

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTONIC APPLICATION OF FLEMING-MASON ENERGY ) CASE NO. 2021-00109  
COOPERATIVE,INC’S PASS-THROUGH OF EAST KENTUCKY )  
POWER COOPERATIVE, INC’S WHOLESALE RATE )  
ADJUSTMENT )

---

**REPLY IN SUPPORT OF APPHARVEST MOREHEAD FARM, LLC.’S,  
MOTION FOR INTERVENTION**

---

On April 30, 2021, AppHarvest Morehead Farm, LLC (“AppHarvest Morehead”) filed its Motion to Intervene in this matter. This was shortly after the Commission granted AppHarvest Morehead’s Motion to Intervene in East Kentucky Power Cooperative, Inc.’s (“EKPC”) companion rate case, 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.”<sup>1</sup> On May 7, 2021, Applicant Fleming-Mason Cooperative, Inc. (“Fleming-Mason”), filed its response in opposition to AppHarvest Morehead. Accordingly, AppHarvest Morehead, by counsel, provides this Reply in support of its Motion to Intervene.

Fleming-Mason presents two primary arguments as to why the Commission should deny intervention to AppHarvest Morehead. First, it suggests that AppHarvest Morehead’s Motion “may” be pretextual. Second, it maintains that the Motion to Intervene was deficient. Both arguments are meritless and must be rejected.

---

<sup>1</sup> Order at 1 (Ky. PSC Apr. 27, 2021).

**I. AppHarvest Morehead is not pretextual in nature.**

Fleming-Mason initially argues that AppHarvest’s motion “may” be pretextual in nature. This argument has no basis in fact. AppHarvest Morehead simply wants to ensure that it can be a party to this rate case so that it may develop facts and issues that can assist the Commission in determining fair, just, and reasonable rates.

Fleming-Mason indicates that it does not want “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.” This suggests that confidential information in this case allows AppHarvest Morehead or its affiliates to leverage its position in contract negotiations. But Fleming-Mason never explains what type of confidential information would provide unfair negotiating power to those entities.

As a regulated entity, it is not clear what information Fleming-Mason could give its customers that would result in a competitive advantage for a consumer receiving utility service from another utility, 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 and its Owner-Members 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, not excluding intervention entirely.

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

Fleming-Mason has filed its Response based on the grounds that AppHarvest Morehead’s Motion to Intervene was somehow deficient. This is simply not true. The Commission has

granted a virtually identical motion for intervention in a companion case. In Case No. 2021-00115, the Commission granted intervention in Owen Electric Cooperative's rate case to Nucor Gallatin Steel ("Nucor Gallatin"), who filed a motion that was virtually identical to AppHarvest's motion. For whatever reason, Owen Electric Cooperative did not (and has not) challenged Nucor Gallatin's intervention.

Nevertheless, 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 Fleming-Mason's rates.<sup>2</sup>

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.

---

<sup>2</sup> 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 Fleming-Mason’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. No other party—including the Office of Attorney General—has sought intervention. 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 Fleming-Mason’s 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 Fleming-Mason rates because the tariffs will change. Unless Fleming Mason 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 Fleming-Mason’s rates. As such, AppHarvest Morehead has a special interest in this proceeding.

In an effort to argue that AppHarvest Morehead does not have a special interest, Fleming-Mason states that other customers have loads that are large or with complicated loads in the EKPC system, but this is Fleming-Mason’s rate case. Yet other than one erroneous reference described below, none of its responses focus on Fleming-Mason. Thus, Fleming-Mason erroneously refers to “other customers taking service under Fleming-Mason’s Schedule LI6B

tariff’ yet their own application says that for the test year there are no customers taking under this tariff.<sup>3</sup>

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,*<sup>4</sup> 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 EKPC rate-case proceeding. The same is true with Fleming-Mason’s rate case. AppHarvest Morehead anticipates addressing issues and developing facts to include but not be limited to the following subject matter: understanding how and why witness Wolfram apparently rejected the Commission’s Kenergy test interpreting KRS 278.455 and used a new test without providing authority for it; understanding how the rate class that AppHarvest Morehead takes under was assigned any costs when apparently there were no customers in that class because the test year was calendar year 2019; and Fleming-Mason’s rate classes. These are topics included within AppHarvest Morehead’s first request 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. AppHarvest Morehead appreciates the Commission’s order granting intervention in EKPC’s rate case, and it looks forward to participating in this case. Accordingly, AppHarvest Morehead respectfully requests that the Commission grant its motion for intervention.

---

<sup>3</sup> See Exhibit 3 page 5 and 6 to John Wolfram’s Direct Testimony.

<sup>4</sup> Order at 1 (Ky. PSC Apr. 27, 2021).

Respectfully submitted,

/s/ M. Todd Osterloh

STURGILL, TURNER, BARKER & MOLONEY, PLLC

James W. Gardner

M. Todd Osterloh

333 W. Vine Street, Suite 1500

Lexington, Kentucky 40507

Telephone No.: (859) 255-8581

Facsimile No.: (859) 231-0851

[jgardner@sturgillturner.com](mailto:jgardner@sturgillturner.com)

[tosterloh@sturgillturner.com](mailto:tosterloh@sturgillturner.com)

*Attorneys for AppHarvest Morehead*