

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC INVESTIGATION OF THE)	CASE NO.
SERVICE, RATES AND FACILITIES OF)	2021-00370
KENTUCKY POWER COMPANY)	

ORDER

On September 29, 2021, Kentucky Power Company (Kentucky Power), pursuant to 807 KAR 5:001, Section 19, filed an application seeking, *inter alia*, a declaratory order from the Commission that Wheeling Power Company (Wheeling) is not required to obtain a Certificate of Public Convenience and Necessity (CPCN) from the Commission in order to install equipment at the Mitchell Generating Station (Mitchell) to comply with the United States Environmental Protection Agency's (EPA) Steam Electric Effluent Guidelines (ELG) Rule. Kentucky Power also requested deviation from the scheduling provisions of 807 KAR 5:001, Section 19, and that the Commission issue an Order on or before October 8, 2021.

BACKGROUND

Kentucky Power and Wheeling are both wholly owned subsidiaries of American Electric Power Company, Inc. (AEP). Kentucky Power is incorporated in Kentucky, is a utility as defined in KRS 278.010(3)(a), and provides, *inter alia*, electric retail service to approximately 165,000 customers in twenty counties in Kentucky. Wheeling is incorporated in West Virginia, provides retail electric service in West Virginia, and, on

information and belief, does not provide in Kentucky any of the services listed in KRS 278.010(3).

Mitchell is a 1,570 MW coal-fired, steam-generating plant in Moundsville, West Virginia. Kentucky Power and Wheeling each own an undivided 50 percent interest in Mitchell and both operate Mitchell under an operating agreement approved by the Federal Electric Regulatory Commission (FERC).

Kentucky Power, in Case No. 2021-00004, applied to the Commission requesting, *inter alia*, a CPCN to construct equipment at Mitchell in order for Mitchell to comply with the EPA's ELG Rule and the EPA's Coal Combustion Residual (CCR) Rule.¹ In the alternative, Kentucky Power requested a CPCN to construct equipment necessary to comply with the CCR Rule. The Commission approved the CCR Rule option and denied the CPCN to construct equipment necessary to comply with the ELG Rule.²

Wheeling, similar to Kentucky Power, sought approval from the West Virginia Public Service Commission (WV PSC) to construct at Mitchell the construction necessary to comply with the ELG and CCR rules.³ The WV PSC, on August 4, 2021, approved

¹ Case No. 2021-00004, *Electronic Application of Kentucky Power Company for Approval of a Certificate of Public Convenience and Necessity for Environmental Project Construction at the Mitchell Generating Station, an Amended Environmental Compliance Plan, and Revised Environmental Surcharge Tariff Sheets* (filed Feb. 8, 2021).

² Case No. 2021-00004, *Electronic Application of Kentucky Power Company for Approval of a Certificate of Public Convenience and Necessity for Environmental Project Construction at the Mitchell Generating Station, an Amended Environmental Compliance Plan, and Revised Environmental Surcharge Tariff Sheets* (Ky. PSC July 15, 2021).

³ West Virginia Public Service Commission Case No. 20-1040-E-N, *Application for the Issuance of a Certificate of Public Convenience and Necessity for Internal Modifications at Coal Fired Generating Plants Necessary to Comply with Federal Environmental Regulations* (filed Dec. 23, 2020). The Commission notes that the application was not only for construction at Mitchell, but also for plants that Wheeling owns with Appalachian Power Company in West Virginia. For the purposes of this Order, the Commission is only discussing the application to construct at Mitchell.

Wheeling's request to construct equipment at Mitchell in order to comply with the ELG and CCR rules, granting Wheeling CPCNs for both projects.⁴

Wheeling and Appalachian Power Company petitioned the WV PSC to reopen the proceeding in order to address certain issues. With regard to Mitchell, according to Kentucky Power, Wheeling sought clarification on issues such as (1) a ruling that Wheeling was to proceed with the ELG project at Mitchell; and (2) an acknowledgement that additional investments at Mitchell would be necessary prior to 2028, and would be the responsibility of West Virginia Customers if Mitchell operates past 2028.⁵ Wheeling and Appalachian Power Company also stated that the ELG Rules required them to notify the West Virginia Department of Environmental Protection, by October 13, 2021, if the companies' decide not to make the modifications necessary to comply with the ELG Rules, necessitating the eventual retirement of those plants.

The WV PSC, on September 24, 2021, held a hearing on Wheeling's and Appalachian Power Company's petition. According to counsel for Kentucky Power, at that hearing, staff for the WV PSC sought clarification regarding whether Wheeling was required to obtain a CPCN from this Commission to proceed with the ELG project at Mitchell.

⁴ WV PSC Case No. 20-1040-E-CN, *Application for the Issuance of a Certificate of Public Convenience and Necessity for Internal Modifications at Coal Fired Generating Plants Necessary to Comply with Federal Environmental Regulations*, (WV PSC Aug. 4, 2021).

⁵ Application for a Declaratory Order at 8.

Kentucky Power states that if Wheeling’s ELG project is approved, then “Kentucky Power will not be responsible for, and its customers will not pay for, any costs beyond those amounts authorized by the Commission for CCR-only.”⁶

Application for Declaratory Order

Kentucky Power states that, as the owner of a 50 percent undivided interest in Mitchell, it has standing to request a declaratory order from the Commission, because it is a person that will be substantially affected by application of KRS 278.020 to Wheeling and whether Wheeling must acquire a CPCN from the Commission in order to construct equipment necessary to comply with the ELG Rules.⁷

As grounds for its argument that Wheeling is not required to receive a CPCN from the Commission, Kentucky Power asserts that no applicable statutes require Wheeling to receive a CPCN from the Commission, specifically noting that KRS 278.040(2) extends the Commission’s jurisdiction to all utilities “in this state.”⁸ Kentucky Power asserts that the Commission lacks subject matter jurisdiction over Wheeling because Wheeling is not a utility “in this state.”

Kentucky Power argues that because Wheeling does not provide service in Kentucky, and has no physical presence in Kentucky, it is not a utility as defined in KRS 278.010(3)(a) and, therefore, the Commission’s subject matter jurisdiction does not extend to Wheeling and the Commission cannot require Wheeling to acquire a certificate.⁹

⁶ Application for a Declaratory Order at 9.

⁷ *Id.* at 10.

⁸ *Id.* at 11.

⁹ *Id.*

Kentucky Power also argues that KRS 278.020(1), the statute governing CPCNs, must be read in conjunction with KRS 278.040(2), which, according to Kentucky Power, “establishes the outer limits of the Commission’s authority to act pursuant to the other provisions of Chapter 278.”¹⁰

Kentucky Power states that it, its customers, and the Commission’s authority to ensure that Kentucky Power’s rates are fair, just and reasonable, will not be affected by Wheeling’s lack of a requirement to obtain a CPCN from this Commission to construct the equipment necessary to comply with the ELG Rules. Kentucky Power states that if Wheeling constructs the equipment at Mitchell, then “Kentucky Power will not be responsible for, and its customers will not pay for, any project costs beyond those costs required to complete the CCR . . . work” authorized by the Commission in Case No. 2021-00004.¹¹

Kentucky Power asserts that the Commission’s jurisdiction over rates and services would be unaffected, but because Wheeling does not provide service in Kentucky, it, and the ELG compliance work it wishes to perform, are not subject to the CPCN requirements in KRS 278.020(1). Kentucky Power also notes that asserting jurisdiction over Wheeling pursuant to KRS 278.020(1) would deviate from Commission precedent.¹²

Kentucky Power next argues that the Commission would violate the dormant commerce clause of the United States Constitution if it required Wheeling to obtain a CPCN to construct equipment necessary to comply with the ELG rules.

¹⁰ Application for a Declaratory Order at 13.

¹¹ *Id.* at 16.

¹² *Id.* at 16–17.

Last, Kentucky Power argues that Kentucky law recognizes the presumption against extraterritorial operation of its statutes and that KRS 278.020(1) lacks clear and unambiguous language that the General Assembly intended to overcome this presumption.¹³ Kentucky Power asserts that, in light of the language in KRS 278.040(2) limiting the Commission’s jurisdiction to utilities in Kentucky and the lack of any language in KRS 278.020(1) rebutting the presumption against the extraterritorial application of Kentucky’s statutes, the CPCN requirements of KRS 278.020(1) cannot apply to Wheeling.¹⁴

Kentucky Power requests a deviation from the scheduling requirements in 807 KAR 5:001, Section 19(4) and (5), permitting responses and replies to an application for declaratory order. Kentucky Power, as grounds for its request, states that it has requested a declaratory order on or before October 8, 2012, because it will allow Kentucky Power time to make a “final and informed decision” on how to address the October 13, 2021 deadline to notify the West Virginia Department of Environmental Protection (WV DEP) if the ELG modification will not be made.¹⁵ Kentucky Power states that if it does not provide notice to the WV DEP by October 13, 2021, and a subsequent decision is made to not make the ELG upgrades and instead retire Mitchell, Mitchell must permanently cease all coal combustion no later than December 31, 2025.¹⁶ According to Kentucky Power, this is the latest compliance date for ELG specified in Mitchell’s National Pollutant

¹³ Application for a Declaratory Order at 21.

¹⁴ *Id.* at 23.

¹⁵ *Id.* at 24.

¹⁶ *Id.* at 25.

Discharge Elimination System (NPDES) permit, but that the date could be as early as June 30, 2023, based upon Mitchell's draft NPDES permit, unless AEP files with the EPA by October 13, 2021, that Mitchell will be retired.¹⁷ Kentucky Power asserts that because of these deadlines, Kentucky Power requires a declaratory order from the Commission by October 8, 2021, so that the WV PSC may be informed of the issue and the WV PSC can make an informed decision by October 13, 2021, and allowing for responses and replies to the application would unnecessarily delay the Commission's entry of a declaratory order.¹⁸

Response of the Sierra Club

On October 4, 2021, the Sierra Club filed a response to Kentucky Power's application for declaratory order.¹⁹ Sierra Club does not oppose Kentucky Power's contention that Wheeling is not required to obtain a CPCN.²⁰ Sierra Club, however, ultimately opposes the application, arguing that the issue is neither urgent nor ripe for a decision.²¹

The October 5, 2021 Hearing

The Commission conducted a previously scheduled formal evidentiary hearing in this case on October 5, 2021. At the hearing, the Commission questioned Kentucky Power and its counsel regarding the reasons for its application for a declaratory order,

¹⁷ Application for a Declaratory Order at 25.

¹⁸ *Id.*

¹⁹ Sierra Club's Response to Kentucky Power Company's Application for Declaratory Order, Request for Expedited Disposition, and Motion for Deviation from Scheduling Requirements Regarding October 5, 2021, Hearing (filed Oct. 4, 2021).

²⁰ *Id.* at 2.

²¹ *Id.* at 3.

noting that the transcript of the WV PSC proceeding did not show that WV PSC staff requested any clarification regarding whether Wheeling needed a CPCN from this Commission. Counsel for Kentucky Power stated that Kentucky Power's understanding of the WV PSC staff's concern was based upon notes from Wheeling's counsel and that Kentucky Power did not receive the transcript until after filing the application for declaratory order. Kentucky Power, however, stated that language from the September 15, 2021 Order establishing this proceeding required clarification whether Wheeling required a CPCN from the Commission or if Kentucky Power required a CPCN if Wheeling proceeded with the ELG project at Mitchell.

DISCUSSION

Administrative Regulation 807 KAR 5:001, Section 19(1), which governs applications for declaratory orders, provides in pertinent part that:

The commission **may**, upon application by a person substantially affected, issue a declaratory order with respect to the jurisdiction of the commission, the applicability to a person, property, or state of facts of an order or administrative regulation of the commission or provision of KRS Chapter 278, or with respect to the meaning and scope of an order or administrative regulation of the commission or provision of KRS Chapter 278.

(Emphasis added.)

Notably, the issuance of a declaratory Order is permissive—the Commission will issue a declaratory order at its discretion. The Commission, in its exercise of this discretion, will not issue the requested declaratory order.

Nevertheless, the Commission notes that based upon a cursory review of the application as well as a similarly cursory review of the law, particularly given the limited time afforded to its review, the Commission is unaware of any legal requirement that

Wheeling seek a CPCN from the Commission to construct equipment necessary to comply with the ELG Rules. Furthermore, based upon the same cursory review, the Commission is unable to determine what recourse, if any, the Commission would have against Wheeling should Wheeling perform the ELG project, and Commission approval for the project was later determined to be necessary. Frankly, Wheeling is not a utility under KRS 278.010(3).

The Commission expects Kentucky Power and Wheeling to promptly seek modifications to the Mitchell operating agreement should Wheeling move forward with the ELG project, in particular the provisions designating Kentucky Power the operator of Mitchell and assigning it certain responsibilities in that role. The Commission further expects Kentucky Power and Wheeling to promptly seek modifications of environmental permits related to ELG currently held in Kentucky Power's name. These modifications will be necessary to ensure Kentucky Power's representations that neither it nor its customers will bear any of the costs of Wheeling's ELG project.

Based upon the foregoing, the Commission finds that because the issuance of a declaratory order is at the discretion of the Commission, (1) Kentucky Power's application for declaratory order should be denied; and (2) all other motions made by Kentucky Power should be denied as moot.

IT IS THEREFORE ORDERED that:

1. Kentucky Power's application for declaratory order is denied; and
2. All outstanding motions in the application for declaratory order are denied as moot.

By the Commission

ENTERED
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KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:


Executive Director

Case No. 2021-00370

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