

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
REPLY IN SUPPORT OF 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 reply in support of 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:

A. AppHarvest Morehead’s Response Again Fails to Tell a Complete Story

AppHarvest Morehead’s response to EKPC’s motion for rehearing – which asserts that AppHarvest Morehead omitted a critical, material fact in its original motion for leave to intervene – begins with this blatant mischaracterization of EKPC’s motion: “First, [EKPC] suggests AppHarvest was not transparent in identifying two sister companies within EKPC territory.”¹ In fact, the first argument in EKPC’s motion for rehearing is a bit more specific: “AppHarvest Morehead’s Motion Failed to Disclose that its Affiliates are Engaged in Active Contract

¹ AppHarvest Morehead Response, p. 1.

Negotiations with EKPC over the Subject Matter of its Purported Interests.”² EKPC’s motion for rehearing focuses upon AppHarvest Morehead’s omission of a material fact – its principals, managers and counsel are actively negotiating for a contract concerning the very subject matter of AppHarvest Morehead’s purported interest in EKPC’s rate case. AppHarvest Morehead makes no effort to deny the claim, nor does it make any effort to distinguish the precedent cited in EKPC’s argument on this point. One must conclude that AppHarvest Morehead does not believe that the fact of its affiliates having ongoing negotiations is material, or that Commission precedent matters. Instead, AppHarvest Morehead merely claims: “it is logical that these two [affiliated] entities would be engaged in contract negotiations with EKPC.”³ This means of course that, according to AppHarvest Morehead, motions for leave to intervene should be adjudicated based upon what is inferentially implied rather than what is explicitly expressed. Adding insult to injury, AppHarvest Morehead offers no potential mitigation steps that it might take to properly limit its participation in this matter. Despite its failure to disclose a material fact of significant importance, AppHarvest Morehead simply lambasts EKPC with this gem of rhetorical irony: “What does EKPC have to hide?”⁴ Clearly, it is AppHarvest Morehead that is engaged in concealment.

AppHarvest Morehead’s response further suggests that there is no harm in its intervention because, “it is not clear why confidential information would give AppHarvest Morehead or its affiliates an advantage in contract negotiations.”⁵ It advances this argument on the grounds that EKPC has sought confidential treatment for information relating to interest rates and associated savings in order to prevent prospective lenders from having an unfair advantage in future

² EKPC Motion for Rehearing, p. 2.

³ AppHarvest Morehead Response, p. 2.

⁴ *Id.*, p. 3.

⁵ *Id.*

negotiations.⁶ AppHarvest Morehead then affirms that it is not a lender and would gain nothing from learning EKPC’s proprietary credit terms and interest savings.⁷ What is most fascinating about AppHarvest’s Morehead’s argument, however, is – once again – the extent to which it obfuscates. AppHarvest Morehead dwells upon information relevant to prospective credit negotiations, while ignoring the fact that the very same motion for confidential treatment also concerned information about specific retail industrial customers scattered all across the service territories of EKPC’s Owner-Members, including these retail customers’ specific identities, names, usage and other unique personal information:

In the response to Request No. 16, EKPC is providing an Excel spreadsheet, *Application Exhibit 39 COSS and RD CONFIDENTIAL.xlsx*. This spreadsheet contains specific personal information for some of EKPC’s owner-member’s retail customers, including customer names along with their usage and other personal details.⁸

Having information pertaining to the revenues recorded for each industrial customer served by EKPC would be a windfall for AppHarvest Morehead’s affiliates.⁹ And this is just one example of what type of confidential information might be commercially valuable to a party sitting across

⁶ See AppHarvest Morehead Response, p. 3.

⁷ See *id.*

⁸ EKPC Motion for Confidential Treatment, ¶ 7, Case No. 2021-00103 (filed Apr. 15, 2021).

⁹ To underscore that the administrative record in this case will be a treasure trove of useful information for parties engaged in active contract negotiations with EKPC and its Owner-Members, consider that in the joint Initial Data Requests of the AG and Nucor, filed on May 14, 2021, further detail on the accounts of “each industrial customer” serviced by EKPC is sought:

Provide the annual amounts of revenue recorded for each revenue category (electric base without fuel and without environmental, base fuel, base environmental, FAC, ES, etc., and steam), and account and subaccount, customer class, and *each industrial customer* (numbered to maintain confidentiality in the public response, but named in the confidential response) on a side-by-side basis for 2018, 2019, 2020, 2021 actual to date, and 2021 budget/forecast for remainder of calendar year. (Emphasis added).

the bargaining table. The burden of proof is on AppHarvest Morehead to prove that its intervention will not serve an improper purpose,¹⁰ and it has failed to sustain that burden in this context. AppHarvest Morehead's claim that it has no interest in EKPC's savings negotiated with lenders may be true, but its omission of the fact that the same request for confidential information relates to detailed information about nearly every other retail customer within EKPC's system that has an industrial power agreement indicates the weakness and disingenuousness of AppHarvest Morehead's argument.

AppHarvest Morehead's response also fails to admit the obvious – by intervening in EKPC's rate case, it has the ability to directly influence any changes to the tariffs which guide EKPC's negotiations of industrial power agreements. For instance, EKPC proposes to amend its Economic Development Rider (“EDR”) tariff to assure that performance assurance is available to recover in the event a retail customer takes advantage of the credit but then fails to purchase power over the full term of the incentive agreement.¹¹ AppHarvest Berea Farm, LLC and AppHarvest Richmond Farm, LLC obviously would not like such a provision. AppHarvest Morehead's intervention does not just create concerns about the improper redirecting of confidential information – it strikes to the very heart of commercial good faith and fair dealing. It is patently unfair to allow an affiliate of two customers with whom EKPC is negotiating to be allowed to use the leverage gained by participation in a rate case to surreptitiously argue for changes (or no changes) in tariffs that pertain to those customers' negotiations.

¹⁰ See 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). Order, Case No. 2021-00103, p. 4 (Ky. P.S.C Apr. 13, 2021).

¹¹ See Application, Exhibit 7, p. 24, Case No. 2021-00103 (filed April 1, 2021).

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

The balance of AppHarvest Morehead’s response is similarly unpersuasive. The special interest that it asserts may be fairly characterized as follows: “We’re not Nucor.” Obviously, Nucor’s size and service requirements place it in a class of its own, but that is not the standard which AppHarvest Morehead must satisfy. To demonstrate a special interest that is not adequately represented, AppHarvest Morehead must demonstrate how EKPC’s proposed changes in rates will affect it differently than any other customer receiving service under an industrial power agreement. That argument remains unarticulated because the answer is that there is nothing particularly unique about AppHarvest Morehead’s consumption of power. It takes service pursuant to an industrial power agreement that relies upon tariffs used by dozens of other retail customers under similar agreements. Without uniquely changing the terms of its specific special contract, there is nothing in this rate case that will uniquely impact AppHarvest Morehead.

It is also noteworthy that AppHarvest Morehead completely abandons the argument in its original motion that its two-level contract demand is somehow implicated by EKPC’s rate application. As pointed out in EKPC’s motion for rehearing, this purported special interest is not in any way implicated in this docket. AppHarvest Morehead’s silence in its response confirms EKPC’s point. The only real argument left from AppHarvest Morehead’s original motion is that it is a consumer of a large quantity of power, however, the Commission’s April 13, 2021 Procedural Order made it clear that this alone is *insufficient* to merit intervenor status:

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.¹²

¹² See Order, Case No. 2021-00103, p. 4 (Ky. P.S.C Apr. 13, 2021) (emphasis added).

Apart from using its participation to leverage ongoing contract negotiations for its affiliates, AppHarvest Morehead has plainly failed to demonstrate that it has a special interest in this proceeding.

C. Despite Originally Asserting a Narrow, “Exclusive” Interest, AppHarvest Morehead is Embarking Upon a Wide-Ranging Fishing Expedition on Policy Issues that are Irrelevant to a Rate Case

It also bears emphasis that, even though AppHarvest Morehead’s motion was premised upon its “interest,” its response now argues that, “the Commission need not make a specific finding that an intervenor has a ‘special interest’....”¹³ AppHarvest Morehead’s First Request for Information to EKPC demonstrates that it never had any intention of limiting its participation in this case to the two interests it identified in its motion. AppHarvest Morehead represented to the Commission that it had two “exclusive” interests in this case: (1) it purchased a large quantity of power; and (2) its special contract had a seasonal, two level contract demand:

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.¹⁴

Despite this self-styled “exclusive” interest, the data requests propounded by AppHarvest Morehead indicate that it intends to embark upon a full-scale fishing expedition that is wholly unrelated to the establishment of base rates. For example, AppHarvest Morehead requests:

¹³ AppHarvest Morehead Response, p. 6.

¹⁴ See AppHarvest Morehead’s Motion to Intervene, p. 3 (emphasis added).

- Information regarding EKPC’s load forecast,¹⁵ which is relevant only to forecasted test year rate cases and Integrated Resource Planning;¹⁶
- EKPC’s Demand Side Management (“DSM”) program (and seeks to leverage its intervention to gain membership in the EKPC DSM collaborative);¹⁷
- The applicability of EKPC’s DSM tariffs when the terms of such are plainly available on the Commission’s website;¹⁸
- Energy Efficiency/DSM savings bids placed into PJM;¹⁹
- A summary of federal and state environmental rules that apply to each generation plant;²⁰
- Plans for retirement of EKPC’s coal fired generation facilities;²¹
- Generation unit capacity factors;²²
- Integration of merchant solar generators into EKPC’s transmission system;²³
- Incentives available for EKPC or retail members to construct renewable facilities;²⁴

¹⁵ See AppHarvest First Information Request to EKPC, Request No. 1, Case No. 2021-00103 (filed May 14, 2021).

¹⁶ See 807 KAR 5:001, Section 16(7)(h)5; 807 KAR 5:058.

¹⁷ See AppHarvest First Information Request to EKPC, Request Nos. 4-6.

¹⁸ See *id.*, Request No. 6(e).

¹⁹ See *id.*, Request No. 7.

²⁰ See *id.*, Request No. 8.

²¹ See *id.*, Request No. 8(b).

²² See *id.*, Request No. 8(d).

²³ See *id.*, Request No. 9.

²⁴ See *id.*, Request No. 10.

- EKPC’s Cooperative Solar One project;²⁵ and
- Suggested revisions to EKPC’s Green Energy tariff.²⁶

Questions of policy such as these are better suited for the Integrated Resource Filings that take place on a triennial basis under the authority of 807 KAR 5:058. Indeed, EKPC’s next IRP filing is due on or before April 1, 2022,²⁷ and AppHarvest Morehead’s participation in that docket would not be unexpected. These topics are not relevant to establishing fair, just and reasonable rates based upon EKPC’s historical test year. In vastly exceeding the scope of its purported “exclusive” interest, AppHarvest Morehead has demonstrated that its participation in this matter will unnecessarily complicate the case and be disruptive. The Commission’s intervention regulation purposefully sets a high bar, precisely so that the parties in a case stay focused upon the statutory considerations on the issue at hand and not on wide-ranging arguments over policy and philosophy that are irrelevant to the statutory criteria.

D. AppHarvest Morehead’s Argument that the Question is Already Decided is Clearly Contrary to Law.

AppHarvest Morehead’s final argument is novel – “the Commission has already determined” that it should be allowed to intervene, therefore it should be allowed to intervene.²⁸ This argument effectively nullifies KRS 278.400, which expressly invites parties before the Commission to advocate for a previous determination being set aside. Moreover, for reasons set forth above, it is quite evident that the Commission did not have all of the relevant facts before it

²⁵ See *id.*, Request Nos. 11 – 12.

²⁶ See *id.*, Request No. 23.

²⁷ See *In the Matter of the Electronic 2019 Integrated Resource Plan of East Kentucky Power Cooperative, Inc.*, Order, Case No. 2019-00096 (Ky. P.S.C. Dec. 23, 2020).

²⁸ See AppHarvest Morehead Response, p. 6.

when it made its original finding. The Kentucky Supreme Court has spoken to this very type of circumstance:

When an administrative body improperly excludes relevant evidence in arriving at its decision, the general purpose of remand is to allow for the introduction of that wrongfully-excluded evidence in order to produce a fully-developed factual basis for an eventual administrative decision. In *Broadway & Fourth Realty Company v. Metcalfe*, 230 Ky. 800, 20 S.W.2d 988, 989 (1929), this Court determined that remand may be required when the facts were not adequately developed in the original administrative proceeding; otherwise “great injustice might be inflicted.” The Court followed the *Broadway & Fourth Realty Company* logic a decade later in *Searcy v. Three Point Coal Co.*, 280 Ky. 683, 134 S.W.2d 228 (1939), declaring that a trial court may remand a case for the taking of further proof when an administrative board has “arbitrarily refused to permit evidence to be introduced.” The principle was explored further in *Browning Manufacturing Division v. Paulus*, 539 S.W.2d 296, 297 (Ky.1976), when this Court held that a trial court acts within its discretion in remanding a matter to ensure that an issue will be disposed of only when “the facts [are] fully explored” by the administrative body.²⁹

In seeking rehearing, EKPC has taken appropriate steps to assure that the Commission’s decision is based upon a complete recitation of relevant facts and any argument that the Commission’s decision is irrevocable is plainly contrary to law.

III. CONCLUSION

By being less than forthcoming with the Commission in the first place, AppHarvest Morehead now possesses the means, motive and opportunity to leverage its participation in this case to enrich its affiliates at the bargaining table to the detriment of EKPC, its Owner-Members and their end-use retail customers. Such actions should not be rewarded. 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.

²⁹ *Comprehensive Home Health Servs., Inc. v. Pro. Home Health Care Agency, Inc.*, 434 S.W.3d 433, 437 (Ky. 2013).

This 18th day of May, 2021.

Respectfully submitted,

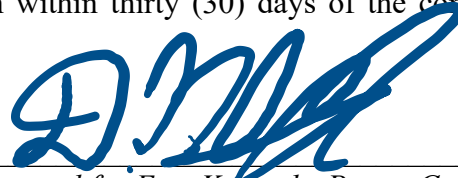


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CERTIFICATE OF SERVICE

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 17, 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.