

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC TARIFF FILING OF EAST)	
KENTUCKY POWER COOPERATIVE, INC.)	
AND ITS MEMBER DISTRIBUTION)	CASE NO.
COOPERATIVES FOR APPROVAL OF)	2021-00198
PROPOSED CHANGES TO THEIR QUALIFIED)	
COGENERATION AND SMALL POWER)	
PRODUCTION FACILITES TARIFFS)	

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

Comes now East Kentucky Power Cooperative, Inc. (“EKPC”) by counsel, pursuant to KRS 278.400 and other applicable law, and does hereby move the Kentucky Public Service Commission (“Commission”) to grant rehearing with regard to its October 26, 2021 Order in this docket, respectfully stating as follows:

I. BACKGROUND

EKPC filed revised tariff sheets for its existing tariff for Qualified Cogeneration and Small Power Production Facilities (“PURPA Tariff”) on March 31, 2021. EKPC proposed to update capacity and energy pricing in the tariffs and to reduce the market administration fee, beginning with an effective date of June 1, 2021, which was timed to coincide with the beginning of a new Delivery Year within PJM Interconnection, LLC (“PJM”), of which EKPC is a member. Each of EKPC’s sixteen (16) Owner-Members also filed conforming tariffs to extend the terms of EKPC’s PURPA Tariff to each of their end-use retail members.

On May 24, 2021, the Commission entered an Order suspending the PURPA Tariff of EKPC and each of its Owner-Members. While several of EKPC's Owner-Members elected to participate in the case, no non-utility parties sought leave to intervene in the case. EKPC responded to two initial rounds of information requests from Commission Staff and offered testimony on matters overlapping the subject of those data requests in its then-pending rate case.¹ EKPC also participated in a lengthy formal conference held on September 10, 2021 and tendered responses to a third set of information requests on September 24, 2021. A brief was filed by EKPC on October 1, 2021. The Commission's Order was entered on October 26, 2021. This motion for rehearing is timely refiled pursuant to KRS 278.400.

II. REQUEST FOR REHEARING

A. EKPC Applied the Correct Legal Standard in Interpreting 807 KAR 5:054

EKPC appreciates that the Commission's Order is a departure from past precedent where EKPC's method for interpreting 807 KAR 5:054 and calculating the capacity value of dispatchable generation resources based upon observable and timely capacity market pricing auctions has been accepted as reasonable by the Commission.² In making this conclusion of law, the Order refers only to 807 KAR 5:054, Section 1(1), which defines

¹ See *In the Matter of the Electronic Application of East Kentucky Power Cooperative, Inc. for a General Adjustment of Rates, Approval of Depreciation Study, Amortization of Certain Regulatory Assets, and Other General Relief*, Hearing Video Record, Case No. 2021-00103 (Aug. 3, 2021).

² See TFS2014-00200 (approved May 28, 2014); TFS2015-00188 (approved May 28, 2015); TFS2016-00197 (approved May 31, 2016); TFS2018-00152 (approved May 24, 2018); TFS2019-00196 (approved May 13, 2019); TFS2020-00152 (approved May 28, 2020); see also *Com., ex. rel. Conway v. Thompson*, 300 S.W.3d 152, 165-66 (Ky. 2009) ([A]n administrative agency ... may depart from its earlier interpretation of the law, provided that the agency "explicitly and rationally justifi[es] such a change of position.") quoting *In re Hughes & Coleman*, 60 S.W.3d 540, 544 (Ky. 2001). The Order recites 807 KAR 5:054 Section 1(1), but offers no additional findings to support its departure from precedent.

“avoided cost” and states that EKPC has misinterpreted the definition as applying to the value of capacity sales as opposed to the value of capacity purchases:

As an initial matter, EKPC applies an incorrect legal standard for avoided costs. EKPC effectively bases its avoided costs on the incremental costs to *sell* the output from a COGEN/SPP. However, in accordance with 807 KAR 5:054, Section 1(1), EKPC should base avoided costs on the incremental costs that, but for the purchase from a COGEN/SPP the utility would have to either *purchase* or *generate*.

Based upon a review of the case record and being otherwise sufficiently advised, the Commission finds that the COGEN/SPP tariffs’ rates proposed by EKPC and its Owner-Members are not fair, just and reasonable, and therefore should be denied. This is because EKPC and its Owner-Members based their COGEN/SPP tariff rates on incremental costs premised on the sale of QF output, which is not allowed under the Commission’s regulation. In accordance with 807 KAR 5:054, Section 1(1), EKPC’s COGEN/SPP tariff rates should reflect the incremental costs for the purchase or generation of energy or capacity that EKPC would have incurred but for the purchase of from the QF.³

EKPC respectfully requests the Commission to grant rehearing on this issue. First, with regard to the use of a “purchase” price as opposed to a “sale” price, the distinction is one without a difference. The Order says EKPC “effectively” bases its avoided cost on the incremental costs to sell a PURPA generator’s output, but does not cite any portion of the record to support the finding. In fact, the avoided cost rate set forth in EKPC’s PURPA Tariff is based on the price to *purchase* capacity in the PJM market. Moreover, even if EKPC did use the “sell” price in the PJM market, it would be equivalent to the use of a “purchase” price as both must be the same for any given capacity transaction to occur. The

³ See Order, p. 4.

purchase price in PJM’s BRA and incremental auctions will always equal the sell price, i.e., the price received by the seller and the price paid by the purchaser are the same. Accordingly, to the extent that EKPC’s reliance upon a price point established in the PJM market through an auction process remains an appropriate and permissible measure of dispatchable capacity values, the sell price would be appropriate and reasonable.

Likewise, EKPC respectfully suggests that the comparison to a utility’s cost to “generate” is too broadly applied in the Order. The definition of “avoided costs” for PURPA purposes is:

"Avoided costs" means incremental costs to an electric utility of electric energy or capacity or both which, if not for the purchase from the qualifying facility, the utility would generate itself or purchase from another source.⁴

The words “generate” and “purchase” are both descriptors of the types of “incremental costs” a utility “would” incur but for the purchase from the qualifying facility. The terms are not used to describe incremental costs that a utility “could” incur but for the purchase from the qualifying facility. “Would” is a term of certainty that connotes a definitive action, while “could” is a word that denotes possible action.⁵ “Would” within the regulation requires there to be an underlying need for capacity before the purchase is necessary. The use of the word “would” must be presumed to be intentional and it must be given its full meaning.⁶ The difference between “would” and “could” is important

⁴ See 807 KAR 5:054, Section 1(1).

⁵ “Would” is defined as “the past tense of will” and is “used in auxiliary function to express plan or intention.” See <https://www.merriam-webster.com/dictionary/would> (Nov. 12, 2021). By contrast, “could” is defined as “the past tense of can” and as “suggesting less force or certainty or as a polite form in the present.” See <https://www.merriam-webster.com/dictionary/could> (Nov. 12, 2021).

⁶ See *Maysey v. Express Servs., Inc.*, 620 S.W.3d 63, 71 (Ky. 2021) citing *Univ. of Louisville v. Rothstein*, 532 S.W.3d 644, 648 (Ky. 2017).

because imposing a capacity purchase obligation on a utility for what it “would” otherwise purchase is consistent with PURPA and does not harm the utility or its ratepayers.⁷ Imposing a capacity purchase obligation on what a utility “could” otherwise do, however, is very different. It creates a financial obligation where none currently exists or might ever exist. This, of course, serves to harm both the utility and its ratepayers by creating a cost that would not otherwise come into being – the utility would not be purchasing the capacity if left to its own devices – and then forcing that cost upon ratepayers. The Order imposes an obligation upon EKPC to purchase dispatchable capacity at a price equivalent to what EKPC “could” pay if it was actually purchasing power. In contrast, EKPC’s use of the most recent incremental auction clearing price is more equivalent to what EKPC “would” pay for such capacity.

EKPC does not have a current need to procure dispatchable capacity until 2024 at the earliest.⁸ Thus, when the Order more than doubles the dispatchable capacity values for PURPA generators, it increases the incremental and unnecessary cost to EKPC, its Owner-Members and their retail use customers. Accordingly, EKPC respectfully requests the Commission to grant rehearing and continue to allow it to use the PJM Third Incremental Auction as the appropriate pricing mechanism for PURPA contracts until such time as EKPC actually has a need for such capacity.

⁷ See, e.g., *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, Regs. Preamble, ¶ 30,128, at 30,870 (1980) (“A [QF] may seek to have a utility purchase more energy or capacity than the utility requires to meet its total system load. In such a case, while the utility is legally obligated to purchase any energy or capacity provided by a [QF], the purchase rate should only include payment for energy or capacity which the utility can use to meet its total system load.”).

⁸ See *In the Matter of the 2019 Integrated Resource Plan of East Kentucky Power Cooperative, Inc.*, Integrated Resource Plan (filed Apr. 1, 2019).

B. The Requirement to Provide “Actual Costs” in the Future is Unreasonable.

While affirming the Commission’s agreement that EKPC is differently situated than other utilities that participate in PJM on a Fixed Resource Requirement basis,⁹ the Order holds that EKPC’s use of PJM’s most recent third incremental BRA results is unreasonable for establishing the capacity value of dispatchable PURPA resources.¹⁰ The Order further directs EKPC to undertake certain tasks prior to updating its PURPA tariff in 2022 and beyond:

However, in future filings, the Commission expects EKPC to develop a robust record upon which avoided costs can be calculated. In those future filings, EKPC should provide the most recent BRA results and the actual cost for a unit of physical capacity, both if the capacity was purchased or built.¹¹

Providing the most recent BRA (or Third Incremental Auction) results will not be difficult, however, EKPC anticipates significant difficulty in being able to provide “the actual cost for a unit of physical capacity, both if the capacity was purchased or built.” The only way to accurately gather this information is to conduct a formal request for proposals (“RFP”) process. However, when potential bidders understand that the RFP is being undertaken solely for price discovery in the construction market, both the quantity and quality of the bids received are likely to be significantly less than what would be received in the event of a normal procurement RFP. Moreover, in conducting price discovery RFPs

⁹ See Order, p. 8.

¹⁰ See *id.*, pp. 8-9. The Order also indicates that the Commission will likely ascribe a value to non-dispatchable capacity in the future. See *id.*, p. 9. Because this action is contemplated for the future, it is not the subject of EKPC’s motion for rehearing. Nevertheless, EKPC has concerns with how such a capacity value might be determined and reserves the right to present evidence on this and related issues at the appropriate time in the future.

¹¹ See Order, p. 9.

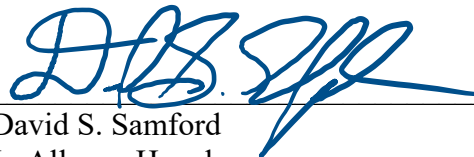
over a period of time, the ability of EKPC to generate reasonable and reliable cost estimates in the future when an actual procurement is underway is likely to be more challenging. Finally, the costs of preparing and running an RFP of this type and nature are not insignificant and require the allocation of administrative personnel and time that would normally be devoted to other purposes. For these reasons, the requirement to gain data as to the “actual cost” for either a construction project or market procurement will be nearly impossible to achieve and could be self-defeating over the long-term.

Instead, EKPC proposes that it be allowed to use open source data and any available proprietary reports which could be used to create a reasonable estimation of the costs of a new construction project or market purchase. Such a proxy calculation would appear to fulfill the Commission’s intent while also preventing reputational harm to EKPC’s standing among vendors in the market and reallocating valuable administrative resources.

WHEREFORE, on the basis of the foregoing, EKPC respectfully requests the Commission to grant rehearing and reconsider the matters set forth herein.

This 15th day of November, 2021.

Respectfully submitted,



David S. Samford
L. Allyson Honaker
GOSS SAMFORD, PLLC
2365 Harrodsburg Road, Suite B-325
Lexington, Kentucky 40504
(859) 368-7740
david@gosssamfordlaw.com
allyson@gosssamfordlaw.com

*Counsel for East Kentucky Power
Cooperative, Inc.*

CERTIFICATE OF SERVICE

In accordance with 807 KAR 5:001, Section 8, this is to certify that the electronically filed documents are true and accurate copies of the same documents being filed; that the electronic filing has been transmitted to the Commission on November 15, 2021; that there are currently no parties in this proceeding that the Commission has excused from participation by electronic means; and that no paper copy of this filing will be delivered to the Commission.



*Counsel for East Kentucky Power
Cooperative, Inc.*