

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE ELECTRONIC APPLICATION OF)
FLEMING-MASON ENERGY COOPERATIVE,)
INC., FOR PASS-THROUGH OF EAST) Case No. 2021-00109
KENTUCKY POWER COOPERATIVE, INC.'S)
WHOLESALE RATE ADJUSTMENT)

FLEMING-MASON ENERGY COOPERATIVE, INC.'S
RESPONSE IN OPPOSITION TO APPHARVEST MOREHEAD FARM, LLC'S
MOTION FOR LEAVE TO INTERVENE

Comes now Fleming-Mason Energy Cooperative, Inc. ("Fleming-Mason"), by counsel, pursuant to 807 KAR 5:001, Section 4(11)(b), 807 KAR 5:001 Section 5(2) and other applicable law, and does hereby tender its response in opposition to the motion for leave to intervene of AppHarvest Morehead Farm, LLC ("AppHarvest Morehead"), respectfully stating as follows:

I. BACKGROUND

Fleming-Mason filed its application to pass through the proposed wholesale rate increase of East Kentucky Power Cooperative, Inc. on April 1, 2021. In a Procedural Order entered on April 15, 2021, the Commission established an April 30, 2021 deadline to file motions for leave to intervene. AppHarvest Morehead subsequently filed a motion to intervene in this case on April 30th. However, the filing was made only after AppHarvest Morehead previously filed a motion for leave to intervene in EKPC's rate case on April 23, 2021, which the Commission granted in an Order entered on April 27, 2021.

For the reasons set forth herein, Fleming-Mason believes that AppHarvest Morehead's motion is not adequately supported and is inconsistent with the standards the Commission has

long-held with regard to proffering a sustainable basis for gaining intervention status. Accordingly, Fleming-Mason respectfully requests the Commission to deny AppHarvest Morehead's motion.

II. ARGUMENT

A. Fleming-Mason is Concerned that AppHarvest Morehead's Request For Leave to Intervene May be Pretextual in Nature

Contemporaneous with the filing of this Response, Fleming-Mason understands that EKPC has filed a motion for reconsideration of the Commission's April 27th Order allowing AppHarvest Morehead to intervene in the wholesale rate case. Fleming-Mason is not a party to the contractual negotiations that are ongoing between EKPC, Blue Grass Energy Cooperative Corporation ("Blue Grass"), AppHarvest Berea Farm, LLC and AppHarvest Richmond Farm, LLC. Nevertheless, Fleming-Mason does not want any intervention in its pass-through case to become a conduit for harming the interests of EKPC, Blue Grass Energy, any other Owner-Member Cooperatives ("Owner-Members") of EKPC or those Owner-Members' End-Use Retail Members ("retail members") by allowing confidential and commercially valuable information of EKPC to be obtained by the affiliates of AppHarvest Morehead in their ongoing contractual negotiations.

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

Even if AppHarvest Morehead's motion is not pretextual in nature, it still fails to adequately state a basis for being granted. 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.¹

In the Commission’s April 15, 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.*²

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 in the Commission’s April 15th Order.³ 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-

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

² *See* Order, Case No. 2021-00109, p. 4 (Ky. P.S.C Apr. 15, 2021) (emphasis added).

³ *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.”).

level Contract Demand provided in the IPA to reflect the seasonal impact on the use of electricity required for the grow lights.⁴

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 15th 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 should be denied.

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 specific 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.

Likewise, AppHarvest Morehead's reliance upon a “two-level Contract Demand” is also inconsequential. Fleming-Mason understands that EKPC has two-level Contract Demand

⁴ See AppHarvest Morehead's Motion to Intervene, p. 3 (emphasis added).

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 fails to identify which portion of Fleming-Mason's rate filing even implicates the two-level contract demand term of its special contract. In fact, the relief sought by Fleming-Mason in this docket is limited to passing through any increase in wholesale rates in accordance with KRS 278.455. This case will have no impact upon AppHarvest Morehead's two-level contract demand. There is simply nothing in Fleming-Mason's application that will uniquely or specially impact AppHarvest Morehead's existing special contract.

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 other 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.⁵ This well-known body of administrative precedent makes AppHarvest Morehead's motion even more puzzling.

⁵ 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 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).

The special contract between AppHarvest Morehead, EKPC and Fleming-Mason contains provisions that were bargained for by AppHarvest Morehead to specifically insulate it from the effect of future changes in Fleming-Mason’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.”⁶ Section 3 of the Special Contract allows AppHarvest Morehead to increase or decrease its Contract Demand –subject to certain floors – upon the giving of thirty (30) days’ notice.⁷ These and other provisions assure that even when Fleming-Mason’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.⁸ 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. AppHarvest Morehead has no special interest in this proceeding.

III. CONCLUSION

AppHarvest Morehead’s motion for leave to intervene is both facially and substantively deficient and ignores the fact that the terms of its special contract help insulate it from whatever

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.”).

⁶ Special Contract, p. 3.

⁷ *Id.*, p. 4.

⁸ 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).

outcome its intervention is purported to ameliorate. The purpose of this case is pass through any increase in EKPC's wholesale rates in a manner that is consistent with KRS 278.455. Any effort to inject new and unrelated issues should be resisted. For the reasons set forth herein, Fleming-Mason respectfully requests the Commission to deny AppHarvest Morehead's 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.



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