

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

**RESPONSE OF APPHARVEST MOREHEAD FARM, LLC.,
TO EKPC’S MOTION FOR REHEARING**

On April 27, 2021, the Commission granted the Motion to Intervene (the “Motion”) by AppHarvest Morehead Farm, LLC (“AppHarvest Morehead”) in this matter, finding that AppHarvest Morehead’s “intervention is likely to present issues and develop facts that will assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings.”¹ On May 7, 2021, Applicant East Kentucky Power Cooperative, Inc. (“EKPC”) filed a Motion for Rehearing related to the Commission’s decision. AppHarvest Morehead, by counsel, provides this Response to EKPC’s Motion for Rehearing.

EKPC presents two primary arguments as to why the Commission should reconsider granting intervention to AppHarvest Morehead. First, it suggests that AppHarvest was not transparent in identifying two sister companies within EKPC territory. Second, it maintains that the Motion to Intervene was deficient. Both arguments are meritless and must be rejected.

I. AppHarvest Morehead explicitly mentioned its corporate relationships, and its intervention in the matter cannot be unfairly prejudicial to EKPC, its Owner-Member Cooperatives, and their End-Use Retail Members.

Contrary to EKPC’s suggestion that AppHarvest Morehead failed to disclose its affiliated

¹ Order at 1 (Ky. PSC Apr. 27, 2021).

entities, paragraph 3 of the Motion explicitly mentions them. It states:

3. AppHarvest Morehead is a wholly-owned subsidiary of AppHarvest Operations, Inc., which is a wholly-owned subsidiary of AppHarvest, Inc., a developer and operator of applied technology large-scale controlled indoor farms. AppHarvest, Inc. expects to have developed 12 such farms by the end of 2025. The first such farm is operated by AppHarvest Morehead, which is an end-use customer located in the Fleming-Mason Energy Cooperative (“Fleming-Mason”) service territory. Fleming-Mason is in turn provided with generation and transmission (“G&T”) service by East Kentucky Power Cooperative, Inc. (“EKPC” or “Company”). AppHarvest Morehead, which currently employs approximately 350 persons at the farm, harvested and sold its first crop of tomatoes in January 2021. **Two additional AppHarvest farms are under construction in Madison County, both of which are also located in EKPC’s territory.**

(Emphasis added.) It is logical that these two entities would be engaged in contract negotiations with EKPC.

EKPC argues that confidential information disclosed to AppHarvest Morehead in this case could be used by its sister entities to negotiate unfair terms with EKPC or its Owner-Member Cooperatives. But this is impossible. Any special contract with or rate charged by a utility must be approved by the Commission.² KRS 278.030 requires that rates be fair, just, and reasonable. Accordingly, the Commission will not approve a special contract or rate that is unfair, unjust, or unreasonable to either the utility or the customer.

Equally important, EKPC would be a party to contractual negotiations. If EKPC believed that the contractual terms were not fair, just, and reasonable, it would not have to execute the contact.

² Most contracts involving a utility’s rate specifically state that the contract must be approved by the Commission. As an example, the contract between AppHarvest Morehead, EKPC, and Fleming Mason expressly states in paragraph 21 that the rates and charges in the contract are “subject to approval by the Commission.”

EKPC suggests that confidential information in this case allows AppHarvest Morehead or its affiliates to leverage its position in contract negotiations. But EKPC never explains what type of confidential information would provide unfair negotiating power to those entities. On page 2 of its Motion for Confidential Treatment filed herein on April 1, 2021, EKPC maintains that certain information should be exempt from public disclosure because the information “would give other participants in the PJM market insights into EKPC’s market strategies and performance within PJM” and it “could arm prospective lenders . . . with data to allow such lenders an unfair commercial advantage over EKPC.” AppHarvest Morehead is neither a PJM market participant nor a prospective lender to EKPC. Thus, it is not clear why confidential information would give AppHarvest Morehead or its affiliates an advantage in contract negotiations.³

As a regulated entity, it is not clear what information could give its customers a competitive advantage because the regulator must ultimately approve the rates and terms of service between the entity and customer. And this begs the question—What does EKPC have to hide? But even if there is an argument that a utility’s disclosure of certain information would lead to an unfair competitive advantage for its customers, those rare instances can be handled on a case-by-case basis.

II. AppHarvest Morehead’s Motion was not deficient, and AppHarvest Morehead meets the requirements for intervention.

EKPC has filed this Motion for Rehearing based on the grounds that AppHarvest Morehead’s Motion to Intervene was somehow deficient, even though EKPC has not filed a

³ If EKPC is concerned about disclosure of information affecting contract negotiations, it is also unclear why EKPC has not objected to Nucor Steel Gallatin’s intervention in this case. It appears that EKPC and Nucor’s contractual term is now year-to-year. See Agreement for Electric Service dated April 30, 2013 at paragraph 2. If disclosure of confidential information benefitted Nucor in negotiations, EKPC could end the contract pursuant to its terms and renegotiate a new contract.

Motion for Rehearing on Nucor’s Motion to Intervene that was virtually identical to AppHarvest Morehead’s Motion. A comparison of the two motions reveals that AppHarvest Morehead provided more information in its Motion, in comparison to Nucor’s Motion. But, for whatever reason, EKPC has not challenged Nucor’s intervention.

AppHarvest Morehead meets the Commission’s requirements for intervention. The Commission has interpreted KRS 278.040(2) as requiring a person seeking intervention to have an interest in the rates or service of a utility as those are the only matters that are subject to the Commission’s jurisdiction. *See Order, Kentucky Power Co.*, Case No. 2017-00179 (Ky. PSC June 19, 2017). AppHarvest Morehead satisfies this requirement because the electric rates it pays are directly related to EKPC’s rates.⁴

Administrative regulation 807 KAR 5:001, Section 4(11)(b) states:

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.

AppHarvest Morehead likewise meets this requirement. Initially, it must be noted that there is no dispute that AppHarvest Morehead made a timely motion for intervention. Then, in order to satisfy this regulatory provision, an intervenor must meet one of two criteria. AppHarvest Morehead meets them both.

⁴ In contrast, entities that have not satisfied this requirement, such as companies that sell electric vehicle charging equipment and services to customers in Kentucky, were not customer of the regulated utility. *See, e.g., Duke Energy Kentucky, Inc.*, Case No. 2019-00271(Ky. PSC Oct. 14, 2019)(denying intervention to ChargePoint, Inc., in part because it “did not establish that it pays any retail rate to Duke Kentucky or that it receives any retail service from Duke Kentucky,” and thus failed to “established any direct interest in Duke Kentucky's retail rates or service”).

AppHarvest Morehead has special interests in EKPC's rate case that will not otherwise be adequately represented. AppHarvest Morehead has a contract with EKPC that is unique to any other party in this case. Although the Office of Attorney General may have the statutory duty to represent "consumer interests," it cannot effectively represent all consumers that may have conflicting interests. Similarly, Nucor Steel Gallatin ("Nucor") has been granted intervention, but its contract with EKPC and Owen Electric Cooperative has different provisions than that of AppHarvest Morehead. In addition, Nucor's load and energy usage is significantly different than AppHarvest Morehead.⁵ Thus, AppHarvest Morehead has a special interest that cannot be represented by another party.

EKPC also maintains that AppHarvest Morehead does not have a special interest in EKPC's rate case because the contractual provisions involving the two parties "insulate it [AppHarvest Morehead] from the effect of future changes in EKPC rates." This is simply not accurate, as EKPC's own statements demonstrate. Specifically, EKPC notes that "Section 2 of the Special Contract allows AppHarvest Morehead to freely and voluntarily 'choose any existing tariff . . . for which [it] qualifies.'" Thus, AppHarvest Morehead's options will change based on future changes in EKPC rates because the tariffs will change. Unless EKPC is interpreting the contract to allow AppHarvest Morehead to receive service on any tariff for which it qualifies *under the rates in effect as of the date of the contract*, the contract does not insulate AppHarvest Morehead from future changes in EKPC rates. Nevertheless, AppHarvest Morehead has a special interest in this proceeding.

⁵ Although EKPC maintains that AppHarvest Morehead's contract is based on a template entered into by dozens of other industrial customers, it appears that there are significant differences between that contract and EKPC's contract with Nucor.

Pursuant to the regulation, the Commission need not make a specific finding that an intervenor has a “special interest” if the intervenor will present issues or develop facts that will assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings. *As the Commission has already determined,*⁶ AppHarvest Morehead is also likely to present issues or develop facts that will assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings. AppHarvest Morehead anticipates addressing issues and developing facts to include but not be limited to the following subject matter: cost of service study adjustments made by witness Richard J.Macke, calculations made by EKPC that resulted in the specific increase for each distribution cooperative, the relationship between the rate categories of EKPC and Fleming Mason’s rate classes, test year selection and adjustments, any pandemic adjustments, bidding of DSM/EE into the PJM market, environmental regulation impacts on the generating fleet and smart grid technologies. These are topics included within AppHarvest Morehead’s requests for information.

III. Conclusion

AppHarvest Morehead seeks to be an asset to this proceeding by presenting issues and developing facts that will assist the Commission in fully considering the matter. It is committed not to unduly complicate or disrupt the proceeding. Moreover, it believes that it has been transparent, and will continue to be transparent, as it has nothing to hide. AppHarvest Morehead appreciates the Commission’s order granting intervention in this case, and it looks forward to participating in this case. Accordingly, AppHarvest Morehead respectfully requests that the Commission deny EKPC’s motion.

⁶ Order at 1 (Ky. PSC Apr. 27, 2021).

Respectfully submitted,

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