

**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of:

| | | |
|---------------------------------------|---|---------------------|
| Electronic Application of Kentucky |) | |
| Power Company for a Certificate of |) | |
| Public Convenience and Necessity to |) | Case No. 2020-00062 |
| Construct a 138 kV Transmission Line |) | |
| and Associated Facilities in Pike and |) | |
| Floyd Counties, Kentucky |) | |

MOTION OF KENTUCKY POWER COMPANY FOR REHEARING

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MOTION OF KENTUCKY POWER COMPANY FOR REHEARING

Introduction

On December 29, 2020 the Commission issued an order (“Order”) in this proceeding, granting a Certificate of Public Convenience and Necessity (“CPCN”) authorizing Kentucky Power Company (“Kentucky Power” or “the Company”) to construct a 138 kV transmission line and associated facilities in Pike and Floyd counties. Relevant to this Motion for Rehearing, the Order reached certain legal conclusions and imposed certain conditions on Kentucky Power related to non-jurisdictional work which the Company originally contemplated would be performed by its affiliate AEP Kentucky Transmission Company, Inc. (“Kentucky Transco”).

The Company respectfully seeks rehearing to request that the Commission modify the CPCN to authorize Kentucky Power to construct both the project presently authorized and those facilities the Company originally contemplated would be constructed by Kentucky Transco. The requested modification is necessary, in light of the legal issues regarding Kentucky Transco raised in the Commission’s Order, to ensure that the Kewanee-Enterprise Park 138 kV Transmission Project can be constructed and placed in service in time to remedy the PJM Baseline criteria violations for which it is needed.

The Company also seeks rehearing to request that the Commission eliminate, in light of Kentucky Power’s first rehearing request, or clarify certain aspects of the Order that either go beyond the scope of the Company’s application in this case (“Application”), or which appear to address subject matter outside of the Commission’s jurisdiction. In the alternative, Kentucky Power avers that the Commission erred in making such findings and orders regarding Kentucky Transco and respectfully requests that those findings and orders be reversed on rehearing.

Law and Argument

A. Standard for Rehearing.

KRS 278.400 authorizes “any party to the proceedings” to apply for rehearing of a Commission order within 20 days of service of the order. The Commission interprets the statute as “provid[ing] closure to Commission proceedings by limiting rehearing to new evidence not readily discoverable at the time of the original hearings.”¹ The statute requires and the Commission expects “the parties to Commission proceedings to use reasonable diligence in the preparation and presentation of their cases and serves to prevent piecemeal litigation of issues.”² The Commission enjoys the discretion to grant rehearing to consider new arguments,³ particularly where an argument could not reasonably have been raised before. In addition, rehearing will be granted when required to address any errors or omissions in the Commission’s orders.⁴

B. Relevant Procedural and Factual Background.

On September 3, 2020, Kentucky Power filed an application for a CPCN to: (1) construct approximately five miles of new double circuit 138-kilovolt (kV) transmission line in Floyd and Pike counties, Kentucky; (2) construct portions of a new 138 kV substation south of and adjacent to the Kentucky Enterprise Industrial Park (the “Kewanee 138 kV Substation”); and (3) retire the existing Fords Branch 46 kV Substation (collectively, the “Kewanee-Enterprise Park 138 kV

¹ Order, In the Matter of: Application Of Kentucky-American Water Company For A Certificate Of Public Convenience And Necessity Authorizing Construction Of The Northern Division Connection, Case No. 2012-00096 at 4 (Ky. P.S.C. January 23, 2014).

² *Id.*

³ Order, *In the Matter of: America’s Tele-Network Corp.’s Alleged Violation of KRS 278.535*, Case No. 2000-00421 at 2 (Ky. P.S.C. March 23, 2001) (limiting scope of rehearing to new arguments raised in petition).

⁴ Order, In the Matter of: Application of Jessamine-South Elkhorn Water District For A Certificate Of Public Convenience And Necessity To Construct And Finance A Waterworks Improvement Project Pursuant To KRS 278.020 And 278.300, Case No. 2012-00470 at 11 (Ky. P.S.C. January 3, 2014).

Transmission Project” or the “Project”).⁵ The Company noted in its Application that Kentucky Transco would “install at the Kewanee 138 kV Substation two 138 kV transmission line positions in a ring bus layout utilizing four 138 kV circuit breakers ... sectionalize the transformer and transmission line component along with an additional 138 kV circuit breaker for a 28.8 MVAR capacitor bank” and explained that “Kentucky Transco is not a utility subject to the jurisdiction of the Commission and thus is not a party to this application.”⁶

In its December 29, 2020 Order, the Commission granted Kentucky Power’s requested CPCN.⁷ The Commission correctly recognized that the circuit breakers and capacitor bank that the Company initially contemplated Kentucky Transco would build, own, and maintain in the Kewanee 138 kV Substation are “necessary to the operation of Kentucky Power’s transmission system and necessary for the operation of the project subject to this application...”⁸ The Commission nevertheless erroneously opined that the facilities Kentucky Transco was planning to construct constitute a “nonregulated electric transmission line within the meaning of KRS 278.700(5)” that “appears to be subject to the requirements of KRS 278.714,” which requires a construction certificate issued by the Kentucky State Board on Electric Generation and Transmission Siting (“Siting Board”).⁹ As a condition to Kentucky Power’s CPCN, the Commission further stated:

Kentucky Power shall not transfer ownership of any portion of the project for which this CPCN is granted from Kentucky Power to Kentucky Transco without prior Commission approval, nor shall Kentucky Transco replace or upgrade any existing

⁵ Appl. at 1.

⁶ *Id.* at 10, footnote 12.

⁷ Order at 30.

⁸ *Id.* at 14.

⁹ *Id.* at 14, 25-27

electric line and related appurtenances currently owned by Kentucky Power without prior Commission approval.¹⁰

C. Kentucky Power's Motion for Rehearing.

- 1. The Commission should grant rehearing and amend its CPCN to authorize Kentucky Power to perform the work that the Company previously indicated Kentucky Transco would complete.**

As indicated in the Application and supporting testimony, and noted above, completion of this Baseline Project requires the installation of five 138 kV circuit breakers arranged in a four breaker ring bus configuration at the Kewanee 138 kV Substation, as well as a 28.8 MVAR capacitor bank, to help support 138 kV voltage in the area after the load is moved from the 46 kV network to the 138 kV network.¹¹

As the Commission found and the record supports, these assets are necessary for the operation of Kentucky Power's transmission system and necessary for the operation of the Project approved in the Commission's Order.¹² As detailed in the Company's alternative argument below, however, the Company disagrees with the Commission's finding that the work that the Application indicated Kentucky Transco would complete constitutes a nonregulated electric line for which a construction certificate is required from the Siting Board.

Notwithstanding the Company's disagreement with the Commission's interpretation of KRS 278.700(5) and 278.714, Kentucky Power has decided to construct, own, and operate these assets in order to ensure that the overall Baseline Project is constructed and placed in service within the time period required by PJM. The Company therefore requests that the Commission grant rehearing and amend its CPCN to authorize Kentucky Power to perform this work.

¹⁰ *Id.* at 33.

¹¹ West Test. at 4-5.

¹² Order at 14.

2. **The Commission should amend its December 29, 2020 Order to eliminate all discussion of and conditions regarding Kentucky Transco.**
 - a. **The amendment of the CPCN Kentucky Power requests in this Motion renders moot and superfluous those portions of the Order discussing Kentucky Transco.**

In light of the Company's request for authorization to construct, own, and operate the facilities not covered in the Order but recognized by the Commission as necessary for the Project, the Company respectfully requests that the Commission also amend the Order to remove the discussion and conditions pertaining to Kentucky Transco, summarized above, because they will be moot if the Commission grants the Company's request to perform all work associated with the Project. The Commission previously determined that Kentucky Transco is not a public utility under Kentucky law.¹³ If the Commission grants this Motion for Rehearing, Kentucky Transco will no longer be involved in the Project. Kentucky Transco's lack of involvement, and the fact that it is not subject to the Commission's jurisdiction, render moot the Order's discussion regarding Kentucky Transco. The Commission thus should revise its Order to eliminate that discussion on rehearing.

- b. **Alternatively, if the Commission declines to eliminate the discussion of Kentucky Transco as requested, the Commission's Order is unreasonable and unlawful in several respects.**
 - i. **The Commission's interpretation of KRS 278.700 and 278.714 incorrect as a matter of law.**

In the alternative, if the Commission does not amend its Order to eliminate the discussion of Kentucky Transco, the Company requests rehearing to clarify that if Kentucky Transco were to construct the in-station facilities that are the subject of this Motion for rehearing, those

¹³ Application of AEP Kentucky Transmission Company, Inc. for A Certificate of Public Convenience and Necessity Pursuant to KRS 278.020 to Provide Wholesale Transmission Service in the Commonwealth, Case No. 2011-00042, Order at 5-8 (Ky. PSC June 10, 2013).

facilities – which would be interconnected to regulated transmission lines owned by Kentucky Power – would not be a nonregulated electric transmission line, as that term is defined under KRS 278.700(5).

KRS 278.700(5) defines a “nonregulated electric transmission line” for which a construction certificate is required under KRS 278.714 to mean “an electric transmission line *and* related appurtenances *for which no certificate of public convenience and necessity is required*; which is *not operated as an activity regulated by the Public Service Commission*; and which is capable of operating at or above sixty-nine thousand (69,000) volts.”¹⁴

The Commission appears to have incorrectly assumed that the contemplated Kentucky Transco facilities would be appurtenances related to a nonregulated electric transmission line. In reality, the transmission lines involved are regulated transmission lines that will be owned by Kentucky Power and for which a CPCN is required. The Company is mindful of the requirement for Kentucky Transco to obtain approval from the Kentucky Power Siting Board for qualifying facilities subject to KRS 278.714, but the circuit breaker and capacitor bank facilities described in the Application, and which Kentucky Power now intends to construct, own and operate, would not be qualifying facilities if constructed by Kentucky Transco because they would be equipment operated in conjunction with a regulated transmission line (*i.e.*, Kentucky Power’s transmission lines).¹⁵

More broadly, the construction by Kentucky Transco of substation facilities connected to a regulated transmission line does not, under KRS 278.700(5), constitute the construction of a

¹⁴ KRS 278.700(5) (emphasis supplied).

¹⁵ The Company further notes that the Commission’s interpretation of KRS 278.714 and 278.700(5) in the Order is not apposite to the CPCN authorization originally sought by Kentucky Power in the Application. As explained in the Order, Kentucky Transco is not an Applicant in this proceeding.

“nonregulated electric transmission line and related appurtenances,” and thus does not implicate the Siting Board’s jurisdiction. Interpreting the definition of “nonregulated electric transmission line” to include substation facilities attached to *regulated* electric transmission lines renders superfluous much of KRS 278.700(5) – specifically those portions of the definition that exclude transmission lines for which a CPCN is required and whose operation the Commission regulates. Such a reading of the statute is impermissible under Kentucky case law and well-accepted canons of statutory construction.¹⁶ Among these are the prohibition against an agency altering a statutory definition.¹⁷

That portion of the Commission’s Order holding that Kentucky Transco is required to seek a “construction certificate” from the Siting Board prior to undertaking work, such as was initially contemplated it would in Kentucky Power’s Application, is contrary to Kentucky law in other respects. First, the Siting Board, and respectfully, not the Commission, exercises jurisdiction over Kentucky Transco, and only then within the confines of KRS 278.700, *et seq.* Although the Siting Board is attached to the Commission for administrative purposes,¹⁸ it is a separately established¹⁹ and constituted²⁰ administrative agency. The Commission is a creature

¹⁶ See *Kotila v. Commonwealth*, 114 S.W.3d 226, 239 (Ky. 2003) (citing *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) (“It is ‘a cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’”); *Pennsylvania Dept. of Pub. Welfare v. Davenport*, 495 U.S. 552, 562, 110 S.Ct. 2126, 2133, 109 L.Ed.2d 588 (1990) (“Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment”); *Commonwealth v. Phon*, 17 S.W.3d 106, 108 (Ky. 2000) (“statutes should be construed in such a way that they do not become meaningless or ineffectual.”)).

¹⁷ *Sladon v. Hawk*, 815 S.W.2d 404, 405-406 (Ky. App. 1991).

¹⁸ KRS 278.702(3).

¹⁹ KRS 278.702(1).

²⁰ KRS 278.702(1)(a)-(d).

of statute and may exercise only such authority as granted it by statute.²¹ It “cannot add to its enumerated powers.”²² Moreover, like every other agency, the Commission is required by the Commonwealth’s organic law to “administer the law as written,”²³ and may not “amend, alter, enlarge or limit the terms of a legislative enactment”²⁴ as its Order with respect to Kentucky Transco purports to do.

ii. The Commission’s present interpretation of KRS 278.700(5) is inconsistent with its prior treatment of Kentucky Transco’s ownership of transmission station equipment.

The Commission’s present interpretation of KRS 278.700(5) also conflicts and is inconsistent with the Commission’s decision in Case No. 2018-00209.²⁵ As the Commission has recognized in this case, the project that was the subject of the 2018-00209 case is “substantially the same as” the Project now before the Commission.²⁶ In Case No. 2018-00209, the Commission recognized that six circuit breakers would be constructed, financed, and owned by Kentucky Transco “to reduce Kentucky Power’s debt burden and improve its credit metrics.”²⁷ The Commission did not then find that Kentucky Transco’s planned work was a nonregulated electric transmission line under KRS 278.700(5), nor did it express the opinion that a

²¹ *Boone Cnty. Water and Sewer Dist. v. Pub. Serv. Com’n*, 949 S.W.2d 588, 591 (Ky. 1997) (Commission lacks authority to regulate sanitation district); *S. Cent. Bell Tel. Co. v Util. Regulatory Com’n*, 637 S.W.2d 649, 564 (Ky. 1982).

²² *Id.*

²³ *Johnson v. Correll*, 332 S.W.2d 843, 845 (Ky. 1960).

²⁴ *Camera Center, Inc. v. Revenue Cabinet*, 34 S.W.3d 39, 41 (Ky. 2000).

²⁵ In the Matter of: Electronic Application of Kentucky Power Company for a Certificate of Public Convenience and Necessity to Construct a 138-kV Transmission Line and Associated Facilities in Pike and Floyd Counties, Kentucky, Case No. 2018-00209, Order (Ky. PSC Dec. 6, 2018) (“Enterprise Park I Order”).

²⁶ Order at 2.

²⁷ *Enterprise Park I Order* at 4 and footnote 9.

construction certificate from the Siting Board was required in order for Kentucky Transco to construct, own, and maintain the facilities.

“It is axiomatic that an administrative agency either must conform with its own precedents or explain its departure from them.”²⁸ As the Supreme Court of Kentucky has held:

An agency changing its course must supply a reasoned analysis indicating that prior policies and standards are deliberately being changed, not casually ignored, and if an agency glosses over or swerves from prior precedent without discussion, it may cross the line from the tolerably terse to the intolerably mute. Consequently, while the agency may reexamine its prior decisions and depart from its precedents, it must explicitly and rationally justify such a change of position.²⁹

By changing course and departing from its decision in Case No. 2018-00209 regarding the work that the Company contemplated Kentucky Transco would perform without explicitly and rationally justifying that change of position, the Commission has erred as a matter of law.

iii. The Commission’s findings regarding Kentucky Power’s supposed “systematic[] transferring [of] ownership of its transmission system” are erroneous and unsupported by the record.

The Order included a condition that Kentucky Power refrain from “transfer[ring] the ownership of any portion of the project for which this CPCN is granted from Kentucky Power to Kentucky Transco without prior Commission approval.”³⁰ The Company notes that to the extent transfers of Kentucky Power’s assets are subject to the Commission’s approval under Kentucky law, the condition is unnecessary, as it simply articulates an already-existing requirement for Kentucky Power to obtain such approval within the requirements of KRS 278.218. KRS 278.218 nevertheless does not authorize the Commission to require Kentucky Power to seek

²⁸ *In re: Appeal of Hughes & Coleman*, 60 S.W.3d 540, 543 (Ky. 2001).

²⁹ *Id.* at 543-544.

³⁰ Order at 33.

approval for transfers of assets valued at less than \$1 million.³¹ The Company's Application does not request authorization to transfer any assets to Kentucky Transco, and none is contemplated.

The Company additionally requests rehearing of the Order to the extent it imposes a restriction to Kentucky Power's ability to retire assets either due to operational needs, damage, obsolescence, or other reasons in the ordinary course of business. Such a restriction would exceed the Commission's authority³² and Kentucky law,³³ unnecessarily encumber the operation of the Company, and is unsupported by the record in this case.³⁴ Such a restriction is particularly unwarranted in the present case, in which the record clearly supports the conclusion that Kentucky Power's retirement of facilities is a necessary aspect of the construction of the Project and in the public interest.

The Company further requests that the Commission amend its Order to clarify that there is no evidence in the record that Kentucky Power is "acquiescing to the transfer of actual ownership and control of its transmission system to affiliates for which Kentucky Power has no command and the Commission has no authority."³⁵ As is reflected in other proceedings involving Kentucky Power, including the present proceeding, Kentucky Power makes the necessary investments in its transmission system to provide service to its customers, as it is required under Kentucky law.

³¹ *Camera Center, Inc. v. Revenue Cabinet*, 34 S.W.3d 39, 41 (Ky. 2000); *Johnson v. Correll*, 332 S.W.2d 843, 845 (Ky. 1960).

³² *Id.*

³³ *Appalachian Racing, LLC v. Family Trust. Found. of Ky., Inc.*, 423 S.W.3d 726, 740 (Ky. 2014) ("the English language is the medium by which our society exchanges thoughts and ideas. Our respect for the language and the need to preserve its value as a medium of exchange rightfully limits the extent to which we will wander from the plain and obvious meaning of everyday words, such as ...[transfer].")

³⁴ KRS 278.430; *Ky. State Racing Com'n v. Fuller*, 481 S.W.2d 298, 307-309 (Ky. 1972).

³⁵ Order at 28.

Nothing in the record would suggest Kentucky Power intends to transfer any of its transmission infrastructure to Kentucky Transco. The Company reassures the Commission that it does not contemplate at this time any such transfer, and if one is contemplated in the future the required regulatory approvals at the federal and state level will be obtained before any such transfer occurs.

A clarification upon rehearing is appropriate in this case, as the Order appears to confuse two different situations, namely an ownership transfer of transmission infrastructure (e.g., for example, if Kentucky Power were to seek approval to transfer ownership of one of its existing transmission lines to Kentucky Transco or some other affiliated or unaffiliated entity), in contrast with the retirement of transmission components owned by Kentucky Power. Subsequent or simultaneous upgrades of transmission facilities done in conjunction with the retirement of facilities that are no longer fit or sufficient for their intended purpose does not involve or constitute a transfer of assets. To the extent the Order based its condition prohibiting a transfer without approval on a misinterpretation of KRS 278.218, rehearing is appropriate to eliminate any possible confusion and to clarify that the transfer statute does not apply to the construction by Kentucky Transco of new facilities, regardless of whether functionally they are required because assets Kentucky Power retires are no longer fit or sufficient for Kentucky Power to provide service to its customers.³⁶

The Company further respectfully also notes that it is not indifferent to the cost and risks attendant to a transfer of a portion of its transmission system, either to an affiliate or to an unaffiliated party, let alone to do so in contravention to policy directives from the Commission or

³⁶ *Appalachian Racing, LLC v. Family Trust. Found. of Ky., Inc.*, 423 S.W.3d 726, 740 (Ky. 2014).

requirements under Kentucky law, and an assumption to the contrary is unsupported by the record. The present case does not present a request to make any such transfer.

iv. Condition 13 of the Commission's Order is unreasonable and unlawful.

The Order also included a condition that prohibits “Kentucky Transco [from] replac[ing] or upgrad[ing] any existing electric line and related appurtenances currently owned by Kentucky Power without prior Commission approval.”³⁷ The Company requests rehearing for the Commission to amend the Order to eliminate this condition, which purports to apply not only to the Project, but to all the transmission infrastructure owned and operated by Kentucky Power.

As clearly articulated by the Commission in Case No. 2011-00042, the Commission declined to exercise jurisdiction over Kentucky Transco because the Commission found that Kentucky Transco does not provide utility service that is subject to the Commission's statutory jurisdiction under KRS 278.040(2).³⁸ Indeed, as the Commission and Kentucky courts have repeatedly recognized, “[t]he PSC is a creature of statute and has only such powers as have been granted to it by the General Assembly.”³⁹ Moreover, in addition to not being a Kentucky utility, Kentucky Transco is not an applicant or a party in the present proceeding, and the Commission lacks jurisdiction to prohibit Kentucky Transco from constructing transmission facilities in Kentucky, regardless of whether such facilities are nonregulated electric transmission lines under KRS 278.700(5) and require Siting Board approval pursuant to KRS 278.714, or other

³⁷ Order at 33.

³⁸ Application of AEP Kentucky Transmission Company, Inc. for A Certificate of Public Convenience and Necessity Pursuant to KRS 278.020 to Provide Wholesale Transmission Service in the Commonwealth, Case No. 2011-00042, Order at 9 (Ky. PSC June 10, 2013) (holding that Kentucky Transco does not provide utility service subject to the Commission's jurisdiction).

³⁹ *Id.* at 5 (quoting *Boone Cnty. Water and Sewer Dist. v. Pub. Serv. Comm'n*, 949 S.W.2d 588, 591 (Ky. 1997); *S. Cent. Bell Tel. Co. v Util. Regulatory Com'n*, 637 S.W.2d 649, 564 (Ky. 1982)).

transmission facilities which do not require Siting Board approval. The Company further notes that Kentucky Transco's operation of its facilities, as well as the rates related to the transmission services Kentucky Transco provides in Kentucky, are the exclusive jurisdiction of the Federal Energy Regulatory Commission, and therefore the Commission lacks jurisdiction⁴⁰ to prohibit Kentucky Transco from providing such service. Indeed, KRS 278.700, *et seq.* do not provide the Siting Board with such authority, and any effort by it to enter such a directive would be contrary to constitutional and statutory limits.⁴¹

The Company wishes to reiterate it does not contemplate the transfer of assets to Kentucky Transco, and that specific to this project the Company has decided, subject to Commission approval, to construct, own, and operate the five circuit breakers and the capacitor bank that will no longer be Kentucky Transco's as originally contemplated, making the discussed conditions inapplicable to this case and moot as to the Project.

Conclusion

For the foregoing reasons, Kentucky Power respectfully requests that the Commission enter an Order granting rehearing and authorizing Kentucky Power to construct the facilities it previously contemplated Kentucky Transco constructing and which are required for the Project's operation. This authorization would render the Order's discussion of Kentucky Transco moot, as Kentucky Transco will no longer have a role with respect to this Project. For that reason, the Company requests that the Commission's discussion of and condition regarding Kentucky Transco in the Order be eliminated on rehearing. In the alternative, the Company requests that the Order be amended consistent with the evidentiary record in the case, and that the restrictions

⁴⁰ *Id.*

⁴¹ *Camera Center, Inc. v. Revenue Cabinet*, 34 S.W.3d 39, 41 (Ky. 2000); *Johnson v. Correll*, 332 S.W.2d 843, 845 (Ky. 1960).

imposed on Kentucky Power related to its ability to retire assets and the dicta pertaining to activities of Kentucky Transco, and which are non-jurisdictional to the Commission, be eliminated or reversed.

Respectfully submitted,



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