COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC TARIFF FILING OF EAST KENTUCKY POWER COOPERATIVE, INC. AND ITS MEMBER DISTRIBUTION COOPERATIVES FOR APPROVAL OF PROPOSED CHANGES TO THEIR QUALIFIED COGENERATION AND SMALL POWER PRODUCTION FACILITIES TARIFFS	)	CASE NO. 2023-00153

ORDER

On November 20, 2023, East Kentucky Power Cooperative, Inc. (EKPC) filed a motion, pursuant to KRS 278.400, requesting reconsideration or clarification on several aspects of the Order entered in this proceeding on October 31, 2023. In conjunction with the motion for rehearing, EKPC filed a motion for an extension of time of 20 days to file tariffs after the Commission enters an Order on EKPC's rehearing motion.

LEGAL STANDARD

KRS 278.400, which establishes the standard of review for motions for rehearing, limits rehearing to new evidence not readily discoverable at the time of the original hearings, to correct any material errors or omissions, or to correct findings that are unreasonable or unlawful. A Commission Order is deemed unreasonable only when "the evidence presented leaves no room for difference of opinion among reasonable minds."[1]

[1] *Energy Regulatory Comm'n v. Kentucky Power Co.*, 605 S.W.2d 46 (Ky. App. 1980).

An order can only be unlawful if it violates a state or federal statute or constitutional provision.[2]

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

DISCUSSION AND FINDINGS

EKPC raised several issues in its motion including requests for clarification and reconsideration. Each issue will be discussed individually.

1. Contract term length

In its motion, EKPC requested the Commission provide the basis for the requirement of a 2-year contract option in its QF tariff.[3] As grounds for this request, EKPC stated it was unaware of any statute or regulation requiring such an option.[4] EKPC alleged that the Commission cited no record evidence for its decision to require EKPC to include a 2-year contract in its tariff for Qualified Cogeneration and Small Power Production Facilities (QF Tariff), much less provided an explanation for the requirement or the basis for it.[5] EKPC also alleged that there is no statute, regulation, or requirement

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

[3] EKPC's Motion for Rehearing at 3, 5-7.

[4] EKPC's Motion for Rehearing at 3, 5-7.

[5] EKPC's Motion for Rehearing at 3, 5-7.

under the Public Utility Regulatory Policies Act of 1978[6] (PURPA) for a minimum contract length.[7] EKPC requested that the Commission modify its Order to eliminate this requirement as it is unreasonable.[8]

Having reviewed the relevant record, the rehearing motion, and being otherwise sufficiently advised, the Commission finds that EKPC's request for a modification of the final Order as contract term length is denied. The Federal Energy Regulatory Commission (FERC) has not established minimum or maximum terms for QF contracts, instead leaving that decision to the states. As the FERC found: "[w]e decline to specify a minimum required contract length given that it is up to states to decide appropriate contract lengths in a way that accurately calculates avoided costs so as to meet all statutory requirements."[9] In the absence of any mandated minimum length of contract, the Commission may set any length, if it determines it is reasonable. The Commission has relied upon this in Case Nos. 2020-00174,[10] 2020-00349,[11] and 2020-00350[12] where

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[6] 16 U.S.C.A. § 824(a)-3 *et seq.*

[7] EKPC's Motion for Rehearing at 7.

[8] EKPC's Motion for Rehearing at 3, 5-7.

[9] See *Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, Order No. 872A, 173 FERC ¶ 61,158, 61,955 (2020).

[10] Case No. 2020-00174, *Electronic Application of Kentucky Power Company For (1) a General Adjustment of Its Rates for Electric Service; (2) Approval of Tariffs and Riders; (3) Approval of Accounting Practices to Establish Regulatory Assets and Liabilities; (4) Approval of a Certificate of Public Convenience and Necessity; and (5) All Other Required Approvals and Relief* (Ky. PSC Jan 13, 2021), Order.

[11] Case No. 2020-00349, *Electronic Application of Kentucky Utilities Company for an Adjustment of Its Electric Rates, a Certificate of Public Convenience and Necessity to Deploy Advanced Metering Infrastructure, Approval of Certain Regulatory and Accounting Treatments, and Establishment of a One-Year Surcredit* (Ky. PSC Sept. 24, 2021), Order.

[12] Case No. 2020-00350, *Electronic Application of Louisville Gas and Electric Company for an Adjustment of Its Electric and Gas Rates, a Certificate of Public Convenience and Necessity to Deploy Advanced Metering Infrastructure, Approval of Certain Regulatory and Accounting Treatments, and Establishment of a One-Year Surcredit* (Ky. PSC Sept. 24, 2021), Order.

the Commission has set contract lengths different than those proposed. The Commission's Order failed to fully explain the basis of a 2-year contact in this matter. The Commission’s basis for the 2-year contract term is the requirement of 807 KAR 5:054, Section 5(1)(a) that electric utilities with annual retail sales greater than 500-million-kilowatt hours file with the Commission data from which avoided costs may be derived every two years.[13]. The contract term length aligns with the QF cost updates required by the Commission’s regulations, which ensures QFs are paid only the utility’s most-recently supported avoided capacity costs. As discussed below, the effect of the Commission’s decision for a 2-year contract is immaterial in this case because the avoided capacity value is $0 and the avoided energy value is locational marginal price, or the same as the as-available rate.

2. Applicable Energy Rate

EKPC requested clarification on whether to continue using the actual real-time locational marginal price (LMP) to calculate its avoided cost energy rate.[14] According to the motion, in 2021, Case No. 2021-00198,[15] EKPC filed revised tariffs setting forth revised rates for the purchase of electric energy and capacity from QFs and in that proceeding, the Commission directed EKPC use the real-time LMP at the time of delivery as the energy rates in its QF tariffs, for all types of resources.[16] EKPC stated that the Order did not contain guidance on this issue.

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[13] EKPC and its distribution cooperatives update their QF rates annually.

[14] EKPC’s Motion for Rehearing at 3, 8-9.

[15] Case No. 2021-00198 *Electronic Tariff Filing of East Kentucky Power Cooperative, Inc. and Its Member Distribution Cooperatives for Approval of Proposed Changes to Their Qualified Cogeneration and Small Power Production Facilities Tariffs* (Ky. PSC Oct. 26, 2021).

[16] EKPC’s Motion for Rehearing at 8-9.

Having reviewed the relevant record, the rehearing motion, and being otherwise sufficiently advised, the Commission finds that EKPC's request for clarification of the final Order as to the calculation of the energy rate should be granted. While the Appendix to the Order only listed the market administration fee regarding the energy rate, it also contains the following language: "All other rates and charges not specifically mentioned herein shall remain the same as those in effect under authority of this Commission prior to the effective date of this Order." EKPC did not propose any changes to the energy rate other than the market administration fee. However, to eliminate any confusion, the Commission confirms that EKPC should continue using the actual real-time LMP to calculate its avoided cost energy rate.

3. Calculation of Avoided Capacity Rates

In it motion, EKPC alleged that the Commission did not explain why it felt that EKPC should use the National Renewable Energy Laboratory (NREL) Annual Technology Baseline (ATB) costs appropriate for calculating its avoided capacity costs.[17] EKPC requested that the Commission explain how it used the NREL ATB information, breaking down the components of the calculation, to arrive at the cost.[18] EKPC argued that, as the Order is written, the lack of evidence constitutes reversible error.[19]

Having reviewed the relevant record, the rehearing motion, and being otherwise sufficiently advised, the Commission finds that the motion for rehearing should be granted although the Commission believes that there is sufficient evidence in the final Order that

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[17] EKPC's Motion for Rehearing at 4, 9-11.

[18] EKPC's Motion for Rehearing at 4, 9-11.

[19] EKPC's Motion for Rehearing at 4, 9-11.

explains how the avoided capacity rates were calculated. The Commission has the authority to determine the reasonableness of a utility's avoided costs and to set the reasonable rate to be charged for the avoided costs.[20] EKPC failed to provide sufficient evidence or its preferred recommendation for determining avoided costs. The Commission, therefore, determined that utilizing a simple-cycle combustion turbine (CT) from the NREL ATB is the most appropriate methodology.

When calculating EKPC's avoided capacity rates, the Commission utilized a moderate scenario of the 2032 minimum CAPEX ($/kW) of a natural gas CT and divided those costs over a 30-year cost recovery period in order to convert $/kW to $/kW-year. Then, the Commission utilized the 2032 minimum Fixed O&M for a natural gas CT and added those costs to the 2032 $/kW-year CAPEX to derive at the hypothetical avoided capacity costs in 2032. The Commission then discounted those costs by 3.25 percent to approximate inflation because EKPC did not provide any avoided capacity values from 2024 to 2032.

4. Capacity Rate Amounts Prior to 2028

In its motion, EKPC stated that it will not have an additional capacity need until Winter 2028.[21] As such, EKPC alleged that the Commission erred in setting the capacity rate at anything other than $0.00 until 2028.[22] EKPC also argued that there is nothing in

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[20] *See, generally*, 16 U.S.C.A. § 824 *et seq.* 18 C.F.R. § 292.301 to 292.314, KRS 278.030, KRS 278.040, and KRS 278.190. *See also*, *Kentucky Public Service Com'n v. Commonwealth ex rel. Conway*, 324 S.W.3d 373, 383 (Ky. 2010) ("[T]he the PSC had the plenary authority to regulate and investigate utilities and to ensure that rates charged are fair, just, and reasonable under KRS 278.030 and KRS 278.040.")

[21] EKPC's Motion for Rehearing at 4.

[22] EKPC's Motion for Rehearing at 4.

the Commission's regulations or orders, or PURPA that requires or permits that result.[23] EKPC stated that the calculation is unjust, unreasonable, not in the public interest, and in violation of PURPA and the Commission's own rules.

Having reviewed the relevant record, the rehearing motion, and being otherwise sufficiently advised, the Commission finds the motion for rehearing on this issue should be denied. The Commission did not err in not setting the avoided capacity costs at $0.00 in any year prior to 2028. The record does reflect that EKPC does not have a capacity need until winter 2028, however, when setting the QF contract length, EKPC's avoided capacity costs are greater than $0.00 when the QF contract length is 5-years. The Commission notes that EKPC has indicated that it has a capacity deficit in winter 2028, which would be approximately five years from the effective date of this Order. Therefore, a 5-year term contract option would need to include avoided capacity rates that accurately reflect EKPC's actual avoided costs considering EKPC is forecasting a capacity deficit.

The Commission's decision is further supported by the FERC which, in discussing the establishment of non-zero avoided capacity costs rates over the length of a contract where a utility has no need for additional capacity when the contract begins found:

> [I]f a utility is able to avoid constructing a new generation facility with a capacity cost of $10/MW-month as a result of purchasing power from a QF, its avoided capacity cost is the $10/MW-month capacity cost that it would have been incurred to construct the new facility. Once the utility commences its purchases from the QF, it may not need additional capacity, and its avoided capacity cost for the next QF would drop to $0/MW-month. It would not be appropriate to then reduce the original QF's avoided capacity charge to $0/MW-month, however, because the only reason that the utility does not need additional capacity is because it already purchased capacity from the original QF in order to avoid the $10/MW-

[23] EKPC's Motion for Rehearing at 4.

> month capacity cost. That is, without the purchase from the original QF, the utility would have incurred a capacity cost of $10/MW-month, and that is the utility's avoided capacity cost for the term of its contract with the original QF. It would be inappropriate, in other words, for avoided cost capacity rates to change after they are first set at the time a LEO (such as a contract) is established.[24]

In the scenario discussed above, if a need for additional capacity arises during the length of a contract it is appropriate to set the avoided capacity costs above $0, even for the periods of time in the contract where there is no need for additional capacity. This is the same factual scenario with which the Commission was presented in this proceeding with EKPC requiring additional capacity during the course of a contract. The FERC's decision in Order No. 872 supports the lawfulness and reasonableness of the Commission's decision.

5. Performance Penalties

In its motion, EKPC requested that the Commission clarify that both dispatchable and non-dispatchable generation resources pose a performance risk, and therefore should be responsible for any capacity performance penalties imposed for their failure to perform.[25] In support of its argument, EKPC stated both dispatchable and non-dispatchable resource pose a risk of non-performance, and if such resources do not perform, then they should bear the costs of capacity performance penalties.[26]

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[24] *Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, 172 FERC ¶ 61,041, 61,252 (2020), *proposed rule adopted in part by* 173 FERC ¶ 61,158 (2020), FERC Order at Para. 358.

[25] EKPC's Motion for Rehearing at 4-5.

[26] EKPC's Motion for Rehearing at 4-5.

Having reviewed the relevant record, the rehearing motion, and being otherwise sufficiently advised, the Commission finds the motion for rehearing on clarification of this issue should be granted. The Commission agrees that both dispatchable and non-dispatchable generation resources, which are registered with PJM as capacity resources and subject to performance obligations, that subsequently do not perform when required should bear the cost of capacity performance penalties.

6. Motion for an Extension of Time

EKPC and its Owner-Members requested an extension of time in which to file their tariffs, stating that, if EKPC is successful on any of its issues raised above, the approved rates will change from the amounts contained in the Appendix to the October 31, 2023 Order. The October 31, 2023 Order required EKPC to file its tariffs within 20 days of the date of service of the Order. EKPC stated that putting the rates into effect now and possibly having them change will cause confusion for the members and cause unreasonable administrative expense. EKPC requested the extension until 20 days after the Commission issues a decision on the motion for rehearing.

Having considered the motion and the underlying issues raised in the motion for rehearing, the Commission finds that EKPC's motion for an extension should be granted. EKPC and its Owner-Members to file their tariffs within 20 days of the date of service of the Order.

IT IS THEREFORE ORDERED that:

1. EKPC's motion for reconsideration is granted, in part and denied, in part.

2. EKPC's motion for an extension of time to file tariff sheets is granted.

3. The remainder of the October 31, 2023 Order not in conflict with this Order remains in effect.

4. Within 20 days of the date of service of this Order, EKPC and its distribution cooperatives shall with the Commission, using the Commission's electronic Tariff Filing System, new tariff sheets setting forth the terms, rates and charges approved by this Order and the Commission's October 31, 2023 Order in this proceeding and reflecting their effective date and that they were approved by this Order and the Commission's October 31, 2023 Order in this proceeding.

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

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Vice Chairman

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ENTERED

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