become eligible for net metering under a special contract or a utility's new tariff, the interconnection terms and condition set forth in the contract or new tariff would be applicable.

For systems not greater than 30 kW, it is highly doubtful that the developer would be able to qualify for net metering under the provisions of KRS 278.465 to 278.468. As noted in Response to 1.e. above, KRS 278.465(1) requires the developer to be a "customer" of a retail electric supplier. The term "customer" is defined as a person

"applying for or receiving service from any utility." 807 KAR 5:006, Section 1(2). If the developer qualifies as a customer of the utility, there would need to be separate metering facilities for use exclusively by the developer. A separate meter would be required because a "utility shall regard each point of delivery as an independent customer and meter the power delivered at each point." 807 KAR 5:041, Section 9(2). If the developer does become a customer, the renewable energy system must be on that customer's premises and used to supply that customer's electricity requirements to meet the statutory definition for net metering eligibility. If all of these statutory conditions are satisfied, the interconnection terms and condition set forth in the utility's existing net metering tariff would be applicable.

Staff also notes that under this scenario, if the renewable energy system produces electricity but is not capable of consuming electricity, an argument could be made that the developer is not eligible to be a customer and/or is not eligible for net metering because the developer, having only the renewable energy system, would never receive "electricity supplied by the electric grid," as those terms are used in the definition of "net metering" under KRS 278.465(4). Due to the hypothetical nature of this scenario, Staff is unable to provide a definitive opinion on the developer's ability to interconnect for purposes of net metering.

Response to No. 2.d.

For systems greater than 30 kW, upon request by a small power production facility, "an electric utility is required to make any interconnection . . . that is necessary for purchase and sale." 807 KAR 5:054, Section 6(6)(a). Thus, under this scenario, a small power production facility can interconnect to a utility to sell power to the utility under the terms for purchase as set forth in 807 KAR 5:054, Section 7. The Commission's regulations address the rights and obligations with respect to the interconnection and purchase of power only by use of the terms "small power production facility" and "utility." The regulation does not separately address, or differentiate between, the developer/owner of a small power production facility and the customer contracting to purchase the output of a small power production facility. Based on the limited facts described in this scenario, Staff's opinion is that only the developer of the small power production facility would have a right to interconnect to the utility, and the developer would have to be a customer with its own meter, as discussed in Response to 2.c.

Scenario No. 3.

A developer would like to install a community solar project and sell assets to various members of the community. Community members can either purchase a panel or certain number of kilowatts from the system, or they can enter into an agreement to purchase a certain amount of electricity generated from the system.

a. Is this arrangement in conflict with a utility's exclusive right to sell electricity?

b. Would the developer be considered a utility as defiled by KRS 278.010(3) or otherwise fall under the jurisdiction of the PSC?

c. Can the developer approach the electric utilities that serve the community to request that the electrical output of the panels owned by each community member under this arrangement be credited to their bill?

For purposes of this response, Staff assumes that a community solar project is a project located in one or a few discrete sites other than the premises of any of the participating community members.

Response to No. 3.a.

A community member who purchases a solar panel to be used to generate electricity to be consumed by that same community member would not be providing "retail electric service . . . to a consumer for ultimate consumption," as that term is defined under KRS 278.010(4). Therefore, neither the community member nor the developer would be in violation of a utility's exclusive right to serve under the Territorial Boundary Act. If a community member purchases kilowatts and the developer of the community project continues to own, control, operate or manage the solar panels, or if a community member purchases a certain amount of electricity from the developer of a community project, the developer is providing "retail electric service . . . to a consumer for ultimate consumption," as that term is defined under KRS 278.010(4). Therefore, under these facts, the developer would be in violation of a utility's exclusive right to serve under the Territorial Boundary Act, KRS 278.016 to 278.018.

Response to No. 3.b.

A developer who sells solar panels does not own facilities used or to be used for the generation of electricity, as defined in KRS 278.010(3)(a). Therefore, a developer who sells solar panels is not a utility subject to the jurisdiction of the Commission. A developer who sells kilowatts and continues to own, control, operate or manage the solar panels, or who sells electricity from the solar panels, does fall within the definition of a utility in KRS 278.010(3)(a) and would be subject to the Commission's jurisdiction. (See also Response to 4.b. below.)

Response to No. 3.c.

A developer could approach the electric utility that serves the community to request that the electrical output of the panels owned by each community member under this arrangement be credited to their respective bills. However, this arrangement would not fall within the utility's obligation to make net metering available under the provisions of KRS 278.465 to 278.468 because the electric generating facilities (i.e., the solar panels) are not "located on the customer's premises" as is required for net metering eligibility under KRS 278.465(1). Although this scenario is not within the

purview of the net metering statute, the electric utility could provide net metering by entering into a special contract or adopting a new net metering tariff if it was cost effective to do so.

Scenario No. 4.

A developer installs a combined heat and power system at an industrial facility and sells both electricity and thermal heat in the form of steam and hot water to the site.

a. Is this permissible within the service territories of the electric utilities regulated by the PSC?

b. Would the developer be considered a utility as defined by KRS 278.010(3) or otherwise fall under the jurisdiction of the PSC?

Response to No. 4.a.

A developer who installs a combined heat and power system at an industrial facility and sells both electricity and thermal heat in the form of steam and hot water to the site would, with respect to the sale of electricity, be providing "retail electric service . . . to a consumer for ultimate consumption," as that term is defined under KRS 278.010(4). The developer would be in violation of a utility's exclusive right to provide electric service as granted under the Territorial Boundary Act, KRS 278.016 to 278.018. A developer who furnishes a customer thermal heat in the form of steam and hot water from a system located on the customer's premises is not providing "retail electric service," as defined under KRS 278.010(4). The developer would not be in violation of a utility's exclusive right to provide electric service as granted under the Territorial Boundary Act, KRS 278.016 to 278.018, by furnishing thermal heat.

Response to No. 4.b.

A developer who installs a combined heat and power system at an industrial facility and sells both electricity and thermal heat to the site would own a facility used for the generation of electricity for a retail sale to a customer for ultimate consumption. As defined in KRS 278.010(3)(a), a utility is a person who owns a facility used for "[t]he generation, production, transmission, or distribution of electricity to or for the public . . . ." The Commission has held in prior cases that a sale of electricity at wholesale (i.e., a sale for resale) to one customer does not constitute using the generating facility "to or for the public." The Commission has also held in those cases that jurisdictional issues of this nature should be decided on a case-by-case basis.[3] Under the scenario presented here, the sale of electricity would be at retail, not wholesale. There is no controlling judicial precedent or Commission precedent on whether a facility used to sell electricity to one retail customer constitutes using the facility "to or for the public."

[3] See footnote 2, *supra.*

Consequently, Staff is unable to express a legal opinion on this scenario. Staff does opine that this particular issue has likely not previously been raised because such a sale of electricity does violate the Territorial Boundary Act. With respect to the developer under this scenario selling thermal heat, the Commission has no jurisdiction over the sale of thermal heat by a person that is not otherwise a utility as a result of owning, controlling, operating, or managing facilities to provide electric, gas, water, telecommunication, or sewer service as defined and enumerated under KRS 278.010(3).

This letter represents Commission Staff's interpretation of the law as applied to the facts presented. This Opinion is advisory in nature and not binding upon the Commission should the issues presented herein be formally presented for Commission resolution. Questions concerning this opinion should be directed to Richard Raff, Assistant General Counsel, at (502) 564-3940, Extension 263.

Sincerely,

Jeff Derouen
Executive Director

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