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**ARKANSAS PUBLIC SERVICE COMMISSION**

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| IN THE MATTER OF A RULEMAKING TO ADDRESS GRANDFATHERING PROVISIONS OF THE NET-METERING RULES | ) ) ) | DOCKET NO. 22-051-R ORDER NO. 7 |

**ORDER**

By this Order the Arkansas Public Service Commission (Commission) adopts amendments (Attachment 2) to the Commission's *Net-Metering Rules* (NMRs), specifically and only to address uncertainties associated with the expiration on December 31, 2022, of mandatory grandfathering of the existing 1:1 net-metering rate credit rate structure that is currently in effect for all jurisdictional electric utilities in Arkansas and applicable to Net-Metering Customers.[1] The amendments adopted today modify and clarify those originally proposed by Order No. 1 in this Docket by interpreting and ratifying the requirements of Ark. Code Ann. § 23-18-604(b)(10)(A), part of the Arkansas Renewable Energy Development Act (AREDA), as amended by Act 464 of 2019, which were originally incorporated into Rule 2.07[2] of the Commission's NMRs by Order No. 28 in Docket No. 16-027-R, and which states that the Commission:

> Shall allow the net-metering facility of a net-metering customer who has submitted a standard interconnection agreement, as referred to in the rules of the Arkansas Public Service Commission, to the electric utility after the effective date of this act but before December 31, 2022, to remain under the rate structure in effect when the net-metering contract was signed, for a period not to exceed twenty (20) years, subject to approval by a commission.

[1] The scope of this rulemaking does not include any changes as a result of the Arkansas Court of Appeals decision in *Petit Jean v. Ark Pub. Srvc. Comm'n,* 2022 Ark. App. 215 (*Petit Jean v. APSC)*. The Commission intends to open a separate rulemaking to consider those rule changes.

[2] Section X.3.12 of the sample tariff in Appendix B of the NMRs also references grandfathering.

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## I. PROCEDURAL HISTORY

On August 18, 2022, by Order No. 1, the Commission proposed amendments to Rule 2.07 on grandfathering and Appendix B (sample tariff) and adopted a procedural schedule to consider the proposed amendments to the NMRs.

On August 22, 2022, the University of Arkansas System (UAS) filed a *Petition to Intervene*.

On August 23, the Office of Attorney General Leslie Rutledge (AG) filed her notice of intent to be an active party in this Docket.

Between August 23 and August 29, 2022, the following Parties filed *Notices of Participation*: Southwestern Electric Power Company (SWEPCO), Oklahoma Gas and Electric Company (OG&E), Entergy Arkansas, LLC (EAL), Entegrity Energy Partners, LLC (Entegrity), First Electric Cooperative Corporation, Carroll Electric Cooperative Corporation (Carroll), Arkansas Valley Electric Cooperative Corporation, Ozarks Electric Cooperative Corporation (Ozarks).

On August 29, 2022, Clay County Electric Cooperative Corporation, Woodruff Electric Cooperative Corporation, Rich Mountain Electric Cooperative, Inc., Southwest Arkansas Electric Cooperative Corporation, South Central Arkansas Electric Cooperative, Inc., Petit Jean Electric Cooperative Corporation (Petit Jean), and C & L Electric

Cooperative Corporation (collectively, the Minority Cooperatives) filed their *Notice of Participation*.

Also on August 29, 2022, Arkansas Advanced Energy Association (AAEA) filed its *Petition to Intervene* and Ouachita Electric Cooperative Corporation (Ouachita) filed its *Notice of Participation*.

On August 30, 2022, Arkansas Electric Cooperative Corporation (AECC) filed its *Petition to Intervene*.

Also on August 30, 2022, the following Parties filed their *Notices of Participation*: Mississippi County Electric Cooperative Corporation, Inc., North Arkansas Electric Cooperative, Inc., and Scenic Hill Solar, LLC (Scenic Hill), filed its *Petition to Intervene*.

On September 2, 2022, the Minority Cooperatives filed *Responses in Opposition to the Petitions to Intervene of AAEA and Scenic Hill*.

Between August 29 and September 2, 2022, the General Staff (Staff) of the Commission filed its *Responses to the Petitions to Intervene* of UAS, Entegrity, AAEA, and Scenic Hill. On September 6 and 7, 2022, respectively, AAEA and Scenic Hill filed their *Replies to Responses in Opposition to their Petitions to Intervene as a Party*.

Between August 29 and September 2, 2022, Staff filed its *Responses to the Petitions to Intervene* of UAS, Entegrity, AAEA, AECC, and Scenic Hill.

On September 13, 2022, by Order No. 2, the Commission granted the *Petitions to Intervene* of UAS and Entegrity.

On September 15, 2022, by Order No. 3, the Commission granted the *Motions* of SWEPCO and OG&E to allow briefing of identified issues and other legal issues identified by the Parties but denied the requests to delay the procedural schedule.

On September 19, 2022, the Minority Cooperatives filed their *Motion to Dismiss for Lack of Jurisdiction Over the Subject Matter*.

On September 20, 2022, by Order No. 4, the Commission granted the *Petitions to Intervene* of AAEA and Scenic Hill.

On September 21, 2022, Carroll filed its *Motion to Dismiss/Motion to Transfer and Consolidate and Legal Brief*, and also submitted its *Initial Comments and Motion for Clarification*.

Also on September 21, 2022, AECC filed its *Motion to Dismiss*.

On September 22, 2022, Ouachita and Ozarks filed notices that they would not be filing Initial Comments or Legal Briefs.

Also on September 22, 2022, AAEA, Entegrity, Scenic Hill, and UAS jointly filed their *Initial Legal Brief*.

Also on September 22, 2022, OG&E, SWEPCO, and EAL each filed their *Initial Brief*.

Also on September 22, 2022, Entegrity/Scenic Hill/AAEA, UAS, SWEPCO, and Entergy each filed *Initial Comments*, and the AG filed a letter stating she would not be filing Initial Comments.

On September 22, 2022, Staff filed the Direct Testimony of Marty D. Risner.

On September 29, 2022, Staff filed its *Response to Joint Cooperative Motion to Dismiss for Lack of Jurisdiction over the Subject Matter*, and Entergy filed its *Response to the Electric Cooperatives' Motion*.

On October 3, Scenic Hill filed its *Response to the Electric Cooperatives' Motion* and Staff filed its *Response to Carroll's Motion to Dismiss/Motion to Transfer and*

*Consolidate*, its *Response to AECC's Motion to Dismiss*, and its *Response to Carroll's Motion for Clarification*.

On October 6, 2022, the Minority Cooperatives filed their *Reply in Support of Motion to Dismiss for Lack of Jurisdiction over the Subject Matter*. On the same day, AECC filed its *Reply to General Staff's Response to Arkansas Electric Cooperative Corporation's Motion to Dismiss*.

On October 10, 2022, Carroll filed its *Reply to Scenic Hill Solar, LLC's Response to Electric Cooperatives' Motion* and Staff filed its *Response to Carroll Electric Cooperative Corporation's Motion to Dismiss/Motion to Transfer and Consolidate*.

On October 13, 2022, Carroll filed its *Reply Comments* requesting that its Reply Comments served as its Reply Brief.

Also on October 13, 2022, the Minority Cooperatives filed their *Reply Brief*.

On October 13, 2022, AAEA, Entegrity, Scenic Hill, and UAS (collectively, Distributed Energy Advocates (DEA)) filed their *Reply Briefs*. Also on October 13, 2022, DEA file their *Reply Comments*.

Also on October 13, 2022, SWEPCO, Staff, and EAL each filed their *Reply Briefs*.

Also on October 13, 2022, Staff filed the *Rebuttal Testimony* of Marty D. Risner.

On October 20, 2022, the Minority Cooperatives filed their *Application for Rehearing of Order No. 4*.

On October 24, 2022, Scenic Hill and AAEA filed *their Responses to Cooperatives' Application for Rehearing of Order No. 4*.

Hearing was held on October 27, 2022.

On November 1, 2022, by Order No. 5, the Commission determined that further briefing was not necessary.

On November 14, 2022, EAL filed its *Motion to Temporarily Hold Proceeding in Abeyance* (EAL Motion). On the same date, SWEPCO and OG&E each filed their Response to EAL's Motion. On November 15, 2022, AECC filed its Response to EAL's Motion.

On November 18, 2022, by Order No. 6, the Commission granted the Cooperatives' *Application for Rehearing of Order No. 4* (Petition) solely for the purpose of further consideration.

On November 18, 2022, AAEA, Entegrity, Scenic Hill, and UAS (Distributed Energy Advocates) filed their *Response to EAL's Motion to Temporarily Hold Proceeding in Abeyance*.

On November 23, 2022, EAL filed its *Reply to the Private Developers and the University of Arkansas*.

On November 28, 2022, Staff filed its *Response to Entergy, Arkansas, LLC's Motion to Temporarily Hold Proceeding in Abeyance*.

Between October 26 and December 22, 2022, a total of ten Public Comments were filed in this Docket, all of which support the extension of grandfathering.

## II. SUMMARY OF COMMENTS AND TESTIMONY

### A. INITIAL COMMENTS

#### CARROLL INITIAL COMMENTS

Carroll asserts that there is no need to revise Rule 2.07 of the NMRs. Carroll states that it supported the idea of grandfathering in Docket No 16-027-R as logical and fair and that it never argued that grandfathering should continue indefinitely. Carroll argues that

in Order No. 28 the Commission clarified that Order No. 28 was to be considered the new order setting a new rate structure as contemplated by Order No. 10 and that Order No. 28 ended the "period of uncertainty" that resulted from the passage of Act 827. Carroll asserts that in Order No. 28 the Commission confirmed that the issue of grandfathering after the December 31, 2022 deadline was effectively closed until a newer, or the next, rate structure is established (after the one set by Order No. 28). Carroll Initial Comments at 1-4 (Doc. #37).

Carroll included as part of its Initial Comments a Motion to Clarify Order No. 1. Carroll asserts that the proposed revised Rule 2.07 can be interpreted in more than one way when reading Order No. 10 in juxtaposition with the proposed Rule 2.07. Carroll argues that the provisions for grandfathering in Order No. 10 and Order No. 28 cannot be read in complete concordance with one another and that removing the December 31, 2022 deadline makes the resulting grandfathering provision confusing, which is a result that is not in the public interest. *Id*. at 4-7.

**AECC INITIAL COMMENTS**

AECC argues that the rules proposed by the Commission in this Docket will create further uncertainty by undermining the General Assembly's date to end grandfathering. AECC asserts that the changes proposed to NMR Rule 2.07 will cause utilities to continue to be locked into an over-compensatory rate structure which harms customers who do not net meter. AECC Initial Comments at 12 (Doc. #43).

AECC asserts that all parties have had adequate time to prepare for potential rate changes that might occur after December 31, 2022, as evidenced by the rate disclaimer that customers were required to sign acknowledging the likelihood of future rates changes

in the Commission-approved net-metering tariff. AECC argues that it appears that the Commission feels it has the authority to eliminate the General Assembly's statutory cut-off date based on Order No. 10 in Docket No. 16-027-R. *Id*. at 12-13.

AECC argues that in Order No. 1 in Docket No. 22-051-R the Commission is seeking to overturn its orders in Docket No. 16-027-R, which is currently open, and establish a change in its NMRs that conflicts with the plain language of Ark. Code Ann. § 604(b)(10)(A). AECC argues that Order No. 1 seems to arbitrarily cherry-pick the findings of Order No. 10. AECC states that both the General Assembly and [former Commission] Chairman Ted Thomas have previously recognized that allowing the current 1:1 net-metering rate structure to extend without end is unsustainable. AECC argues that the General Assembly mitigated this by setting a date for grandfathering to end. AECC argues that the Commission must adhere to its prior orders and provide the ability for utilities to petition for a rate structure change after December 31, 2022, as it has previously ordered in Docket No. 16-027-R. *Id*. at 13-14.

AECC argues that the rules surrounding net metering are highly contested and the abbreviated schedule the Commission has established in this Docket does not provide adequate ability for the parties to "meaningfully participate" and doesn't align with the basic concepts of fairness or the requirements of due process. AECC asserts that good cause has not been shown to require such a tight procedural schedule. AECC asserts that the Commission denied reasonable requests for an extension of time and kept a tight timeline so it can issue what appears to be a predetermined decision based on Commission orders in individual dockets on this issue which are still being contested by EAL. AECC

requests an extension of time for the filing by the parties of Reply Briefs and Comments. *Id.* at 14-16.

**SWEPCO INITIAL COMMENTS**

SWEPCO argues that the NMRs cannot be lawfully amended by the Commission to extend grandfathering past the December 31, 2022 deadline in AREDA and further asserts that a piecemeal approach to net-metering issues implicates due process issues. SWEPCO requests that these legal issues be addressed prior to any Commission decisions enacting changes to the NMRs. SWEPCO Initial Comments at 1 (Doc. #50).

SWEPCO states that concerns about cost shifts from Net-Metering Customers to non-net metering customers have been presented to the Commission for years but the Commission has not resolved the issue. SWEPCO asserts that the Commission has not met AREDA's directive that the Commission take certain actions regarding rates and rate structure if those actions "are in the public interest and doing so will not result in an unreasonable allocation of or increase in costs to other utility customers." SWEPCO notes that Order No. 1 only mentions cost shifting in a footnote. SWEPCO argues that the Commission cannot make a factual finding that the 1:1 rate credit continuing under the proposed rules is just and reasonable without considering the impacts of that rate on non-net metering customers. *Id.* at 2.

SWEPCO argues that the unreasonable allocation of costs to non-Net-Metering Customers will continue to grow as long as the existing 1:1 net-metering rate structure does not align properly with SWEPCO's cost-drivers. SWEPCO provides specific data showing the growth in Net-Metering Customers and installed capacity on its system and asserts that the growth has been explosive and is fostered by the 1:1 rate construct and will

continue to grow if the current rate construct is continued beyond December 31, 2022. SWEPCO states that it stands ready to provide information and analysis concerning cost shifting to the Commission. *Id.* at 3-4.

SWEPCO asserts that the NMRs have fostered an environment of continued growth in small-scale renewables as intended when the generous grandfathering period was established. SWEPCO argues that it is now time to address more pressing issues associated with net metering including the appropriate remedy to the cost shift that impacts non-Net-Metering Customers. SWEPCO states that it opposes the changes to the NMRs proposed by the Commission. *Id.* at 4-5.

**EAL INITIAL COMMENTS**

EAL asserts that the right to net meter will continue after December 31, 2022, as provided under the law. EAL states that compensating net-metered energy injections at the full retail rate excessively compensates private solar customers at the expense of those that choose not to net meter. EAL argues that perpetuating this subsidy does not foster sustainable growth of renewables but instead builds Arkansas's renewable future on a shaky and fundamentally unsustainable foundation. EAL points to the experiences of California where the 1:1 net-metering regime led to massive subsidies and unreasonable distortions in electricity rates that all customers pay. EAL asserts that the General Assembly was aware that prolonging an unfair rate structure would only perpetuate bad public policy and made clear its plain intent for automatic grandfathering to end on December 31, 2022, for new facilities that come on-line after that date. EAL states that Act 464 provided ample notice to developers and installers of the unambiguous December 31, 2022 deadline. EAL Initial Comments at 1-4 (Doc. #54).

EAL asserts that it has supported grandfathering in prior Commission net-metering proceedings, but that support was combined with an understanding that the Commission would decide on a new net-metering rate structure in Phase 2, which did not happen. EAL argues that grandfathering provisions contained in the legislative framework are intended to be transitory, with an expectation that a regulator will implement new policy. EAL states that there are over 66 MW of installed capacity for Net-Metering Facilities on its system, and with the explosive growth of net-metering there are many more systems in the queue. EAL argues that extending grandfathering beyond December 31, 2022, is contrary to statute and bad public policy. EAL states that grandfathering was structured to be a temporary exception to the rule, not a permanent or long-lasting rule. EAL argues that the General Assembly enabled grandfathering for a finite period with the expectation of transitioning to a sustainable rate structure. EAL states that Act 464 was passed more than two years after Order No. 10 partly as a result of Phase 2 of the rulemaking not determining a successor net-metering rate structure. EAL asserts that Act 464 included a hard deadline with the expectation that Phase 3 of the rulemaking would be initiated and EAL notes that AREDA has not been amended by the General Assembly since 2019. *Id.* at 5-12.

EAL argues that in Phase 3 of Docket No. 16-027-R and in many individual net-metering dockets it proved that due to the 1:1 full retail credit net-metering rate structure cost shifting was occurring. EAL argues that the Commission agreed that there was some evidence of cost shifting in Order No. 28, and therefore the Commission approved the concept of a grid charge to be applied to net-metering facilities being installed with a capacity greater than 1 MWAC. However, EAL argues that there was no meaningful path

to receive approval of a grid charge under the tenets of Order No. 28. EAL asserts that after the issuance of Order No. 28 the number or systems and the capacity of those systems have continued to grow and so has the unfair subsidy by non-Net-Metering Customers. EAL argues that the subsidies are made worse because the Commission has not yet opened a proceeding to address the issue that certain riders are bypassed by net-metering billing arrangements. EAL further asserts that even though the Commission has not yet determined reporting metrics that will aid in the ongoing evaluation of these subsidies, it has offered evidence of such subsidies in numerous proceedings. EAL argues that these subsidies should never have been allowed to continue for over half a decade and automatically continue for another 20 years and should not be continued beyond December 31, 2022, under any circumstances for new facilities installed after that date, and they should unequivocally not continue under the current paradigm. *Id.* at 12-15.

EAL argues that Arkansas net-metering policies are among the most liberal and overly expansive in the country and overall are the most generous by far in the South. EAL states that Arkansas's net-metering policy surpasses what states like California and New York now allow, after they have implemented changes in their net-metering policies in response to the economic challenges those policies have created. EAL states that the Louisiana Public Service Commission voted to transition to 2-Channel Billing in September 2019 and additionally implemented a 15-year grandfathering period for existing net-metering customers. EAL asserts that the expiration of the grandfathering mechanism provided by the Arkansas General Assembly should be enforced. *Id.* at 15-17.

EAL argues that due to both the Infrastructure Investment and Jobs Act (IIJA) and the Inflation Reduction Act (IRA), net-metering in Arkansas is likely to grow more rapidly

over the next ten years due to the federal Investment Tax Credit (ITC) increase back to 30 percent and certainty provided with the ITC along with the Production Tax Credit for solar PV and other tax credit sweeteners. EAL states that it understands that tax exempt entities such as counties and school districts may be eligible under the IRA to receive these benefits by direct payments. EAL asserts that this federal legislation will enable substantial investment in Arkansas, so net-metering applicants can and should be expected to mitigate their own financial risk without subsidies being placed onto other customers. *Id.* at 18-20.

EAL argues that a good portion of the bill savings current Net-Metering Customers enjoy is due to the unfair net-metering rate structure in place. EAL argues that the subsidies are real and are growing unabated and if grandfathering is extended beyond December 31, 2022, it will be secured for twenty more years for every new Net-Metering Facility installed after that date. EAL asserts that was not the intent of the General Assembly, which clearly intended that a new and more sustainable net-metering rate structure would be imposed after December 31, 2022. *Id.* at 21-21.

EAL asserts that it strongly supports the initiation of the proceeding to consider if certain utility charges should be non-bypassable that the Commission has said for two years it intends to initiate. *Id.* at 21.

EAL argues that this proposed rulemaking rushes an important issue regarding a statutory deadline that has been known for over three years and has not allowed for adequate development of the issues and evidence. EAL states that it supports the establishment of a new sustainable net-metering rate structure for new net-metering customers that come online after December 31, 2022. EAL asserts that grandfathering should not and cannot be continued after the end of 2022. *Id.* at 21.

**ENTEGRITY/SCENIC HILL/AAEA INITIAL COMMENTS**

Entegrity/Scenic Hill/AAEA support an extension and revision of Net-Metering Rule 2.07 but objects to the revisions proposed by the Commission. Entegrity/Scenic Hill/AAEA object to the continued use of the Standard Interconnection Agreement (SIA) for determining grandfathering eligibility, particularly for non-residential customers, because it is an uncertain date that is dependent on various unknown variables and the fact that the date of a future net-metering rate structure change for each Electric Utility is currently unknown. Entegrity/Scenic Hill/AAEA argue that it is possible that a net-metering rate structure change could occur for all utilities on or around the Summer of 2024 or that the Arkansas General Assembly could amend the rate structure sometime in the Spring of 2023 without requiring a subsequent Commission rulemaking proceeding. DEA Initial Comments at 3-5 (Doc. #45).

Entegrity/Scenic Hill/AAEA argue that the Commission's proposed revisions do not address the uncertainty and financial risk that results from the specification of NMR Rule 3.01(C) that an SIA is not valid until the Net-Metering Facility is installed before knowing if the project will qualify for grandfathering. Entegrity/Scenic Hill/AAEA propose that NMR Rule 2.07 could be improved by establishing an appropriate safe harbor test where grandfathering eligibility would be based on either the date the Net-Metering Customer signs a binding contract with a solar developer or the date the Preliminary Interconnection Site Review Request (PISRR) is submitted to the Electric Utility. Entegrity/Scenic Hill/AAEA argue that either of these events is reflective of significant commitments made by the Net-Metering Customer in terms of investment towards development of the Net-Metering Facility. Entegrity/Scenic Hill/AAEA assert that if the

date of the PISRR is used to determine grandfathering eligibility, it should apply to all Net-Metering Facilities regardless of generating capacity. *Id.* at 6-12.

Entegrity/Scenic Hill/AAEA argue that the 20-year grandfathering period should begin on the prospective date that any new net-metering rate structure is adopted by the Commission in the future so that the Net-Metering Customer would truly receive a 20-year grandfathering period as allowed by AREDA and Order No. 10. *Id.* at 12-13.

Entegrity/Scenic Hill/AAEA request that the Commission clarify what portions of the SIA must be completed for purposes of establishing grandfathering eligibility. Entegrity/Scenic Hill/AAEA point to inconsistencies between the requirements in Appendix A of the NMRs and Net-Metering Rule 3.01(C) when making this recommendation. *Id.* at 13-14.

Entegrity/Scenic Hill/AAEA assert that the Commission should clarify that the useful life of the Net-Metering Facility is the proper test for determining the appropriate grandfathering period pursuant to Net-Metering Rule 2.07(B). Entegrity/Scenic Hill/AAEA argue that basing the grandfathering term on the useful life of the facility provides an evidence-based rationale for grandfathering decisions and recognizes differences between technologies in the market. Entegrity/Scenic Hill/AAEA submit a redline of Rule 2.07(B) and recommends that the Commission either provide explicit policy guidance in the rule or acknowledge policy and evidentiary precedents within the order adopting the proposed rule. *Id.* at 14-16.

Entegrity/Scenic Hill/AAEA propose that the phrase "grandfathering" be replaced with a more respectful term such as "legacy status" or "safe harboring." Entegrity/Scenic Hill/AAEA argue that the Arkansas General Assembly did not codify the term

"grandfathering" in AREDA, so the Commission has the discretion to use another term. *Id*. at 16-17.

Entegrity/Scenic Hill/AAEA argue that their proposals are consistent with applicable law, including AREDA. Entegrity/Scenic Hill/AAEA state that AREDA does not limit the Commission's ability to approve grandfathering when an SIA is submitted after December 31, 2022, or based on the date of an appropriate document other than an SIA is submitted to the utility. *Id*. at 17-18.

**UAS INITIAL COMMENTS**

UAS states that it supports an extension and revision of the NMRs that will encourage all sizes of electricity users to invest in renewable energy options. UAS asserts that revising NMR Rule 2.07 so that it provides regulatory certainty for net-metering customers and financing entities prior to the investment of resources required to install a net-metering project will help achieve that goal. UAS agrees with the proposals set out in Order No. 1, and specifically agrees that the previous rules in effect adopted in Order No. 10 in Docket No. 16-027-R for residential and non-residential customers with facilities not exceeding 1 MW and prior to the passage of Act 464 for customers over 1 MW supports the purpose of the Arkansas General Assembly when it enacted AREDA. UAS argues that energy users of all sizes in Arkansas must have additional time to investigate net-metering options and implement plans to utilize renewable resources if those options are viable. UAS asserts that two years of the time needed was lost while navigating the effects of COVID-19. UAS argues that removing the uncertainties associated with the December 31, 2022 expiration of the automatic grandfathering provisions is a step in the right direction and is in the public interest. UAS Initial Comments at 1-3 (Doc. #46).

**STAFF DIRECT TESTIMONY OF MARTY RISNER**

Staff witness Risner testifies in support of retaining certain language in the NMRs that allow grandfathering treatment to be granted by the Commission on a case-by-case basis for the upgraded portion of a net-metering facility's generating capacity that exceeds the statutory limits. He states that his comments are limited to the Commission's proposed changes to NMR Rule 2.07.B.2-4. Risner Direct at 3-4 (Doc. #52).

Mr. Risner asserts that AREDA seems to allow customer upgrades that will increase the generating capacity limits of an existing net-metering facility beyond the statutory limits, and he provides excerpts from Ark Code Ann. § 23-18-604(b)(9) in support of that assertion. Therefore, he argues that it seems reasonable to allow customers to apply for grandfathering treatment for the upgraded capacity that exceeds 1,000 kW based on the rate structure approved by the Commission in effect at the time that SIA for the upgrade is submitted to the utility. He states that it appears that the NMRs will not allow for Commission review of such an upgrade if NMR Rule 2.07.B.2-4 is removed from the NMRs. He expresses concern that without a path for approval of such upgrades they may be denied by the utility. *Id*. at 5-8.

Mr. Risner states that in Order No. 4 of Docket No. 21-069-U, the Commission approved grandfathering based upon the time the SIA was submitted to the utility for net-metering facilities that the customer declared as "upgrades" to their first 1,000 kW of generating capacity. He asserts that it is consistent with Order No. 28 of Docket No. 16-027-R to apply grandfathering provisions to the upgraded capacity of a net-metering facility. *Id*. at 8-9.

Mr. Risner recommends that the language regarding "an additional Net-Metering Facility" be removed from NMR Rule 2.07.B.2-3 due to the court finding in *Petit Jean v. APSC* that the Commission cannot aggregate multiple Net-Metering Facilities of a customer in order to determine if a customer has exceeded the statutory limit and therefore must apply for Commission approval. *Id.* at 9.

Mr. Risner recommends that the Commission:

- Retain, but amend, NMR Rule 2.07.B.2-3 to allow for Commission approval of grandfathering treatment on a case-by-case basis for the upgraded portion of the net-metering facility over the statutory limit pursuant to Ark. Code Ann. § 23-18-604(b)(9), under the rate structure in place at the time the customer submits a SIA to the utility for the upgraded capacity.
- Delete references to "additional Net Metering Facility" from NMR 2.07.B to align with *Petit Jean v. APSC.*
- Retain NMR 2.07.B.2.4 to allow the utility to charge the Net-Metering Customer for the costs of any metering required under NMR 2.07.B.2-3 as a result of upgrading an existing net-metering facility.

*Id.* at 9-10.

## B. REPLY COMMENTS

### CARROLL REPLY COMMENTS

Carroll argues that the Commission's authority to implement rules and regulations does not extend to additional policies that the Legislature has not sanctioned, such as the deadline for grandfathering stated by the Legislature. Carroll asserts that the statutes that grant the Commission the power and jurisdiction and authority to regulate utility service

do not mention or suggest or grant policy-making authority. Carroll states that Arkansas's renewable energy policy comes from the Arkansas State Legislature and is wholly encompassed in AREDA as passed. Carroll argues that extending or altering that policy by removing the deadline the Arkansas General Assembly set would be acting beyond the Commission's considerable authority. Carroll states that the Arkansas Supreme Court found in *Ark. Gas Consumers, Inc. v. Arkansas Pub. Serv. Comm'n* that the Commission exceeded its authority when it mandated a policy that would have had all ratepayers pay for unpaid debt incurred by low-income ratepayers. Carroll asserts that the policy in this docket will have lower-income ratepayers shoulder costs shifted from higher-income ratepayers. Carroll Reply Comments at 1-2 (Doc. #68).

Carroll argues that the changes suggested to Rule 2.07 in the Initial Comments of DEA to discontinue the use of the SIA to determine grandfathering eligibility that have been advocated along with discontinuing the use of the June 1, 2020 date as the beginning date applicable to the grandfathering period are also outside of the Commission's authority. Carroll states that the SIA is mentioned specifically in Ark. Code § 23-18-604(b)(10)(A) to be used to determine grandfathering eligibility. Carroll asserts that it cannot be presumed that the General Assembly's awareness of the grandfathering language in Order No. 10 is the basis for AREDA's grandfathering provision without also accepting the intended beginning date for the twenty-year grandfathering period being the "date of an order setting a new rate structure." *Id.* at 3.

Carroll highlights Staff's statement in Docket No. 19-055-U that "[t]he black letter provisions of Act 464 should be given effect in existing net-metering tariffs as soon as possible" and additionally highlights the Commission's statement in Order No. 4 of that

same Docket that "[w]hen a rule or tariff does not conform to a statute, the statute must control." *Id.* at 3-4.

Carroll argues that DEA fails to support the statement in their legal brief that the looming end of the automatic grandfathering provisions is hurting solar development in Arkansas. Carroll refers to Commission Order No. 1 in Docket No. 22-061-U, where the Commission stated that the reported number of Net-Metering Facilities has increased every year and further stated that the number of Net-Metering Facilities interconnected in Arkansas more than doubled between 2020 and 2021. *Id.* at 4.

Carroll states that the Legislature could have left the December 31, 2022 date out of the statute entirely or it could have stated that it was leaving the issue to the Commission's discretion, but the fact is the deadline was included and cannot be considered to have no purpose. *Id.* at 4.

Carroll asserts that the extraordinary price decrease in solar that has been submitted in testimony at the Joint Energy Committee on March 11, 2019, makes it even harder to assume that the legislative intent of Act 464 was not for grandfathering to end on December 31, 2022. Carroll argues that grandfathering is only one of many factors that impact the solar industry's success, and the Commission has no obligation to aid the success of unregulated companies. Carroll states that the Commission should not be persuaded to act outside of its statutory authority to provide such aid. *Id.* at 5.

**AECC REPLY COMMENTS**

In reply to EAL and SWEPCO, AECC states that it agrees with EAL that it is bad policy to extend grandfathering beyond December 31, 2022. AECC asserts that grandfathering is discriminatory because it provides preferential treatment to a select few

and is a temporary solution during a transitory period. AECC states that Order No. 28 and the NMRs recognized the ending date, and the Commission now proposes to undo it in violation of the law, without substantial evidence, using questionable and inefficient procedural actions. AECC Reply Comments at 12-13 (Doc. #71).

AECC agrees with EAL that ending grandfathering is not an attempt to undermine meaningful investment in renewables in Arkansas. AECC states that the right to net meter will continue and the 1:1 net-metering billing option will still exist, but the subsidy net metering customers enjoy will go away. AECC asserts that the General Assembly's intent to foster growth in the small-scale renewable industry was successful and the transitory mechanism is no longer needed. AECC states that the distribution cooperatives in Arkansas have seen a much greater increase in net metering customers than any other utility yet have a fraction of the number of customers of the investor-owned utilities. AECC states that Midcontinent Independent System Operator, Inc. has 83.7 GW of solar in the queue with almost 20 GW in Arkansas and Southwest Power Poolπ has 44.2 GW of solar in its queue with 941 MW in Arkansas. AECC argues that the value of the kWh generated by solar will be greatly reduced when additional solar comes online which increases the impact of the 1:1 retail kWh swap and that banking of solar kWh credits when the system is saturated drives the cost of power negative at times of high sun and low load, even though the utility pays full retail for their production. *Id.* at 13-14.

AECC states that non-Net-Metering Customers pay for several subsidies including

- Federal incentives;
- Rate design mitigations approved by the Commission. As an example, the service availability charge could be too low to recover the costs to serve;

- The current 1:1 full retail kWh swap is over-compensatory;
- Free use of the utility system, especially for remote generation meters;
- Time shift of energy, where net-metering customers bank kWh during the cheapest hours, such as sunny fall days, and net kWh taken during the most expensive time when the Net-Metering Facility is not producing, such as the cold dark days during Winter Storm Uri; and
- Some counties are not assessing the property improvements of the solar facility, so taxes potentially are not being collected. AECC notes this is not an issue in this Docket.

*Id*. at 15.

In reply to AAEA/Scenic Hill/Entegrity, AECC argues that the uncertainty claimed by the DEA is not created by AREDA or the NMRs and is outside of the Commission's authority to resolve. AECC asserts that it is the unlawful promulgation of rules in this Docket that is creating the regulatory uncertainty. AECC states that the statutory cut-off date for grandfathering has been known since 2019 and that the only way a net-metering customer could assume grandfathering rate treatment would be available is if an Unregulated Party provided it by private contract. AECC states that the other uncertainties claimed such as land constraints, supply chain issues, *etc.* are outside of the purview of AREDA and the Commission's authority to alleviate and are uncertainties that all businesses face, including regulated utilities. AECC asserts that the Commissions' *Promotional Practice Rules* and a Special Rate Contract could be pursued by the Unregulated Parties with the utility and the customer. AECC argues that if the proposed NMRs and expansions sought by the Unregulated Utilities are approved it would "move

the goal posts" and create regulatory uncertainty for the regulated utilities that the Commission is charged with regulating and the public interest it is charged with serving. AECC Reply Comments at 16-18 (Doc. #71).

AECC states that with the known end date of grandfathering, the use of the SIA to determine eligibility for grandfathering will soon be a moot point. However, AECC argues that using a mechanism other than the SIA would contravene the law and the substantial evidence supporting the decision in Order No. 28 to use the SIA to determine grandfathering eligibility. AECC argues that the DEA parties hint that their unregulated contracts may allow a Net-Metering Customer to avoid those contracts and are seeking to lock those customers into an uneconomic transaction by regulatory action. AECC states that the full costs of the facility are not known until the SIA is submitted, as the upgrade costs to the system are not determined until that time and those costs are borne by the net-metering customer. AECC argues that submitting the SIA to the utility in order to qualify for grandfathering under AREDA protects the customer. *Id*. at 18-19.

In reply to UAS, AECC responds to UAS by stating that the regulatory certainty for net-metering customers and financing entities was resolved with the codification of the December 31, 2022 date certain and the Commission has no authority to extend it. *Id*. at 19.

In reply to Staff, AECC responds to Staff witness Risner by asserting that retaining the grandfathering provisions in the NMRs related to future upgrades to net-metering facilities would conflict with the Commission's Order No. 28 at page 552 that additional generating capacity approved is subject to the new net-metering rate structure. AECC responds to Staff's statement that "no utility has yet to file for a new rate structure" by

asserting that the Commission ordered that no utility can apply for a new rate structure until after December 31, 2022. AECC asserts that Order No. 4 in Docket No. 21-069-U, which Mr. Risner refers to as support for his claim that the Commission has previously grandfathered upgrades to facilities was wrongly decided, was issued after this Docket was initiated, and a stay or rehearing of that order has been requested. *Id.* at 20-21.

AECC states Order No 28 clearly stated that SIAs must be submitted before December 31, 2022, in order to qualify to remain under the rate structure in effect at that time. AECC states that it is necessary and proper for the Commission to adhere to its own decision as it provides certainty of the rules governing litigants. AECC argues that the Commission committed in Order No 28 to allow utilities to apply for a net metering rate structure after December 31, 2022. AECC asserts that for the Commission to extend grandfathering before allowing utilities that opportunity would defy prior orders and infringe on the substantive and procedural due process rights of the parties. *Id.* at 21-22.

AECC concludes that if grandfathering continues beyond the statutory cut-off date, utilities will be required to continue to take excess generation at a rate that is much higher than the cost to purchase power in the wholesale market. AECC argues this will exacerbate the utility's lost contribution to fixed costs and raise rates for all customers that do not net-meter. *Id.* at 22.

AECC argues that no evidence has been presented that extending grandfathering is just and reasonable, not unduly discriminatory, not violative of due process, and in the public interest. AECC recommends that the Commission uphold the law to end grandfathering after December 31, 2022, and find in favor of non-Net-Metering Customers. *Id.* at 22.

**SWEPCO REPLY COMMENTS**

SWEPCO states that it has filed a Reply Legal Brief and that the Commission only need rule on the legal issues it has presented in its legal brief in this rulemaking. SWEPCO asserts that the changes proposed to the NMRs are not permitted by Arkansas statute and are beyond the Commission's authority. SWEPCO Reply Comments at 1 (Doc. #76).

SWEPCO states that the expiration of the 1:1 rate structure will not prevent the opportunity to net meter in Arkansas but instead it prevents the underwriting that non-Net-Metering Customers have provided to customers that do net meter. SWEPCO asserts that Arkansas's policies continue to support the growth of small-scale renewables and that Arkansas remains net metering friendly even with the proper alignment of costs and benefits. *Id*. at 1-2.

SWEPCO states that in Docket No. 22-061-U, it will file testimony addressing the shift of costs that results from the 1:1 rate structure. SWEPCO asserts that its Initial Comments demonstrated that there has been explosive growth in net metering in its service territory and that trend is expected to continue. SWEPCO argues that an extension of the deadline is not just or reasonable and would continue the misalignment of rates and encourage growth of a practice that is detrimental to non-Net-Metering Customers. *Id*. at 2.

SWEPCO concludes that the statutory deadline must be respected by the Commission. SWEPCO states that it opposes the changes to the NMRs described in Order No. 1, and it asks that the Commission turn its attention to setting appropriate rates that are fair, reasonable, and workable for all utility customers. *Id*. at 2.

**EAL REPLY COMMENTS**

EAL asserts that extension of a statutory deadline cannot be accomplished by rule. EAL states that after the end of 2022, all Arkansans will continue to have the right to net meter. EAL states that the General Assembly envisioned that the socialization of the subsidies enjoyed by private Net-Metering Facilities would end when it set December 31, 2022, as the date for grandfathering to end. EAL Reply Comments at 1-3 (Doc. #77).

EAL argues that the belief that net-metering will not survive without a prolonged rate guarantee is a myth. EAL argues that this is a self-serving perspective offered by those that benefit from the subsidies. EAL asserts that it is the customers who are being forced to pay these subsidies that need a guarantee that they will not be forced to pay for these uneconomic facilities for decades to come. Further, EAL argues that no investment is ever a sure thing and that grandfathering is not intended to afford private developers or the customers installing private facilities a guarantee. EAL states that the Commission in Order No. 33 in Docket No. 16-027-R confirmed that "the purpose of grandfathering is not to eliminate all uncertainty for the large net-metering customer." EAL argues that AAEA seems to suggest a structure where the date could be extended again and again depending on the projects in the pipeline. EAL states this would mean that private Net-Metering Facilities would never stand on their own without subsidization. EAL argues that the General Assembly did not intend for an unsustainable rate structure to linger into perpetuity. *Id.* at 3-5.

EAL states that when grandfathering first began in 2017, the Commission stated it was intended to be a limited, transitional exception until a more sustainable rate structure was established. EAL states that the General Assembly clearly laid out that transition three

years ago in Act 464 of 2019. EAL asserts that no evidence has been presented to the Commission that reasonably supports a need for continuing grandfathering for new systems that are built and come on-line on or after January 1, 2023, or how it would be consistent with the clear directive in Act 464. EAL argues that federal tax incentives for renewable resources are likely to be more important to the economics of solar facilities than continuing to grandfather at the 1:1 full retail credit rate structure. *Id*. at 5-7.

EAL argues that grandfathering was only intended to be a temporary tool that was part of a larger rate structure reform, but that reform never occurred. EAL states that it is appropriate to dial back the subsidy given to new systems installed after December 31, 2022, and allow new private net-metering installations to be constructed under a reasonable and fair rate framework. *Id*. at 7-8.

EAL asserts that in 2017 even Scenic Hill agreed with Staff that grandfathering should only apply to those receiving service before a new rate structure was established, and they both agreed that was enough to ensure the continued growth of net-metering. EAL argues that mitigating risk for future projects was never the justification for Order No. 10, and the Commission rejected that claim in Order No. 33. EAL argues that the private developers cannot claim to have been unaware of the rate structure under Order No. 28. EAL asserts that as its Initial Comments make clear the private developers cannot claim that grandfathering is necessary to advance solar in general and net metering will continue to be available to every interested Arkansan. *Id*. at 9-10.

EAL argues that Arkansas' net-metering policy is undoubtedly the most liberal in the southern United States and possibly in the nation. EAL argues that comments and recent public statements made by the executive director of AAEA and the comments from

the private developers affirm that the current net- metering rate structure is very profitable for them, and EAL argues that they are fighting hard to keep in place the subsidy that grandfathering provides. EAL disputes the private developers' claims that other states have extended grandfathering indefinitely by discussing changes that have been made or are currently being made in California, Hawaii, Arizona, and Louisiana, including moving away from the 1:1 full retail credit framework. EAL states that significant growth in new systems installed has occurred after those reforms in those states. *Id*. at 10-18.

EAL states that removal of the December 31, 2022 date as the deadline for submitting an SIA in the current language in Rule 2.07 would be improper because the legislature has already determined that is the correct public policy to limit grandfathering. EAL asserts that the Commission has recognized several times that its rules cannot contradict a statute. *Id*. at 18.

EAL states that the SIA is explicitly written into AREDA as the sole document upon which grandfathering can be premised. EAL asserts that the Commission and the Arkansas Court of Appeals have recognized this fact. EAL states that a PISRR, which the private developers now advocate to use, is a non-binding document that is used to help understand if a given project at a specific location may be feasible and the potential upgrade costs. EAL states that it is been routinely flooded with PISRRs for projects that often go nowhere and multiple PISRRs for a given project are often submitted. EAL states that it receives thousands of PISRRs a year and that many of them are not complete. EAL argues that it would be impossible for it or the Commission to track grandfathering eligibility based on the date a PISRR was submitted and that it would result in additional costs that would be borne by customers. *Id*. at 19-21.

EAL argues that relying on when a binding contract was signed with a solar developer to determine when grandfathering could begin would cede some of the Commission's jurisdiction to a litany of private developers. EAL argues that this would be inappropriate as indicated by Act 464 and it would violate the due process that is afforded currently in net-metering dockets. EAL further asserts that it would be impossible to enforce because of the vagaries of what would legally constitute a binding contract due to the fact that contracts can be amended, superseded, and voided under Arkansas law. EAL argues that a Net-Metering Customer could potentially circumvent the maximum grandfathering period identified in the statute, "not to exceed twenty years", by re-signing or amending its binding contract. *Id*. at 22.

EAL argues that Order No. 28 determined that June 1, 2020, was the date for determining the grandfathering status for facilities that require pre-approval, those over 1,000 kWAC in capacity. EAL states that Order No. 28 also held that facilities less than 1,000 kWAC were grandfathered automatically for 20 years if the SIA was executed by December 31, 2022. EAL asserts that no party appealed these determinations in that docket. EAL states that the private developers' proposal to use the individual completion dates to grandfather facilities would be unworkable, as recognized in Order No. 28 by the Commission and it would be cost prohibitive to require utilities to track. *Id*. at 22-23.

EAL states that it does not take a position on changing the nomenclature to describe grandfathering, so long as it is clear that the concept of grandfathering is what is being discussed. EAL asserts that "grandfathering" provisions, as a legal term of art, are well-recognized in the law. *Id*. at 23-24.

EAL requests that "safe harbor" (as proposed by the private developers) not be used because it is also a term of art that has commonly accepted usage in the power industry and other contexts. EAL states that it is also referenced in AREDA related to tax exempt status. EAL asserts that adopting "safe harbor" terminology to substitute for "grandfathering" would also implicate the element identified in Ark. Code Ann. § 23-18-603(7)(C), that certain net-metering projects must prove in their applications by law that relate to tax provisions under 26 U.S.C. § 7701(e)(3)(A) as in effect on July 24, 2019. EAL asserts that it would also create new and unnecessary confusion in net-metering records. *Id*. at 24.

EAL concludes that Act 464 does not permit extension of the grandfathering deadline. EAL states that the change to the NMRs as proposed in Order No. 1 has not been justified based on substantial evidence or shown to be in the public interest. EAL asserts that this purported rulemaking rushes an important issue for no reason other than to apparently appease private developers. EAL argues that grandfathering cannot and should not be continued beyond the end of 2022 as the General Assembly provided. *Id*. at 24-25.

**DEA REPLY COMMENTS**

DEA states that they have been persuaded by the testimony of Staff witness Risner and now agree that Net-Metering Rule 2.07(B)(2-4) should not be stricken in its entirety and they have revised their proposed redline of the net-metering rules to incorporate Mr. Risner's proposed changes. DEA states that the fact that there is not a rate structure change at this time does not mean that the grandfathering status of the original capacity and upgrades does not need to be clarified. DEA Reply Comments at 1-2 (Doc. #70).

DEA states that they also agree Mr. Risner that language regarding "an additional Net-Metering Facility should be removed from Net-Metering Rule 2.07(B)(2-3) due to the decisions of the Arkansas Court of Appeals in *Petit Jean v. APSC*. DEA asserts that the Commission must revise its rules because the *Petit Jean v. APSC* decision is now final. DEA states that they have revised their proposed redline of the Net-Metering Rules to incorporate Mr. Risner's proposed changes. *Id*. at 2-3.

DEA states that in addition to the changes recommended by Mr. Risner, they are proposing that Net-Metering Rule 2.07(B)(2-3) also be revised to refer to the PISRR rather than the SIA. DEA states that any proposed upgrades to Net-Metering Facilities should be eligible for grandfathering of the net-metering rate structure in effect at the time the PISRR for the upgrade was submitted to the Electric Utility. *Id*. at 3.

DEA incorporates and adopts the Initial Comments of the UAS, agreeing with UAS that the COVID-19 pandemic justifies an extension of time to qualify for grandfathering of the net-metering rate structure. DEA states that they have all experienced delays in the development of Net-Metering Facilities due to the COVID-19 pandemic, which required clients and prospective clients to focus on the public health crisis rather than developing a Net-Metering Facility. DEA asserts that many customers decreased operations to comply with the Governor's executive orders which caused variances in the historical energy usage and made it more difficult for solar developers to properly size and design net-metering facilities. DEA argues that a temporary extension of grandfathering eligibility is justified for these reasons until the date that the Commission issues an order changing the net-metering rate structure. *Id*. at 3-4.

DEA also agrees with the broad policy benefits associated with net-metering by public entities. DEA states that Scenic Hill and Entegrity have both developed many net-metering projects for public entities that share the benefits with the communities they serve. DEA argues that these projects are supporting public entities and local communities that they serve rather than excessively compensating "private solar customers" as alleged by the utilities. *Id*. at 4-5.

Replying to EAL, DEA argues that grandfathering is still necessary in this transitory phase. DEA asserts that we are still in a transitory phase and no change has been made by the General Assembly or the Commission to the 1:1 net metering rate structure. DEA argues that the best way to ensure that customers investing in early net metering are protected against unforeseen policy changes, including legislation that EAL and other electric utilities may propose in the 2023 legislative session is to use the submission of a PISRR to determine grandfathering eligibility. *Id*. at 5-6.

DEA asserts that Chart 2 presented by EAL in its Initial Comments demonstrates that approximately 100 MW of the 170 MW of Net-Metering Facilities generating capacity is not fully interconnected and therefore risks missing out on grandfathering eligibility due to interconnection delays and other circumstances out of their control even though they have already made substantial investments in those facilities. DEA asserts that for this reason the Commission should adopt their proposed rule revisions to provide certainty to encourage those customers to complete the interconnection of their Net-Metering Facilities. *Id*. at 6-7.

DEA does not agree that Net-Metering Customers avoid paying their fair share for infrastructure costs. DEA states that larger Net-Metering Customers continue to pay the

demand charges applicable to their tariff, and that the electric utilities have been provided a mechanism by the Commission to propose re-determined demand charges if the existing demand charges are not covering the utility's demand costs. DEA states that Net-Metering Customers continue to pay for upgrades to EAL's distribution system that are fully used by the Net-Metering Facility, and they assert that Entegrity and Scenic Hill have paid over $1,000,000 each to support distribution and transmission system upgrades that will benefit Net-Metering Customers and non-Net-Metering Customers. DEA states that Net-Metering Customers and solar developers were subsidizing infrastructure upgrades that may benefit all EAL's customers prior to EAL's adoption of its revised Extension of Facilities Policy in Docket No 22-068-TF. *Id*. at 7-8.

DEA does not agree with EAL's assertion that customers with Net-Metering Facilities are receiving an "unfair subsidy" paid by non-Net-Metering Customers. DEA argues that AREDA clearly indicates that the General Assembly intended to encourage net-metering (*i.e*., 1:1 credit of kWh) for renewable energy resources. DEA asserts that an unreasonable allocation of costs is only precluded by AREDA for facilities that exceed 5 MWAC, which indicates that some level of cost shifting was determined to be reasonable by the General Assembly, especially for relatively small facilities. *Id*. at 9.

DEA asserts that non-Net-Metering Customers are not required by the current Net-Metering Rules to pay any subsidy to Net-Metering Customers, and no such rule revisions have been proposed. DEA argues that EAL has had nearly two years since the current NMRs became effective to file an application presenting evidence that an unreasonable cost shift is occurring or already has occurred on a cumulative basis but it has not filed an application or presented such evidence. DEA states that each time approval has been

sought for a Net-Metering Facility with a generating capacity greater than 5,000 kW AC that would trigger a cost allocation review, EAL's Director of Utility Rates and Pricing has testified that an unreasonable cost shift to other customers will not result under the current 1:1 full retail credit net-metering. *Id*. at 9-10.

DEA states that Arkansas has a very robust net-metering policy overall, especially after Act 464 expanded AREDA. However, it states that EAL's assertion that Arkansas' net-metering policy is "the most generous by far in the South and among the most liberal in the entire United States" is not true regarding the only issue under consideration in this Docket which is whether the Commission's current grandfathering policy provides adequate certainty to Net-Metering Customers. DEA discusses the recent revision the Mississippi Public Service Commission made to its Net-Metering Rules adopting a 25-year grandfathering period from the date the customer begins taking renewable generation service. DEA argues that the grandfathering period is actually less than 20 years for facilities interconnected after June 1, 2020, and is fairly conservative and does not come close to corresponding with the expected useful life of standard solar arrays commonly installed in Arkansas, and therefore does not meet the "essential" policy goals of Order No. 10. *Id*. at 10-12.

DEA disagrees with EAL's assertion that the federal incentives resulting from the Inflation Reduction Act of 2022 (IRA) make grandfathering of the net-metering rate structure unnecessary. DEA states that the IRA does not provide any level of regulatory certainty for the useful life of Net-Metering Facilities. DEA argues that if the IRA will be as impactful as EAL claims, then it should allow EAL to continue to transition its resource portfolio to clean and renewable energy sources at a lower cost of investment and to

provide lower retail electric rates and reduce the likelihood of a potential cost shift. *Id*. at 12.

DEA argues that this proceeding is not intended to address many of the arguments EAL advanced in its initial comments such as whether 1:1 net metering should be continued or whether net-metering customers should be able to bypass certain riders. *Id*. at 12-13.

In reply to SWEPCO, DEA asserts that Ark. Code Ann. § 23-18-604(b)(2)(B) and (D) are properly characterized as being discretionary option rather than a "directive," as SWEPCO argued. DEA states that § 23-18-604(b)(2) uses the word "**may,"** which means that the cost-shift test only becomes applicable if and when the Commission seeks to deviate from 1:1 net metering under one of the available options, as the Commission explained in Order No. 28. DEA notes that the four discretionary options [(A) through (D)] in that subsection are only available for "customers who receive service under a rate that does not include a demand component (*e.g*., residential customers)," citing Docket No. 16-027-R, Order No. 28 at 514-515 (Doc. # 423). *Id*. at 13-14.

DEA asserts that SWEPCO has not provided substantial evidence that an unreasonable allocation of costs to other customers is occurring or will occur as a result of a temporary extension of grandfathering eligibility until the net-metering rate changes. DEA argues that SWEPCO could have filed an application for a grid charge if the level of Net-Metering Facility generating capacity that it stated was expected on its system was causing an unreasonable cost shift to other customers. *Id*. at 14.

DEA further argues that according to Appendix A-8 of the NMRs, grandfathering of the net-Metering Rate structure does not preclude SWEPCO from increasing basic

charges or service fees. DEA asserts that if SWEPCO's Net-Metering Customers are not paying any of the fixed costs associated with service from SWEPCO other than the monthly customer service portion of the bill, it indicates that SWEPCO has not properly allocated fixed costs in retail rates, including via demand charges, or it could also indicate that the majority of SWEPCO's Net-Metering Customers are residential customers that take service under a rate that does not include a demand component. DEA states that after December 31, 2022, SWEPCO can propose a new rate structure and extending grandfathering eligibility for these customers for a relatively short transitory period will have a fairly minimal impact. DEA states that for smaller solar projects, such as those that residential customers are developing, using the PISRR date instead of the SIA date is much shorter than for larger facilities so using the PISRR to establish grandfathering eligibility for residential customers should also result in a fairly minimal impact. *Id*. at 14-15.

DEA states that SWEPCO has not provided any evidence that any level of cost-shifting is being caused by Net-Metering Customers that receive service under a rate schedule that includes a demand schedule that would justify not extending grandfathering of the 1:1 rate structure for those customers. *Id*. at 15.

In reply to AECC, DEA argues that the current net-metering structure will not be allowed to extend without end under the proposal by the Commission and DEA to temporarily extend grandfathering, and it is not contrary to Order No. 28 which provided a clear indication that the Commission would revisit grandfathering for facilities interconnected after December 31, 2022, when appropriate to do so. *Id*. at 16.

DEA states that AECC has not shown that it incurred any harm due to the Commission's delay in granting it intervention, which may have resulted from frivolous

filings made by outside counsel for various electric cooperatives claiming that AAEA and Scenic Hill should be denied intervention because they are not a "Person" as defined by statute. DEA disagrees with AECC's statement that the procedural schedule does not provide the parties the ability to meaningfully participate in this proceeding. *Id*. at 16-17.

Replying to Carroll, DEA asserts that there was no new rate structure or change in the 1:1 rate structure set in Order No. 28 and that the Commission used the words "retained" or "continuation" in describing the net-metering rate structure for all customers except those "demand component customers installing Net-Metering Facilities with generating capacity from over 1 MW to 20 MW. *Id*. at 17-18.

DEA states that "the Commission adopted a *potential* rate structure change, (*i.e*., 1:1 full retail credit for net excess generation plus the adoption of a grid charge)," for customers installing Net-Metering Facilities with generation capacity from 1 MW to 20 MW that was contingent on approval by the Commission of an electric utility's application for a grid charge pursuant to NMR Rule 2.04(A)(3)(d). DEA states that in the two years since this rule became effective, no electric utility has sought or received Commission approval for a grid charge, so the rate structure for these customers has not actually changed and the grandfathering deadline established in Order No. 10 ("the date of the order setting a new rate structure") has not been fulfilled. Further, DEA asserts that due to the decision by the Arkansas Court of Appeals reversing the Commission's imposition of a grid charge in *Petit Jean v. APSC,* no legally valid change to the 1:1 net-metering rate structure for any customers has been made. Therefore, DEA argues that the deadline to obtain grandfathering eligibility established in Order No. 10 has not been fulfilled. *Id*. at 18-20.

**STAFF REBUTTAL TESTIMONY OF MARTY RISNER**

Mr. Risner states that changes to the NMRs are needed and supports the Commission's proposed NMR amendments with the modifications presented in his Initial Comments. He argues that delaying action until after December 31, 2022, will create further rate structure uncertainty for Net-Metering Customers that have already made significant investments in net-metering facilities but have not yet submitted their SIAs to the utility, which will stifle the development of net-metering and discourage the use of renewable energy resources. Risner Rebuttal Testimony at 7 (Doc. #75).

Mr. Risner responds to EAL by stating that the Commission has shown that it is committed to achieving a "sustainable net-metering rate structure," including through opening Docket No. 22-061-U to investigate potential cost shifting. *Id*. at 7-8.

Mr. Risner states that Staff agrees with DEA and UAS's Initial Comments that removing the December 31, 2022 deadline is a means to reduce uncertainty. *Id*. at 8-10.

Mr. Risner testifies that EAL's and SWEPCO's comments on fairness are based on alleged but unsubstantiated allegations that Net-Metering Customers are shifting costs to all other customers. He expresses Staff's support for Docket No. 22-061-U opened by the Commission to gather the data needed to determine a fair rate structure going forward. *Id*. at 11.

Mr. Risner testifies that it is reasonable to remove the December 31, 2022 deadline for the reasons that UAS provides in its Initial Comments that circumstances beyond their control existed during the two previous years. *Id*. at 12.

Mr. Risner testifies that Staff's response concerning whether the Commission has authority to extend grandfathering eligibility past December 31, 2022, is addressed in Staff's Reply Legal Brief. *Id*. at 12-13.

Mr. Risner testifies that based on Staff's reading of Commission Order No. 1, Staff is not making recommendations at this time on the need for DEA's clarifications regarding grandfathering. *Id*. at 13-16.

Mr. Risner testifies that he continues to support the recommendations he made in his Direct Testimony. *Id*. at 16.

## C. PUBLIC HEARING TESTIMONY

**ANDREW OWENS (EAL)**

Mr. Owens states that nothing is going to change January 1 and there has been no implemented rate structure to speak of by Order No. 28. He states that any change to the rule is premature until the cost-shifting issue is resolved in Docket No. 22-061-U. T. 53.

**LYNN FERRY-NELSON (SWEPCO)**

Ms. Ferry-Nelson testifies that there is no need for a two-year extension. T. 77. She claims rooftop solar has grown almost exponentially, from fewer than 200 to more than 600 new customers between 2020 and 2022. T. 83. She believes SWEPCO has four customers that fall into the greater than 1 MW bucket, so up to this point in time, SWEPCO has not necessarily had the need for a grid charge for its larger customers like Entergy has seen. T. 84-85. She takes the position that there has been plenty of fair notice to customers over the last several years that grandfathering will be expiring and that you need to look to the General Assembly perhaps to modify the statutes at this time before the Commission can move forward with any change. T. 86. She has no concerns with changing from

"grandfathering" but agrees with EAL that it should not be labeled as "safe harbor." T. 86-87.

**ROBERT SHIELDS (AECC)**

Mr. Shields states that the cooperatives have 65 MW of installed net-metering capacity, which approaches three percent already of the penetration level for cooperatives. He testifies that cost-shifting is approaching in the millions [of dollars] and sits about 2.5 percent based on capacity for the seventeen cooperatives, based on the AECC system peak, with some higher and some lower. T. 104-05.

**BILL HALTER (SCENIC HILL)**

Mr. Halter is strongly in favor of a two-year extension, as well as the initial draft rule that the Commission put forward. He testifies that because of the constant attempts to object, obstruct, and litigate, there has been a relatively small period of time where the rules have actually been clear. And that because of the appeal, the Commission was forced to defend its rules and thus there have been merely months where this has been definitively decided. T. 110-111. Mr. Halter cites to Producers Rice Mill as one of the first projects approved under Act 464. He notes that in this first examination and adjudication of the underlying data, not only was there not cost shifting to other ratepayers, but the project provided net benefits to all other ratepayers in EAL's service territory. He notes that this is the first and only time that cost shifting was contested and that the Commission ruled that not only was there not cost shifting to other ratepayers but in fact the project provided net benefits to all other ratepayers in EAL's service territory. T. 111-12.

Mr. Halter testifies that there was another Scenic Hill project for the City of Hot Springs in which there was an opportunity to address cost shifting and the utility, EAL,

passed its opportunity to say that there was cost shifting, presumably because they could not prove that there was. T. 112.

Mr. Halter states that it is better for the Commission to do everything it can to provide the initial certainty, as opposed to just saying that it will be dealt with it in the legislative session. He notes that new legislation will require a new rule and that there is the virtual certainty that somebody who does not like the rule is going to appeal it. He states that a lot of individual entities, seeing certainty but subject to the possibility of appeal, are more likely to move forward with their plans, and he encourages the Commission to extend grandfathering. He observes that if somebody wants to litigate it, they are going to litigate it, and that there is little that he and the Commission can do about that. T. 122-23.

Mr. Halter testifies that there is a huge difference between the word shall and the word may and that in Act 464 and in Section (b)(10), the grandfathering that is being talked about was a "shall" through December 31, 2022. He states that in AREDA and before Act 464, the Commission had the authority to grandfather projects and nothing about the passage of Act 464 removed the Commission's authority to grandfather projects before December 31, 2022, or after December 31, 2022. He notes that Act 464 required the Commission to do some things, but it absolutely removed none of the Commission's permissions to do the things that it could have done, and in fact did, before Act 464. T. 126-28.

Mr. Halter testifies that his preference is that the Commission move forward extending grandfathering, even given the implied threat of litigation by the parties. T. 129-31.

**ADAM NESS (AAEA)**

Mr. Ness testifies that an extension of the grandfathering for two more years sends a clear signal to customers that the regulatory intent that they will be treated fairly for the life of investment and that they can run their own analysis to determine whether it is in their best interest to move forward with net metering. He states that AAEA would be open to a capacity cap if it was rooted in data, case studies, and examples. He notes that the highest penetration for the cooperatives was Ouachita at 13 percent and Ouachita has been singing the praise of net-metering for years and had a rate reduction that it associated with its promotion of solar and energy efficiency. T. 142.

**CHRIS THOMASON (UAS)**

Mr. Thomason testifies that UAS supports the governor's recommendation at a minimum of a two-year extension to grandfathering. He states that with the potential litigation in mind and the purpose of the rulemaking being providing certainty, there is still sufficient certainty with this rule for customers like UAS to continue to pursue projects. T. 154-55.

**LAUREN WALDRIP (AAEA)**

Ms. Waldrip testifies that grandfathering even in perpetuity is something that is good business and good policy. She notes that this is not unprecedented and is common in other states across the nation. T. 158. She states that in the event that litigation does cause some sort of delay, any dates adopted by an order such as a two-year period should not be lessened by the delay. T. 162.

**MARTY RISNER (STAFF)**

Mr. Risner testifies that Staff would be open to a two-year extension, but that the impact of grandfathering and the freezing of the 1:1 rate structure in ongoing Docket No. 22-061-U that is already addressing cost shifting must be kept in mind. T. 170. Regarding the excision of subsections 2 and 3 from NMR Rule 2.07(b), he states that the issue with the upgrades is with the way that the Commission has issued Order No. 1. He notes that it eliminated the grandfathered upgrades for net-metering customers who would like to upgrade their net-metering facility above the statutory limit but the grandfathered upgrade was allowed to remain in place for the net-metering customers that were below the statutory limit. He concludes that there should be a mechanism to allow the net-metering customer to be able to upgrade his net-metering facility if he wants to under the rate structure that would be in effect at the time of the SIA being submitted for the upgraded capacity. He thinks it is important to put that back in there and does not change the spirit of what the Commission has suggested but allows the rules to remain for the net-metering customer to be able to upgrade a system. He believes that by the Commission eliminating the sections, the Commission was creating uncertainty as to whether the original facility would maintain grandfathering if it was upgraded. T. 173-74.

## III. DISCUSSION OF AND RULINGS ON LEGAL ISSUES

Pending before the Commission are the following Motions:

- The Minority Cooperatives *Motion to Dismiss for Lack of Jurisdiction Over the Subject Matter* (Doc. #34)
- Carroll *Motion to Dismiss/Motion to Transfer and Consolidate* (Doc. #36)
- Carroll *Motion for Clarification* (Doc. #37)

- AECC *Motion to Dismiss* (Doc. #38)
- The Minority Cooperatives *Application for Rehearing of Order No. 4* (Doc. #78)[3]
- EAL *Motion to Temporarily Hold Proceeding in Abeyance* (Doc. #85)

The Minority Cooperatives' Motion, Carroll's Motion to Dismiss, and AECC's Motion are premised on the argument that the Commission did not have jurisdiction to proceed in this Docket and modify Order No. 28 in Docket No. 16-027-R because no mandate had been issued in the appeal of Order Nos. 28 and 33 of Docket No. 16-027-R. Carroll also asks that this rulemaking be transferred to Docket No. 16-027-R. Carroll alleges in its Motion for Clarification that there is a lack of uncertainty within the statutes and rules to justify the rulemaking and states that the proposed rule and Order No. 10 in Docket No. 16-027-R cannot be read in harmony. AECC also alleges that the proceeding is duplicative to Docket No. 16-027-R and conflicts with orders in that Docket and that the Commission has no authority to extend grandfathering past December 31, 2022. After the mandate was issued, the Minority Cooperatives state that the Commission still has no jurisdiction because the Docket was initiated before the mandate; Carroll notes that even if the mandate did not moot part of its argument, there is still a lack of uncertainty.

Carroll's *Motion for Clarification* seeks clarification on the proposed revisions as to whether there would be single or multiple stages of grandfathering, whether June 1, 2020, remains the start date of the 20-year grandfathering period, and what rate mechanisms would end grandfathering.

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[3] On November 18, 2022, Order No. 6 granted the *Application for Rehearing of Order No. 4* solely for the purpose of further consideration.

The Minority Cooperatives *Application for Rehearing of Order No. 4* challenges the Commission's findings in Order No. 4 that AAEA and Scenic Hill are "persons" who qualify to intervene in this Docket.

EAL's Motion seeks to hold this Docket in abeyance pending the Commission's investigation of potential net-metering cost shifting in Docket No. 22-061-U and during any rate proceedings emanating from that Docket.

In addition to the Motions filed, the Parties have raised legal issues in their Briefs, some of which duplicate the issues raised in the Motions. The Commission therefore identifies and rules on the following legal issues.

1. **Whether the appeal of Order Nos. 28 and 33 in Docket No. 16-027-R prevents the Commission from considering and adopting revisions to Rule 2.07.**

As a preliminary issue, the arguments that the Commission cannot amend its Net-Metering Rules, in particular Rule 2.07, because the mandate had not been issued in the Appeal of Order Nos. 28 and 33 in Docket No. 16-027-R, is moot, as the mandate was issued on September 22, 2022.

Even after the issuance of the mandate, several Parties revised their arguments and contend that the Commission's initiation of this rulemaking is invalid because it was done before the mandate was issued and that the Commission did not have jurisdiction to adopt new rules. Parties argue that the Commission cannot "amend" Order No. 28 in Docket No. 16-027-R during the pendency of the appeal. The Minority Cooperatives and other Parties claim that the Commission had no jurisdiction to take or begin to take any substantive action to change its NMRs, but the only authorities cited to support the Parties' argument that the Commission lacked the jurisdiction to initiate this rulemaking are cases which are

adjudicatory – from a circuit court and from a complaint (quasi-judicial) action at the Commission.[4]

This is a rulemaking, not an adjudication, and there is no prohibition on the Commission's action and no lack of jurisdiction. The Commission is neither modifying Order No. 28 nor considering modifying Order No. 28. Rules are not enacted to be applied retroactively, but on a going-forward basis. The Parties misunderstand the legislative nature of rulemaking. Adoption of amendments in this proceeding will not "amend" Order No. 28 but will instead set a new rule going forward from the effective date. Jurisdiction of the Court is over the order being appealed, not all orders or rules of the Commission: "Upon the filing of the petition, the court shall have original jurisdiction, which, upon the filing of the record with it, shall be exclusive, *to affirm, modify, or set aside the order of the commission* in whole or in part." Ark. Code Ann. § 23-2-423(c)(1) (emphasis added).

Rulemaking is a legislative function, which involves forward-looking pronouncements of general regulations relating to classes of persons and situations, not a quasi-judicial function, which applies to a specific person and specific situations and is backward-looking. The Commission notes that if those Parties are correct, then any Party could deprive the Commission of jurisdiction to adopt new rules, set new rates, or take other forward-looking, legislative acts by merely appealing an order.[5]

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[4] Minority Cooperatives Reply at 2-4 (Doc. #63).
[5] For example, if an intervenor appealed a final order in a rate case, under this theory the utility could not file a new rate case or any tariff filing (to change a rate or tariff going forward) while the rate case order was being appealed.

The Commission is a creature of the legislature and performs, by delegation, legislative functions.[6] Rulemaking is clearly a legislative, not a quasi-judicial function. Rulemaking is the "function of laying down general regulations relating to classes of persons and situations as distinguished from orders that apply to named persons or to specific situations, the latter being adjudicatory in nature."[7] Rules are distinguished from determinations of a judicial nature, which "deal with a particular present situation, or which apply to named persons, while the former are actions in which the legislative element predominates."[8] The Court in *Meadors v. Ark. Okla. Gas Corp*.[9] explained the differences:

> Legislative and judicial functions are distinguished by elements of futurity and retrospection, generality and particularity, and discretion and initiation. Action of an administrative tribunal is adjudicatory in character if it is particular and immediate rather than, as in the case of legislative rulemaking action, general and future in effect. Another test for determining whether action by a commission is legislative is whether there is laid down a rule of future action which affects a group, and not the direct application of policy or discretion to a specific individual.

Promulgating "policy-based standards of general import" is rulemaking and "is not adjudication or quasi-adjudication."[10]

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[6] *S.W. Bell Tel. Co. v. Ark. Pub. Serv. Comm'n*, 69 Ark. App. 323, 328, 13 S.W.3d 197, 200 (2000), *citing Ark. Elec. Energy Consumers v. Ark. Pub. Serv. Comm'n,* 35 Ark. App. 47, 813 S.W.2d 263 (1991). *See also Lavaca Tel. Co., Inc. v. Ark. Pub. Serv. Comm'n*, 65 Ark. App. 263, 268, 986 S.W.2d 146, 149 (1999).
[7] *Ark. Elec. Co-op. Corp. v. Ark. Pub. Serv. Comm'n*, 42 Ark. App. 198, 212 (FN4 and 5), 856 S.W.2d 880, 887 (1993) (*citing* 1 Am.Jur.2d *Administrative Law* § 164 (1962) and 73 C.J.S. *Public Administrative Law and Procedure, Rules and Regulations* § 87 (1983)).
[8] *Id.*
[9] CA 87-303, 1988 WL 34541, at *2–3 (Ark. App. Apr. 13, 1988) (citing to 2 Am.Jur.2d *Administrative Law* § 162 at 966), *opinion supplemented on denial of reh'g,* CA 87-303, 1988 WL 54078 (Ark. App. May 25, 1988). *See also Ark. Elec. Energy Consumers v. Ark. Pub. Serv. Comm'n*, 35 Ark. App. 47, 66–67, 813 S.W.2d 263, 274 (1991), and *Ozarks Elec. Co-op. Corp. v. Turner,* 277 Ark. 209, 212, 640 S.W.2d 438, 440 (1982).
[10] *Assn. of Nat. Advertisers, Inc. v. F.T.C.*, 627 F.2d 1151, 1161, 201 U.S. App. D.C. 165, 175 (D.C. Cir. 1979).

As pointed out by DEA[11], the issue of what happens concerning grandfathering after December 31, 2022, is not addressed in Order Nos. 28 and 33 of Docket No. 16-027-R, which were the subject of the appeal to the Court of Appeals. DEA pointed to the case of *Nameloc, Inc. v. Jack, Lyon & Jones,* where the Arkansas Supreme Court stated:

> The rule that an appeal divests the trial court of jurisdiction applies only to matters necessarily or directly involved in the matter under review. It does not stay further proceedings with respect to rights not passed on or affected by the judgment or decree from which the appeal is taken. Matters which are independent of, or collateral or supplemental, are left within the jurisdiction and control of the trial court.[12]

Therefore, even in adjudicatory proceedings, such an appeal does not divest the lower tribunal of all jurisdiction.

The appeal of Order Nos. 28 and 33 in Docket No. 16-027-R did not prevent the Commission from considering and adopting revisions to NMR Rule 2.07.

**2. Whether this net-metering rulemaking should instead occur in Docket No. 16-027-R, including whether there are relevant outstanding issues in that Docket.**

Several Parties contend that the limited rulemaking to amend NMR Rule 2.07 should occur in Docket No. 16-027-R. The Parties argue on the one hand that that Docket contains a relevant record on grandfathering and on the other hand that the record in that Docket cannot be used to support the proposed amendments.

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[11] DEA Reply Brief (Doc. #69).
[12] *Nameloc, Inc. v Jack, Lyon & Jones, P. A.*, 362 Ark. 175, 179 (2005), quoting *Bleidt v. 555, Inc.*, 253 Ark. 348, 350-51, 485 S.W.2d 721, 723 (1972), (also quoted in *Fewell & Holdingsco. v. Pickens*, 346 Ark. 246, 257, 57 S.W.3d 144 (2001); *Vanderpool v. Fidelity & Cas. & Ins. Co.*, 327 Ark. 407, 412, 939 S.W.2d 280 (1997); *Sherman v. State*, 326 Ark. 153, 158, 931 S.W.2d 417 (1996)).

SWEPCO states that "piecemealing" the net-metering issues violates due process concerns and urges the Commission to rely on the "full record" in Docket No. 16-027-R where there are substantive issues pending. SWEPCO Initial Brief (Doc. #49).

AECC states that this Docket duplicates Docket No. 16-027-R, in which the NMRs are "currently being implemented," and should be dismissed until Docket No. 16-027-R is closed. AECC says Order No. 1 creates "inconsistency" with previous orders in Docket No. 16-027-R because the previous orders adopted the statutory cut-off date to qualify for grandfathering and the proposed rule circumvents the intent of the statute. AECC states that the proposed rule inappropriately is based on Order No. 10 which was not precedent setting. AECC Motion to Dismiss (Doc. #38), and AECC Initial Brief/Comments (Doc. #43).

Carroll urges the Commission to "continue its revision" of Rule 2.07 in Docket No. 16-027-R, where the rule originated and was deliberated, stating that "substantive issues" remain "unresolved." Carroll Motion/Brief (Doc. #36).

Staff observes that the Commission is not precluded from opening a separate rulemaking docket. Staff Response to Carroll Motion to Dismiss (Doc. #59).

The Commission notes that a final order was issued (and appealed) and there are no pending issues in Docket No. 16-027-R except revising the rules to comply with the Court's decision in the appeal. Therefore, there is no relation to that docket except the fact that the Commission is considering revisions to the NMRs, and revisions to the NMRs have been done in numerous dockets over the years.[13] There is no requirement, and the Parties

[13] Docket Nos. 02-046-R, 06-105-U, 12-001-R, 12-060-R, and 16-027-R.

cite to none, that the Commission consider changes to one set of rules in one continuing docket.

Continuing, multiple revisions to the Net-Metering Rules in Docket No. 16-027-R would be administratively inefficient. The proposal in the instant Docket is the revision of one rule to address the status of grandfathering once the mandatory grandfathering from Act 464 expires. The purpose of Docket No. 16-027-R was to consider comprehensive revisions to the Net-Metering Rules more than six years ago in response to Act 827 of 2015 (and Act 464 of 2019, which was passed before new rules could be adopted).

Therefore, the Commission finds that this Docket is the proper forum for consideration of the proposed amendments.

**3. Whether Act 464 permits grandfathering beyond December 31, 2022, or whether the proposed rule contravenes AREDA.**

Carroll states that Parties in Docket No. 16-027-R accepted the December 31, 2022 deadline in the rule as the end of grandfathering. Carroll also states that the December 31, 2022 deadline in the statute must be given effect as the clear deadline by which "one may qualify for grandfathering" and that otherwise, the date could have been left out completely. Carroll Initial Brief (Doc. #36.)

AECC states that the proposed rule contradicts the plain language of the statute, which establishes a cut-off date for grandfathering, and has the effect of unlawfully amending and overruling the statute by eliminating the cut-off date. AECC states that the Commission may not allow grandfathering after the end of the year unless the General Assembly expressly allows it, as AREDA only authorized the Commission to do "one thing"

under specific parameters. AECC Motion to Dismiss (Doc. #38), AECC Initial Brief/Comments (Doc. #43).

SWEPCO contends that the proposed rule attempts to illegally extend the 1:1 rate structure beyond the "firm deadline" set in Ark. Code Ann. § 23-18-604. SWEPCO states that nothing in AREDA contemplates extending the grandfathering deadline past December 31, 2022, and that the proposed amendment conflicts with the statute. SWEPCO Initial Brief (Doc. #49).

The Minority Cooperatives state that extending grandfathering past December 31, 2022, contradicts the statute by doing away with that date, saying that the ability to establish appropriate rates, terms, and conditions in Ark. Code Ann. § 23-18-604(b)(1) must yield to the express conditions of Ark. Code Ann. § 23-18-604(b)(10)(A). Minority Cooperatives Initial Brief (Doc. #42).

EAL contends that grandfathering was intended to be temporary and never intended to extend past Phase 2 or 3 of Docket No. 16-027-R. EAL Motion (Doc. #85).

DEA points out that in Act 464, the General Assembly made grandfathering of all net-metering projects (if an SIA was submitted before December 31, 2022) a mandatory requirement by inclusion of "shall," which was a more explicit direction than the "shall establish appropriate rates, terms and conditions for net-metering" found in Ark. Code Ann. § 23-18-604(b)(1). DEA states that pursuant to Ark. Code Ann. § 23-18-604(b)(1), the Commission has discretion to allow grandfathering as an appropriate rate, term, or condition but that Act 464 made grandfathering mandatory until December 31, 2022, for those net-metering projects meeting the Act's requirements. DEA observes that Act 464 does not preclude grandfathering past December 31, 2022, but that after that time it is

reasonable to assume the General Assembly intended to turn the issue back to the Commission to exercise its discretion after the end of mandatory grandfathering. DEA states that if the General Assembly's intent was to end all grandfathering past December 31, 2022, and not just mandatory grandfathering, it could have done so explicitly but chose not to. DEA Initial Brief (Doc. #48).

Staff notes that Act 464 does not limit the Commission's ability to enact additional, reasonable grandfathering rules within its NMRs to promote renewable energy in Arkansas. Staff Response to AECC Motion (Doc. #60).

No one challenged the authority of the Commission to adopt grandfathering in Order No. 10 of Docket No. 16-027-R, and the Court upheld the concept in the appeal of Order Nos. 28 and 33 in Docket No. 16-027-R.[14]

The net-metering rate structure is not changing or being "extended." Grandfathering does not change the rate structure. Whether or not this rule amendment is adopted, the net-metering rate structure currently remains at 1:1 pursuant to NMR Rule 2.04.[15]

The Commission agrees that the "plain language" of the statute must be read. The General Assembly, in adopting Act 464, recognized the authority of the Commission to grandfather the net-metering rate structure for net-metering customers, as it had done previously in Order No. 10, but determined that for a period until December 31, 2022,[16]

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[14] "Act 464 contains first-time provisions that expressly allow the grandfathering of net-metering facilities in the event of a future change in rate structure" and "The AREDA now expressly requires grandfathering for certain net-metering customers." *Petit Jean v. APSC*, 2022 Ark. App. 215, at 7, 15.
[15] AREDA sets the rate structure at 1:1 for customers with a demand rate, but utilities may petition to change the rate structure for residential and non-demand-component customers after the end of this year.
[16] When the SIA was signed and submitted by December 31, 2022.

grandfathering should be mandatory for all net-metering customers instead of discretionary, as the Commission had adopted in Order No. 10 for large customers. Several Parties incorrectly label the December 31, 2022 date in AREDA as the date the General Assembly set after which customers could no longer qualify for any grandfathering, when in fact that date is the end of mandatory grandfathering for all customers. While the General Assembly plainly mandated grandfathering until that date, it did not specifically address what would happen after that date. The statute did not remove the Commission's discretionary authority to grandfather after December 31, 2022, nor does it prohibit the Commission from exercising that authority. The statute merely mandated grandfathering through that date.

Setting a policy for grandfathering for customers who submit a signed SIA after December 31, 2022, does not in any way disregard the date set in AREDA. Arkansas Code Annotated § 23-18-604(b)(10)(A) dictates what happens until December 31, 2022. The proposed rule covers what happens after that date. As previously discussed, the rule as a legislative act is forward looking and has no effect on, and does not conflict with, the dictates of Ark. Code Ann. § 23-18-604(b)(10)(A).

As attested by DEA, not knowing whether a facility with a SIA after December 31, 2022, is eligible for grandfathering inhibits investment because of the uncertainties of the financial aspects of the facility and therefore does not promote net metering. The purpose of this modification to the rule is to provide clarity as to the availability of grandfathering after December 31, 2022.

4. **Whether the Commission must make a finding, before adopting revisions to Rule 2.07, that substantial evidence supports the rule, that the rule is in the public interest, and that the rule does not result in an**

**unreasonable allocation of costs to other utility customers (including whether this Docket should be held in abeyance pending a final decision on the issues of cost-shifting in Docket No. 22-061-U).**

The Commission agrees that its findings should be supported by substantial evidence and that the rule adopted should be in the public interest. The Commission's findings on these fact issues are contained elsewhere in this Order.

The remaining question is whether the Commission is required, before adopting revisions to Rule 2.07, to make a finding that adoption of the grandfathering rule does not result in an unreasonable allocation of costs to other utility customers.

Several Parties contend that, to adopt proposed Rule 2.07, the Commission must make a finding that the proposed rule does not result in an unreasonable allocation of costs to other utility customers, citing Ark. Code Ann. § 23-18-604(b)(2)(B). SWEPCO Initial Brief (Doc. #49).

DEA states that the provisions of AREDA cited to support this only apply to net-metering customers who take service under a rate that does not include a demand component and that the four actions listed in the subsection have nothing to do with grandfathering but with rate structures. DEA Reply Brief (Doc. #69).

Subsections (b)(1) and (b)(2) of Arkansas Code Annotated § 23-18-604[17] state:

(b) Following notice and opportunity for public comment, a commission:

(1) Shall establish appropriate rates, terms, and conditions for net metering;

(2) For net-metering customers who receive service under a rate that does not include a demand component, may:

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[17] Subsection (b) also includes sections 3-10 which address other specific components of net-metering.

(A) Require an electric utility to credit the net-metering customer with any accumulated net excess generation as measured in kilowatt hours or kilowatt hours multiplied by the applicable rate in the next applicable billing period and base the bill of the net-metering customer on the net amount of electricity as measured in kilowatt hours or kilowatt hours multiplied by the applicable rate that the net-metering customer has received from or fed back to the electric utility during the billing period;

(B) Take the following actions if those actions are in the public interest and doing so will not result in an unreasonable allocation of or increase in costs to other utility customers:

(i) Separately meter the electric energy, measured in kilowatt hours, supplied by the electric utility to the net-metering customer and the electric energy, measured in kilowatt hours, that is generated by the net-metering customer's net-metering facility that is fed back to the electric utility at any time during the applicable billing period;

(ii) Apply the commission-approved retail rate to all kilowatt hours that are supplied by the electric utility to a net-metering customer by the electric utility during the applicable period determined by a commission;

(iii) Apply the avoided cost of the electric utility plus any additional sum determined under subdivision (b)(2)(B)(iv) of this section to all kilowatt hours supplied to the electric utility by a net-metering customer, during the period determined by a commission, which shall be credited to the total bill of the net-metering customer in a dollar value; and

(iv) The additional sum added to the avoided cost of the electric utility may be applied after the demonstration of quantifiable benefits by the net-metering customer and shall not exceed forty percent (40%) of the avoided cost of the electric utility;

(C) Authorize an electric utility to assess a net-metering customer that is being charged a rate that does not include a demand component a per-kilowatt-hour fee or charge to recover the quantifiable direct demand-related distribution cost of the electric utility for providing electricity to the net-metering customer that is not:

(i) Avoided because of the generation of electricity by the net-metering facility; and

(ii) Offset by quantifiable benefits; or

(D) Take other actions that are in the public interest and do not result in an unreasonable allocation of costs to other utility customers[.]

The Commission notes that subsection (b)(1) is of broad applicability and generally authorizes the Commission to establish "appropriate rates, terms, and conditions for net metering," while the provisions of subsections (b)(2) through (10) cover specific rates, terms, and conditions. Subsection (b)(2) by its terms applies only to "net-metering customers who receive service under a rate that does not include a demand component" and specifically applies to the various rate structures that may be adopted for those same customers.

In the appeal of Order Nos. 28 and 33 in Docket No. 16-027-R, the Court of Appeals recognized that subsection (b)(2) specifically deals with possible rate structures for non-demand customers:

> For net-metering customers with a demand component, the Commission "shall" require 1:1 compensation. Ark. Code Ann. § 23-18-604(b)(6). For net-metering customers without a demand component, the Commission has the discretion to (1) continue with 1:1 compensation pursuant to Ark. Code Ann. § 23-18-604(b)(2)(A); (2) adopt two-channel billing pursuant to Ark. Code Ann. § 23-18-604(b)(2)(B), authorizing electric utilities to impose a grid charge pursuant to Ark. Code Ann. § 23-18-604(b)(2)(C); or (3) take other appropriate action pursuant to Ark. Code Ann. § 23-18-604(b)(2)(D). **Before taking any of these alternatives, however, the Commission must first determine that its chosen action is "in the public interest" and "will not result in an unreasonable allocation of or increase in costs to other utility customers."** Ark. Code Ann. § 23-18-604(b)(2)(B).
>
> Act 464 also added other provisions to this issue concerning the appropriate rates, terms, and conditions applicable to net-metering facilities. The AREDA now expressly requires grandfathering for certain net-metering customers, providing, in relevant part, that the Commission
>
> > shall allow the net-metering facility of a net-metering customer who has submitted a standard interconnection agreement, as referred to in the rules of the Arkansas Public Service Commission, to the electric utility after July 24, 2019, but before December 31, 2022, *to remain under the rate structure* in effect when the net-metering contract was signed, for a

> period not to exceed twenty (20) years, subject to approval by a commission.

Ark. Code Ann. § 23-18-604(b)(10)(A) (Supp. 2021).[18]

Therefore, AREDA does not require the Commission to find, before adoption, that the proposed grandfathering rule does not result in an unreasonable allocation of costs to other utility customers. As a result, there is no reason to hold this Docket in abeyance pending a final decision on the issues of cost-shifting in Docket No. 22-061-U.

**5. Whether the Parties' due process rights were violated by the schedule.**

The Parties have alleged that due process rights were violated by extending the 1:1 net-metering rate beyond 2040 prior to a finding of fact that no unreasonable cost shift is occurring (SWEPCO Initial Brief (Doc. #49)) and by the "unduly and unnecessary shortened procedural schedule" and the initiation of Docket No. 22-061-U to examine cost-shifting, which will not conclude until after this Docket's schedule (AECC Reply Brief (Doc. #71)).

As discussed above, AREDA does not require the Commission to find that no unreasonable cost shift is occurring to adopt this revision to Rule 2.07. SWEPCO's allegation that the "1:1 net-metering rate" is being extended beyond 2040 is factually inaccurate. First, Rule 2.07 does not set the net-metering rate structure – that is done by Rule 2.04. Second, the adopted rule ends grandfathering after May 31, 2040, because the rule states that the twenty year term (or any lesser term for large facilities) starts on June

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[18] *Petit Jean v. APSC,* 2022 Ark. App. 215, at 15-16 (bold emphasis added).

1, 2020. However, to clear up any confusion, the Commission has slightly revised Rule 2.07 to reference the end date for the grandfathering period.

AECC's complaint about the "unduly and unnecessary shortened procedural schedule" is unsubstantiated. The scope of this Docket is limited to one issue and rule (2.07 and its mention in the form tariff), despite the Parties' attempts to expand its scope. As evidenced by the pleadings, the parties have filed robust comments, briefs, and numerous motions, and a hearing was held. AECC and SWEPCO do not identify, and the Commission does not find, any due process rights which were violated by this proceeding.

**6. Whether there are "uncertainties" sufficient to justify the rulemaking.**

Carroll asserts that there is no uncertainty to justify an amended rule because Order No. 28 in Docket No. 16-027-R ended the period of uncertainty. Carroll urges the rule to stand without change. Carroll Motion to Dismiss (Doc. #36), Carroll Initial Comments at 3 (Doc. #37). Carroll notes that the only change since the adoption of Rule 2.07 is that the deadline is now much nearer. Carroll Reply to Response (Doc. #65). Carroll states that Order No. 10 in Docket No. 16-027-R does not contemplate grandfathering after a new rate structure is adopted, and that was done by Order No. 28 in Docket No. 16-027-R. Carroll Initial Comments (Doc. #37).

DEA states that developers of net-metering facilities must have rate structure certainty before they will invest in net-metering projects and that the uncertainty, because of the looming end to the automatic grandfathering, is hurting solar development in Arkansas. DEA Initial Brief (Doc. #48). Extending grandfathering means that customers can make a wise financial decision concerning an investment in a net-metering facility. DEA Reply Brief (Doc. #69).

Staff states that the expiration of automatic grandfathering creates uncertainty that does not promote the use of renewable energy in the state, which contravenes the clear purpose of AREDA. Staff Initial Brief (Doc. #53).

The widely varying viewpoints and arguments in the Docket have confirmed the uncertainties which exist that the Commission discussed in Order No. 1. Although Carroll contends that Order No. 28 adopted a new rate structure, that was nullified by the decision of the Court of Appeals in *Petit Jean v. APSC*, which found that the imposition of a grid charge, even if set at zero, was without substantial evidence showing unreasonable cost shifting in the record. As discussed herein, by its express terms, AREDA imposed mandatory grandfathering until December 31, 2022, but did not address grandfathering after that date, neither mandating nor prohibiting grandfathering. As attested by DEA, not knowing whether a facility with an SIA after that date is eligible for grandfathering inhibits investment because of the uncertainties of the financial aspects of the facility. AREDA's purpose is to promote net metering and removing uncertainties about the status of grandfathering after December 31, 2022, will align with that purpose. The Commission recognized those uncertainties in Order No. 1, and based on the discussions herein, finds that there are sufficient uncertainties in the state of grandfathering after December 31, 2022, to justify this rulemaking.

**7. Whether the Commission may base the timing of grandfathering on any document other than the signed Standard Interconnection Agreement.**

Because the Commission is not basing the timing of grandfathering on any document other than the signed SIA, this issue is moot.

**8. Whether AAEA and Scenic Hill are "persons" who qualify to intervene in this Docket.**

The Commission denies the Minority Cooperatives Application for Rehearing for the same reasons stated in Order No. 4.

## IV. DISCUSSION OF AND RULINGS ON FACT ISSUES

In Order No. 10 of Docket No. 16-027-R, issued on March 8, 2017, the Commission discussed the need for grandfathering, noting that it is premised on the assumption that the Commission will establish a new rate structure, resulting in a desire by existing customers to remain on the current 1:1 net-metering rate structure. However, the Commission stated that it would not pre-judge any positions on a new net-metering rate structure and made no findings in Order No. 10 on whether a new rate structure should be adopted or, if it were, the details of that new rate structure. Accordingly, the Commission found that Net-Metering Customers who have submitted a SIA to the utility before the date of an order, if any, which adopts a new rate structure should be grandfathered under the current rate structure for a period of twenty years, with the twenty years measured from the date of any such order adopting a new rate structure.[19]

Order No. 10 found that the use of grandfathering allows for phase-in of any new rate structure and appropriately transitions customers to any new net-metering rate structure that might be adopted. The Commission found that this ruling provides a fair, stable, and predictable cost environment, which creates certainty for existing Net-

[19] Docket No. 16-027-R, Order No. 10 at 142 (Doc. #212). The Commission notes that prior to the decision in *Petit Jean v. APSC*, rejecting the adoption of a grid charge rate structure for lack of substantial evidence of cost shifting, the date used for calculating the beginning of the grandfathering period was the date of issuance of Order No. 28 – June 1, 2020 -- and numerous net-metering orders of the Commission for facilities exceeding the 1 MW capacity threshold of Act 464 since that date have adopted that date as the starting point for the not-to-exceed twenty-year grandfathering period.

Metering Customers and for the market until new tariffs are established, and clarity and simplicity for all parties thereafter. The Commission also found that the ruling appropriately balances the interests of existing Net-Metering Customers, potential Net-Metering Customers, and other utility customers, along with the interests of the utility, and noted that the general intent of AREDA is to promote the development of renewable energy net metering and that a long period of uncertainty would chill such development.[20]

As the Commission noted in Order No. 1 of this Docket, Order No. 10 found that a period of advance notice to Net-Metering Customers commensurate with the useful life of the assets in question (but also balancing questions of administrative efficiency and fairness to all ratepayers) is essential to implementing AREDA, which has the fundamental purpose of incentivizing customers' investment in net-metering assets. The Commission noted that if it should determine that a new rate structure is necessary in future years, a grandfathering period beginning with the date of the order adopting a new rate structure and ending with a "drop-dead date" not to exceed the twenty-year periods beginning on June 1, 2020 and ending no later than May 31, 2040, ensures that each Net-Metering Customer will eventually transition to any new rate structure adopted by the Commission. The Commission found that for customers who submit SIAs prior to the adoption of any new rate structure, grandfathering is an appropriate term or condition that furthers the purposes of AREDA. The Commission stated that determining the time to apply new rate structures to Net-Metering Customers is an appropriate exercise of the Commission's

[20] *Id.* at 143.

discretion as it balances AREDA's directives with concerns raised for existing Net-Metering Customers.[21]

Order No. 10 established as the most reasonable date to use for beginning the twenty-year grandfathering period the date of any order which adopts a new rate structure and found it to be administratively efficient to use one date for all utilities rather than the date that implementing tariffs are approved, which could involve multiple dates resulting in non-uniformity among utilities.[22]

In Order No. 28 of Docket No. 16-027-R, issued on June 1, 2020, the Commission observed in its interpretation of the impacts of Act 464 on grandfathering that the Act codified and expanded the grandfathering provision adopted in Order No. 10. Following the issuance of Order No. 28, the Commission has consistently employed a not-to-exceed twenty-year grandfathering period in all net-metering orders for facilities for those Net-Metering Customers who receive service under a rate that includes a demand component exceeding 1 MW that begins on June 1, 2020, and expires no later than May 31, 2040.

Act 464 exempted all Net-Metering Facilities at or below 1 MW of generating capacity (regardless of whether the Net-Metering Customer receives service under a demand-component rate) from any requirement to seek Commission approval to install Net-Metering Facilities, but Ark. Code Ann. § 23-18-604(b)(2)(A) through (D) authorized the Commission to adopt a new rate structure solely for those Net-Metering Customers who receive service under a rate that does not include a demand component. Thus, under

[21] *Id.* at 143-44.
[22] *Id.* at 146.

these provisions, only residential customers and non-residential customers (generally small general service or commercial customers) "who receive service under a rate without a demand component" face the express possibility of a rate structure change from the 1:1 default billing credit approach now in effect pursuant to Ark. Code Ann. § 23-18-604(b)(6). Thus, all customers that receive service under a rate with a demand component are required to remain under the 1:1 billing credit rate structure now mandated by Ark. Code Ann. § 23-18-604(b)(6). While that section states that "[e]xcept as provided in subdivision (b)(9) [of § 23-18-604]," the Commission notes that nothing in subdivision (b)(9) addresses or changes the effectiveness of the requirement for a 1:1 billing credit rate structure contained in (b)(6). The language of (b)(9) only provides for two different tests for the Commission to use to determine whether to exempt the Net-Metering Customer from exceeding the 1 MW threshold: (1) the test for Net-Metering Facilities with less than 5 MW of generating capacity, under subdivision (b)(9)(A), and (2) the test for Net-Metering Facilities with greater than 5 MW and not more than 20 MW of generating capacity, subdivision (b)(9)(B). If a Net-Metering Facility proposal fails either of the tests, the Commission will deny the request for exemption from the 1 MW threshold and there will be no need for grandfathering to be addressed since the customer will be found to be ineligible to net meter.

In short, all Net-Metering Customers receiving service under a rate with a demand component (those below 1 MW and up to 20 MW) are required by AREDA as amended by Act 464 to remain under the 1:1 net-metering credit rate structure. The Commission finds that this is a sensible determination by the General Assembly, since the intent of allowing the change of rate structure for residential and non-demand component customers at or

below 1 MW of capacity under Act 464 is to address possible cost shifting by those Net-Metering Customers to non-Net-Metering Customers if utilities are able to demonstrate "quantifiable direct demand-related distribution cost… that is not… [a]voided as a result of the generation of electricity by the Net-Metering Facility and…[o]ffset by quantifiable benefits," as provided by Ark. Code Ann. § 23-18-604(b)(2)(C) (emphasis added), which provision is inapplicable to Net-Metering Customers of any size served under a rate with a demand component.

With the approaching December 31, 2022 deadline ending mandatory grandfathering of the 1:1 net-metering credit rate structure for all Net-Metering Customers, by Order No. 1 in this Docket the Commission proposed to revert to or continue the practice adopted in Order No. 10, which established an automatic twenty-year grandfathering period for all Net-Metering Facilities for residential customers and for non-residential customers with facilities not exceeding the capacity threshold of 1 MW, who are not required to obtain Commission approval for their Net-Metering Facilities.[23] The Commission finds that pairing "automatic" with grandfathering for this group of customers is just and reasonable, given that the General Assembly determined that Net-Metering Customers with these characteristics must be interconnected by the utilities without involving any approval or other direct action by the Commission.[24] Otherwise, the Commission would be placed in the position of delaying hundreds if not thousands of

[23] But with a term ending May 31, 2040.
[24] The Commission notes that the beginning date of June 1, 2020, for the "not-to-exceed" twenty-year period of grandfathering for non-demand component customers was established by Order No. 28 in Docket No. 16-027-R.

interconnections while it determined case-by-case whether a Net-Metering Facility that does not require Commission approval is eligible for rate structure grandfathering. This was the dilemma that was faced by the Commission and solved by Order No. 10, and the reasoning supporting it then is applicable now.

Given that customers who receive service under a rate with a demand component that are otherwise eligible to exceed the 1 MW capacity threshold are currently required to be served under the 1:1 default rate structure, one question to be determined is whether there are avenues for a change in the rate structure applicable to these larger customers that seek to net meter. The Commission believes the answer is yes and acknowledges that its original approach of designing a grid charge rate structure for these large customers for implementation of Order Nos. 28 and 33 of Docket No. 16-027-R was rejected by the Court of Appeals in *Petit Jean v. APSC*. However, the Court's premise for this rejection was that there was no substantial evidence of unreasonable cost shifting in the record to justify a grid charge, even if set at zero. The Commission finds that if sufficient evidence of unreasonable cost shifting can be demonstrated by utilities, on a utility-by-utility basis, as an outcome of the current investigation in Docket No. 22-061-U, it may adopt a grid charge or other remedial rate structure for individual utilities going forward for use in billing Net-Metering Customers served under a rate with a demand component in the 5 to 20 MW range. As provided by Ark. Code Ann. § 23-18-604(b)(10), after December 31, 2022, the same is true for net-metering customers (receiving service with or without a demand component) with Net-Metering Facilities with capacity at or below 1 MW, as provided by Ark. Code Ann. § 23-18-604(b)(2)(B). Unless and until such evidence of cost shifting is presented in utility-specific dockets in the manner prescribed by the Commission in Order

No. 28 and survives any possible challenges by other Parties, the Commission will continue to exercise the discretion it employed in adopting grandfathering in Order No. 10.

A second avenue for a change in the rate structure for demand-component customers is for the General Assembly to amend Act 464 to remove or modify the language of Ark. Code Ann. § 23-18-604(b)(6) that provides that the utility "[f]or net-metering customers who receive service under a rate that includes a demand component, shall require an electric utility to credit the net-metering customer with any accumulated net excess generation as measured in kilowatt hours or kilowatt hours multiplied by the applicable rate in the next applicable billing period and base the bill of the net-metering customer on the net amount of electricity that the net-metering customer has received from or fed back to the electric utility during the billing period." (emphasis added). This quoted language is the essence of the 1:1 net metering credit rate structure that has been in place in Arkansas since the enactment of AREDA in 2001. In all of the large demand-component customer dockets in which the Commission has approved requests to exceed the 1 MW threshold since the effective date of Act 464, the Commission has granted grandfathering of the existing 1:1 net-metering credit rate structure status to the Net-Metering Customer applicants, for a period not to exceed the twenty-year period that began on June 1, 2020 and ends on May 31, 2040. Should a new rate structure be established by the Commission for these large customers, the not-to-exceed twenty-year period grandfathering will end no later than May 31, 2040.

A third avenue for a change in the rate structure for demand-component customers seeking net-metering status (and for non-demand customers) is for the utility to seek general rate structure or rate design changes, such as revisions of its energy, demand, and

customer charges in a general rate case – an option that is always available to the utility if it believes that unreasonable cost allocations or shifts are occurring within its customer base between Net-Metering Customers and non-Net-Metering Customers.[25] So far, none of the utilities have opted to pursue this option.

In summary, the Commission finds that the language of Ark. Code Ann. § 23-18-604(b)(10) is easily reconcilable with the Commission's long-standing interpretation of its discretionary authority as described in Order No. 10:

- For the period before the effective date of Act 464 (July 24, 2019) the Commission exercised its discretion to implement rate structure grandfathering on a case-by-case basis for Net-Metering Customers with capacity in excess of 1 MW that are served under a rate with a demand component, with all such customers having been granted a grandfathering period not to exceed twenty years from June 1, 2020 and ending no later than May 31, 2040; and further, the Commission exercised its discretion to implement automatic rate structure grandfathering for not to exceed twenty years beginning on June 1, 2020 and ending no later than May 31, 2040, for all customers with capacity up to 1 MW (served under a rate with or without a demand component), all of which are exempt by law from seeking Commission approval to net meter.
- For the period between the effective date of Act 464 and December 31, 2022, pursuant to the requirements of Ark. Code Ann. § 23-18-604(b)(10), rate structure

[25] The Commission believes that this option would apply to Net-Metering Customers of all sizes up to 20 MW, including those from 1 MW to 5 MW.

grandfathering is mandatory for all Net-Metering Customers, and the Commission has to date exercised its discretion to set the not-to-exceed twenty-years grandfathering period as beginning on June 1, 2020 and ending no later than May 31, 2040, for all such customers.

- For the period after December 31, 2022, and unless and until the Commission adopts utility-specific rate structure changes, the Commission will continue to exercise its discretion to grandfather as it did before the effective date of Act 464, as described above, subject to the changes and clarifications described in this Order and adopted in Rule 2.07.

In short, as provided in revised NMR Rule 2.07, mandatory grandfathering of all Net-Metering Customers' existing 1:1 net-metering credit rate structure will end on December 31, 2022, but automatic grandfathering will continue for all Net-Metering Customers at or below 1 MW of capacity for a period ending on May 31, 2040, and discretionary case-by-case grandfathering will resume for Net-Metering Customers served under a rate with a demand component, having capacity greater than 1 MW and not more than 20 MW for a period not-to-exceed twenty years ending no later than May 31, 2040. The Commission notes that the automatic grandfathering period for all Net-Metering Customers under the current 1:1 rate structure is shrinking as months go by, given that its starting date for the not-to-exceed twenty-year period remains at June 1, 2020, and ends no later than May 31, 2040. The Commission retains the discretion to adopt a shorter grandfathering period for larger Net-Metering Customers served under a rate with a demand component exceeding 1 MW up to 20 MW, should circumstances indicate a change in the period is warranted.

For a variety of reasons discussed by the Parties, the Commission declines at this time to adopt DEA's proposal to allow the use of a document other than the SIA, such as the PISRR, to set the start date for discretionary grandfathering. The Commission finds that a PISRR is a non-binding document seeking utility review of the feasibility of interconnection for a potential net-metering facility and notes that because of the current lack of clear visibility of the hosting capacity available on distribution circuits and feeders, developers have routinely filed numerous PISRRs for projects that often are not pursued. The Commission acknowledges EAL's contention that it would be impractical if not impossible for the utility and its engineering teams to track thousands of PISRRs from planning to construction to completion for potential projects.[26] Likewise, the Commission finds that owing to the growth in net-metering requests, the costs of managing the high volume of PISRRs, tests of net-metering facilities, engineering review (if not otherwise covered by refundable study deposits), complex billing and overall management of net-metering inquiries, are not insignificant. The Commission also declines to adopt DEA's suggestion of beginning grandfathering as of the date when a net-metering customer signs a "binding contract with a solar developer," given the vagaries of determining what would legally constitute a "binding contract" and the fact that the trigger date could be changed by the Net-Metering Customer's re-signing or amending its contract at the end of the grandfathering period, thus potentially extending the grandfathering period beyond twenty years. Accordingly, the Commission reaffirms its original determination that the beginning date for determining the not-to-exceed twenty-year grandfathering period

[26] EAL's Reply Comments at 20 (Doc. # 77).

should remain as June 1, 2020, the date of the filing of Order No. 28 in Docket No. 16-027-R.

The Commission does not see a need to further clarify the purported lack of harmonization between Order No. 10 in Docket No. 16-027-U and Order No. 1 in this Docket. Carroll's Request (Doc. #37). The Commission finds that grandfathering keeps the net-metering rate structure (1:1, 1:1 with a grid charge, avoided cost, etc.), not the underlying (customer classification) rate structure and thus no further clarification is necessary since 1:1 is the current net metering rate structure.

The Commission finds the reasoning advanced by Staff witness Risner persuasive regarding the need for retention of the provisions of original Rule 2.07.B. 2, 3, and 4, which address the eligibility for grandfathering of an upgrade to an existing Net-Metering Facility or an additional Net-Metering Facility that causes the total capacity of the Net-Metering Customer to exceed 1,000 kW. The Commission reaffirms that the grandfathering will be based on the rate structure approved by the Commission in effect at the time that the SIA for the upgrade or the additional Net-Metering Facility is submitted to the Electric Utility. Therefore, the Commission reinstates the provisions of NMR Rule 2.07 B. 2, 3, and 4 that are contained in the original Rule to clarify the intent of the rule.

With regard to Entegrity's proposal to cease using the term "grandfathering" and substitute another term, the Commission has considered the case for making such a change and the alternatives proposed by the Parties and discussed during the hearing. Going forward, and starting with this Order, the Commission finds that the proposal to make a change is not controversial, although the choice of a substitute does not easily come to mind. However, the Commission finds that a change is warranted and, for now, and

unless changed by subsequent order or law, will employ the term "rate structure lock" and its variants as the preferred term. The Commission will incorporate it into the findings and rulings in this Order and the NMRs, including in the revised Rule 2.07 and Sample Tariff.

## V. RULING

Accordingly, the Commission finds that NMR Rule 2.07 and Appendix B as modified herein and shown in blackline and clean versions (Attachments 1 and 2) are supported by substantial evidence and are in the public interest. The Commission declines to adopt the change to Appendix B advanced by DEA.

The purpose of this modification to the rule is to provide clarity as to the potential for grandfathering after December 31, 2022. Despite some of the Parties suggesting otherwise, it is clear based on testimony submitted by the various Parties in this Docket that there is a lack of certainty regarding the availability of grandfathering after December 31, 2022. The Commission acknowledges that proposing this clarification and subsequently seeking the approval of the rule from the General Assembly so close to the 2023 Regular Session of the General Assembly creates a timing problem.[27] Nonetheless, the Commission believes it is important to address this uncertainty, as the General Assembly will not have an opportunity to address this issue or clarify its intent in regard to the future of grandfathering until after the period of mandatory grandfathering ends. The Commission believes that its proposed clarification is not only permissible within the

[27] Given the date of this Order, the Commission acknowledges that the 2023 Regular Session will likely already be in progress before the General Assembly gets an opportunity to review this proposed clarification to the NMRs.

plain language of the statute but also aligns with the intent of the General Assembly in passing Act 464. Fortunately for the Commission and the Parties, the General Assembly will have an opportunity to address this issue both in its review of this clarification to the NMRs and during the upcoming Regular Session.

IT IS, THEREFORE, ORDERED:

1. The Minority Cooperatives Motion to Dismiss for Lack of Jurisdiction Over the Subject Matter (Doc. #34) is denied.

2. Carroll Motion to Dismiss/Motion to Transfer and Consolidate (Doc. #36) is denied.

3. Carroll Motion for Clarification (Doc. #37) is denied.

4. AECC Motion to Dismiss (Doc. #38) is denied.

5. The Minority Cooperatives Application for Rehearing of Order No. 4 (Doc. #78) is denied.

6. EAL Motion to Temporarily Hold Proceeding in Abeyance (Doc. #85) is denied.

7. Rule 2.07 and Appendix A of the Net-Metering Rules as revised herein are reasonable, appropriate, and in the public interest and are hereby adopted to be effective upon review and approval by the Governor and the Arkansas Legislative Council. A marked-up version showing these modifications is appended to this Order as Attachment 1 and a clean copy is appended at Attachment 2.

8. The Secretary of the Commission is hereby directed to send a copy of this Order together with the revised rules, hereby approved and adopted, to all jurisdictional Providers.

9. The Secretary of the Commission is directed to prepare and make all filings as required by law and Rule 2.04 of the Commission's RPPs with the Governor, the Arkansas Legislative Council, Arkansas Secretary of State, and the Arkansas State Library.

10. Staff is hereby directed to file in this Docket a letter or other documentation reflecting the dates of approval by the Governor and the Arkansas General Assembly, and the Secretary of the Commission shall note that the date of the latter of these two approvals is the effective date of the rules.

BY ORDER OF THE COMMISSION.

This 27th day of December, 2022.

Katie Anderson, Chair

Kimberly A. O'Guinn, Commissioner

Justin Tate, Commissioner

Karen Shook
Jennifer R. Ivory, Secretary of the Commission

I hereby certify that this order, issued by the Arkansas Public Service Commission, has been served on all parties of record on this date by the following method:

__ U.S. mail with postage prepaid using the mailing addresss of each party as indicated in the official docket file, or

X Electronic mail using the email address of each party as indicated in the official docket file

# ATTACHMENT 1

## Blacklined Versions:

### Rule 2.07 Rate Structure Lock for~~Grandfathering~~ Net-Metering Rate Structures

A. Net-Metering Facilities for residential use or for other than residential use that does not exceed one thousand (1,000) kW:

1. The Net-Metering Facility of a Net-Metering Customer ~~who submits a Standard Interconnection Agreement to the Electric Utility before December 31, 2022,~~ shall remain under the Net-Metering rate structure in effect when the Standard Interconnection Agreement was submitted~~signed~~ by the Net-Metering Customer to the Electric Utility, for a period ~~of twenty (20) years beginning June 1, 2020~~ending May 31, 2040.

2. A Net-Metering Facility may be upgraded and retain rate structure lock~~grandfathered~~ status so long as the Net-Metering Facility still meets the statutory definition under Ark. Code Ann. § 23-18-603(8).

B. Net-Metering Facilities for which approval is required to exceed one thousand (1,000) kW:

1. If a Net-Metering Customer ~~(a)~~ requests approval to exceed the statutory limit for a Net-Metering Facility pursuant to Ark. Code Ann. § 23-18-604(b)(9), ~~and (b) has submitted a Standard Interconnection Agreement to the Electric Utility before December 31, 2022,~~ the Net-Metering Customer may request that the Net-Metering Facility remain under the Net-Metering rate structure in effect when the Standard Interconnection Agreement was submitted~~signed~~ by the Net-Metering Customer to the Electric Utility. The request will be considered on a case-by-case basis for a rate structure lock~~grandfathering~~ period ~~up to twenty (20) years~~ending no later than May 31, 2040. The request for rate structure lock status~~to be grandfathered~~ shall be made when the request to exceed the statutory limit is made.

2. If a Net-Metering Customer proposes to upgrade a Net-Metering Facility under 1,000 kW and add additional generating capacity by either (a) an upgrade to the existing Net-Metering Facility, or (b) an additional Net-Metering Facility, and such upgrade would cause the total generating capacity to exceed 1,000 kW, then the original capacity of the Net-Metering Facility shall retain any rate structure lock~~grandfathered~~ status and the additional capacity shall be subject to the Net-Metering rate structure in effect when the Standard Interconnection Agreement for the additional capacity is signed by the Net-Metering Customer.

3. If a Net-Metering Customer proposes to upgrade a Net-Metering Facility for which approval was previously granted by the Commission pursuant to Ark. Code Ann. § 23-18-604(b)(9) and add additional generating capacity by either (a) an upgrade to the existing Net-Metering Facility, or (b) an additional Net-Metering Facility, then the original capacity of the Net-Metering Facility shall retain any rate structure lock~~grandfathered~~ status and the additional capacity shall be subject to the Net-Metering rate structure in effect when the Standard Interconnection Agreement for the additional capacity is signed by the Net-Metering Customer.

4. The cost of any additional metering equipment required under subsections B.2. or B.3. above shall be borne by the Net-Metering Customer.

C. The Electric Utility need not have approved and signed the Standard Interconnection Agreement for the date of eligibility for rate structure lock~~grandfathering~~ to be established.

D. The rate structure lock~~grandfather~~ period shall attach to the Net-Metering Facility on the premises rather than the Net-Metering Customer.

E. If the Net-Metering Customer sells a premises with a Net-Metering Facility, the Standard Interconnection Agreement may be transferred to the new Net-Metering Customer and the rate structure lock~~grandfather~~ period shall continue for the remainder of the ~~twenty (20) year~~ term, assuming no other triggering event occurs.

F. A Net-Metering Customer may not transfer a Net-Metering Facility to a new premises or location and continue to operate under the rate structure lock~~grandfather~~ period.

G. Maintenance and repair of existing Net-Metering Facilities shall not be a triggering event which ends the rate structure lock~~grandfather~~ period.

H. A Net-Metering Facility having rate structure lock~~grandfathered~~ under this Rule remains subject to any other change or modification in rates, terms, or conditions.

## APPENDIX B OF NET-METERING RULES (SAMPLE TARIFF)

X.3.12. Rate structure lock~~Grandfathering~~ shall be governed by Rule 2.07 of the Net-Metering Rules~~Ark. Code Ann. 23-18-604(b)(10)~~.

## ATTACHMENT 2

## Clean Versions:

## Rule 2.07 Rate Structure Lock for Net-Metering Rate Structures

A. Net-Metering Facilities for residential use or for other than residential use that does not exceed one thousand (1,000) kW:

1. The Net-Metering Facility of a Net-Metering Customer shall remain under the Net-Metering rate structure in effect when the Standard Interconnection Agreement was submitted by the Net-Metering Customer to the Electric Utility, for a period ending May 31, 2040.

2. A Net-Metering Facility may be upgraded and retain rate structure lock status so long as the Net-Metering Facility still meets the statutory definition under Ark. Code Ann. § 23-18-603(8).

B. Net-Metering Facilities for which approval is required to exceed one thousand (1,000) kW:

1. If a Net-Metering Customer requests approval to exceed the statutory limit for a Net-Metering Facility pursuant to Ark. Code Ann. § 23-18-604(b)(9), the Net-Metering Customer may request that the Net-Metering Facility remain under the Net-Metering rate structure in effect when the Standard Interconnection Agreement was submitted by the Net-Metering Customer to the Electric Utility. The request will be considered on a case-by-case basis for a rate structure lock period ending no later than May 31, 2040. The request for rate structure lock status shall be made when the request to exceed the statutory limit is made.

2. If a Net-Metering Customer proposes to upgrade a Net-Metering Facility under 1,000 kW and add additional generating capacity by either (a) an upgrade to the existing Net-Metering Facility, or (b) an additional Net-Metering Facility, and such upgrade would cause the total generating capacity to exceed 1,000 kW, then the original capacity of the Net-Metering Facility shall retain any grandfathered status and the additional capacity shall be subject to the Net-Metering rate structure in effect when the Standard Interconnection Agreement for the additional capacity is signed by the Net-Metering Customer.

3. If a Net-Metering Customer proposes to upgrade a Net-Metering Facility for which approval was previously granted by the Commission pursuant to Ark. Code Ann. § 23-18-604(b)(9) and add additional generating capacity by either (a) an upgrade to the existing Net-Metering Facility, or (b) an additional Net-Metering Facility, then the original

capacity of the Net-Metering Facility shall retain any grandfathered status and the additional capacity shall be subject to the Net-Metering rate structure in effect when the Standard Interconnection Agreement for the additional capacity is signed by the Net-Metering Customer.

4. The cost of any additional metering equipment required under subsections B.2. or B.3. above shall be borne by the Net-Metering Customer.

C. The Electric Utility need not have approved and signed the Standard Interconnection Agreement for the date of eligibility for rate structure lock to be established.

D. The rate structure lock period shall attach to the Net-Metering Facility on the premises rather than the Net-Metering Customer.

E. If the Net-Metering Customer sells a premises with a Net-Metering Facility, the Standard Interconnection Agreement may be transferred to the new Net-Metering Customer and the rate structure lock period shall continue for the remainder of the term, assuming no other triggering event occurs.

F. A Net-Metering Customer may not transfer a Net-Metering Facility to a new premises or location and continue to operate under the rate structure lock period.

G. Maintenance and repair of existing Net-Metering Facilities shall not be a triggering event which ends the rate structure lock period.

H. A Net-Metering Facility having rate structure lock under this Rule remains subject to any other change or modification in rates, terms, or conditions.

## APPENDIX B OF NET-METERING RULES (SAMPLE TARIFF)

X.3.12. Rate structure lock shall be governed by Rule 2.07 of the Net-Metering Rules.