COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION FOR A DECLARATORY ORDER OF EAST KENTUCKY POWER COOPERATIVE, INC.	)))	CASE NO. 2023-00253

<u>O R D E R</u>

On July 26, 2023, East Kentucky Power Cooperative, Inc. (EKPC) filed an application for a declaratory order, pursuant to KRS 270.020 and 807 KAR 5:001, Sections 15 and 19, that its planned construction of a 500 kW solar project for an industrial customer, Star Hill Farms d/b/a Maker's Mark, may be properly considered an ordinary extension in the usual course of business. There are no intervenors in this matter. EKPC requested a ruling by August 22, 2023, to allow it to award the contract before expiration of the selected bid. This matter is now before the Commission for a decision on the merits.[1]

<u>BACKGROUND</u>

EKPC provides electric generation capacity and electric energy to its 16 owner-member cooperatives (owner-member), which in turn serve approximately 560,000 Kentucky homes, farms and commercial and industrial customers in 89 Kentucky

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[1] Pursuant to 807 KAR 5:001, Section 19, the Commission may, among other things, "issue a declaratory order . . . with respect to the meaning and scope of an order or administrative regulation of the commission or provision of KRS Chapter 278." The Commission "may dispose of an application for a declaratory order solely on the basis of the written submissions filed" or may allow for other actions, including additional discovery, to ensure that the record is complete.

counties.[2] In its most recent annual report, EKPC reported $1,240,964,567[3] in total revenue from electric sales and $2,998,609,017 in net utility plant in service as of December 31, 2022.[4]

EKPC is proposing to construct a 500 kW solar farm on Star Hill Farms property on land leased to EKPC.[5] The project will be interconnected to the owner-member's, Inter-County Energy's, distribution system and will only serve the Maker's Mark facility.[6] EKPC stated that the solar farm is designed to offset the hospitality load, including the visitor's center, restaurant, gift shop, tasting room and toll house, of the Maker's Mark facility.[7] EKPC estimated that the total cost to construct the solar farm to be approximately $2,250,000[8] and will be owned, operated, and maintained by EKPC for the entire 25-year contract period.[9]

EKPC indicated that it would finance all project expenditures through funds available from normal operations and seek additional credits and anticipated grant funding available from the Inflation Reduction Act to reduce the total cost of the project.[10] Once completed, any short-term debt associated with the project would be refinanced

[2] Application at 2.

[3] *Annual Report of East Kentucky Power Cooperative, Inc. to the Public Service Commission of the Commonwealth of Kentucky for the Calendar Year Ended December 31, 2022* (2022 Annual Report) at 5.

[4] 2022 Annual Report at 15.

[5] Application at 7.

[6] Application at 7.

[7] Application at 7.

[8] Application at 10.

[9] Application at 8.

[10] Application at 9.

using long-term debt available under EKPC's Trust Indenture from the Rural Utilities Service or other lenders.[11]

EKPC asserts that the solar farm qualifies as an ordinary extension of an existing system in the usual course of business pursuant to 807 KAR 5:001, Section 15(3). Among other things, EKPC asserts that the solar farm will not result in wasteful duplication, nor will it conflict with the existing certificates or service of other utilities operating in the same area and under the jurisdiction of the Commission that are in the general or contiguous area in which EKPC renders service. Further, EKPC asserts that the project will not involve a sufficient capital outlay that materially affects its financial condition and will not require a rate increase. EKPC notes that the Commission previously found in Case Nos. 2020-00385 and 2017-00155 that larger solar projects of 2-3 MW were ordinary extensions in the usual course of business.[12]

LEGAL STANDARD

The Commission's standard of review for a request for a CPCN is well settled. No utility may construct or acquire any facility to be used in providing utility service to the public until it has obtained a CPCN from this Commission except as provided in KRS 278.020(1) and (2) and 807 KAR 5:001, Section 15(3). To obtain a CPCN, a utility must demonstrate a need for such facilities and an absence of wasteful duplication.[13]

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[11] Application at 10.

[12] *Id*. at 15 *citing* Case No. 2020-00385, *Electronic Application of Duke Energy Kentucky, Inc. for an Order Declaring the Construction of Solar Facilities is an Ordinary Extension of Existing Systems in the Usual Course of Business* (Ky. PSC Mar. 1, 2021), Order *and* Case No. 2017-00155, *Electronic Application of Duke Energy Kentucky, Inc. for an Order Declaring the Construction of Solar Facilities is an Ordinary Extension of Existing Systems in the Usual Course of Business* (Ky. PSC July 10, 2017), Order.

[13] *Kentucky Utilities Co. v. Public Service Comm'n*, 252 S.W.2d 885 (Ky. 1952).

"Need" requires:

> [A] showing of a substantial inadequacy of existing service, involving a consumer market sufficiently large to make it economically feasible for the new system or facility to be constructed or operated.
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> [T]he inadequacy must be due either to a substantial deficiency of service facilities, beyond what could be supplied by normal improvements in the ordinary course of business; or to indifference, poor management, or disregard of the rights of consumers, persisting over such a period of time as to establish an inability or unwillingness to render adequate service.[14]

"Wasteful duplication" is defined as "an excess of capacity over need" and "an excessive investment in relation to productivity or efficiency, and an unnecessary multiplicity of physical properties".[15]

To demonstrate that a proposed facility does not result in wasteful duplication, we have held that the applicant must demonstrate that a thorough review of all reasonable alternatives has been performed.[16] Selection of a proposal that ultimately costs more than an alternative does not necessarily result in wasteful duplication.[17] All relevant factors must be balanced.[18]

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[14] *Kentucky Utilities Co. v. Public Service Comm'n*, 252 S.W.2d at 890.

[15] *Kentucky Utilities Co. v. Public Service Comm'n*, 252 S.W.2d at 890.

[16] Case No. 2005-00142, *Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company for a Certificate of Public Convenience and Necessity for the Construction of Transmission Facilities in Jefferson, Bullitt, Meade, and Hardin Counties, Kentucky* (Ky. PSC Sept. 8, 2005).

[17] See *Kentucky Utilities Co. v. Public Service Comm'n*, 390 S.W.2d 168, 175 (Ky. 1965).

[18] See also Case No. 2005-00089, *Application of East Kentucky Power Cooperative, Inc. for a Certificate of Public Convenience and Necessity for the Construction of a 138 kV Electric Transmission Line in Rowan County, Kentucky* (Ky. PSC Aug. 19, 2005), final Order at 6, 18.

An exception to the CPCN requirement is provided in KRS 278.020(1)(a)(2) for "ordinary extensions of existing systems in the usual course of business." This exception is further described in 807 KAR 5:001, Section 15(3), which states:

> A certificate of public convenience and necessity shall not be required for extensions that do not create wasteful duplication of plant, equipment, property, or facilities, or conflict with the existing certificates or service of other utilities operating in the same area and under the jurisdiction of the commission that are in the general or contiguous area in which the utility renders service, and that do not involve sufficient capital outlay to materially affect the existing financial condition of the utility involved, or will not result in increased charges to its customers.

The Commission has interpreted 807 KAR 5:001, Section 15(3) as stating that no CPCN is required for extensions "that do not result in wasteful duplication of utility plant, do not compete with the facilities of existing public utilities, and do not involve a sufficient capital outlay to materially affect the existing financial condition of the utility involved or to require an increase in utility rates."[19]

Pursuant to 807 KAR 5:001, Section 19, the Commission may, upon application by a person substantially affected, "issue a declaratory order . . . with respect to the meaning and scope of an order or administrative regulation of the commission or provision of KRS Chapter 278."[20] An application for a declaratory order must:

> (a) Be in writing;
> (b) Contain a complete, accurate, and concise statement of the facts upon which the application is based;

[19] Case No. 2000-00481, *Application of Northern Kentucky Water District (A) for Authority to Issue Parity Revenue Bonds in the Approximate Amount of $16,545,000; and (B) A Certificate of Convenience and Necessity for the Construction of Water Main Facilities* (Ky. PSC Aug. 30, 2001), Order at 4.

[20] 807 KAR 5:001, Section 19(1); *see also* Case No. 2020-00095, *Electronic Application of Kenergy Corp. for a Declaratory Order* (Ky. PSC Mar. 11, 2021), Order at 4-5 (noting that Commission may issue a declaratory order, in its discretion, with respect to the meaning and scope of an order, regulation, or statute if a request is made by a person substantially affected).

(c) Fully disclose the applicant's interest;
(d) Identify all statutes, administrative regulations, and orders to which the application relates; and
(e) State the applicant's proposed resolution or conclusion.[21]

Any factual allegation in an application for a declaratory order must be supported by an affidavit or verified.[22] The Commission "may dispose of an application for a declaratory order solely on the basis of the written submissions filed"[23] or may allow for other actions, including additional discovery, to ensure that the record is complete.

DISCUSSION AND FINDINGS

EKPC argued that the proposed project is an extension in the ordinary course of business because (1) it will not result in wasteful duplication of utility plant, (2) will not result in the construction of facilities competing with the facilities of existing public utilities, and (3) does not involve a sufficient capital outlay to materially affect EKPC's existing financial condition or to require an increase in EKPC's rates.

EKPC argued that the proposed project will not result in wasteful duplication because it is needed to supplement the hospitality load of its customer, Star Hill Farms, at its Maker's Mark distillery location.[24] EKPC further asserted that the solar farm project will not conflict with existing certificates of service of other utilities operating in the same area and under the jurisdiction of the Commission that are in the general or contiguous

[21] 807 KAR 5:001, Section 19(2).

[22] 807 KAR 5:001, Section 19(6).

[23] 807 KAR 5:001, Section 19(8); see also Case No. 2020-00095, Mar. 11, 2021 Order at 4-5 (noting that that Commission has discretion in whether to address an application for a declaratory order).

[24] Application at 15.

area in which EKPC renders service.[25] EKPC then asserted that the solar project does not involve a sufficient capital outlay to materially affect EKPC's existing financial condition or customer rates, because the solar project is relatively small in size and capacity compared to EKPC's other plants and projects.[26]

Having considered the application and all evidence in the record, the Commission finds that EKPC's application for a declaratory order should be granted. EKPC is substantially affected in this case, and it met all the filing requirements in 807 KAR 5:001, Section 19 for applications for declaratory orders. EKPC has established a lack of wasteful duplication, as the project will offset the hospitality load of Star Hill Farms' Maker's Mark location. EKPC has also established that the project will not compete with other utilities in the Commission's jurisdiction. Further, as noted by EKPC, in Case Nos. 2020-00385[27] and 2017-00155,[28] the Commission found that solar facilities that were 2 to 3 MW each with an approximate average cost of $5 million were extensions in the ordinary course of business as that term is used in KRS 278.020 and defined in 807 KAR 5:001, Section 15(3). Like those projects, the Commission finds that the size and cost of the solar installation at issue in this case – about 500 kW with an estimated construction cost of $2,250,000 – would not result in a capital outlay that would materially affect EKPC's financial condition or a rate increase that justifies denying EKPC's application.

[25] Application at 13.

[26] Application at 6.

[27] Case No. 2020-00385, Mar. 1, 2021 Order.

[28] Case No. 2017-00155, July 10, 2017 Order.

Thus, the Commission finds that the solar project is an ordinary extension of existing systems in the usual course of business.

IT IS THEREFORE ORDERED that:

1. EKPC's application for a declaratory order is granted.

2. The 500 kW solar farm is an ordinary extension in the usual course of business, and a CPCN, pursuant to KRS 278.020(1), is not required for its construction.

3. EKPC shall file notice of completion of construction within 30 days of the project's completion.

4. Any documents filed pursuant to ordering paragraph 3 herein shall reference this case number and shall be retained in the post-case correspondence file for this proceeding.

5. The Executive Director is delegated authority to grant reasonable extension of time for the filing of any documents required by ordering paragraph 3 of this Order upon EKPC's showing of good cause.

6. This matter is closed and shall be removed from the docket.

PUBLIC SERVICE COMMISSION

Chairman

Vice Chairman

Commissioner

ENTERED

AUG 18 2023 rcs

KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:

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