

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In The Matter Of:

The Application Of Kentucky Power Company For:)
(1) A Certificate Of Public Convenience And Necessity)
Authorizing The Transfer To The Company Of An)
Undivided Fifty Percent Interest In The Mitchell)
Generating Station And Associated Assets; (2) Approval)
Of The Assumption By Kentucky Power Company Of)
Certain Liabilities In Connection With The Transfer Of)
The Mitchell Generating Station; (3) Declaratory Rulings;)
(4) Deferral Of Costs Incurred In Connection With The)
Company's Efforts To Meet Federal Clean Air Act And)
Related Requirements; And (5) For All Other Required)
Approvals And Relief)

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**PUBLIC SERVICE
COMMISSION**

Case No. 2012-00578

**Kentucky Power Company's Response In Opposition To "Lawrence County
Kentucky's Petition For Re-Hearing On Motion To Intervene"**

Kentucky Power Company, for its response in opposition to Lawrence County
Kentucky's¹ "Petition for Rehearing On Motion To Intervene" with respect to the Commission's
June 28, 2013 Order denying the county's motion to intervene, states:

Introduction

As of the morning of November 4, 2013, the Commission's website did not indicate that
Lawrence County's petition for rehearing had been filed. Nevertheless, counsel for Kentucky
Power received a service copy of the petition on October 31, 2013. The certificate of service
indicates it was served on October 28, 2013.² Kentucky Power is filing this response in the event
Lawrence County's petition for rehearing in fact has been filed at the Commission, but the

¹ The motion is brought in name of both Lawrence County, Kentucky and John A. Osborne, County Judge
Executive, by and through the Lawrence County Fiscal Court. For ease of reference these persons and bodies will
be referred to collectively as Lawrence County

² Because KRS 278.400 requires that a party seeking rehearing "apply" within 20 days of service of the
Commission's order, and for the constitutional and statutory reasons described below, Lawrence County's petition
must be filed with the Commission. Service is not sufficient.

Commission's records do not yet reflect the fact. In doing so, the Company is not waiving its objection to the untimeliness of Lawrence County's motion.

Lawrence County's petition is barred by the express provisions of KRS 278.400. That statute provides that any motion for rehearing of the Commission's June 28, 2013 Order denying intervention must have been filed no later than July 22, 2013.³ Lawrence County's motion, which fails to offer any new evidence or issues, also fails to set forth sufficient grounds for rehearing. Finally, even if the Commission were to consider Lawrence County's motion on its merits, the motion provides no grounds for intervention, much less a basis sufficient for the Commission to reverse its prior Order denying intervention.

Statement Of The Case

On December 19, 2013, Kentucky Power filed its application for approval of the transfer to the Company of an undivided fifty percent interest in the Mitchell generating station. Nearly six months later, Lawrence County on June 7, 2013 and June 12, 2013 moved to intervene in this proceeding. The Commission denied Lawrence County's motion to intervene by Order dated June 28, 2013. Lawrence County did not seek rehearing or appeal the June 28, 2013 Order denying intervention.

On October 7, 2013, the Commission entered its Order approving the transfer subject to the Company's agreement to accept and be bound by the four modifications, as set forth in Appendix B to the October 7, 2013 Order, to a July 2, 2013 Stipulation and Settlement Agreement. On October 14, 2013, Kentucky Power filed the required acceptance and agreement.

³ KRS 278.400 provides that any rehearing petition must be filed within 20 days after service of the Commission's order from which rehearing is sought. That same statute provides that service of Commission Order is deemed complete three days after the Order is mailed. Three days after June 28, 2013 was July 1, 2013. Twenty days from July 1, was July 21, 2013. Because that day was a Sunday, the motion for rehearing was required to be filed no later than the next day the Commission's offices were open – July 22, 2013.

On October 28, 2013, Lawrence County – more than three months after the last day for filing its petition for rehearing – served its petition for rehearing.

Argument

A. Lawrence County’s Failure To File Its Petition For Rehearing Within The Time Period Provided By KRS 278.400 Deprives The Commission Of Jurisdiction Over The Matter.

KRS 278.400 is crystal clear. If Lawrence County desired rehearing of the Commission’s June 28, 2013 Order denying Lawrence County’s petition to intervene, Lawrence County was required to file its petition for rehearing no later than 23 days after service of that order:

After *a determination* has been made by the commission in any hearing, any party to the proceedings may, with twenty (20) days service of the order, apply for a hearing *with respect to any matters determined*. Service of a commission order is complete three (3) days after the date the order is mailed.⁴

The Commission’s June 28, 2013 Order determined the matter of Lawrence County’s intervention in this proceeding adversely to Lawrence County,⁵ and Lawrence County was required to seek rehearing within 23 days of the mailing of that order on June 28, 2013.⁶ Lawrence County elected to forego that opportunity, even though it appeared through counsel at the July 10, 2013 public hearing to express its disappointment with the Commission’s June 28, 2013 Order:

Mr. Hogan: Good morning. I appreciate, I guess, the reservation of time that was allowed to me.

⁴ KRS 278.400 (emphasis supplied).

⁵ The Commission’s October 7, 2013 Order approving the Mitchell Transfer, by contrast, made no determination regarding Lawrence County’s motion to intervene. But even if the October 7, 2013 Order had re-adjudicated the June 28, 2013 denial of the county’s motion to intervene, and it did not, Lawrence County’s motion for rehearing had not been filed as of November 1, 2013, or 24 days after the October 7, 2013 Order. As a result, it would have been untimely even if Lawrence County could seek rehearing of the October 7, 2012 Order.

⁶ KRS 278.400.

Let me first say that I was disappointed in the Commission's ruling that Lawrence County would not have a seat at the table. I'm not going to go into the procedural issues there. I think that we got late notice. Certainly, no one from AEP ever put Lawrence County specifically on notice of this.⁷

Having failed to act within the period provided by statute for seeking rehearing, Lawrence County is barred from doing so at this late date.

Nor may Lawrence County, as it implicitly attempts here, ask the Commission to ignore the statutory deadline imposed by KRS 278.400. The Commission, like all administrative agencies, is a creature of statute.⁸ As such, any exercise of authority by the Commission must be grounded in statute. The Commission may not "amend, alter, enlarge, or limit the terms of legislative enactment."⁹ Nor may it employ administrative procedures or remedies not granted it by the General Assembly.¹⁰ All reasonable doubts concerning an agency's authority to exercise a power is to be resolved against the existence of the power.¹¹

These limitations on the Commission's authority are imposed by Sections 27, 28, and 29 of the Kentucky Constitution, and by Chapter 13A of the Kentucky Revised Statutes. Specifically, Sections 27 and 29 of the Kentucky Constitution reserve to the General Assembly, and not the Executive Branch or its agencies, the right to make, alter, or amend the Kentucky Revised Statutes.¹² An agency's alteration or amendment of statutorily granted authority, constitutes an attempt to exercise the legislative power of the Commonwealth in violation of

⁷ Transcript of Hearing at 8-9.

⁸ See *Dep't for Natural Resources and Envtl. Protection v. Stearns Coal & Lumber Co.*, 563 S.W.2d 471, 473 (Ky. 1978); *South Cent. Bell Telephone Co. v. Utility Regulatory Comm'n*, 637 S.W. 649, 653 (Ky. 1982) ("legislative grant of power to regulate rates will be strictly construed and will neither be interpreted by implication nor inference.")

⁹ *Johnson v. Correll*, 332 S.W.2d 843, 845 (Ky. 1960).

¹⁰ *Revenue Cabinet v. Cherry*, 803 S.W.2d 570, 572-573 (Ky. 1990); *Public Service Comm'n v. Attorney General of Com.*, 860 S.W.2d 296, 298 (Ky. App. 1993) ("Here the statutory authority urged by the PSC is not present in the statute and the PSC's effort to assign these costs to the utilities is in excess of its statutory power.")

¹¹ *United Sign, Ltd. v. Commonwealth*, 44 S.W.3d 794, 798 (Ky. App. 2000).

¹² See *Legislative Research Comm'n v. Brown*, 664 S.W.2d 907, 912-913 (Ky. 1984).

Kentucky's strict separation of powers doctrine.¹³ Chapter 13A of the Kentucky Revised Statutes likewise prohibits the Commission from acting contrary to the requirements of KRS 278.400. Specifically, KRS 13A.130 provides:

- (1) An administrative body shall not by internal policy, memorandum, *or other form of action*:
 - (a) Modify a statute or administrative regulation;
 - (b) Expand or limit a statute or administrative regulation;
- ...
- (2) Any administrative body memorandum, internal policy, or other form of action violative of this section, or the spirit thereof, is null, void, and unenforceable.

Lawrence County's untimely petition is just such an effort to enlarge and amend the requirements of KRS 278.400. It is an invitation the Commission can and must decline.

Even without these constitutional and statutory roadblocks to Lawrence County's motion, strict adherence to the statutory deadlines is critical in connection with a petition to intervene such as that presented by Lawrence County. In the more than four months since the Commission's June 28, 2013 Order denying intervention, this case has been tried, briefed and decided. The parties, Staff, and the Commission expended enormous amounts of resources in doing so. Yet, Lawrence County slept on its rights during that period, just like it did in the six months between the filing of the Company's application and the county's petition to intervene. Allowing Lawrence County to intervene at this late date would mean further delay – with the Mitchell Transfer two months away – and the further expenditure of the Commission's scarce

¹³ See *id.* at 912 (“the separation of powers doctrine is fundamental to Kentucky's tripartite system of government and must be ‘strictly construed.’”)

resources with respect to arguments the Commission properly concluded was beyond its jurisdiction.¹⁴

B. Lawrence County’s Petition Fails To Meet The Standard For Rehearing.

Rehearing serves but a limited purpose: to permit the party requesting rehearing to “offer additional evidence that could not with reasonable diligence have been offered at the former hearing.”¹⁵ It does not provide a vehicle for presenting the same arguments presented in the initial petition and rejected by the Commission.¹⁶ These limitations apply with equal force to motions seeking rehearing of an order denying the movant’s petition to intervene.¹⁷

Each of the arguments presented in Lawrence County’s petition for rehearing previously were raised in the county’s petition to intervene. Indeed, the petition for rehearing makes the same arguments – using the same language – as Lawrence County’s original petition to intervene:

Motion To Intervene	Petition For Rehearing
“Having many years of knowledge and experience which impacts Kentucky Power Company’s (KPC) application for a Certificate of	“Having many years of knowledge and experience which impacts Kentucky Power Company’s (KPC) application for a Certificate of

¹⁴ Order, *In the Matter of: The Application of Kentucky Power Company For: (1) A Certificate of Public Convenience And Necessity Authorizing The Transfer To the Company Of A Fifty Percent Undivided Interest In The Mitchell Generating Station And Associated Assets; (2) Approval Of The Assumption By Kentucky Power Company Of Certain Liabilities In Connection With The Transfer Of The Mitchell Generating Station; (3) Declaratory Rulings; (4) Deferral of Costs Incurred In Connection With The Company’s Efforts To Meet Federal Clean Air Act And Related Requirements; And (5) For All Other Required Approvals And Relief*, Case No. 2012-00578 at 24-27 (Ky. P.S.C. October 7, 2013).

¹⁵ KRS 278.400.

¹⁶ Order, *In the Matter of: Brandenburg Telecom LLC v. BellSouth Telecommunications, Inc.*, 2008 Ky. PUC LEXIS 217 at * 7 (Ky. P.S.C. February 15, 2009) (“No provision is made for presenting arguments that had previously been rejected.”); Order, *In the Matter of: Complaint Of Sprint Communications Company LP Against Brandenburg Telephone Company And Request For Expedited Relief*, Case No. 2008-00315 at 2 (Ky. P.S.C. December 15, 2009) (“Because there is no new evidence and Brandenburg presents merely a rehash of its old arguments, we are unconvinced we should revisit our previous Order in its case.”)

¹⁷ Order, *In the Matter of: The 2008 Joint Integrated Resource Plan Of Louisville Gas And Electric Company And Kentucky Utilities Company*, 2008 Ky. PUC LEXIS 1032 at * (Ky. P.S.C. August 25, 2008).

Motion To Intervene	Petition For Rehearing
Public Convenience and Necessity and interests that are not are not adequately represented by any other party to the proceeding.”	Public Convenience and Necessity and interests that are not are not adequately represented by any other party to the proceeding.”
“Lawrence County seeks full intervention to ensure that the requested CPCN is approved only if it represents the best option to satisfy low cost energy service.”	“Lawrence County seeks full intervention to ensure that the requested CPCN is approved only if it represents the best option to satisfy low cost energy service.”
“The economy of Lawrence County and the surrounding area will suffer greatly as families are forced to sell their properties and move elsewhere and establish new lives and jobs. This would also disrupt the lives of children who attend Lawrence County schools, or other schools nearby to the Big Sandy Plant. Additionally many truck drivers who make their living hauling coal will suddenly come to an abrupt halt.”	“The economy of Lawrence County and the surrounding area will suffer greatly as families are forced to sell their properties and move elsewhere and establish new lives and jobs. This would also disrupt the lives of children who attend Lawrence County schools, or other schools nearby to the Big Sandy Plant. Additionally many truck drivers who make their living hauling coal will suddenly come to an abrupt halt.”
“Lastly, as families are forced to move away from Lawrence County, local businesses would suffer as well, such as restaurants, grocery stores, auto shops, to name a few.”	“Lastly, as families are forced to move away from Lawrence County, local businesses would suffer as well, such as restaurants, grocery stores, auto shops, to name a few.”
“The everyday working class citizens do not appear to factor into this scenario, as it greatly impacts the economy of Lawrence County and the hard-working people who live here.”	“The everyday working class citizens do not appear to factor into this scenario, as it greatly impacts the economy of Lawrence County and the hard-working people who live here.”

Lawrence County presents no new evidence to support its motion, much less evidence that could not have been presented, with reasonable diligence, at the time of the county's initial petition to intervene. As such, its petition must be denied.

C. The Commission Properly Denied Lawrence County's Original Petition For Rehearing.

Even if Lawrence County's petition for *rehearing* was timely filed, and otherwise met the requirements of KRS 278.400, the earlier petition to *intervene* remains untimely,¹⁸ only more so. In addition, Lawrence County's participation as a party is still unlikely present facts or develop issues that would assist the Commission,¹⁹ and Lawrence County was afforded, and took full advantage of, the opportunity to participate in the proceedings even though it was not granted intervention.²⁰

To the extent the Commission nonetheless elects to grant rehearing and reconsider Lawrence County's petition to intervene, Kentucky Power incorporates its June 27, 2013 response to Lawrence County's original petition to intervene.

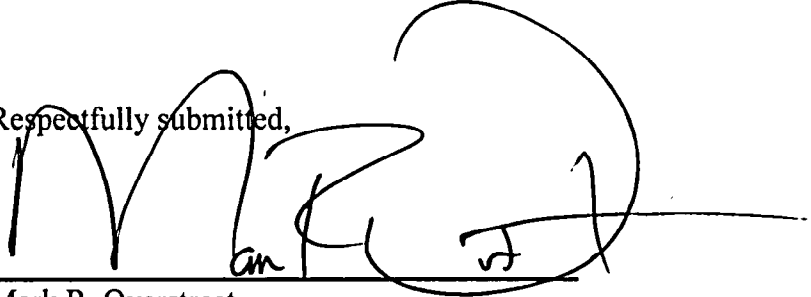
¹⁸ Order, *In the Matter of: The Application of Kentucky Power Company For: (1) A Certificate of Public Convenience And Necessity Authorizing The Transfer To the Company Of A Fifty Percent Undivided Interest In The Mitchell Generating Station And Associated Assets; (2) Approval Of The Assumption By Kentucky Power Company Of Certain Liabilities In Connection With The Transfer Of The Mitchell Generating Station; (3) Declaratory Rulings; (4) Deferral of Costs Incurred In Connection With The Company's Efforts To Meet Federal Clean Air Act And Related Requirements; And (5) For All Other Required Approvals And Relief*, Case No. 2012-00578 at 3 (Ky. P.S.C. June 28, 2013).

¹⁹ *Id.* at 3-4.

²⁰ *Id.* at 4.

Wherefore, Kentucky Power Company respectfully requests that the Commission deny Lawrence County's petition for rehearing of the Commission's June 28, 2013 Order denying intervention.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by first class mail, postage prepaid, upon the following parties of record, this 4th day of November, 2013.

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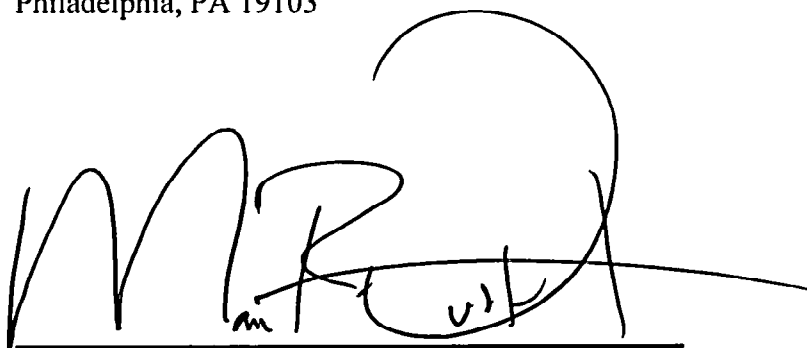
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A handwritten signature in black ink, appearing to read 'Mark R. Overstreet', written over a horizontal line. The signature is stylized with large, sweeping letters and a long horizontal stroke extending to the right.

Mark R. Overstreet