

Commonwealth of Kentucky

Before the Public Service Commission

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In the Matter of:

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 and the Implementation of)
Separate Tariffs for Power Purchases for Solar)
Generating Qualifying Facilities)

Case No. 2017-00212

**JOINT REPLY TO EKPC RESPONSE
TO MOTIONS FOR INTERVENTION**

Pursuant to 806 KAR 5:001 Sections 3(8) and 5(3), Bluebird Solar LLC and Great Blue Heron Solar LLC (collectively, "Movants"), hereby jointly reply to the Response filed by East Kentucky Power Cooperative, Inc. ("EKPC") in opposition to their individual motions to intervene in the above-captioned proceeding. EKPC's filing is almost entirely mis-directed to arguing the merits of its positions opposing Bluebird's in the FERC proceedings on its petitions to terminate its PURPA purchase obligation. It does not mention the standards for intervention in this case investigating its proposed tariff revisions, or acknowledge the issues that are relevant to the Commission's consideration (e.g., are these "fair, just and reasonable rates," with "reasonable rules" and "suitable and reasonable classifications of its service, patrons and rates," per KRS 278.030). EKPC misrepresents statements made and the requests and purposes of the Motions. It also contests facts presented for background only — as if those were issues for this case,

and without showing that it would make any difference to whether intervention should be allowed. In short, EKPC presents nothing to dispute that each Movant (a) has an unrepresented, special interest in the rates and terms of the proposed solar power purchase tariffs that are the subject of this proceeding and (b) is likely to present issues or develop facts that will assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings.

So as not to reiterate arguments already presented, the Movants here highlight how EKPC is trying to distract from the fact that Great Blue and Bluebird seek intervention because of the effect of the proposed tariff(s) on each of them and not to raise here arguments that are before FERC:

1. EKPC recognizes that Great Blue is not a participant in its FERC petition proceedings, Response p.3 fn.6, but then ignores how Great Blue's circumstances as the developer of a 20 MW project give it interests distinct from those of Bluebird and independent of the FERC proceedings. Instead, EKPC presumes that Great Blue "has the same concerns" as Bluebird, *id.*,¹ and makes generalized assertions about "the Movants" and their motions that are total fabrications with respect to Great Blue. For example, EKPC asserts that "Movants allege that Kentucky law itself is discriminatory towards QFs." Response p.4. Subjection of QFs within EKPC's service territory to undue

¹ EKPC refers to Movants as "affiliates." See Response p.3 n.6. Movants do share representation with respect to this proceeding; however, they are not "affiliates" in any usual meaning of that term. Furthermore, even if they had the same parent or common ownership, they would still have their distinct interests in the proposed tariff revisions.

discrimination — including the more restrictive siting requirements in KRS 278.704 (compared to KRS 278.216) — is among the grounds on which Bluebird opposes EKPC's present termination petition at FERC. See Bluebird Motion p.4 (¶6). However, a “perceived discrimination embedded in Kentucky law” is not alleged or referenced in Great Blue's Motion and is not the basis for either Motion to intervene in this case. See Bluebird Motion pp.6-10 (¶¶11-18); Great Blue Motion pp.4-8 (¶¶6-12).²

2. EKPC argues that its positions in the FERC termination proceedings are right and Bluebird's are wrong, Response pp.2-9, but those are arguments for FERC to decide and are not arguments in which Great Blue is participating. To the extent that similar issues are presented for this Commission to decide, EKPC fails to recognize those issues as germane to KRS 278.030 standards or the Commission's PURPA implementation role. For example, intervention by Great Blue or Bluebird will “present issues about ... a five-year term as substantively insufficient to allow a QF reasonable opportunities to attract capital from potential investors and as discriminatory *vis-a-vis* the effective term for EKPC.” Great Blue Motion pp.6-7 ¶11(e); Bluebird Motion pp.9-10 ¶17(e)). EKPC asserts only that there is “no defined minimum contractual term” under PURPA, FERC regulations, or state law, Response pp.5-6, without addressing whether

² EKPC asserts that Movants “special interests” for intervention “concern perceived discrimination embedded in Kentucky law.” This assertion is inaccurate on its face and inconsistent with the assertion one page earlier that “Movants’ present motions confirm that economic viability through a non-market based rate structure remains their principal ‘special interest’.” Response p.3 (referring only to a Bluebird filing in one of the FERC termination proceedings and the Bluebird Motion in this case, *id.* fn. 6 & 7).

the tariff-defined minimum term of five year is unreasonable, impermissibly discriminates, or fails a relevant PURPA criterion. Similarly, EKPC notes that 18 C.F.R. § 292.304 allows for different, technology-specific avoided cost rates for purchases from QFs (*id.* pp.5-6), but bypasses the issue Movants present about the proposed differences between solar and non-solar QFs — that the rate differences must be based on supply characteristics affecting factors that the regulation requires to be considered. Bluebird Motion p.10 ¶17(c); Great Blue p.7 ¶11(c).

3. EKPC dispute Movants' statements in their respective "Background" sections that a legally enforceable obligation under 18 C.F.R. § 292.304 ("LEO") arose as of a certain date. Response pp.8-9. It quotes and characterizes its arguments to FERC on this point, *id.* & fn 25, and asserts that there is no legally enforceable obligation for EKPC to purchase power from either Bluebird or Great Blue.³ Movants have not made a "repeated invitation for the Commission to affirm" that an LEO exists (as EKPC titles this segment of its Response, p.8), and the evident dispute on this point only highlights their interest in the existing tariff and the proposed revisions. EKPC reserves "the right to address the question of what factors and circumstances give rise to a [LEO] under Kentucky law at such time as the issue might be properly raised and ripe for an adjudication," and notes that a motion for leave to intervene is not the opportunity for fully debating or deciding such an issue. *Id.* p.9 fn.26. The Response thus possible adds to

³ Movants assume this denial is limited to the particulars of an LEO, and that EKPC is not denying the legal enforceability of its obligations under the existing or proposed CoGen/Solar tariffs.

the ways Movants' intervention and participation in the proceeding is likely to present issues or develop facts that will assist the Commission in fully considering these and other disputed matters.

4. In their Motions, Bluebird (p.10 ¶18) and Great Blue (p.8 ¶12) state that intervention "can be accomplished without unduly complicating or disrupting the matter." EKPC does not contest this statement; instead, it asserts that "their request for a procedural order, discovery, a hearing and the opportunity to file legal briefs will be prejudicial to EKPC and its Member-Owners." Response p.9. Movants do not make such a request; they simply suggest that the Commission go ahead to enter a procedural schedule "that provides for information requests and the possibility of a hearing in this matter," even before intervention is granted. Bluebird p.11 ¶20; Great Blue p.8 ¶14. This would keep things moving along and avoid delay.

5. EKPC accuses Movants of trying to "extend the suspension of the new rates for as long as possible ... to the enrichment of existing QFs from whom EKPC is purchasing power." Response p.10.⁴ The Commission *sua sponte* suspended the proposed tariff revisions shortly before they were to take effect and thereby caused the alleged "prejudice" that "rates in effect for the 2016-2017 delivery year continue in effect even though EKPC is now in the 2017-2018 delivery year" and "what should be a cost

⁴Movants deny that delay is their "primary purpose" in seeking to intervene. They also note that they would not be motivated by an extended suspension of the proposed tariff revisions that helps those other existing QFs.

savings to EKPC and its Owner-Members is not being realized because the CoGen Tariff remains suspended." *Id.* EKPC's asserted practice "of filing annual CoGen Tariff updates on or before March 31st of each year," Response p.10, does not require the Commission to automatically approve tariff revisions on EKPC's schedule. Furthermore, this focus on the forecasted rates in the proposed non-solar schedules of the tariff completely ignores that EKPC chose to "bundle" those revisions with the proposed institution of the Solar Tariff with structurally different rates and the exclusion from the tariffs of any obligation to purchase from QFs of over 20 MW.⁵

6. Movants are asking for proper implementation of PURPA and scrutiny of the proposed revisions under KRS ch.278 standards in this case, and understand that because this is a tariff matter, the outcome will affect current and future QFs in the EKPC territory. That effect will include Movants, but cannot be limited to them. EKPC conjures up some nefarious plot by which Movants seek some "private economic gain" by getting "increased leverage over EKPC" in separate negotiations over "commercial terms for a power purchase agreement." Response pp.10-11.⁶ Movants are uncertain what EKPC means, but deny that this is their intent. Furthermore, any Commission concern over individual ratepayers intervening in general rate cases "solely for the

⁵ EKPC misleadingly refers to "Bluebird's claim that EKPC would have no obligation to purchase power in excess of 20 MW in the event the proposed CoGen tariff is approved." Response p.11 (emphasis added; citing Bluebird Motion pp. 5-6 and Great Blue Motion p.2). Bluebird and Great Blue simply quote from the proposed revisions to the non-solar and Solar Tariffs, that "EKPC is no longer obligated to purchase...."

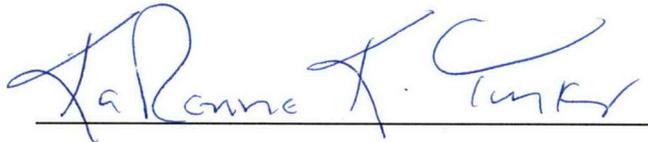
⁶ According to EKPC, these negotiations are going on with Great Blue, but not with Bluebird. Response pp. 11-12.

purpose of seeking preferences and concessions that the applicant utility would otherwise not be included to grant but for the desire to resolve the matter in a timely manner" (*id.* p.11) does not apply here.

CONCLUSION

WHEREFORE, Movants Bluebird Solar LLC and Great Blue Heron Solar LLC each respectfully requests that it be granted intervention as a party to this proceeding.

Respectfully submitted,



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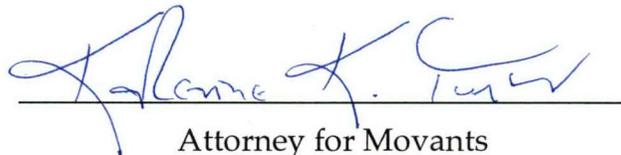
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 2nd day of August, 2017, the original and 10 copies of the foregoing were filed by hand-delivery to the Public Service Commission, 211 Sower Boulevard, Frankfort, KY 40601, and that a copy of the foregoing was served by mailing it via first-class U.S. Mail, postage prepaid, to the addressees listed on the attached Service List.



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