

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE ELECTRONIC APPLICATION OF EAST)	
KENTUCKY POWER COOPERATIVE, INC.)	
FOR A GENERAL ADJUSTMENT OF RATES)	Case No. 2021-00103
APPROVAL OF DEPRECIATION STUDY)	
AMORTIZATION OF CERTAIN REGULATORY)	
ASSETS AND OTHER GENERAL RELIEF)	

EAST KENTUCKY POWER COOPERATIVE, INC.’S
MOTION FOR REHEARING

Comes now East Kentucky Power Cooperative, Inc. (“EKPC”), by and through counsel, pursuant to KRS 278.400 and other applicable law, and does hereby tender its motion for rehearing of the Commission’s April 27, 2021 Order granting the motion for leave to intervene of AppHarvest Morehead Farm, LLC (“AppHarvest Morehead”), respectfully stating as follows:

I. BACKGROUND

EKPC’s application for an increase in base rates was accepted for filing on April 6, 2021. In a Procedural Order entered on April 13, 2021, the Commission established an April 23, 2021 deadline to file motions for leave to intervene. At approximately 6:00 PM on April 23rd, EKPC’s in-house counsel received a telephone call from counsel for AppHarvest Morehead informing him that AppHarvest Morehead planned to file a motion for leave to intervene in EKPC’s case. The motion was then filed at approximately 8:04 PM that evening.

Although 807 KAR 5:001, Section 5(2) affords a party to a Commission proceeding seven (7) days in which to file a response to any motion brought before the Commission, an Order

granting AppHarvest Morehead’s motion to intervene was nevertheless entered on the morning of Tuesday, April 27, 2021. Thus, rather than file a response in opposition to AppHarvest Morehead’s motion pursuant to the Commission’s regulation, EKPC is required to instead file a motion for rehearing under KRS 278.400. For the reasons set forth herein, EKPC respectfully requests the Commission to grant rehearing, set aside its April 27, 2021 Order and deny AppHarvest Morehead’s motion for leave to intervene.

II. ARGUMENT

A. AppHarvest Morehead’s Motion Failed to Disclose that its Affiliates are Engaged in Active Contract Negotiations with EKPC over the Subject Matter of its Purported Interests

Consistent with past precedent, the Commission has already entered an Order in this docket affirming its commitment to assuring transparency and accountability from intervenors.¹ In filing its motion for leave to intervene, however, AppHarvest Morehead omitted a material fact which has a significant impact upon the nature, significance and consequences of its being allowed to intervene in this case. Upon information and belief, AppHarvest Morehead is an affiliate of AppHarvest Berea Farm, LLC (“AppHarvest Berea”) and AppHarvest Richmond Farm, LLC (“AppHarvest Richmond”).² All three entities have common ownership, management and representation.

AppHarvest Morehead’s April 23, 2021 motion for leave to intervene inexplicably failed to disclose that its affiliates have been engaged – *and are currently engaged* – in protracted negotiations with EKPC and Blue Grass Energy Cooperative Corporation over the terms and

¹ See Order, Case No. 2021-00103 (Ky. P.S.C. Apr. 16, 2021) (“As the Commission has indicated in the past, any joint participation agreements should be filed into the case record as a matter of transparency and accountability.”).

² See Annual Reports for AppHarvest Morehead, AppHarvest Berea and AppHarvest Richmond, attached collectively hereto as Exhibit 1.

conditions of two industrial power agreements to serve their respective facilities. These negotiations specifically involve the very two issues asserted as a “special interest” in AppHarvest Morehead’s motion for leave to intervene.³ Participation as an intervenor, and thereby having access to EKPC’s confidential information, allows AppHarvest Morehead to leverage its position in the contract negotiations in a manner that is inconsistent with commercial good faith, fair dealing and arms-length negotiations.

For instance, it will be practically impossible for EKPC to share confidential information requested in this case with AppHarvest Morehead without prejudicing its ability to fairly negotiate industrial power agreements with AppHarvest Morehead’s affiliates. All three AppHarvest affiliates have common ownership and common management. Moreover, counsel of record for AppHarvest Morehead in this proceeding is also leading the contract negotiations on behalf of AppHarvest Berea and AppHarvest Richmond. EKPC will, quite literally, be asked to provide confidential information to AppHarvest Morehead while knowing it will become known to the principals simultaneously engaged in negotiating two industrial power agreements with EKPC. Allowing one party to a contract negotiation to have detailed confidential and proprietary information about the party with whom it is negotiating offends all notions of fairness. Moreover, to the extent that AppHarvest Morehead might use this information to renegotiate for more favorable terms than what it may already enjoy, such an outcome is prejudicial to the other EKPC Owner-Member Cooperatives (“Owner-Members”) and their End-Use Retail Members (retail members). In the past, the Commission has denied attempts to intervene in cases where it is obvious an intervenor could leverage its participation in the case to achieve a commercial

³ See AppHarvest Morehead’s Motion to Intervene, p. 3.

advantage or pecuniary benefit.⁴ Indeed, in Case No. 2017-00179, the Commission went so far as to opine:

It seemed going back over the years, prior to even 2009, all of the rate cases that we had had, a number of parties filed motions to intervene and were permitted intervention even though their interests seemed to overlap and they seemed not to ... many did not present any evidence and seemingly took no part in the proceedings other than to perhaps use their leverage in terms of being required, everybody being required to agree to a settlement in order to leverage some benefit for themselves which wasn't necessarily a part or shouldn't have been a part of the rate case.⁵

This case does not present an appearance of a conflict – an actual conflict exists. Allowing AppHarvest Morehead to participate as an intervenor in EKPC's rate case at the same time its affiliates are negotiating two power supply agreements with EKPC and one of its Owner-Members is patently unfair and inconsistent with the Commission's long-standing principles. While the Commission could not have known of this conflict at the time that it entered the Order granting AppHarvest Morehead's motion for leave to intervene, it should not allow this injustice to be perpetuated once the self-serving interest behind AppHarvest Morehead's motion has been brought

⁴ See *In the Matter of the Application of Kentucky Utilities Co. for Certificates of Public Convenience and Necessity and Approval of its 2011 Compliance Plan for Recovery by Environmental Surcharge*, Order, Case No. 2011-00161 (Ky. P.S.C. July 15, 2011) (denying intervention to labor union seeking to intervene to support capital investments and gain work for local union members as a result); *In the Matter of the Application of East Kentucky Power Cooperative, Inc. for a Certificate of Public Convenience and Necessity, and a Site Compatibility Certificate, for the Construction of a 278 MW (Nominal) Circulating Fluidized Bed Coal Fired Unit and Five 90 MW (Nominal) Combustion Turbines in Clark County, Kentucky*, Order, Case No. 2004-0053, p. 2 (Ky. P.S.C. Apr. 18, 2005) (“a self-serving financial interest” is not a special interest sufficient to grant intervention); *In the Matter of A Formal Review of Western Kentucky Gas Company's Decision to Terminate a Natural Gas Sales, Transportation and Storage Agreement with Noram Energy Services, Inc. and Enter into a Natural Gas Sales, Transportation and Storage Agreement with Woodward Marketing, LLC*, Order, Case No. 1999-00447, (Ky. P.S.C. Mar. 2, 2000) (a competitive interest is not a basis for being granted intervention).

⁵ See *In the Matter of the Electronic Application of Kentucky Power Company for (1) a General Adjustment of its Rates for Electric Service; (2) an Order Approving its 2017 Environmental Compliance Plan; (3) an Order Approving its Tariffs and Riders; (4) an Order Approving Accounting Practices to Establish Regulatory Assets and Liabilities; and (5) an Order Granting all Other Required Approvals and Relief*, Case No. 2017-00179, Hearing Video Record, 10:03:40 A.M. (Ky. P.S.C. July 24, 2017).

to light.⁶ Rehearing should be granted, the Commission's April 27th Order should be set aside, AppHarvest Morehead's motion should be denied and all future prospective intervenors should be put on notice that all material facts should be disclosed in a motion for leave to intervene.

B. AppHarvest Morehead's Motion Fails to Satisfy 807 KAR 5:001, Section 4(11)(b) and the Commission's April 13, 2021 Order.

Per the Commission's regulations, intervention is permissively granted only to those persons who satisfy certain criteria:

The commission shall grant a person leave to intervene if the commission finds that he or she has made a timely motion for intervention and that he or she has a special interest in the case that is not otherwise adequately represented or that his or her intervention is likely to present issues or to develop facts that assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings.⁷

In the Commission's April 13, 2021 Procedural Order, the requisite evidentiary basis for satisfying this regulatory standard was further articulated as follows:

Therefore, any person requesting to intervene in a Commission proceeding must state with specificity the person's special interest that is not otherwise adequately represented, or the issues and facts that the person will present that will assist the Commission in fully considering the matter. *A mere recitation of the quantity of utility service consumed by the movant or a general statement regarding a potential impact of possible modification of rates will not be deemed sufficient to establish a special interest.*⁸

⁶ See, e.g., *W. J. Dillner Transfer Co. v. Pennsylvania Pub. Util. Comm'n*, 107 A.2d 159, 164 (1954) ("However, intervention cannot be allowed where it would prejudice a party's rights or defeat the purpose underlying a statute.").

⁷ 807 KAR 5:001, Section 4(11)(b); see also *Inter-County Rural Elec. Co-op. Corp. v. Public Service Commission*, 407 S.W.2d 127, 129 (Ky. 1966).

⁸ See Order, Case No. 2021-00103, p. 4 (Ky. P.S.C Apr. 13, 2021) (emphasis added).

It is well-established that a party seeking leave to intervene bears the burden of proof to satisfy each of the criteria set forth in the regulation and elaborated upon by the Commission's April 13th Order.⁹ AppHarvest Morehead has singularly failed to carry this burden.

1. AppHarvest Morehead's Motion is Prima Facially Deficient

The overwhelming majority of AppHarvest Morehead's motion for leave to intervene is merely boilerplate text that recounts the rules for intervention. In fact, a mere two sentences are offered to justify its motion for leave to intervene:

AppHarvest Morehead's interest is *exclusively* related to being a large energy-intensive customer taking service as an industrial customer pursuant to an Industrial Power Agreement With Interruptible Service and Economic Development Rider ("IPA") entered into between AppHarvest Morehead, EKPC and Fleming Mason. The uniqueness of the service is further manifested by a two-level Contract Demand provided in the IPA to reflect the seasonal impact on the use of electricity required for the grow lights.¹⁰

AppHarvest Morehead's motion is – quite ironically – a textbook example of “a mere recitation of the quantity of utility service consumed by the movant” and “a general statement regarding a potential impact of possible modification of rates.” These are the very types of recitations the Commission's April 13th Procedural Order emphatically states are plainly *insufficient* as purported grounds to be granted intervention status. AppHarvest Morehead's motion is inadequate on its face and rehearing should be granted so that the April 27th Order can be set aside and the motion for leave to intervene denied.

⁹ See *In the Matter of: The 2011 Joint Integrated Res. Plan of Louisville Gas and Electric Company and Kentucky Utilities Company*, Order, Case No. 2011-00140 (Ky. P.S.C. July 8, 2011) (“As the petitioner, he had the burden to demonstrate in his petition that he was entitled to be granted the relief that he requested.”).

¹⁰ See AppHarvest Morehead's Motion to Intervene, p. 3 (emphasis added).

2. AppHarvest Morehead's Motion Lacks Substantive Support

It is also apparent that AppHarvest Morehead's claimed exclusive interest of being a large customer with a special contract is neither special nor unique. Similarly, AppHarvest Morehead fails to identify a single issue or fact that it alone is situated to address. The absence of any details to support its assertions bears witness to the fact that AppHarvest Morehead's basis for intervening is neither special nor unique.

AppHarvest Morehead receives service under a special contract – an industrial power agreement with interruptible service and an economic development rider – that is based upon a template entered into by dozens of other industrial customers scattered across the service territories served by EKPC's Owner-Members. While AppHarvest Morehead's contract demand is higher than many customers, it is by no means the highest within the EKPC system. And simply purchasing a large quantity of power does not grant a customer a superior right to consumers who purchase lesser amounts. Despite making the bald assertion that the AG's interest in this case is inadequate to fully protect its interests, AppHarvest Morehead supplies no actual support for that statement or a demonstration of how the AG's intervention will somehow complicate or thwart its intended objective of minimizing its power costs. Indeed, the interest of a *retail* customer in the charges paid by its power supplier for *wholesale* electric purchases is more remote and no different than any other retail customer's interest. The AG is fully capable of representing the rates of all consumers in this particular context and AppHarvest Morehead's motion offered no specific evidence to support a contrary conclusion.

Likewise, AppHarvest Morehead's reliance upon a "two-level Contract Demand" is also inconsequential. EKPC has two-level Contract Demand industrial power agreements with other customers as well. There is nothing magical about using a bifurcated contract demand term in a

special contract as it is a reasonable method for addressing circumstances where a customer's consumption patterns are seasonal or structured. Moreover, AppHarvest Morehead's motion failed to identify which portion of EKPC's rate filing even implicates the two-level contract demand term of its special contract. In fact, the relief sought by EKPC in this docket will have no impact upon the so-called unique aspects of AppHarvest Morehead's two-level contract demand. There is nothing in EKPC's application that will uniquely or specially impact AppHarvest Morehead's existing special contract. And any effort by AppHarvest Morehead to use this case to furtively renegotiate its special contract by creating issues germane to its special contract but otherwise irrelevant to this proceeding is itself reason enough to confirm that its intervention is improper as they unnecessarily complicate and disrupt the proceeding.

C. AppHarvest Morehead's Motion Ignores the Plain Language of its Own Special Contract

The very purpose of a special contract is to negotiate a power supply arrangement that satisfies the particular needs of a customer in a manner consistent with established tariffs without harming the general interests of EKPC's Owner-Members and their retail members. The goal of preventing unnecessary cross-subsidization by one customer of other customers is a well-articulated concept within the Commission's recent jurisprudence.¹¹ This well-known body of administrative precedent makes AppHarvest Morehead's motion even more puzzling.

¹¹ See e.g. *In the Matter of the Electronic Application of Louisville Gas & Electric Company and Kentucky Utilities Company for Approval of a Solar Power Contract and two Renewable Power Agreements to Satisfy Customer Requests for a Renewable Energy Source Under Green Tariff Option #3*, Order, Case No. 2020-00016, p. 21 (Ky. P.S.C. May 8, 2020):

The RPAs with Dow and Toyota do not relieve LG&E/KU's obligation to plan for the provision of all customers energy needs, including Dow and Toyota. Therefore, the RPA customers, as all other customers, should bear their fair share of the costs to provide reliable energy. *The Commission will not allow for utilities under its jurisdiction to provide special contracts to customers that satisfies tariff provisions that were proposed and approved to fulfill corporate goals that ultimately result in significant cost shifts. The proposed RPAs are further unreasonable due to the fact that Green Tariff Option #3 is limited to only a few*

The special contract between AppHarvest Morehead, EKPC and Fleming-Mason Energy contains provisions that were bargained for by AppHarvest Morehead to specifically insulate it from the effect of future changes in EKPC’s rates. For instance, Section 2 of the Special Contract allows AppHarvest Morehead to freely and voluntarily “choose any existing tariff...for which [it] qualifies.”¹² Section 3 of the Special Contract allows AppHarvest Morehead to increase or decrease its Contract Demand – certain to subject floors – upon the giving of thirty (30) days’ notice.¹³ These and other provisions assure that even when EKPC’s rates change at the conclusion of this proceeding, any impacts to AppHarvest Morehead will be no more impactful than to other customers taking service under Fleming-Mason’s Schedule LIS 6B tariff and – due to the terms of the special contract – likely even less so. The Commission has previously held that a customer taking service under a utility’s general tariff has no special interest in intervening in a case to review a special contract.¹⁴ The inverse is equally true. A customer taking power under a special contract has no special interest in intervening in a case to review a utility’s general rate tariffs. Once again, a complete picture of the AppHarvest Morehead’s situation confirms that it has no special interest in this proceeding.

of the utilities’ customers, but as proposed, the RPAs will likely shift costs to customers within and amongst LG&E/KU’s customer classes. (emphasis added).

See also In the Matter of the Electronic Application of South Kentucky Rural Electric Cooperative for Approval of Master Power Purchase and Sale Agreement and Transactions Thereunder, Order, Case No. 2018-00050, p. 36 (Ky. P.S.C. Sept. 27, 2018) (“...permitting [a customer] to avoid costs it previously agreed to incur by shifting those costs to other [customers] is not fair, just, or reasonable.”).

¹² Special Contract, p. 3.

¹³ *Id.*, p. 4.

¹⁴ *See In the Matter of: Joint Application of Kenergy Corp & Big Rivers Electric Corporation for Approval of Contracts and for a Declaratory Order, Order, Case No. 2013-00221, (Ky. P.S.C. July 19, 2013).*

III. CONCLUSION

AppHarvest Morehead's motion for leave to intervene was prematurely granted based upon an incomplete understanding of AppHarvest Morehead's ability to use its intervention in this case to assist its affiliates in ongoing contractual negotiations. The motion is both facially and substantively deficient and ignores the fact that the terms of the Special Contract help insulate AppHarvest Morehead from whatever outcome its intervention is purported to ameliorate. For the reasons set forth herein, EKPC respectfully requests the Commission to grant rehearing, set aside the April 27th Order granting AppHarvest Morehead's motion for leave to intervene and deny said motion.

This 7th day of May, 2021.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that the foregoing electronic filing is a true and accurate copy of the document being filed in paper medium; that the electronic filing was transmitted to the Commission on May 7, 2021; that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding; and that a copy of the filing in paper medium will be delivered to the Commission within thirty (30) days of the conclusion of the present COVID-19 related state of emergency.



Counsel for East Kentucky Power Cooperative, Inc.