

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 COOPERATIVES)	CASE NO.
FOR APPROVAL OF PROPOSED CHANGES TO)	2021-00198
THEIR QUALIFIED COGENERATION AND SMALL)	
POWER PRODUCTION FACILITIES TARIFFS)	

ORDER

On November 15, 2021, East Kentucky Power Cooperative, Inc. (EKPC), pursuant to KRS 278.400, requested a partial rehearing of the Commission's October 26, 2021 Order that established rates for EKPC's qualified cogeneration and small power production facilities (COGEN/SPP) tariff. There are no intervenors in this proceeding. This matter stands submitted for a decision.

LEGAL STANDARD

KRS 278.400, which establishes the standard of review for motions for rehearing, limits rehearing to new evidence not readily discoverable at the time of the original hearings, to correct any material errors or omissions, or to correct findings that are unreasonable or unlawful. A Commission Order is deemed unreasonable only when "the evidence presented leaves no room for difference of opinion among reasonable minds."¹

¹ *Energy Regulatory Comm'n v. Kentucky Power Co.*, 605 S.W.2d 46 (Ky. App. 1980).

An order can only be unlawful if it violates a state or federal statute or constitutional provision.²

By limiting rehearing to correct material errors or omissions, and findings that are unreasonable or unlawful, or to weigh new evidence not readily discoverable at the time of the original hearings, KRS 278.400 is intended to provide closure to Commission proceedings. Rehearing does not present parties with the opportunity to relitigate a matter fully addressed in the original Order.

DISCUSSION AND FINDINGS

The issues raised by EKPC in its motion and the Commission's findings are set forth below.

Standard and Reasonable Proxy for Calculating Avoided Capacity Costs

EKPC argued that the Commission's Order contained a material error in alleging that EKPC applied the incorrect legal standard for calculating avoided costs for capacity, and thus rehearing should be granted to correct the error. Although EKPC framed the issue as an incorrect statement that EKPC based certain costs on a sale price versus a purchase price, EKPC's primary argument appears to be the proxy that the Commission directed EKPC to use to calculate avoided capacity costs.

EKPC first argued that the Commission erroneously said that EKPC based the avoided costs on the incremental costs to sell output from a COGEN/SPP instead of the cost to purchase output, and therefore EKPC applied the incorrect legal standard for calculating avoided costs. EKPC asserted that the Commission failed to cite to the record

² *Public Service Comm'n v. Conway*, 324 S.W.3d 373, 377 (Ky. 2010); *Public Service Comm'n v. Jackson County Rural Elec. Coop. Corp.*, 50 S.W.3d 764, 766 (Ky. App. 2000); *National Southwire Aluminum Co. v. Big Rivers Elec. Corp.*, 785 S.W.2d 503, 509 (Ky. App. 1990).

in support of the conclusion, that EKPC followed the law in calculating avoided costs, and that even if EKPC based avoided costs on the sale of output, the difference between the sale price and the purchase price is a distinction without a difference. EKPC next argued that the Commission imposed an obligation for EKPC to purchase COGEN/SPP output at a price that it could pay and not what it would pay because EKPC does not expect to need capacity until 2024, and that it should be allowed to use the PJM Interconnection, LLC (PJM) Third Incremental Auction as the proxy for the avoided capacity cost component of COGEN/SPP tariffs.

In the October 26, 2021 Order, the Commission stated that EKPC based the COGEN/SPP tariff rates on incremental costs “premised on the sale of QF output,” which is contrary to Commission regulation, 807 KAR 5:054, Section 1(1).³ That regulation requires EKPC’s COGEN/SPP tariff rates to “reflect the incremental costs for the purchase of generation of energy or capacity that EKPC would have incurred but for the purchase from the QF.”⁴ The Commission also directed EKPC to use the most recent base residual auction (BRA) capacity market clearing price in this proceeding, instead of the Third Incremental Auction, as a reasonable proxy for calculating avoided capacity costs.

Addressing first the question of a reasonable proxy, the October 26, 2021 Order explained in significant detail that the Commission is placing greater emphasis on calculating avoided costs based upon a proxy unit calculation and why the Commission

³ Oct. 26, 2021 Order at 4.

⁴ *Id.*

rejected EKPC's request to use the Third Incremental Auction as the reasonable proxy.⁵ The Commission reiterates that the use of incremental auctions to determine EKPC's avoided capacity cost and value is inappropriate because, "as EKPC notes that that auction is not where the utility purchases back its entire load."⁶ EKPC seeks to relitigate the issue, which was decided based upon substantial evidence in the case record.

The Commission is concerned that EKPC contradicts the case record in this matter when, in its motion for rehearing, EKPC says that it does not project a need for capacity until 2024 and that this period aligns with the 5-year COGEN/SPP contracts.⁷ EKPC currently projects the need for capacity resources in 2024, which is within the 5-year term of the COGEN/SPP contracts.

Finally, the Commission notes that EKPC's argument that the sale price is inherently the same as the purchase price, and thus is a distinction without a difference, ignores that context matters, and the sale price is not always the purchase price. The Public Utility Regulatory Policies Act of 1978 (PURPA)⁸ and 807 KAR 5:054, Section 1(1), obligate EKPC to calculate avoided costs based upon incremental costs that, but for the purchase from a COGEN/SPP, EKPC would either have to purchase or generate. EKPC seemed to assume that any COGEN/SPP purchases would only offset its purchases

⁵ See Oct. 26, 2021 Order at 5–10 and footnote 10.

⁶ *Id.* at 9.

⁷ EKPC's Response to Commission Staff's First Request for Information (Staff's First Request), Item 4b; Formal Conference Video Transcript (VT) at 3:05:19–3:05:32; and EKPC's Post-Formal Conference Brief (filed Oct. 1, 2021) at 8.

⁸ 16 U.S.C. Chapter 46, § 2601 *et seq.*

during the third incremental auction, when capacity prices are demonstratively less than the BRA results, for the entire 5 years of the contract.⁹

For the reasons discussed above, the Commission finds that EKPC failed to meet its burden of proof that the October 26, 2021 Order contained a material error or omission, or was unlawful or unreasonable, and thus rehearing should be denied for this issue.

Basis for Actual Cost for Physical Capacity

EKPC asserted that the Commission's requirement to use actual costs in calculating avoided capacity costs in the future is unreasonable, and therefore rehearing should be granted.

EKPC argued that the only way to obtain actual costs is to issue a request for purchase (RFP), and that issuing an RFP only to obtain pricing information would not provide accurate or robust information because few bidders would expend the time and effort to place a bid on a non-existent project. EKPC requested Commission approval to use public and proprietary sources to obtain estimates that closely represent actual costs.

The Commission notes that the October 26, 2021 Order did not require EKPC to issue an RFP and disputes EKPC's assertions that an RFP is the only way to obtain actual costs. Although the Commission finds that EKPC failed to meet its burden of proof on this issue, we will clarify that EKPC does not have to issue an RFP, but can use public, transparent, widely used data sources, such as the National Renewable Energy Laboratories' Annual Technology Baseline (NREL ATB) as a source for determining actual costs for a physical proxy unit in calculating avoided capacity costs.

⁹ EKPC's Response to Commission Staff's Second Request for Information, Item 1.

IT IS THEREFORE ORDERED that:

1. EKPC's motion for rehearing is denied.
2. This matter is closed and removed from the Commission's docket.

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By the Commission



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