

Kentucky Power Company
KPSC Case No. 2021-00004
Commission Staff's Rehearing Data Requests
Dated August 19, 2021
Page 1 of 13

DATA REQUEST

RH_1_1 Explain Kentucky Power and Wheeling Power's plan regarding Mitchell. Provide updated status reports every ten days through the pendency of this proceeding.

RESPONSE

Kentucky Power and Wheeling Power currently are implementing plans to ensure the construction of the CCR project to allow the operation of the Mitchell Generating Station through December 31, 2028.

Kentucky Power Company and Wheeling Power Company are reviewing their alternatives regarding the Mitchell Generating Station in light of the July 15, 2021 decision of this Commission, and the August 4, 2021 decision of the Public Service Commission of West Virginia. No decision regarding a plan for the Mitchell Generating Station beyond that described above has been reached by either Company.

Kentucky Power will file updated status reports every ten days during the pendency of this proceeding.

September 13, 2021 Update

Wheeling Power Company and Appalachian Power Company on September 8, 2021 filed with the Public Service Commission of West Virginia their "Petition to Reopen Case and to Take Further Action" in Case No. 20-1040-E-CN. The petition requests the West Virginia Commission to provide certain confirmations, acknowledgements, and commitments regarding, *inter alia*, the Mitchell Generating Station, in light of the inconsistent orders of the Kentucky and West Virginia commissions regarding the proposed ELG work at the Mitchell Generating Station. The petition further requests that the West Virginia Commission provide the confirmations, acknowledgements, and commitments prior to the October 13, 2021 deadline under the ELG Rule for notifying the West Virginia Department of Environmental Protection concerning the ELG modifications at the Mitchell Generating Station. Finally, Wheeling Power and Appalachian Power Company indicated in the petition that there were matters in need of resolution should West Virginia decide to fully fund the ELG investment and maintain the plant in order to preserve an option to run the Mitchell Generating Station past 2028.

A copy of the petition is attached as KPCO_SR_KPSC_RH_1_1_Attachment1.

Kentucky Power Company
KPSC Case No. 2021-00004
Commission Staff's Rehearing Data Requests
Dated August 19, 2021
Page 2 of 13

The West Virginia commission by order dated September 9, 2021 established a procedural schedule, and provided for a September 24, 2021 evidentiary hearing, in connection with the petition.

A copy of the September 9, 2021 order is attached as KPCO_SR_KPSC_RH_1_1_Attachment2.

Kentucky Power Company and Wheeling Power Company continue to review their alternatives regarding the Mitchell Generating Station pending action by the West Virginia Commission on the petition. Kentucky Power Company also intends to explore these issues and will work to bring the Commission a recommendation on how to handle the Mitchell operating agreement in a new docket for review.

Kentucky Power will continue to file updated status reports every ten days during the pendency of this proceeding on the status of the West Virginia decision on ELG investment.

September 23, 2021 Update

Wheeling Power Company and Appalachian Power Company on September 20, 2021 filed with the Public Service Commission of West Virginia their Reply in support of their "Petition to Reopen Case and to Take Further Action."

A copy of the Reply is attached as KPCO_SR_KPSC_RH_1_1_Attachment3.

Kentucky Power Company and Wheeling Power Company continue to review their alternatives regarding the Mitchell Generating Station pending action by the West Virginia Commission on the petition. Kentucky Power Company will work to bring the Commission a recommendation on how to handle the Mitchell operating agreement either in Case No. 2021-00370 or in a separate docket.

Kentucky Power will continue to file updated status reports every ten days during the pendency of this proceeding.

October 4, 2021 Update

The Public Service Commission of West Virginia held an evidentiary hearing on September 24, 2021 in Case No. 20-1040-E-CN. The purpose of the hearing was to address the issues raised in Wheeling Power Company and Appalachian Power Company's September 8, 2021 "Petition to Reopen Case and to Take Further Action."

Kentucky Power Company
KPSC Case No. 2021-00004
Commission Staff's Rehearing Data Requests
Dated August 19, 2021
Page 3 of 13

Kentucky Power Company and Wheeling Power Company continue to review their alternatives regarding the Mitchell Generating Station pending action by the West Virginia Commission on the petition. Kentucky Power Company will work to bring the Commission a recommendation on how to handle the Mitchell operating agreement either in Case No. 2021-00370 or in a separate docket.

Kentucky Power will continue to file updated status reports every ten days during the pendency of this proceeding.

October 13, 2021 Update

On October 12, 2021 the Public Service Commission of West Virginia issued its Order regarding Wheeling Power Company and Appalachian Power Company's September 20, 2021 "Petition to Reopen Case and to Take Further Action" affirming the earlier order that the Companies proceed with ELG at all three plants.

Please see KPCO_SR_KPSC_RH_1_1_Attachment4 which provides a copy of the October 12, 2021 Order and all other documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN since October 2, 2021¹ through October 12, 2021.

Kentucky Power will continue to file updated status reports every ten days during the pendency of this proceeding.

October 25, 2021 Update

Wheeling Power Company is moving forward with CCR/ELG work at the Mitchell Generating Station given the recent action by the West Virginia Commission on the petition. Kentucky Power Company will work to bring the Commission a recommendation on how to handle the Mitchell operating agreement either in Case No. 2021-00370 or in a separate docket. The Company expects to make the operating agreement filing in fourth quarter 2021 and further plans to address through that filing that Kentucky Power will only pay for CCR-related costs associated with the CCR/ELG project.

¹ The Commission Staff's data request 2-6 dated September 17, 2021 sought, as a continuing request, that the Company provide a copy of any documents filed by Wheeling Power or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN and to be provided in the Company's 10-day status reports. The Company's response to 2-6 provided these documents through October 1, 2021.

Kentucky Power Company
KPSC Case No. 2021-00004
Commission Staff's Rehearing Data Requests
Dated August 19, 2021
Page 4 of 13

Kentucky Power will continue to file updated status reports every ten days during the pendency of this proceeding.

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN from October 13, 2021 through October 24, 2021.

November 4, 2021 Update

AEP has entered into an agreement to sell its Kentucky operations, which include Kentucky Power and AEP Kentucky Transco, to Liberty Utilities Corp., the regulated utility business of parent company Algonquin Power & Utilities Corporation. Liberty will own and obtain power from Kentucky Power's 50% portion of the Mitchell Plant through 2028. The sale is expected to close in the second quarter of 2022, pending regulatory approvals. The Company expects that an application for Commission approval of the transaction will be made in the fourth quarter 2021.

Kentucky Power Company will work to bring the Commission a recommendation on how to handle the Mitchell operating agreement either in Case No. 2021-00370 or in a separate docket. The Company expects to make the operating agreement filing in the fourth quarter 2021.

Kentucky Power will continue to file updated status reports every ten days during the pendency of this proceeding.

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN from October 25, 2021 through November 3, 2021.

November 15, 2021 Update

On November 5, 2021, Kentucky Power filed its notice of intent to file an application for approval of affiliate agreements related to the Mitchell Generating Station. The Commission assigned this proceeding Case No. 2021-00421. The Company will file its application before November 30, 2021. A comparable filing will be made at the same time in West Virginia.

Kentucky Power will continue to file updated status reports every ten days during the pendency of this proceeding.

Kentucky Power Company
KPSC Case No. 2021-00004
Commission Staff's Rehearing Data Requests
Dated August 19, 2021
Page 5 of 13

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN from November 4, 2021 through November 14, 2021.

November 24, 2021 Update

On November 19, 2021, Kentucky Power filed its application for approval of its proposed Mitchell Plant Operations and Maintenance Agreement and Mitchell Plant Ownership Agreement (collectively the “New Mitchell Agreements”) in Case No. 2021-00421. Please see KPCO_SR_KPSC_1_1_Attachment5 for a copy of the Company’s application, including the supporting testimonies of D. Brett Mattison and Timothy C. Kerns. A comparable filing was made contemporaneously in West Virginia under Case No. 21-0810-E-PC. Please see KPCO_SR_KPSC_1_1_Attachment6 for a copy of this filing.

Additionally, American Electric Power Service Corporation (on behalf of Wheeling Power and Kentucky Power) filed the New Mitchell Agreements and cancellation of Rate Schedules No. 303 (current Mitchell Plant Operating Agreement) with FERC on November 19, 2021. Please see KPCO_SR_KPSC_1_1_Attachment7 for a copy of this filing.

Kentucky Power will continue to file updated status reports every ten days during the pendency of this proceeding.

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN from November 15, 2021 through November 23, 2021.

December 3, 2021 Update

On November 30, 2021 an informal meeting was held following the hearing in Case No. 2021-00370 to discuss a procedural schedule for Case No. 2021-00421. The Commission entered an Order on December 3, 2021 in Case No. 2021-00421 establishing the procedural schedule for Case No. 2021-00421.

As of December 2, 2021 a procedural schedule has not been established in the comparable filing made in West Virginia (21-0810-E-PC).

Copies of the FERC eLibrary docket for FERC Case No. ER22-453-000 (Kentucky Power Company) and FERC Case No. ER22-452-000 (Wheeling Power Company) are filed as KPCO_SR_KPSC_1_1_Attachment8 and KPCO_SR_KPSC_1_1_Attachment9 respectively.

Kentucky Power Company
KPSC Case No. 2021-00004
Commission Staff's Rehearing Data Requests
Dated August 19, 2021
Page 6 of 13

Kentucky Power will continue to file updated status reports every ten days during the pendency of this proceeding.

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN during the period November 24, 2021 through December 2, 2021.

December 13, 2021 Update

On December 13, 2021, the Commission established a hearing date in Case No. 2021-00421. The hearing is to be held on March 1, 2022 through March 3, 2022.

As of December 12, 2021 a procedural schedule has not been established in the comparable filing made in West Virginia (21-0810-E-PC).

Copies of the FERC eLibrary docket for FERC Case No. ER22-453-000 (Kentucky Power Company) and FERC Case No. ER22-452-000 (Wheeling Power Company) are filed as KPCO_SR_KPSC_1_1_Attachment10 and KPCO_SR_KPSC_1_1_Attachment11 respectively.

Kentucky Power will continue to file updated status reports every ten days during the pendency of this proceeding.

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN during the period December 3, 2021 through December 12, 2021.

December 22, 2021 Update

The Company will be filing its responses to the first set of discovery requests in Case No. 2021-00421 today.

As of December 21, 2021 a procedural schedule has not been established in the comparable filing made in West Virginia (21-0810-E-PC).

Copies of the FERC eLibrary docket for FERC Case No. ER22-453-000 (Kentucky Power Company) and FERC Case No. ER22-452-000 (Wheeling Power Company) are filed as KPCO_SR_KPSC_1_1_Attachment12 and KPCO_SR_KPSC_1_1_Attachment13 respectively.

Kentucky Power Company
KPSC Case No. 2021-00004
Commission Staff's Rehearing Data Requests
Dated August 19, 2021
Page 7 of 13

Kentucky Power will continue to file updated status reports every ten days during the pendency of this proceeding.

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN during the period December 13, 2021 through December 21, 2021.

January 3, 2022

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN during the period December 22, 2021 through December 31, 2021.

On December 22, 2021 the Staff of the Public Service Commission of West Virginia issued its initial memorandum and first set of data requests in Case No. 21-0810-E-PC. The proceeding seeks approval of the Mitchell Plant Operations and Maintenance Agreement and the Mitchell Plant Ownership Agreement. Copies of the filed memo and the data requests are attached as KPCO_SR_KPSC_1_1_Attachment14 and KPCO_SR_KPSC_1_1_Attachment15 respectively. As of December 29, 2021 a procedural schedule has not be established in Case 21-0810-E-PC.

Copies of the FERC eLibrary docket for FERC Case No. ER22-453-000 (Kentucky Power Company) and FERC Case No. ER22-452-000 (Wheeling Power Company) are filed as KPCO_SR_KPSC_1_1_Attachment16 and KPCO_SR_KPSC_1_1_Attachment17 respectively.

January 13, 2022

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN during the period January 1, 2022 through January 12, 2022.

Responses to the Staff of the Public Service Commission of West Virginia's first set of data requests in Case No. 21-0810-E-PC were filed on January 11, 2022. A copy of these responses is attached as KPCO_SR_KPSC_1_1_Attachment18. As of December 29, 2021 a procedural schedule has not be established in Case 21-0810-E-PC.

Copies of the FERC eLibrary docket for FERC Case No. ER22-453-000 (Kentucky Power Company) and FERC Case No. ER22-452-000 (Wheeling Power Company) are filed as KPCO_SR_KPSC_1_1_Attachment19 and KPCO_SR_KPSC_1_1_Attachment20 respectively.

Kentucky Power Company
KPSC Case No. 2021-00004
Commission Staff's Rehearing Data Requests
Dated August 19, 2021
Page 8 of 13

January 24, 2022

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN during the period January 13, 2022 through January 23, 2022.

A proposed procedural schedule was filed by West Virginia Staff in Case No. 21-0810-E-PC on January 14, 2022. On January 20, 2022 the "Objections of Appalachian Power Company and Wheeling Power Company to the Consumer Advocate Division's First Request for Information" were filed. A copy of these documents are attached as KPCO_SR_KPSC_1_1_Attachment21 and KPCO_SR_KPSC_1_1_Attachment22.

Copies of the FERC eLibrary docket for FERC Case No. ER22-453-000 (Kentucky Power Company) and FERC Case No. ER22-452-000 (Wheeling Power Company) beginning November 24, 2021 are filed as KPCO_SR_KPSC_1_1_Attachment23 and KPCO_SR_KPSC_1_1_Attachment24 respectively.

February 3, 2022

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN during the period January 24, 2022 through February 2, 2022.

The West Virginia Commission's procedural order in Case No. 21-0810-E-PC was entered on January 25, 2022. Appalachian Power Company's and Wheeling Power Company's responses to the Consumer Advocate Division and the West Virginia Energy Users Group first data requests were filed on January 26, 2022. A copy of these documents are attached as KPCO_SR_KPSC_1_1_Attachment25 through KPCO_SR_KPSC_1_1_Attachment27.

Copies of the FERC eLibrary docket for FERC Case No. ER22-453-000 (Kentucky Power Company) and FERC Case No. ER22-452-000 (Wheeling Power Company) beginning December 4, 2021 are filed as KPCO_SR_KPSC_1_1_Attachment28 and KPCO_SR_KPSC_1_1_Attachment29 respectively.

Kentucky Power Company
KPSC Case No. 2021-00004
Commission Staff's Rehearing Data Requests
Dated August 19, 2021
Page 9 of 13

February 14, 2022

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN during the period February 3, 2022 through February 13, 2022.

In Case No. 21-0810-E-PC, Appalachian Power Company's and Wheeling Power Company's response to the Consumer Advocate Division's motion to compel was filed on February 7, 2022. On February 8, 2022 the West Virginia Commission granted intervention two petitions to intervene: 1) West Virginia Coal Association and 2) West Virginia Citizens Action Group, Solar United Neighbors, and Energy Efficient West Virginia. A copy of these documents are attached as KPCO_SR_KPSC_1_1_Attachment30 through KPCO_SR_KPSC_1_1_Attachment31.

On February 7, 2022 American Electric Power Service Corporation on behalf of Kentucky Power and Wheeling Power Company filed a motion to withdraw the rate filing submitted on November 19, 2021 in dockets ER22-452-000 and ER22-453-000.

February 24, 2022

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN or Case No. 21-0810-E-PC during the period February 14, 2022 through February 23, 2022.

March 7, 2022

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN during the period February 24, 2022 through March 6, 2022.

The Company inadvertently omitted from its last 10-day status update that in Case No. 21-0810-E-PC, Appalachian Power Company's and Wheeling Power Company's responses to West Virginia Energy Users Group second set of data requests were filed on February 23, 2022. A copy of these responses is attached as KPCO_SR_KPSC_1_1_Attachment32.

Kentucky Power Company
KPSC Case No. 2021-00004
Commission Staff's Rehearing Data Requests
Dated August 19, 2021
Page 10 of 13

The Commission held a hearing in Case No. 2021-00421 on March 1, 2022. After that hearing, the Kentucky Public Service Commission issued an order requiring the Company to notify the Commission whether or not the Company intended to file a proposed amendment to the Mitchell Ownership Agreement concerning the Company's alternate proposal to divide the Mitchell units between Kentucky Power and Wheeling Power. The Company is evaluating this option and will file its response regarding such a proposal as soon as is practical before March 16, 2022.

March 16, 2022

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN during the period March 7, 2022 through March 15, 2022.

In Case No. 21-0810-E-PC, on March 8, 2022 the West Virginia Commission granted two requests for admission Pro Hac Vice of West Virginia Citizens Action Group, Solar United Neighbors and Energy Efficient West Virginia. On March 9, 2022, Appalachian Power Company and Wheeling Power Company filed a response to the third set of data requests from West Virginia Energy Users Group. A copy of the response is attached as KPCO_SR_KPSC_1_1_Attachment33. On March 11, 2022 the West Virginia Commission approved the Consumer Advocate Division's (CAD) Motion to Compel. A copy of the Order is attached as KPCO_SR_KPSC_Attachment34.

March 28, 2022

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN during the period March 16, 2022 through March 27, 2022.

In Case No. 21-0810-E-PC, on March 16, 2022, Appalachian Power Company and Wheeling Power Company filed responses to CAD's first set of data requests as required by the Public Service Commission of West Virginia's order granting CAD's motion to compel. A copy of the public responses are attached as KPCO_SR_KPSC_1_1_Attachment35. On March 17, 2022 Appalachian Power Company and Wheeling Power Company filed their response to CAD's motion to amend the procedural schedule. A copy of the response is attached as KPCO_SR_KPSC_1_1_Attachment36. On March 18, 2022 Appalachian Power Company and Wheeling Power Company filed supplemental direct testimony of Christian Beam. A copy of the supplemental testimony is attached as KPCO_SR_KPSC_1_1_Attachment37. On March 18, 2022 the Public Service Commission of West Virginia issued an Order amending the procedural schedule. A copy of this Order is attached as KPCO_SR_KPSC_1_1_Attachment38. On March

Kentucky Power Company
KPSC Case No. 2021-00004
Commission Staff's Rehearing Data Requests
Dated August 19, 2021
Page 11 of 13

23, 2022, Appalachian Power Company and Wheeling Power Company filed a motion for protective treatment. A copy of this motion is attached as KPCO_SR_KPSC_1_1_Attachment39.

April 5, 2022

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN during the period March 28, 2022 through April 6, 2022.

In Case No. 21-0810-E-PC, on March 28, 2022, the Staff of the Public Service Commission of West Virginia filed the direct testimonies of James Weimer, P.E., and Geoffrey M. Cooke. A copy of these testimonies is attached as KPCO_SR_KPSC_1_1_Attachment40.

On March 31, 2022 the Public Service Commission of West Virginia issued an Order granting the request for admission *Pro Hac Vice* of Melissa Anne Legge. A copy of the Order is attached as KPCO_SR_KPSC_Attachment41.

On April 1, 2022, the Staff of the Public Service Commission of West Virginia filed the supplemental direct testimony of James Weimer, P.E. A copy of the supplemental direct testimony is attached as KPCO_SR_KPSC_1_1_Attachment42.

On April 4, 2022 Appalachian Power Company and Wheeling Power Company filed the Rebuttal Testimony of Christian T. Beam. A copy of Mr. Beam's rebuttal testimony is attached as KPCO_SR_KPSC_1_1_Attachment43. Mr. Beam's Rebuttal Testimony covered the particulars of Section 9.6 and the Unit Interest Swap option contained in the amended proposed Mitchell Plant Ownership Agreement. Mr. Beam also supported the remaining elements of the agreements overall.

Of special note in Mr. Beam's Rebuttal Testimony was an alternative offered by Appalachian Power and Wheeling Power to the West Virginia Commission to remove in its entirety the provisions governing the transfer of Kentucky Power's plant interest by 2028 (Section 9.6 and related provisions and definitions) and rather focus the agreements on the operation of and investment in the plant between now and December 31, 2028.

The Rebuttal Testimony recognizes the Kentucky Commission's Order that Kentucky Power not invest in ELG, and the Kentucky Commission's discussions at its recent hearing in Case No. 2021-00421 concerning the potential need for a certificate of public convenience and necessity in the future should Kentucky Power wish to keep Mitchell in its generation mix past December 31, 2028.

Kentucky Power Company
KPSC Case No. 2021-00004
Commission Staff's Rehearing Data Requests
Dated August 19, 2021
Page 12 of 13

The Rebuttal Testimony also recognizes the Kentucky Commission's requirement to update the Kentucky Commission on the West Virginia proceeding every 10 days, and recognizes these updates as an avenue for informing the Commission about the West Virginia proceeding.

Ultimately, though, the Rebuttal Testimony requests that the West Virginia Commission find acceptable *both options presented*: the Unit Interest Swap option *and* the removal of Section 9.6 (and associated provisions) in its entirety, in order to provide flexibility and to reduce the potential for inconsistent decisions between the Kentucky and West Virginia Commissions, and to increase the potential that the agreements are found acceptable by both commissions.

As presented in the Rebuttal Testimony, the West Virginia Commission could authorize Wheeling Power to enter into the agreements except for Section 9.6 of the Mitchell Ownership Agreement (including associated definitions and provisions such as the arbitration clause in Section 12.4 that are specific to that clause) if it finds that to be reasonable. That could also facilitate Kentucky Power entering into the agreements on those same terms, assuming that the Kentucky Commission approves the agreements absent Section 9.6 and authorizes Kentucky Power to enter into the agreements on the same basis. If the West Virginia Commission sees both options as reasonable, it could issue an order finding it reasonable for Wheeling Power to enter into an agreement containing either option to facilitate consistency.

Finally, a hearing is set for April 7, 2022 on Appalachian Power and Wheeling Power's application in 21-0810-E-PC. On April 4, 2022 Appalachian Power and Wheeling Power filed an agreed order of witnesses for the April 7, 2022 hearing. A copy of this document is attached as KPCO_SR_KPSC_1_1_Attachment44.

April 13, 2022

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN during the period April 6, 2022 through April 12, 2022.

In Case No. 21-0810-E-PC, on April 7, 2022 a hearing was held concerning the New Mitchell Agreements. A copy of the transcript is attached as KPCO_SR_KPSC_1_1_Attachment45.

The transcript includes the testimony of two Wheeling Power witnesses (President Christian Beam and Timothy Kerns), as well as Staff and intervenor witnesses. The hearing concerned the same New Mitchell Agreements as those filed with the Kentucky Commission (i.e., the Mitchell Plant Operations and Maintenance Agreement and the Revised Mitchell Plant Ownership Agreement) and also includes testimony regarding the removal of Section 9.6 and related definitions and provisions from the Ownership Agreement if the WVPSC determined that was a

Kentucky Power Company
KPSC Case No. 2021-00004
Commission Staff's Rehearing Data Requests
Dated August 19, 2021
Page 13 of 13

more reasonable option and to assist in promoting consistency in the agreements approved by both this Commission and the WVPSC. The transcript also includes testimony by Wheeling Power and an intervenor witness regarding the need for timely approval of the New Mitchell Agreements in order to move permits into Wheeling Power's name and for Wheeling Power to move forward with the ELG physical work.

Kentucky Power provides this update earlier than the required 10 days in consideration of the Commission's comments at the March 30, 2022 hearing in Case No. 2021-00421 that the Commission relies on these updates to inform it of the status of the West Virginia proceedings in the Commission's consideration of Case No. 2021-00421.

April 25, 2022

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN during the period April 13, 2022 through April 24, 2022.

In Case No. 21-0810-E-PC, on April 13, 2022 an email from Christian Beam to Commissioner Raney was filed with the West Virginia Commission and treated as a Commission request exhibit. A copy of the request exhibit is attached as KPCO_SR_KPSC_1_1_Attachment46. On April 15, 2022 Appalachian Power Company and Wheeling Power Company filed post-hearing exhibits. A copy of these documents is attached as KPCO_SR_KPSC_1_1_Attachment47 through KPCO_SR_KPSC_1_1_Attachment49. On April 19, 2022 initial briefs were filed by West Virginia Staff, CAG/SUN/EEWV, CAD, West Virginia Coal Association, WVEUG, and Appalachian Power Company and Wheeling Power Company. A copy of these initial briefs are attached as KPCO_SR_KPSC_1_1_Attachment50. On April 22, 2022 Appalachian Power Company and Wheeling Power Company filed an addendum to motion for protective treatment originally filed March 23, 2022. A copy of this motion is attached as KPCO_SR_KPSC_1_1_Attachment51.

Witness: Deryle B. Mattison

01:58 PM APR 13 2022 EXEC SEC DIV

Case No. 21-0810-E-PC

From: Christian T Beam <ctbeam@aep.com>
Sent: Friday, April 8, 2022 4:18 PM
To: Raney, William <WRaney@psc.state.wv.us>
Subject: Re: [EXTERNAL] RE: Appalachian Power, Mitchell Plant information request

I think it converts over to about 23 days due to blend the low sulfur. So that pile would be the limiting factor.

Sent from my iPhone

On Apr 8, 2022, at 3:37 PM, Raney, William <WRaney@psc.state.wv.us> wrote:

This is an **EXTERNAL** email. **STOP. THINK** before you **CLICK** links or **OPEN** attachments. If suspicious please click the '**Report to Incidents**' button in Outlook or forward to incidents@aep.com from a mobile device.

Thanks again. How many days of generation is that amount of tonnage.

From: Christian T Beam [<mailto:ctbeam@aep.com>]
Sent: Friday, April 8, 2022 2:35 PM
To: Raney, William <WRaney@psc.state.wv.us>
Subject: Appalachian Power, Mitchell Plant information request

Commissioner Raney,

Following up with you on your questions yesterday about Mitchell Plant. As of April 5, 2022 we had 392,000 tons of high sulfur coal (NAPP) and 138,000 tons of low sulfur (CAPP) on the ground.

04:09 PM APR 15 2022 EXEC SEC DIV



An **AEP** Company

BOUNDLESS ENERGY

Keith D. Fisher
Senior Counsel

500 Lee Street East, Suite 800
Charleston, WV 25301
304.348.4154
kdfisher@aep.com

April 15, 2022

Via Hand Delivery

Karen Buckley
Acting Executive Secretary
Public Service Commission of West Virginia
201 Brooks St.
Charleston, WV 25301

Re: Case No. 21-0810-E-PC
Appalachian Power Company and Wheeling Power Company
*Petition for Commission Consent and Approval to Enter into Ownership and
Operating Agreements for the Mitchell Plant*

Dear Ms. Buckley:

On behalf of Appalachian Power Company ("APCo") and Wheeling Power Company ("WPCo") (together, the "Companies"), and pursuant to the Commission's directives at the hearing held April 7, 2022 in this matter, I enclose herewith the original and twelve (12) copies of the Post-Hearing Exhibits requested by the Commission and certain parties to this proceeding. On this date, copies thereof were served in accordance with the Certificate of Service.

Certain material is being filed under seal because it contains confidential information. Pursuant to Rule 4.1.6 of the Commission's *Rules of Practice and Procedure*, the Companies are providing an original and two (2) copies of the confidential material in a sealed envelope, with an appropriate cover letter affixed to it. The Companies respectfully request that the Executive Secretary take the necessary measures to ensure the protective treatment of the confidential material pending any action by the Commission on the Companies' request for protective treatment to be filed in this matter within one week.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink that reads "Keith D. Fisher". The signature is written in a cursive, flowing style.

Keith D. Fisher (WV State Bar #11346)
Counsel for Appalachian Power Company
and Wheeling Power Company

Enclosures
cc: Certificate of Service

04:09 PM APR 15 2022 EXEC SEC DIV

**APPALACHIAN POWER COMPANY &
WHEELING POWER COMPANY
WEST VIRGINIA CASE NO. 21-0810-E-PC
PSC Post-Hearing Exhibits**

Request PSC PHE-1

Request made during April 7, 2022 Hearing for Mitchell Plant Day-Ahead bid prices in PJM and PJM market prices, from mid-2021 to current.

Response PSC PHE-1

Please see file "PSC PHE-1 CONFIDENTIAL Attachment 1" on the enclosed CD for the requested information.

**APPALACHIAN POWER COMPANY &
WHEELING POWER COMPANY
WEST VIRGINIA CASE NO. 21-0810-E-PC
PSC Post-Hearing Exhibits**

Request PSC PHE-2

Request made during the April 7, 2022 Hearing seeking cost estimates for complying with only the Coal Combustion Residuals (CCR) Rule on one Mitchell Unit, and complying with CCR and the Effluent Limitation Guidelines (ELG) on the other unit.

Response PSC PHE-2

The Company performed an analysis in October 2021 (based on a Class 3 cost estimate from August 2021) to consider the cost of performing projects to comply with CCR-Only on one Mitchell unit, and CCR and ELG on the other unit.

That analysis estimated the total cost for CCR and ELG compliance for both units at \$148M, and \$126M for CCR-only on one unit, and CCR and ELG on the other unit (estimates are post-allocated, with Fuel and Asset Retirement Obligation costs on a total plant basis). The one unit CCR-only estimate has not been updated as the projects proceeded because a CCR-only option is no longer viable for either Mitchell unit. Because the Companies did not file a Notice of Planned Participation (NOPP) by October 13, 2021, the Companies must continue to follow the plans filed with the Environmental Protection Agency and the West Virginia Department of Environmental Protection on November 30, 2020, which lay out a timeline to comply with both the CCR and ELG rules in an expedient fashion.

**APPALACHIAN POWER COMPANY &
WHEELING POWER COMPANY
WEST VIRGINIA CASE NO. 21-0810-E-PC
PSC Post-Hearing Exhibits**

Request PSC PHE-3

Request made during the April 7, 2022 Hearing for the sale prices of the Sporn, Kanawha River, and Glen Lyn Plants, as well as the Net Book Value of each plant at the time of retirement.

Response PSC PHE-3

Please note that of the three plants named, only the Sporn Plant has been sold to a third party. See PSC PHE-3 CONFIDENTIAL Attachment 1 for the requested information regarding the Sporn sale amount.

The Net Book Values for the Glen Lyn, Kanawha River, and Sporn Power Plants at the time of the retirement (as of 4-30-2015) are as follows:

- Glen Lyn: \$14.3M
- Kanawha River: \$61.7M
- Sporn: \$16.7M

WVPSC Case No. 21-0810-E-PC
PSC PHE-3 PUBLIC Attachment 1
Page 1 of 1

The Sporn Plant was sold for [begin confidential] [end confidential], meaning that amount was paid to the buyer to take the Sporn site and assume liabilities associated with that site.

**APPALACHIAN POWER COMPANY &
WHEELING POWER COMPANY
WEST VIRGINIA CASE NO. 21-0810-E-PC
CAD Post-Hearing Exhibits**

Request CAD PHE-1

Request during April 7, 2022 Hearing for any Mitchell Operating Committee meeting minutes that had not already been filed in Kentucky Power's Case No. 2021-00421 before the Kentucky Public Service Commission.

Response CAD PHE-1

There are no Mitchell Operating Committee meeting minutes from January 1, 2021 to March 31, 2022, beyond those that have been filed by Kentucky Power in Case No. 2021-00421.

**APPALACHIAN POWER COMPANY &
WHEELING POWER COMPANY
WEST VIRGINIA CASE NO. 21-0810-E-PC
CAD Post-Hearing Exhibits**

Request CAD PHE-2

Request made during April 7, 2022 hearing regarding the not-yet-filed response to a discovery request in Kentucky Power's Case No. 2021-00421 related to replacement costs for Mitchell Plant outages.

Response CAD PHE-2

See CAD PHE-2 Attachment 1 for Kentucky Power's response to the relevant discovery request, including one attachment, and see CAD PHE-2 Attachment 2 on the enclosed CD for the forecasted budget information provided in the same response.

Kentucky Power Company
KPSC Case No. 2021-00421
Commission Staff's PHDRs (2nd Hearing)
Dated March 31, 2022

DATA REQUEST

- KPSC
PHDR S1** Refer to March 30, 2022 Hearing Testimony of Timothy Kerns regarding the expected equipment repair costs and replacement power forecasts for Mitchell used to prepare Kentucky Power's Integrated Resource Plan.
- a. Provide the ten-year expected capital and expense forecast for Mitchell, itemized by the project.
 - b. Provide the ten-year replacement power forecast for Mitchell.
 - c. Provide the failure rates used to prepare the ten-year forecasts.

RESPONSE

- a. See KPCO_R_KPSC_PHDR_S1_Attachment1 for the requested information, used to prepare the Company's most recent IRP filing. Note that costs are 2019 post-allocated, fully loaded estimates that represent Kentucky Power's 50% share of the Mitchell Plant.
- b. The Company does not have estimated costs for the replacement of power specifically for the Mitchell Plant. See KPCO_R_KPSC_PHDR_S1_Attachment2 for the forecasted power prices used in the most recent IRP that were created as part of the Fundamentals Forecast.
- c. The Company does not have forecasted failure rates for specific pieces of equipment, but rather estimates the forced outage rates for each generating unit. For the most recent IRP, the equivalent forced outage rate - demand (EFORd) assumed for the units at the Mitchell Plant were as follows:
 - Mitchell Unit 1: 20.08%
 - Mitchell Unit 2: 9.77%

Witness: Timothy C. Kerns

Year	Power Prices (\$/MWh) -Nominal \$'s	
	On-Peak	Off-Peak
2019	30.55	25.15
2020	30.97	25.43
2021	31.13	25.72
2022	32.25	26.78
2023	33.61	27.93
2024	35.01	29.22
2025	36.17	30.14
2026	37.25	31.06
2027	38.69	32.28
2028	47.58	41.03
2029	47.86	41.11
2030	48.89	41.90
2031	49.73	42.38
2032	51.29	43.16
2033	52.38	43.88
2034	53.58	45.13
2035	55.61	46.59
2036	55.86	46.94
2037	57.33	48.33
2038	59.40	49.81
2039	60.96	50.89
2040	61.73	51.95
2041	62.33	53.01
2042	63.77	54.59
2043	64.31	55.85
2044	66.55	58.08
2045	67.29	59.62
2046	68.94	61.55
2047	70.58	63.18
2048	72.03	64.85
2049	72.33	65.85
2050	74.03	67.40
2051	75.57	68.90
2052	77.10	70.38
2053	78.63	71.88

**APPALACHIAN POWER COMPANY &
WHEELING POWER COMPANY
WEST VIRGINIA CASE NO. 21-0810-E-PC
CAD Post-Hearing Exhibits**

Request CAD PHE-3

Request made during the April 7, 2022 hearing regarding how many days the Mitchell Plant had operated, from January 1, 2022 to current.

Response CAD PHE-3

See CAD PHE-3 CONFIDENTIAL Attachment 1 for the requested information, including the coal inventory at the Mitchell Plant over the same period.

Mitchell Plant Unit Status
January 1, 2022, through April 7, 2022

Date	Unit 1 Status	Unit 2 Status	Total Inventory (Days FLB)	Constraining Pile Inventory (Days FLB)
1/1/2022	RS	OP	REDACTED	
1/2/2022	RS	OP		
1/3/2022	RS	OP		
1/4/2022	RS	OP		
1/5/2022	RS	OP		
1/6/2022	RS	OP		
1/7/2022	RS	OP		
1/8/2022	RS	OP		
1/9/2022	RS	OP		
1/10/2022	OP	OP		
1/11/2022	OP	OP		
1/12/2022	OP	OP		
1/13/2022	OP	OP		
1/14/2022	OP	OP		
1/15/2022	OP	OP		
1/16/2022	OP	OP		
1/17/2022	OP	OP		
1/18/2022	OP	OP		
1/19/2022	OP	OP		
1/20/2022	OP	OP		
1/21/2022	OP	OP		
1/22/2022	OP	OP		
1/23/2022	OP	OP		
1/24/2022	OP	OP		
1/25/2022	OP	OP		
1/26/2022	OP	OP		
1/27/2022	OP	OP		
1/28/2022	OP	OP		
1/29/2022	OP	OP		
1/30/2022	OP	OP		
1/31/2022	MO	OP		
2/1/2022	MO	OP		

FLB - Full Load Burn
 OP - Operating
 FO - Forced Outage
 MO - Maintenance Outage
 RS - Reserve Shutdown (not called upon to run)

Mitchell Plant Unit Status
January 1, 2022, through April 7, 2022

Date	Unit 1 Status	Unit 2 Status	Total Inventory (Days FLB)	Constraining Pile Inventory (Days FLB)
2/2/2022	MO	OP	REDACTED	
2/3/2022	MO	OP		
2/4/2022	MO	OP		
2/5/2022	MO	OP		
2/6/2022	MO	OP		
2/7/2022	MO	OP		
2/8/2022	MO	OP		
2/9/2022	MO	OP		
2/10/2022	MO	OP		
2/11/2022	FO	OP		
2/12/2022	FO	OP		
2/13/2022	FO	OP		
2/14/2022	FO	OP		
2/15/2022	FO	OP		
2/16/2022	FO	OP		
2/17/2022	RS	OP		
2/18/2022	RS	OP		
2/19/2022	RS	OP		
2/20/2022	RS	OP		
2/21/2022	RS	MO		
2/22/2022	RS	MO		
2/23/2022	RS	MO		
2/24/2022	RS	MO		
2/25/2022	RS	MO		
2/26/2022	RS	MO		
2/27/2022	RS	MO		
2/28/2022	RS	MO		
3/1/2022	RS	MO		
3/2/2022	RS	MO		
3/3/2022	RS	MO		
3/4/2022	RS	MO		
3/5/2022	RS	MO		
3/6/2022	RS	MO		
3/7/2022	RS	MO		
3/8/2022	RS	MO		

FLB - Full Load Burn
 OP - Operating
 FO - Forced Outage
 MO - Maintenance Outage
 RS - Reserve Shutdown (not called upon to run)

Mitchell Plant Unit Status
January 1, 2022, through April 7, 2022

Date	Unit 1 Status	Unit 2 Status	Total Inventory (Days FLB)	Constraining Pile Inventory (Days FLB)
3/9/2022	RS	MO	REDACTED	
3/10/2022	MO	MO		
3/11/2022	MO	MO		
3/12/2022	MO	MO		
3/13/2022	RS	MO		
3/14/2022	RS	MO		
3/15/2022	RS	MO		
3/16/2022	RS	MO		
3/17/2022	RS	MO		
3/18/2022	RS	MO		
3/19/2022	RS	MO		
3/20/2022	RS	MO		
3/21/2022	RS	MO		
3/22/2022	RS	MO		
3/23/2022	RS	MO		
3/24/2022	RS	MO		
3/25/2022	FO	MO		
3/26/2022	FO	MO		
3/27/2022	OP	RS		
3/28/2022	FO	RS		
3/29/2022	FO	RS		
3/30/2022	RS	RS		
3/31/2022	RS	RS		
4/1/2022	RS	RS		
4/2/2022	RS	RS		
4/3/2022	RS	RS		
4/4/2022	RS	RS		
4/5/2022	OP	RS		
4/6/2022	OP	RS		
4/7/2022	OP	RS		

FLB - Full Load Burn
 OP - Operating
 FO - Forced Outage
 MO - Maintenance Outage
 RS - Reserve Shutdown (not called upon to run)

**PUBLIC SERVICE COMMISSION
 OF WEST VIRGINIA
 CHARLESTON**

CASE NO. 21-0810-E-PC

**APPALACHIAN POWER COMPANY and
 WHEELING POWER COMPANY,**
 public utilities.

*Petition for Commission Consent and Approval
 to Enter into Ownership and Operating Agreements
 for the Mitchell Plant*

CERTIFICATE OF SERVICE

I, Keith D. Fisher, counsel for Appalachian Power Company and Wheeling Power Company, do hereby certify that a true and correct copy of the foregoing filing was served upon the following, via electronic mail, on this 15th day of April, 2022:

Lucas R. Head, Esq. Public Service Commission of West Virginia 201 Brooks Street Charleston, WV 25301 <i>Counsel for Staff of WV Public Service Commission</i>	Robert F. Williams, Esq. Heather B. Osborn, Esq. John Auville, Esq. Consumer Advocate Division 300 Capitol Street, Suite 810 Charleston, WV 25301 <i>Counsel for Consumer Advocate Division</i>
Susan J. Riggs, Esq. Jason C. Pizatella, Esq. Spilman Thomas & Battle, PLLC 300 Kanawha Blvd E Charleston, WV 25301 <i>Counsel for WVEUG</i>	Derrick P. Williamson, Esq. Barry A. Naum, Esq. Spilman Thomas & Battle, PLLC 1100 Bent Creek Blvd, Suite 101 Mechanicsburg, PA 17050 <i>Counsel for WVEUG</i>
Emmett Pepper, Esq. Pepper & Nason 8 Hale Street Charleston, WV 25301 <i>Counsel for CAG, SUN, and EEVW</i>	H. Brann Altmeyer, Esq. Jacob C. Altmeyer, Esq. Phillips, Gardill, Kaiser & Altmeyer, PLLC 61 Fourteenth Street Wheeling, WV 26003 <i>Counsel for WV Coal Association, Inc.</i>
Shannon Fisk, Esq. Earthjustice 48 Wall St., 15 th Floor New York, NY 10005 <i>Counsel for CAG, SUN, and EEVW</i>	Raghava Murthy, Esq. Earthjustice 48 Wall St., 15 th Floor New York, NY 10005 <i>Counsel for CAG, SUN, and EEVW</i>



Keith D. Fisher (WV State Bar #11346)

Non-Scanned Items

Case No.: 21-0810-E-PC

Item Description: CD included with APCo and WPCo's Post-Hearing Exhibits Requested by the Commission, filed by Counsel (Excel Spreadsheets)

X	Item(s) is with case file
	Item(s) was forwarded to Engineering
	Item(s) was forwarded to Legal
	Item is with case file under seal
	Item(s) was forwarded to Lynn Scott, Utilities Division

02:31 PM APR 19 2022 EXEC SEC DIV

Public Service Commission of West Virginia

201 Brooks Street, P.O. Box 812
Charleston, West Virginia 25323

Phone: (304) 340-0300
Fax: (304) 340-0325



April 19, 2022

Karen Buckley, Acting Executive Secretary
Public Service Commission
P. O. Box 812
Charleston, WV 25323

Re: **CASE NO. 21-0810-E-PC**
APPALACHIAN POWER COMPANY AND
WHEELING POWER COMPANY

Dear Ms. Buckley:

Enclosed for filing please find the original and twelve (12) copies of the "Staff's Initial Brief to the Commission".

Copies have today been mailed to all parties of record in this proceeding.

Sincerely,

A handwritten signature in black ink, appearing to read "Lucas R. Head", is written over a large, light-colored scribble or stamp.

LUCAS R. HEAD
Staff Attorney
WV State Bar I.D. No. 11146

02:31 PM APR 19 2022 EXEC SEC DIV

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

**CASE NO. 21-0810-E-PC
APPALACHIAN POWER COMPANY AND
WHEELING POWER COMPANY**

STAFF'S INITIAL BRIEF TO THE COMMISSION

April 19, 2022

Prepared By:

/s/ Lucas R. Head

**Lucas R. Head
Staff Attorney
WV State Bar ID No. 11146**

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

**CASE NO. 21-0810-E-PC
APPALACHIAN POWER COMPANY AND
WHEELING POWER COMPANY**

STAFF'S INITIAL BRIEF TO THE COMMISSION

I. INTRODUCTION

The Commission is presented with a Petition filed by Appalachian Power Company (APCo) and Wheeling Power Company (WPCo) (jointly "Companies") pursuant to W. Va. Code § 24-2-12, and the Commission's orders in Case No. 20-1040-E-CN, Appalachian Power Company and Wheeling Power Company, for consent and approval for WPCo to enter into a new Mitchell Plant Ownership Agreement and a new Mitchell Plant Operations and Maintenance Agreement (Agreements) for the Mitchell Plant located in Moundsville, WV. As a result of Final Orders by this Commission and the Kentucky Public Service Commission (KPSC) which differed on allowing reimbursement for investments related to federally-mandated environmental control measures, the new agreements are necessary to address cost sharing and continued operations at the Mitchell Plant. The Companies filed two, proposed new Agreements, and subsequently filed a Modified Mitchell Ownership Agreement (Modified Agreement). Staff recommends that the Commission approve the proposed Mitchell

Operations and Maintenance Agreement, and deny approval of the Modified Mitchell Ownership Agreement.

II. LEGAL STANDARD OF REVIEW

The Company's certificate application was filed pursuant to W. Va. Code §24-2-12. A utility seeking Commission consent and approval of an act governed by W. Va. Code §24-2-12 must make a showing that the terms of the proposed transaction are reasonable, do not give either party an undue advantage over the other, and do not adversely affect the public in this state.

III. ARGUMENT

The Commission should deny approval of the Modified Mitchell Ownership Agreement because it is inconsistent with the Commission's Final Orders in Case No. 20-1040-E-CN

Company's witness Beam submitted supplemental direct testimony (Company's Ex. CTB-S) on March 18, 2022, where he sponsored a proposed, Modified Mitchell Plant Ownership Agreement (Company's Ex. CTB-S2). The proposed, Modified Mitchell Plant Ownership Agreement (Modified Agreement) included a Unit Interest Swap alternative to the Fair Market Value provision of the original, proposed Agreement. Under the Unit Interest Swap, the parties would no longer own an undivided interest in the property, plant, and equipment. The parties would each own one of the generating units, and the common facilities shared by both units and inventories of coal and other consumable would be divided among the parties. The Companies made it clear on the record that the

Modified Agreement is the one they are seeking Commission consent and approval to enter into. The Commission should deny the Company's request for consent and approval to enter into the Modified Agreement because it is inconsistent with the Commission's prior directives in Case No. 20-1040-E-CN.

On October 12, 2021, the Commission entered a Final Order in Case No. 20-1040-E-CN, where the Commission concluded that since West Virginia customers and FERC jurisdictional customers are incurring the full costs of ELG compliance work to keep the Mountaineer, Amos, and Mitchell Plants operating as coal-fired generating facilities beyond 2028, they alone shall receive the benefits of capacity and energy made possible by the ELG compliance work from the three plants beyond 2028, unless Kentucky or Virginia decide to authorize the ELG improvements. In the Company's Modified Agreement, Article 1, Section 1.8 reads as follows:

Notwithstanding the provisions of this Article One, to the extent that either Owner funds or bears an amount greater than 50% of any capital expenditures or ELG Capital Expenditures as contemplated in the Capital Budget or this Agreement, the directly resulting portion of any property, plant and equipment, or improvements thereto ***shall be owned*** by the Owners in proportion to their respective amounts funded and shall be included only in such proportion in each Owner's ownership accounts for regulatory, accounting, tax and other purposes. (***Emphasis added***)

(Company's Ex. CTB-S2, Art. 1.8, Pg. 5 of 40) The language of Section 1.8 of the Modified Agreement is at odds with the Rebuttal Testimony of Company witness Beam where he was asked if the Unit Swap Provision as proposed in Section 9.6 of the Modified Agreement is a reasonable outcome. His answer was:

Yes. Even though WPCo owns 50% of the Mitchell Plant and will pay for 100% of ELG, it is not possible to assert 100% unilateral control over the Mitchell Plant under any condition *because KPCo has equal rights to the other 50% undivided interest in all non-ELG parts of the plant. (Emphasis added)*

(Company's Ex. CTB-R, Pg. 5) This discrepancy is concerning as the Modified Agreement states that any capital expenditures that either owner funds above its 50% share shall result in the property, plant, and equipment funded being owned by each owner in proportion to their respective amounts funded. However, Company witness Beam's testimony appears to suggest that West Virginia's interest in the Mitchell Plant remains capped at 50%, regardless of investments in shared capital expenditures. Furthermore, the Modified Agreement does not make it clear that an agreement between WPCo and KPCo related to KPCo's usage of the ELG equipment or any capital expenditure funded wholly by WPCo would be needed in the event WPCo and KPCo were to each own an individual unit, and KPCo were to decide to continue operating its unit past 2028. The Commission should decline to approve the Modified Agreement because it is inconsistent with the Commission's previous findings that West Virginia customers and FERC jurisdictional customers should alone receive the benefits of the ELG compliance work they funded, and because there is ambiguity about the ownership interests of the respective owners with respect to other capital expenditures for common facilities and equipment at the Mitchell Plant.

The Commission should deny approval of the Modified Mitchell Ownership Agreement because the language is inconsistent with Commission jurisdiction

The Commission should deny approval of the Modified Agreement because language in the Unit Interest Swap and Unit Interest Swap Dispute provisions of the Modified Agreement seems to actually preclude the Commission's exercise of its jurisdiction pursuant to W. Va. Code §24-2-12. While there is ample language throughout the Modified Agreement generally referring to actions by the Mitchell Plant owners being subject to further review and approval of state Commissions, other language in the Modified Agreement clearly contradicts those assertions in the event of a dispute about the Unit Interest Swap. Specifically, Section 9.6 of the Modified Agreement sets forth the process for the Unit Interest Swap transactions, and states that "In the event the Owners do not mutually agree upon any element of definitive transactions documents for a Unit Interest Swap Transaction (a "Unit Interest Swap Dispute"), then any Unit Interest Swap Dispute shall be resolved in accordance with ARTICLE Twelve." (CTB-S2, Art. 9.6(b) Pg. 19 of 40)

Article 12.4 of the Modified Agreement is titled "Unit Interest Swap Dispute", and states that if the owners are unable to resolve any aspect of a Unit Interest Swap Dispute, then either owner can have the dispute referred to binding arbitration, "and judgment on the award rendered by such arbitration shall be final and binding upon the Owners and not subject to appeal or review, and such judgment may be entered in any court having jurisdiction thereof." (CTB-S2, Art. 12.4(a), Pg. 24 of 40) Article 12.4 goes on to describe the process the Arbitrator will follow, and that the Arbitrator will allow for each

Owner to receive an allocation of property and rights that the Arbitrator deems to be fair and reasonable on an economic basis, after giving due consideration to any regulatory requirements applicable to each Owner. “The decision of the Arbitrator shall be final and binding upon the Owners and not subject to appeal or review. The Arbitrator shall have the sole power to rule on any challenge to its own jurisdiction without any need to refer such matters first to a court.” (CTB-S2, Art. 12.4(b), Pg. 24 of 40) This provision of the Modified Agreement essentially delegates this Commission’s authority to determine what is in West Virginia ratepayers’ best interest to an unaffiliated arbitrator whose decision will be final and binding, and who has the sole power to rule on its own jurisdiction. The Commission cannot approve an Agreement with this language.

Article 12.4(c) states that “The dispute resolution procedures of this Article Twelve shall be the sole and exclusive remedy of the parties hereto and their respective Affiliates for any Unit Interest Swap Dispute. Each of the parties hereto agrees, on behalf of itself and its Affiliates, to be fully bound by all arbitral awards or decisions resulting from the dispute resolution procedures of this Article Twelve.” (CTB-S2, Art. 12.4(c), Pg. 24 of 40) Again, this language means that arbitration is the only remedy for disputes involving the disposition of an electric power plant in West Virginia, and states that the parties agree to be fully bound by what the arbitrator decides.

Lastly, Article 12.4(d) of the Modified Agreements states:

It is expressly acknowledged and agreed that if any Owner or any of its Affiliates (the “Challenging Party”) resists, ignores, contests or otherwise challenges the enforceability or validity of any provision of this Article Twelve or any arbitral award or decision resulting from the dispute resolution procedures of this Article Twelve (an “Enforceability Claim”),

then (i) the other Owner shall be entitled to an injunction, specific performance and other equitable relief to enforce specifically the terms and provisions of this Article Twelve and such arbitral award or decision,' as applicable, in each 'case, without proof of actual damages and without any requirement for the posting of security, and (ii) such Challenging Party shall indemnify, defend and hold harmless such other Owner and its Affiliates and any of their respective agents and representatives (collectively, the "indemnified Parties") from and against any and all Covered Losses incurred or suffered by any of the Indemnified Parties to the extent arising out of or resulting- from such Enforceability Claim. Without limiting the foregoing, each party hereto irrevocably waives, to the fullest extent permitted by applicable Law, any Enforceability Claim.

(CTB-S2, Art. 12.4(c), Pg. 25 of 40) When viewed together, the language of this Modified Agreement is ambiguous at best about whether the West Virginia Public Service Commission would have the authority to amend or reject any portion of a future Unit Interest Swap transaction between WPCo and KPSCo. At worst it clearly precludes any such exercise of jurisdiction. In his Rebuttal Testimony, Company witness Beam stated his belief that the other parties' concerns about the Modified Agreement were premature (CTB-R, Pgs. 3- 4). Staff disagrees that its concerns are premature. On its face, the language of the Modified Agreement can reasonably be read as giving either party to the future sale of the Mitchell Plant a cause of action for breach of contract if this Commission or the KPSC were to amend or reject any part of the arbitrator's decision. The Companies are requesting that this Commission approve an Agreement that limits the Commission's jurisdiction over the very act that the Agreement governs. That is a concern that needs to be addressed sooner, rather than later.

Under W.Va. Code 24-2-12, a utility seeking Commission consent and approval of an act governed by W. Va. Code §24-2-12 must make a showing that the terms of the

proposed transaction are reasonable, do not give either party an undue advantage over the other, and do not adversely affect the public in this state. The Commission has a duty to ensure that all of those elements are met, and has the authority to amend or reject any action it deems as contrary to the public interest in West Virginia. In the event that the Mitchell Plant owners were to utilize Article 12.4 of the Modified Agreement, WPCo would subsequently come to this Commission for approval of whatever was decided by the arbitrator. According to the language of Article 12 cited above, anything other than a rubber stamp by this Commission would technically be a violation of the Modified Agreement. The same Modified Agreement the Companies are requesting that this Commission approve. The Commission must deny approval of the Modified Agreement in its current form.

IV. CONCLUSION

The proposed Mitchell Operation and Maintenance agreement is reasonable, and Staff recommends that the Commission approve that agreement. The proposed, Modified Mitchell Ownership Agreement is not reasonable as it is inconsistent with prior Commission Orders and potentially limits the Commission's authority under W.Va Code §24-2-12. Staff recommends that the Commission deny the proposed, Modified Mitchell Ownership Agreement.

Respectfully submitted this the 19th day of April 2022.

STAFF OF THE PUBLIC SERVICE
COMMISSION OF WEST VIRGINIA

By Counsel



LUCAS R. HEAD
WV State Bar I.D. No. 11146

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

**CASE NO. 21-0810-E-PC
APPALACHIAN POWER COMPANY AND
WHEELING POWER COMPANY**

CERTIFICATE OF SERVICE

I, LUCAS R. HEAD, Counsel for the Public Service Commission of West Virginia, do hereby certify that a copy of the foregoing "Staff's Initial Brief to the Commission" has been served upon the following parties of record by First Class United States Mail, postage prepaid this 19th day of April, 2022.

Keith D. Fisher, Esq.
Senior Counsel, APCo and WPCo
Appalachian Power Company
500 Lee Street East, Suite 800
Charleston, WV 25301

Anne C. Blankenship, Esq.
Counsel, APCo and WPCo
Robinson & McElwee
PO Box 1791
Charleston, WV 25326

William C. Porth, Esq.
Counsel, APCo and WPCo
Robinson & McElwee PLLC
PO Box 1791
Charleston, WV 25326

Derrick P. Williamson, Esq.
Counsel, WVEUG
Spilman Thomas & Battle, PLLC
1100 Bent Creek Blvd., Suite 101
Mechanicsburg, PA 17050

Barry A. Naum, Esq.
Counsel, WVEUG
Spilman Thomas & Battle, PLLC
1100 Bent Creek Boulevard, Suite 101
Mechanicsburg, PA 17050

Susan J. Riggs, Esq.
Counsel, WVEUG
Spilman Thomas & Battle
PO Box 273
Charleston, WV 25321-0273

Shannon Fisk, Esq.
Earthjustice
48 Wall Street, 15th Floor
New York, NY 10005

Raghava Murthy, Esq.
Earthjustice
48 Wall Street, 15th Floor
New York, NY 10005

Jonathan C. Stanley, Esq.
Counsel, Appalachian Power Company
Robinson & McElwee PLLC
PO Box 1791
Charleston, WV 25326

Melissa Anne Legge, Esq.
Counsel, CAG/SUN/EEWV
Earthjustice
48 Wall Street, 15th Floor
New York, NY 10005

Jacob C. Altmeyer, Esq.
Counsel, West Virginia Coal Association, Inc.
61 Fourteenth Street
Wheeling, WV 26003

Emmett Pepper, Esq.
Counsel, CAG/SUN/EEWV
Pepper & Nason
8 Hale Street
Charleston, WV 25301

Jason C. Pizatella, Esq.
Counsel, WVEUG
Spilman Thomas & Battle, PLLC
PO Box 273
Charleston, WV 25321-0273

Robert F. Williams, Esq.
Director
Consumer Advocate Division
300 Capitol Street, Ste. 810
Charleston, WV 25301

Heather B. Osborn, Esq.
Consumer Advocate Division
300 Capitol Street, Suite 810
Charleston, WV 25301

John Auville, Esq.
Consumer Advocate Division
300 Capitol Street, Ste. 810
Charleston, WV 25301



LUCAS R. HEAD, Staff Attorney
WV State Bar I.D. No. 11146



03:24 PM APR 19 2022 EXEC SEC DIV

April 19, 2022

Karen Buckley
Executive Secretary
Public Service Commission of West Virginia
201 Brooks Street, PO Box 812
Charleston, WV 25323-0812

Re: *APPALACHIAN POWER COMPANY and WHEELING POWER
COMPANY, Petition for Commission Consent and Approval to Enter into
Ownership and Operating Agreements for the Mitchell Plant,
Case No. 21-0810-E-PC*

Dear Ms. Buckley:

Attached for filing on behalf of West Virginia Citizen Action Group, Solar United Neighbors, and Energy Efficient West Virginia is a copy of the Post-Hearing Brief by West Virginia Citizen Action Group, Solar United Neighbors, and Energy Efficient West Virginia, in the above-referenced case.

Copies of this Brief are being served upon all parties of record.

Please contact me if you have any questions concerning this filing.

Respectfully,

Emmett Repper
W. Va. Bar No. 12051
Pepper & Nason
8 Hale Street
Charleston, WV 25301
emmett@eewv.org
304-346-5891
*Counsel for West Virginia Citizen
Action Group, Solar United
Neighbors, and Energy Efficient
West Virginia*

03:24 PM APR 19 2022 EXEC SEC DIV

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

**APPALACHIAN POWER COMPANY and)
WHEELING POWER COMPANY,) Case No. 21-0810-E-PC
Petition for Commission Consent and)
Approval to Enter into Ownership and)
Operating Agreements for the Mitchell Plant.)**

**POST-HEARING BRIEF BY WEST VIRGINIA CITIZEN ACTION GROUP, SOLAR
UNITED NEIGHBORS, AND ENERGY EFFICIENT WEST VIRGINIA**

Intervenors West Virginia Citizen Action Group (“CAG”), Solar United Neighbors (“SUN”), and Energy Efficient West Virginia (“EEWV”) (collectively, “CAG/SUN/EEWV”), by Counsel, and pursuant to the scheduled established at the April 7, 2022 hearing in this case, timely files the following Post-Hearing Brief regarding the issues presented in this case.

INTRODUCTION

The Commission should order Wheeling Power (“WPCo”) to immediately begin negotiating a Unit Interest Swap to acquire 100% control over the better-performing Mitchell Unit 2, and to prepare and implement a plan to retrofit only that single Mitchell unit for compliance with the federal Effluent Limitation Guidelines (“ELGs”). A better-tailored ELG plan will save West Virginia customers at least \$22 million in ELG retrofit costs as compared to retrofitting both Mitchell units and will ensure that WPCo’s West Virginia customers are not saddled with the poorly-performing and unneeded Unit 1 of the Mitchell Plant.

I. Standard of Review

Under W. Va. Code § 24-2-12, public utilities are required to obtain consent from the Commission before entering certain transactions including a transfer of control, utility asset purchase, or affiliated agreements. The proposed Mitchell Ownership Agreement and Operating Agreement (“Agreements”) fall under the Commission’s jurisdiction pursuant to W. Va. Code § 24-2-12. If the utility entered the Agreements or completed a transaction involving Mitchell, without the Commission’s approval, the Agreements would be void “to the extent that the interests of the public in [West Virginia] are adversely affected.”¹

In reviewing the Ownership and Operating Agreements before it, the Commission is guided by the statutory test in W. Va. Code § 24-2-12: (i) the terms and conditions thereof are reasonable, (ii) neither party thereto is given an undue advantage over the other, and (iii) the terms and conditions do not adversely affect the public in the State. The Commission may also “modify or void any clause in the contract that the Commission determines is adverse to the public interest.”² Alternatively, the Commission may approve an agreement without specifically approving the underlying terms and conditions thereof.³ In deliberations and decisions, the Commission has the further responsibility to appraise and balance (i) the interests of current and future utility service customers, (ii) the general interests of the State's economy, and (iii) the

¹ W. Va. Code § 24-2-12.

² *City of S. Charleston v. W. Va. Pub. Serv. Comm'n*, 204 W. Va. 566, 571, 514 S.E.2d 622, 627 (1999). See also *Mill Creek Coal & Coke Co. v. Pub. Serv. Comm'n*, 84 W. Va. 662, 662, 100 S.E. 557, 558 (1919) (“Private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict.”).

³ See *Appalachian Power Co., Doing Bus. As Am. Elec. Power, Petition for Consent & Approval of the Sale of Real Prop. of Appalachians to Spire Properties, LLC.*, Case No. 00-1670-E-PC, 2001 WL 36949885, at *4 (W. Va. P.S.C. Jan. 12, 2001) (Where the Commission approved AEP’s sale of an acre of land without approving the underlying terms and conditions of the agreement); *Commodore Intermediate Holdco, LLC, Zayo Grp., LLC, & Ena Healthcare Servs., LLC.*, Case No. 22-0296-T-PC, 2022 WL 993857, at *3 (W. Va. P.S.C. Mar. 29, 2022) (In which the Commission approved the Joint Applicant transfer of control of telecommunications entities without approving the underlying terms and conditions).

interests of the utilities.⁴ The transactions contemplated by the Agreements could lead to significant rate increases; pursuant to W. Va. Code § 24-1-1(a)(4), Commission decision making should be guided by the need to ensure that rates and charges for utility services are just and reasonable, are applied without unjust discrimination or preference, and are based primarily on the costs of providing these services. While the Commission maintains broad authority over the public utilities under its jurisdiction, the West Virginia Supreme Court has stated that the “only limitation upon such power and authority is that the requirements shall not be contrary to law and that they shall be just and fair, just and reasonable, and just and proper.”⁵

The Commission has broad power to address the interests of each party, ratepayers, and the state in every case that comes before it under W. Va. Code § 24-2-12.⁶ Indeed, the primary purpose of the Commission is “serv[ing] the interests of the public.”⁷

The West Virginia Supreme Court reviews Commission decisions based on “(1) whether the Commission exceeded its statutory jurisdiction and powers; (2) whether there is adequate evidence to support the Commission's findings; and, (3) whether the substantive result of the Commission's order is proper.”⁸ A Commission order based on its factual finding will not be upheld if “such finding is contrary to the evidence, or is without evidence to support it, or is

⁴ W. Va. Code § 24-1-1(b).

⁵ *Broadmoor/Timberline Apartments v. Pub. Serv. Comm'n of W. Va.*, 180 W. Va. 387, 388, 376 S.E.2d 593, 594 (1988); *Delardas v. Morgantown Water Comm'n*, 148 W. Va. 776, 137 S.E.2d 426 (1964) (citation omitted).

⁶ *W. Va. Citizen Action Grp. v. Pub. Serv. Comm'n of W. Va.*, 233 W. Va. 327, 336, 758 S.E.2d 254, 263 (2014).

⁷ *Affiliated Constr. Trades Found. v. Pub. Serv. Comm'n of W. Va.*, 211 W. Va. 315, 565 S.E.2d 778, 787-88 (W. Va. 2002) (quoting *Boggs v. Pub. Serv. Comm'n*, 174 S.E.2d 331, 336 (W. Va. 1970)).

⁸ *W. Va. Citizen Action Grp. v. Pub. Serv. Comm'n of W. Va.*, 233 W. Va. 327, 332, 758 S.E.2d 254, 259 (W. Va. 2014).

arbitrary, or results from a misapplication of legal principles.”⁹ Furthermore, findings of fact “will be overturned as clearly wrong when there is no substantial evidence to support them.”¹⁰

II. The Commission should require WPCo to initiate a Unit Interest Swap now so that West Virginia customers are not saddled with the \$22 million cost of retrofitting low-performing Mitchell Unit 1, which they do not need.

The Companies have always presented the question of ELG retrofits at Mitchell as either for both units or for neither unit. With the introduction of the Unit Interest Swap provision in the modified proposed Ownership Agreement, however, it is now clear that the two Mitchell units are separable.¹¹ As such, the Commission now has a third option to consider: an ELG retrofit plan designed just to keep one Mitchell unit operational past the ELG compliance deadline. Such an approach would save West Virginia customers at least \$22 million in capital cost for ELG retrofits, avoid saddling those customers with poorly performing capacity that they do not need, and be responsive to the divergent interests of Kentucky Power Company (“KPCo”) and WPCo regarding the Mitchell Plant. At the hearing, Companies witness Christian Beam confirmed that there is nothing in the proposed Ownership Agreement that would prevent the Companies from negotiating a Unit Interest Swap immediately.¹² The available evidence suggests that doing so would be in the best interest of West Virginia customers.

⁹ *City of Wheeling v. Pub. Serv. Comm'n of W. Va.*, 483 S.E.2d 835, 846 (W. Va. 1997) (citation omitted).

¹⁰ *Jefferson Utils., Inc. v. Pub. Serv. Comm'n of W. Va.*, 227 W.Va. 589, 595, 712 S.E.2d 498, 504 (W. Va. 2011) (citation omitted).

¹¹ At the hearing, Companies’ witness Timothy Kerns stated that he had confirmed that, from an Operations & Maintenance standpoint, the separation of the units was technically feasible. Hearing Transcript (“Tr.”), 64:24 to 65:3 (Apr. 7, 2022).

¹² Tr. 131:5-8.

A. Retrofitting only one Mitchell unit for ELG compliance would save West Virginia customers at least \$22 million in capital costs.

At the hearing and in Post-Hearing exhibits, the Companies explained that an alternative ELG retrofit plan, designed just to keep one Mitchell unit operational past 2028, would not require the dry bottom ash conveying system that is currently planned.¹³ Avoiding installation of this system would save customers \$22 million and still preserve the option of operation of the better-performing Mitchell unit past 2028.¹⁴ The West Virginia Supreme Court has emphasized the Commission's obligation to realize these types of savings for customers.¹⁵ For example, in 2019, the Commission authorized the buyout and retirement of a Morgantown waste coal plant to realize "a . . . \$21 million net present value benefit for customers."¹⁶

Now is the ideal time for WPCo and KPCo to proceed with the swap and an alternative ELG plan, since the actual retrofits have not started: "the detailed engineering and design [for the ELG retrofits] has commenced, but there hasn't been any dirt turned over or any steel on the

¹³ Tr. 65:25 to 66:8. In *The Application of Appalachian Power Company and Wheeling Power Company for the Issuance of a Certificate of Public Convenience and Necessity for the Internal Modifications at Coal Fired Generating Plants Necessary to Comply with Federal Environmental Regulations*, W. Va. Pub. Serv. Comm'n, Case No. 20-1040-E-CN, Companies' witness Brian Sherrick explained that two other components of the ELG retrofits, the ash bunker and the flue gas desulfurization wastewater treatment equipment, also could be smaller for a unit-specific ELG plan, resulting in further cost savings: "Under this option, the ash bunker and FGD wastewater treatment equipment could be marginally smaller than they would be if sized for compliance for all three units, which would result in a small cost savings relative to the cost of compliance projects for all three units." Direct Testimony of Brian Sherrick, Case No. 20-1040-E-CN, at 14.

¹⁴ PSC Post-Hearing Response to PSC PHE-2: "The Company performed an analysis in October 2021 (based on a Class 3 cost estimate from August 2021) to consider the cost of performing projects to comply with CCR-only on one Mitchell unit, and CCR and ELG on the other unit. That analysis estimated the total cost for CCR and ELG compliance for both units at \$148M, and \$126M for CCR-only on one unit, and CCR and ELG on the other unit."

¹⁵ *Sierra Club v. Pub. Serv. Comm'n of W. Va.*, 241 W. Va. 600, 611, 827 S.E.2d 224, 235 (2019) ("The PSC's driving obligation is to ensure that West Virginia's retail customers are not paying for uneconomical power purchases.").

¹⁶ *Monongahela Power Co. & the Potomac Edison Co., Pub. Utils. Monongahela Power Co. & the Potomac Edison Co., Pub. Utils.*, No. 19-0785-E-ENEC, 2019 WL 7568073 at *9 (W. Va. P.S.C. Dec. 20, 2019).

ground.”¹⁷ Proceeding with the Unit Interest Swap before installation of the actual ELG retrofits begins is important because it helps ensure that the capital cost savings of a one-unit retrofit plan can be fully realized.

In response to a Post-Hearing data request, the Companies contend that a one-unit ELG retrofit is no longer an option for the Mitchell Plant because they did not file a Notice of Planned Participation (“NOPP”) by October 13, 2021.¹⁸ According to the Companies, their failure to file a NOPP means that they must continue to follow the two-unit ELG compliance plans that they previously proposed to the U.S. EPA and West Virginia Department of Environmental Protection for inclusion in the NPDES permit for the Mitchell Plant.¹⁹ In reality, the Companies could seek modification of their NPDES permit to account for WPCo retrofitting one Mitchell unit and KPCo retiring the other. The Clean Water Act specifically allows for modification of NPDES permits “for cause,” including “change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.”²⁰ In addition, the NOPP deadline only governed whether the Companies were electing to take advantage of the ELG Rule’s exemption for electric generating units that plan to permanently cease combusting coal by December 31, 2028.²¹ At most, the failure to submit the NOPP would mean that the non-retrofitted Mitchell unit may have to retire by the ELG compliance deadline of December 31, 2025. Under the one-unit ELG retrofit approach, that is a question KPCo would have to answer – but given that, as the Consumer Advocate Division pointed out at the hearing, the Kentucky Commission prohibited any expenditure by KPCo on ELG retrofits – perhaps that is a decision

¹⁷ Tr. 69:1 to 69:3.

¹⁸ Companies’ Post-Hearing Response to PSC PHE-2.

¹⁹ *Id.*

²⁰ 33 U.S.C. § 1342(b)(1)(C); *see also* 40 C.F.R. § 122.62.

²¹ 40 C.F.R. § 423.19(f).

Kentucky has already made. Regardless, West Virginia customers should not have to pay for retrofitting the additional 780 MWs of Mitchell capacity that WPCo does not need, and that WPCo does not own.

B. WPCo does not need additional Mitchell capacity to serve its West Virginia customers either today or post-2028..

The Mitchell Plant consists of two equally-sized units, each with a capacity of 780 MWs. Under the current ownership structure, the 50% undivided interest that WPCo and KPCo each have in the plant entitle each company to 780 MWs of Mitchell capacity. Under the Unit Interest Swap, WPCo would continue to have only 780 MWs of Mitchell capacity, just in the form of full ownership of a single Mitchell Unit, rather than a 50% interest in the entire plant.

While the Buyout Transaction provisions of the proposed Ownership Agreement provide a pathway for WPCo to potentially acquire the additional 780 MWs of Mitchell capacity, the available evidence clearly demonstrates that WPCo has no need for such capacity, either today or in 2029. In response to a question from Commissioner Raney, the Companies' witness Christian Beam acknowledged that WPCo could satisfy its customers' capacity needs solely with the 780 MW of Mitchell capacity that WPCo would continue to own under the Unit Interest Swap.²² In response to discovery, the Companies further confirmed that they do not at this time project that they will need more generating capacity to serve their West Virginia ratepayers in 2029.²³ CAG/SUN/EEWV witness Jim Wilson's testimony further supports this projection, explaining that WPCo's required generation capacity was only at 617 MW in 2021 and grows quite

²² "Q: Can you service the West Virginia customers that you have with the Wheeling Power 50 percent of Mitchell?

A: Yes, we can." Tr. 165:5 to 165:7.

²³ Hearing Ex. JFW-D, Direct Testimony of James F. Wilson at 10:7 to 10:15 (Mar. 28, 2022) ("Wilson Test."); Companies' response to WVEUG 2-6(a), Exhibit JFW-2 to testimony.

gradually to 680 MW in 2029.²⁴ Given that WPCo's current 50% interest in Mitchell provides the company with 668 MWs of firm capacity,²⁵ there would plainly be no need for WPCo to acquire a second 780 MW interest in the Mitchell Plant.²⁶ As such, no Buyout Transaction is needed, and there is no reason for WPCo and KPCo to delay a Unit Interest Swap while they try to negotiate a Buyout Transaction that WPCo simply cannot show its customers need.²⁷

C. Mitchell Unit 1 is performing poorly; ELG retrofits to keep that unit operational would be a significant cost with no long-term benefit.

In making their decision here, as in all of its decisions, the Commission must "apprais[e] . . . the interests of current and future utility service customers."²⁸ The Companies have even urged regulators to exercise caution when approving additional expenditures on the electric power system, noting the need to "protect customers from paying for mandates that leave them vulnerable to significant financial obligations with no long-term benefit."²⁹ Regarding the ELG retrofits at Mitchell, the Commission must therefore closely examine whether Mitchell Unit

²⁴ Hearing Ex. JFW-D, Wilson Test. at 10:7 to 10:15.

²⁵ *Id.* at 10:12 to 10:13.

²⁶ WPCo's lack of need for additional Mitchell capacity is even more indisputable when evaluated in a Combined Companies analysis that accounts for the portion of Appalachian Power Company's ("APCo") capacity that is allocated to West Virginia customers. *Id.* at 10:16 to 11:7. This is especially so, given that this Commission's October 12, 2021 Order in the ELG CPCN docket makes clear that 100% of the capacity of the Amos and Mountaineer plants would need to be allocated to West Virginia customers starting in 2029, as opposed to the current 42% allocation, if West Virginia customers are going to pay for 100% of the cost of ELG retrofits at those plants. *Id.* at 11:8 to 12:5. This amounts to an additional approximately 1,700 MWs of Amos capacity, and 766 MWs of Mountaineer capacity being allocated to West Virginia customers. *Id.*

²⁷ Given WPCo's clear lack of need for the additional 780 MWs of Mitchell capacity, it is difficult to see how WPCo could ever demonstrate that such capacity would be "used and useful" for purpose of inclusion in WPCo's rates, given that "'useful' means that the utility plant is reasonably necessary to provide service to its customers." *Huttonsville Pub. Serv. Dist., Mill Creek, Randolph Cty., Petition for Consent & Approval to Accept A Design Loan & for Approval of an Eng'g Agreement*, Case No. 11-1805-PWD-PC, 2012 WL 11907930, at *1 (W. Va. P.S.C. Mar. 29, 2012).

²⁸ W. Va. Code § 24-1-1(b).

²⁹ Sierra Club Cross Ex. 1, Case No. 20-1040-E-CN, AEP Climate Impact Analysis, at 77 (Mar. 2021).

1 is worth retrofitting. The available evidence demonstrates that Unit 1 is not worth retrofitting, as it is performing poorly, with high forced outage rates and low capacity factors.

The high outage rates and low capacity factors of Mitchell Unit 1 make it clear that “there are obvious differences between the two units at Mitchell.”³⁰ Companies’ witness Kerns explained that while Unit 2’s forced outage rate “has been traditionally over the past five years better than uniform”, Unit 1’s forced outage rate ranged from 12.14% to 43.9%.³¹ The Companies expect this disparity to continue: in its most recent Integrated Resource Plan filing, KPCo assumed an equivalent forced outage rate-demand (“EFORd”) of 20.08% for Mitchell Unit 1, while Unit 2’s EFORd was assumed at 9.77%.³²

For that and other reasons, the capacity factor of Mitchell Unit 1 has dropped steadily over the last five years, as shown in the following table.

Table 1: Mitchell Units 1 and 2 Capacity Factors 2016 to February 2022³³

Capacity Factor	2016	2017	2018	2019	2020	2021
Unit 1	52.07%	46.50%	38.12%	35.97%	22.43%	26.50%
Unit 2	59.99%	65.77%	42.37%	37.38%	30.20%	43.07%

Mitchell Unit 1’s comparatively poor performance has continued in 2022, as Unit 1 operated only approximately 25% of days between January 1 and April 7, 2022, while Unit 2 operated approximately 52.5% of the days during that time period.³⁴ The Companies have given various and conflicting reasons for the drop in Mitchell Unit 1’s capacity factor. In response to

³⁰ Tr. 55:12-13.

³¹ Tr. 54:12-55:2.

³² Companies’ Response to CAD PHE-2, Attach. 1.

³³ Values are from CAG Cross Ex. 14, AEP Response to Staff Discovery Question 1-17, Case No. 20-1040-E-CN, Direct Testimonies of Michael Zwick, Case No. 21-0339-E-ENEC, Fig. 1 (Apr. 16, 2021), and (calculated from) Fig. 1 (Mar. 14, 2022).

³⁴ Companies’ Response to CAD PHE-3, Attach. 1.

questions from Commissioner Raney, Mr. Beam claimed that the Mitchell units could be operating at a capacity factor of 69% or even higher if only the Companies could obtain coal:

COMMISSIONER RANEY: . . .in our Order in October, we talked about operating the plants at 69 percent capacity whenever possible or hopefully . . . has Wheeling Power been able to achieve that?

[Answer from Mr. Beam:] So I would think the answer to that is no. . . . currently where we sit today on that facility, we have a couple of fuel contracts that are not meeting their contractual deliveries. And so it is shorting us on fuel for that facility and or others. And so we are managing our fuel in a way that will make those units available when the market is most volatile, or another way to say it is when energy's the highest priced. And then we will dispatch those units to our customer's benefit to minimize that volatility.

COMMISSIONER RANEY: With the hopeful achievement of 69 percent?

A. Well, or more if we can get the fuel. Yes, sir.³⁵

But, as counsel for the Consumer Advocate Division pointed out at the hearing³⁶, Mr. Kerns told a different story to the Kentucky Commission, acknowledging that both Mitchell units were available with adequate fuel, but were not being selected by the PJM market:

Q: What is the capacity factor been in the first three months, say, of 2022?

[Answer from Mr. Kerns]: I don't have the numbers with me - it's been fairly low. . . . Right now, both units are down on reserve shutdown. So the market hasn't picked them up.

Q. OK. So they're, they're down for planned or forced outages?

A: Right now they're down because the market didn't select them. They're in DNR status. or reserve shutdown status. So they're available – they're just not needed.

Q: They're just not being dispatched by PJM.

A: They weren't picked up in the market in the day-ahead market.³⁷

Ultimately, even if Wheeling Power is able to somehow prop up Mitchell Unit 1's capacity factors in the short term, the unit's historical forced outage rate, the projected forced outage rate, and its declining capacity factors since 2016 demonstrate that performance will very

³⁵ Tr. 163:23 to 164:21.

³⁶ Tr. 51:2-7.

³⁷ Kentucky Public Service Commission Hearing, Case No. 2021-00421, YouTube (Mar. 30, 2022, 10:44am), <https://youtu.be/l8E4AQiDxWg?t=2905>.

likely continue to slide in the long term. This Commission can save West Virginia customers at least \$22 million dollars by ordering WPCo to proceed with a Unit Interest Swap that would allow for the foregoing of ELG retrofits of Mitchell Unit 1,³⁸ while retrofitting and preserving the option of WPCo operating the better-performing Mitchell Unit 2 past 2028.

D. WPCo and KPCo have divergent interests for Mitchell.

Another reason to separate the units now, rather than later, is to avoid any conflicts from the divergent interests of WPCo and KPCo when it comes to Mitchell. At the hearing, Witness Kerns acknowledged that “. . . the desired outcome for the Mitchell Plant is different . . .” between the two companies.³⁹ Witness Kerns further explained the “different investment strategy” that Kentucky Power or Liberty will employ for its share of Mitchell: “if someone ends up with a unit that they may not want to operate past 2028, they're going to have a different view on how – what kind of investment to make in that unit. They don't need it to last to 2040.”⁴⁰

CAD witness Emily Medine explains how the divergent interests of WPCo and KPCo could impact West Virginia customers:

[Liberty's parent company] has made clear that its intention is to replace all of KPCo's fossil generation with renewables, presumably as soon as possible. As a result, WPCo and KPCo no longer share the same interest in preserving the plant for continued operations. . . . Once KPCo is sold to a company whose primary interest is in closing the fossil generation, there is a serious concern as to how well the asset [Mitchell plant] will be preserved.”⁴¹

³⁸ The Commission should consider requiring an economic transition plan to aid those impacted by the retirement of the one Mitchell unit. The Companies have already committed to an economic transition plan in the event of any unit retirements at Mitchell, “to make sure you don't leave that community behind.” Hearing Transcript Day 1, Case No. 20-1040-E-CN, at 60 (June 8, 2021).

³⁹ Tr. 23:7 to 23:8.

⁴⁰ Tr. 71:14 to 72:7.

⁴¹ Direct Testimony of Emily S. Medine at 4 (Mar. 28, 2022).

The transaction, as proposed, requires WPCo and KPCo to make decisions jointly concerning Mitchell Unit 1 and Mitchell Unit 2 that could put West Virginia customers at a material disadvantage.⁴² The best solution is to give Wheeling Power exclusive control over Mitchell Unit 2 now, and plan for an ELG retrofit plan that serves just that unit.

III. If the Commission decides to approve the proposed Ownership Agreement with the Section 9.6 Buyout Transaction provisions, it should make clear that any such transaction must be preceded by a showing that the additional Mitchell capacity is needed to serve West Virginia customers and in the best interest of those customers.

The proposed Ownership Agreement would provide a pathway for WPCo to acquire from KPCo an additional 780 MWs of Mitchell capacity through the Buyout Transaction provisions found in Section 9.6 of the Agreement. As shown in Section II.B above, there has been no showing to date that WPCo would need such additional capacity to serve their customers.⁴³ In addition, no party disputed the fact that there has been no demonstration in either this or previous proceedings that it would be in the best interest of West Virginia customers for KPCo to acquire an additional 780 MWs of Mitchell capacity.⁴⁴ In the event that the Commission approves the proposed Ownership Agreement with the Section 9.6 Buyout Transaction provisions, it should make clear that any such transaction would need to be preceded by a demonstration that WPCo needs such capacity to serve its West Virginia customers and that acquisition of such capacity is in the best interest of those customers.⁴⁵

⁴² W. Va. Code § 24-2-12 discourages transactions that give one party an undue advantage over the other.

⁴³ Hearing Ex. JFW-D, Wilson Test. at 9:20 to 12:5.

⁴⁴ Hearing Ex. JFW-D, Wilson Test. at 6:5 to 6:8; 12:6 to 17:13; Hearing Tr., Witness Beam at 133:6 to 133:8.

⁴⁵ The Companies acknowledge that a future transaction would have to be preceded by a demonstration of need. Witness Beam, Tr. 131:23 to 133:1.

As explained by CAG/SUN/EEWV witness James Wilson, the provision of such clear direction by this Commission is important for two reasons. First, while the proposed Agreement states that any Buyout Transaction would be “subject to receipt of applicable regulatory approvals,”⁴⁶ it does not identify or define what approvals WPCo and KPCo would be committing to obtain.⁴⁷ Second, the proposed Agreement allows for as little as four months for such regulatory approvals to be obtained, which is too short of a period of time to allow for a meaningful review of the questions of need and best interest of West Virginia customers that would arise from any Buyout Transaction.⁴⁸ As such, the Commission should make clear that such regulatory approvals must include a demonstration that any Buyout Transaction is needed to serve West Virginia customers and in the best interest of those customers, and that such demonstration is provided at least eight months before any deadline for regulatory approvals so that adequate time is provided for a meaningful review.

CONCLUSION

Mitchell Unit 2 is sufficient for Wheeling Power's capacity needs. The current Buyout Transaction would saddle West Virginia customers with unneeded capacity and a Mitchell Unit 1 that is performing poorly. As such, the Commission should order WPCo to negotiate a Unit Interest Swap now so that West Virginia customers can avoid \$22 million in additional ELG retrofit costs that would be incurred if both Mitchell units were retrofit. If the Commission approves the proposed Agreement with the Buyout Transaction, the Commission should clearly require that any Buyout must be preceded by a showing that WPCo needs such capacity to serve

⁴⁶ Company Ex. CTB-S1 at Section 9.6(a).

⁴⁷ Hearing Ex. JFW-D, Wilson Test. at 7:13 to 8:2.

⁴⁸ *Id.* at 8:3 to 8:14.

its West Virginia customers and that such acquisition is in the best interest of those customers, and that any such showing be made far enough in advance to allow for a meaningful review and evaluation by the Commission and interested parties in a CPCN or other contested case proceeding.

Respectfully submitted,



Emmett Pepper
W. Va. Bar No. 12051
Pepper & Nason
8 Hale Street
Charleston, WV 25301
304-346-5891
917-617-8208 (cell)
emmett@eewv.org

Shannon Fisk (admitted pro hac vice)
Earthjustice
48 Wall Street, 15th Floor
New York, NY 10005
(215) 717-4522
sfisk@earthjustice.org

Melissa Anne Legge (admitted pro hac vice)
Earthjustice
48 Wall Street, 15th Floor
New York, NY 10005
212-823-4978
mlegge@earthjustice.org

Raghava Murthy (admitted pro hac vice)
Earthjustice
48 Wall St., 15th Fl.
New York, NY 10005
(212)-823-4991 (office)
(732)-322-2178 (cell)
rmurthy@earthjustice.org

*Counsel for West Virginia Citizen Action
Group, Solar United Neighbors, and Energy
Efficient West Virginia*

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused to be served a copy of the foregoing Post-Hearing Brief by West Virginia Citizen Action Group, Solar United Neighbors, and Energy Efficient West Virginia upon the following parties:

Keith D. Fisher, Esq.
Appalachian Power Company
Senior Counsel, APCo and WPCo
500 Lee Street East, Suite 800
Charleston, WV 25301
kdfisher@aep.com

William C. Porth, Esq.
Anne C. Blankenship, Esq.
Counsel, APCo and WPCo
Robinson & McElwee PLLC
PO Box 1791
Charleston, WV 25326
wcp@ramlaw.com
acb@ramlaw.com

Susan J. Riggs, Esq.
Jason C. Pizatella, Esq.
Counsel, WVEUG
Spilman Thomas & Battle
PO Box 273
Charleston, WV 25321-0273
sriggs@spilmanlaw.com
jpizatella@spilmanlaw.com

Lucas R. Head, Esq.
Wendy Braswell, Esq.
Public Service Commission of West Virginia
201 Brooks Street
Charleston, WV 25301
lhead@psc.state.wv
wbraswell@psc.state.wv

Jacob C. Altmeyer, Esq.
Counsel, West Virginia Coal Association, Inc.
61 Fourteenth Street
Wheeling, WV 26003
jacobaltmeyer@pgka.com

Derrick P. Williamson
Barry A. Naum, Esq.
Counsel, WVEUG
Spilman Thomas & Battle, PLLC
1100 Bent Creek Blvd., Suite 101
Mechanicsburg, PA 17050
dwilliamson@spilmanlaw.com
bnaum@spilmanlaw.com

Robert F. Williams, Esq.
Heather B. Osborn, Esq.
John Auville, Esq.
Consumer Advocate Division
300 Capitol Street, Ste. 810
Charleston, WV 25301
rwilliams@cad.state.wv.us
hosborn@cad.state.wv.us
jauville@cad.state.wv.us

Jonathan C. Stanley, Esq.
Counsel, Appalachian Power Company
Robinson & McElwee, PLLC
PO BOX 1791
Charleston, WV 25326
jcs@ramlaw.com

April 19, 2022



Emmett Pepper

03:48 PM APR 19 2022 EXEC SEC DIV



CONSUMER ADVOCATE DIVISION
STATE OF WEST VIRGINIA
Suite 810
300 Capitol Street
Charleston, West Virginia 25301
(304) 558-0526

April 19, 2022

VIA ELECTRONIC DELIVERY

Karen Buckley
Acting Executive Secretary
Public Service Commission of West Virginia
201 Brooks Street
Charleston, West Virginia 25301

RE: Case No. 21-0810-E-PC
APPALACHIAN POWER COMPANY and
WHEELING POWER COMPANY

Dear Ms. Buckley:

Pursuant to the Commission's Order of April 7, 2020, in General Order No. 262.3, attached for filing in the above-captioned proceeding is a PDF of *The Consumer Advocate Division's Initial Brief*, a copy of which has been served on all parties of record.

Very truly yours,

A handwritten signature in black ink that reads "Heather B. Osborn".

Heather B. Osborn
State Bar No. 9074

Handwritten initials "J.B.W." in black ink, positioned above the "cc:" label.

cc: William C. Porth, Esq.
Anne C. Blankenship, Esq.
Keith D. Fisher, Esq.
James R. Bacha, Esq.
Barry A. Naum, Esq.
Derrick P. Williamson, Esq.
Susan J. Riggs, Esq.
Jason C. Pizatella, Esq.
Jacob C. Altmeyer, Esq.
Lucas Head, Esq.

Emmett Pepper, Esq.
Shannon Fisk, Esq.
Raghava Murthy, Esq.

03:40 PM WED 19 2022 EXEC SEC DIV

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

CASE NO. 21-0810-E-PC

APPALACHIAN POWER COMPANY and
WHEELING POWER COMPANY,
Petition for Commission Consent and Approval to
Enter Into Ownership and Operating Agreements for
the Mitchell Plant.

**THE CONSUMER ADVOCATE DIVISION'S
INITIAL BRIEF**

Comes now the Consumer Advocate Division of the Public Service Commission of West Virginia (CAD) and, pursuant to the briefing schedule established by the Commission in this matter, submits its *Initial Brief*.

Appalachian Power Company (APCo) and Wheeling Power Company (WPCo) (together "the Companies") have proposed a complicated solution to a very simple question: what changes to the current Mitchell Plant Operating Agreement are necessary to further this Commission's goal of allowing Mitchell to operate for West Virginia's sole benefit beyond 2028? The CAD contends those are the only modifications to the current Operating Agreement that are required to fulfill the spirit and explicit requirements of this Commission's Orders in Case No. 20-1040-E-CN. That is not what the Companies have presented in this case.

The CAD recommends the Commission deny the *Petition for Commission Consent and Approval to Enter Into Ownership and Operating Agreements for the Mitchell Plant* ("the Petition") because the proposed agreements do not conform to the

Commission's Order in Case No. 20-1040-E-CN and they are not in the best interest of West Virginia ratepayers. Further, the proposed Ownership Agreement is not needed to allow WPCo to proceed with ELG compliance work at Mitchell. To be clear, no Ownership Agreement is necessary at this time because there is currently no proposed transfer of Mitchell ownership. To the extent one is needed for other reasons, such Ownership Agreement must clearly confirm the basis for the Commission's agreement to fund ELG compliance for the entire station.

INTRODUCTION AND BACKGROUND

On November 19, 2021, the Companies filed with the Commission a *Petition for Commission Consent and Approval to Enter Into Ownership and Operating Agreements for the Mitchell Plant*. On that same date, Kentucky Power Company (KPCo) filed an application with the Kentucky Public Service Commission for all approvals necessary to authorize KPCo to enter into the same proposed Mitchell Plant Operations and Maintenance Agreement and Mitchell Plant Ownership Agreement.¹

On March 15, 2022, following an evidentiary hearing in Kentucky Case No. 21-00421, KPCo filed with the Kentucky PSC an Amended Application, along with the supplemental direct testimony of witnesses Stephan Haynes and others, and a "modified proposed Ownership Agreement" (submitted therein as Exhibit STH-S1). KPCo represented in its Amended Application that the modified proposed Ownership

¹ KY PSC Case No. 21-00421

Agreement “replaces and supersedes the original Ownership Agreement submitted as Exhibit DBM-3 on November 19, 2021.”²

Thereafter, in this (WV) proceeding, the Companies filed the Supplemental Direct Testimony of Christian T. Beam, which included as an exhibit the modified proposed Ownership Agreement. At the hearing in this case, the Companies made it clear that the originally filed Ownership Agreement is no longer under consideration, and the modified proposed agreement which the Companies filed with this Commission on March 18, 2022, is the agreement for which they seek approval.³

WV PSC Case No. 20-1040-E-CN

On December 23, 2020, the Companies filed an application for a certificate of convenience and necessity to obtain authorization to make modifications and environmental upgrades necessary to comply with federal environmental regulations at the Amos, Mountaineer, and Mitchell coal-fired generating plants.⁴ The Companies presented two alternative modification programs: (1) keeping all three plants operating through at least 2040; and (2) keeping Amos and Mountaineer operating through at least 2040 but closing Mitchell by 2028. The first alternative would require investments in both Coal Combustion Residuals (CCR) and Effluent Limitations Guidelines (ELG) compliance at all three plants, whereas the second alternative would require both CCR and ELG investment at Amos and Mountaineer but CCR investment only, at Mitchell. Regarding Mitchell, in which WPCo owns an undivided 50 percent interest with

² Id.

³ Although through the rebuttal testimony of witness Beam, the Companies suggested they would be willing to agree to yet another change, which would be to drop Section 9.6 and all references to it.

⁴ WV PSC Case No 20-1040-E-CN.

Kentucky Power Company (KPCo), KPCo would likewise need to seek approval for CCR and ELG investment at Mitchell, and did so in Kentucky Public Service Commission Case No. 21-00004.⁵

On August 4, 2021, this Commission approved the Companies' request for the expenditures necessary to ensure compliance with both CCR and ELG at all three plants, thus allowing the Companies' jurisdictional share of the Amos, Mitchell and Mountaineer plants to continue to operate past 2028.

The Commission's August 4, 2021, Order was clear with respect to Mitchell. A decision by the Companies not to proceed with the ELG upgrades would require Mitchell to close in 2028.

KY PSC Case No. 21-00004

On February 8, 2021, KPCo made a filing with the Kentucky PSC for approval to proceed with CCR and ELG compliance at Mitchell. (KY PSC Case 21-00004).

By Order dated July 15, 2021, the Kentucky PSC approved the request to make CCR investment at Mitchell but denied the request for ELG investment. Notably, the Kentucky PSC found that KPCo failed to meet its burden of proof with respect to ELG investment.⁶ KPCo subsequently filed a Motion for Rehearing on August 2, 2021, but, for reasons that are unknown to the CAD, did not request rehearing on the central question of ELG investment.

KPCo did nothing to challenge the Kentucky PSC's decision to deny the proposed ELG investment at Mitchell. KPCo's inability to meet the ELG requirements would

⁵ APCo would also seek approval from the Virginia SCC with respect to Amos and Mountaineer.

⁶ KY PSC Case No. 21-00004, Order (July 15, 2021) at 20-21.

effectively require discontinuation of the coal operation of Mitchell by KPCo at the end of 2028. That was the Kentucky PSC's decision to make and now it – and KPCo – must abide by the consequences of that decision.

WV PSC Case No. 20-1040-E-CN (Reopening and Rehearing)

Instead of seeking reconsideration of the Kentucky PSC decision to deny their request to install ELG upgrades at the Mitchell plant, the Companies instead asked the West Virginia Commission to reopen the record in Case No. 20-1040-E-CN and require West Virginia ratepayers to pay 100% of the ELG upgrade costs. By Order dated September 9, 2021, this Commission approved the Companies' request for a rehearing on certain matters, including the question of whether the WV Commission would support recovery of all ELG expenses at the plants, i.e., both jurisdictional and non-jurisdictional. Subsequently, on October 12, 2021, this Commission approved the Companies paying for the entire ELG expenses at all three plants, after the Commissions in both Kentucky and Virginia declined to approve the Company's ELG expenditures.

Before the Companies would commit to performing the ELG upgrades needed to continue to potentially operate the Mitchell plant beyond 2028, the Companies elicited a commitment from the WV PSC to require West Virginia ratepayers to fund all of the ELG costs for the Mitchell Plant, in light of a Kentucky Commission's order declining to authorize the ELG expenditures at the plant. The Companies represented that they may elect a compliance option by filing a Notice of Plan Participation (NOPP), available to the Companies through October 13, 2021, to close the Mitchell plant (as well as the Amos and Mountaineer plants) on or before 2028, without such a commitment from the

WV Commission. Even though they had permit modifications submitted for consideration (and some of the permit modifications had already been approved by the WV DEP), the Companies declined to commit to performing the ELG upgrades without such financial assurances and commitments from the WV Public Service Commission.

By order entered on October 12, 2021, the West Virginia Public Service Commission granted the Companies' request. The Commission's October 12, 2021, Order explained the reasons why the Commission agreed it was to the benefit of West Virginia that the required expenditures on all three stations be funded by West Virginia ratepayers. As part of its discussion, the Commission made clear that this position meant that (a) KPCo was effectively deciding to retire its 50 percent interest in Mitchell, (b) the early retirement of KPCo's share of Mitchell would result in KPCo retaining the associated stranded cost, and (c) KPCo would have no economic interest in the Mitchell station after 2028.⁷

As witness Medine explained, key excerpts of this Commission's October 12, 2021, Order provide as follows:

- *Moreover, it is important to note that the net undepreciated value of the Plants will continue to be paid by ratepayers if the Plants are prematurely retired. These costs are referred to as sunk costs because they represent dollars that have already been spent (sunk) on plants needed to serve ratepayers but which have not yet been recovered by the utility. When a utility is forced to prematurely retire or sell a plant (or any other undepreciated asset) the unrecovered sunk costs have been referred to as "stranded costs." Mr. Martin testified that these costs will be recovered from customers in all scenarios, including the premature retirement and replacement scenarios. (Page 6)*
- *By confirming our decision to proceed with the CCR and ELG compliance, after 2028 West Virginia customers will receive the full capacity and energy*

⁷ (Medine Direct Testimony at 11).

capabilities of three West Virginia coal plants capable of operating to at least 2040. The Plants could then provide West Virginia's PJM demand capacity requirements and produce excess capacity that could be sold through some combination of bi-lateral PPAs, RTO capacity bids, and affiliated agreements. The Plants could also provide base load energy for West Virginia needs and excess energy that could likewise be sold. To the extent excess capacity and energy are sold, the revenue received would be credited for ratemaking purposes to the benefit of West Virginia customers. (Page 7)

- *We find it fair and reasonable to expect West Virginia customers, and FERC jurisdictional customers benefitting from the Plants, to pay the ELG control and continuing operations costs incurred solely to keep the Plants open and to assign all capacity and energy from the Plants after 2028 either for the needs of those West Virginia and FERC jurisdictional customers or to be sold to third parties with the benefits of those sales being credited to West Virginia and FERC jurisdictional revenue requirements. (Page 9)*

DISCUSSION

This proceeding arises out of the divergent decisions of the West Virginia and Kentucky PSCs regarding ELG investment at Mitchell. The Companies seek this Commission's approval – as well as the approval of the Kentucky PSC⁸ – of (1) an Operations & Maintenance Agreement that would replace the existing Operating Agreement that has been in place since 2014 and (2) an Ownership Agreement (of which there is no version currently in effect).

The CAD does not support the approval of either agreement, as neither are in the interest of West Virginia residential ratepayers. Further, the agreements must reflect this Commission's decision, and the rationale therefor, that West Virginia will solely fund – and, therefore, solely enjoy the benefits of – ELG investment at Mitchell. As proposed, the agreements do not reflect this Commission's decision and rationale, however.

⁸ KY PSC Case No. 21-00421.

The divergent decisions by West Virginia and Kentucky have created a situation in which WPCo has the authority to proceed with ELG investments that allow it to operate the co-owned Mitchell plant beyond 2028, while KPSC does not have such authority. As such, this Commission found that “the changes in the Operating Agreement for the Mitchell plant or changes in ownership of the Mitchell plant necessary to accommodate the continued operation of the plant without the involvement of Kentucky Power Company or Kentucky jurisdictional customers shall be filed for approval by this Commission.”⁹ Similarly, on October 8, 2021, the Kentucky PSC found that, “[t]he 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.”¹⁰ Neither Commission indicated that such an agreement needed to be formalized before ELG work commenced.

Proposed New Mitchell Ownership Agreement

Not only do the proposed terms of the proposed new Mitchell Ownership Agreement fail to satisfy this Commission’s expectations and requirements relative to West Virginia’s sole investment in ELG projects at Mitchell, but an Ownership Agreement is not even necessary at this time because the ownership of Mitchell is not now changing. In order for WPCo to move forward with ELG investment at Mitchell, there is no requirement that a plan be put in place now for a proposed change in ownership that may arise in the future. The Commission should not approve the

⁹ WV PSC Case No. 20-1040-E-CN, Order (Oct. 12, 2021) at 16.

¹⁰ KY PSC Case No. 21-00370, Order (Oct. 8, 2021) at 9.

Ownership Agreement proposed by the Companies, in any of its various iterations. Any Ownership Agreement must address the threshold position regarding WPCo's rights to the full Mitchell station after 2028.

As noted above, this Commission previously ordered the Companies file with it "the changes in the Operating Agreement for the Mitchell plant or changes in ownership of the Mitchell plant necessary to accommodate the continued operation of the plant without the involvement of Kentucky Power Company or Kentucky jurisdictional customers."¹¹ Thus, the Commission made clear what needs to be put into place: an agreement with those changes necessary to allow WPCo, alone, to move forward with the ELG project, thus allowing the plant to continue to operate beyond 2028. Nothing more.

Frankly, the Companies, by and through their parent company, are putting at risk Mitchell's ability to remain in operation. WPCo, by virtue of this Commission's ruling in Case No. 20-1040-E-CN, has committed to ELG compliance at Mitchell. It is undisputed that the commitment to ELG requires compliance by 2025. The fact that WPCo did not file an NOPP committing to retire no later than 2028 if Mitchell did not comply with the ELG rule threatens the ability for the units to stay online past 2025 (or possibly sooner) without ELG compliance. Both KPCo and WPCo would be critically impaired by loss of the ability to operate Mitchell until at least 2028.

The focus, then, needs to be on what must be accomplished at this time, if anything, in order for WPCo to move forward with ELG work. The Companies' assertion that both a replacement Operations Agreement and a new Ownership Agreement must be

¹¹ WV PSC Case No. 20-1040-E-CN, Order (Oct. 12, 2021) at 16 (emphasis added).

approved prior to the commencement of physical ELG compliance work is simply not supported by the record in Case No. 20-1040-E-CN.

Similarly, the CAD is aware of no provision in any order of the Kentucky PSC that supports the Companies' position that an Ownership Agreement must be approved at this time.

Even assuming an Ownership Agreement is necessary at this time, the Ownership Agreement proposed by the Companies does not reflect the understanding and directives of this Commission when it approved funding for the ELG investment of the entire Mitchell plant (i.e., both units). Further, it does not provide adequate protection for West Virginia ratepayers, who are funding the environmental improvements necessary to allow the Mitchell plant to remain online after 2028.

First, the proposed Ownership Agreement does not reflect this Commission's finding – one that was dictated by the Kentucky PSC's decision to disallow ELG funding for Mitchell – that KPCo is not entitled to energy or capacity from Mitchell after December 31, 2028. Witness Beam, during the April 7, 2022, hearing in this case, confirmed WPCo's understanding of that finding.¹² In practice, this Commission's "no energy / no capacity for KPCo post-2028" requirement necessarily means that any transfer of Mitchell would include all of the assets WPCo needs to maintain plant operations.

Further, the proposed Ownership Agreement contains no provision that would prevent KPCo from coopting the plant for any reason. The proposed Ownership

¹² Tr. p. 101 (April 7, 2022).

Agreement only obligates repayment of ELG expenditures if KPCo decides to operate Mitchell beyond 2028. In that regard, the proposed Ownership Agreement contains no provision to compensate West Virginia that reflects the risk assumed by WPCo in funding the ELG investment. The plant demonstrably has no value beyond 2028 without the ELG investment.

The Companies (including KPCo in the companion Kentucky PSC proceeding) attempted to alleviate concerns regarding Section 9.6 of the Ownership Agreement by revising it to include a "Unit Interest Swap" provision. However, those revisions made the agreement even worse. The Unit Interest Swap provision sets up what might be a worst case scenario for WPCo and West Virginia ratepayers. That is, if WPCo and KPCo are unable to agree upon a transfer because KPCo (or the Kentucky PSC) refuses to concede that the value of Mitchell for KPCo is \$1 or less, then the Unit Interest Swap would, by default, be triggered.

There is nothing to guarantee that WPCo would obtain the "better" of the two Units (or even which Unit would be more desirable in 2028) by virtue of the swap. Perhaps more importantly, there is nothing to prevent KPCo from immediately retiring the Unit it obtains by virtue of the swap, thereby leaving West Virginia ratepayers on the hook for ELG investment in both units, despite one being retired. Obviously, this Commission did not envision such a scenario when it approved ELG investment paid for solely by West Virginia and it should not now approve any proposed Ownership Agreement that would allow for such an absurd result.

In October 2021, AEP announced the sale of its Kentucky operations which include KPCo and AEP Kentucky Transco to Liberty Utilities Co., (Liberty), the regulated utility business of Algonquin Power & Utilities Corp. (APUC), for \$2.85 billion including the assumptions of approximately \$1.22 billion in debt, with an expected second quarter 2022 closing subject to regulatory approvals. Liberty and AEP have jointly requested the Kentucky PSC's approval for the transfer of control of KPCo to Liberty, a request that the PSC has yet to rule upon.¹³ If and when that transfer occurs, Liberty would step into the shoes of KPCo and would inherit its rights, duties, responsibilities, and liabilities related to Mitchell. At that time, Mitchell would no longer be operated by affiliates.

While West Virginia has no direct interest in the outcome of the KPCo transfer to Liberty, for purposes of this proceeding the transfer is of paramount importance. First and foremost, it is undisputed that the approval of both proposed Mitchell Agreements is a condition precedent to Liberty's agreement to purchase KPCo.¹⁴ Therefore, while it may not be in the best interest of WPCo that these agreements obtain regulatory approval, it certainly is in the best interest of AEP because it cannot move forward with the sale of KPCo absent approval of both agreements, or Liberty electing to waive these conditions.

The evidence demonstrates that the revision to Section 9.6 arose in Kentucky PSC Case No. 21-000421, in response to concerns and objections expressed by the Kentucky Attorney General's office. Notably, an Informal Conference was held in that case on

¹³ KY PSC Case No. 21-00481, *Electronic Joint Application of American Electric Power Company, Inc. Kentucky Power Company, and Liberty Utilities Co. for Approval of the Transfer of Ownership and Control of Kentucky Power*.

¹⁴ Tr. pp. 39, 99 (April 7, 2022).

March 9, 2022. Not only were Kentucky stakeholders present for the Informal Conference, but so were representatives of Liberty¹⁵, despite the fact that Liberty is not a party to Case No. 21-000421. To the contrary, no representatives of WPCo (or any other West Virginia stakeholders¹⁶) were present. The logical inference is that the revision to Section 9.6 was designed for the benefit of Kentucky ratepayers, not West Virginia ratepayers. It is also one that is acceptable to, and therefore beneficial to, Liberty. And what is beneficial to Liberty may certainly be contrary to the interests of WPCo and West Virginia ratepayers.¹⁷ Thus, these agreements – both the contents thereof and their necessity for moving forward with ELG work – must be viewed critically.

At a minimum, any proposed Ownership Agreement would need to confirm that KPCo is entitled to no capacity or energy after 2028; that KPCo's interest in assets needed to produce and transmit that energy will be transferred to WPCo or its designee unless WPCo elects to close its share of the plant; and that KPCo has no unilateral rights to withdraw from the plant at any time prior to December 31, 2028, or to close it at any time. The proposed Ownership Agreement contains no language that protects WPCo and West Virginia ratepayers in this way. The proposed Ownership Agreement does not meet the spirit, intent and express directives contained in this Commission's Orders in Case No. 20-1040-E-CN and, therefore, it must be rejected in its entirety.

¹⁵ CAD Cross Exhibit 3.

¹⁶ Any fair and reasonable settlement negotiation should include, at a minimum, a representative of the aggrieved party. In this instance, the aggrieved parties are the West Virginia ratepayers who are being required to bear more than their fair share of environmental upgrade costs.

¹⁷ The CAD also questions the ability and willingness of WPCo to represent the interests of WV ratepayers, in light of its prior actions related to this issues, to the extent that WV ratepayer interests are different from the interests of its parent corporation.

In light of the concerns expressed by the CAD and other parties in their respective direct testimony, the Companies' submitted rebuttal testimony of witness Beam on April 4, 2022. In his rebuttal testimony, witness Beam suggested this Commission could approve the proposed Ownership Agreement while eliminating Section 9.6 and related definitions and provisions. This suggestion by witness Beam is not acceptable because it does nothing to address the concerns expressed herein by the CAD. Further, a version of the proposed Ownership Agreement that does not contain Section 9.6 (and related provisions) has not been formally proposed by KPCo to the Kentucky PSC in Case No. 21-00421, despite the fact that no agreement can be put in place without both Commissions approving an identical version thereof.

The CAD reiterates that an Ownership Agreement is unnecessary at this juncture and the Companies' proposal thereof is simply complicating the issue of what changes to the current Mitchell Plant Operating Agreement are needed to further this Commission's goal of allowing Mitchell to operate beyond 2028. The fact that Liberty requires an Ownership Agreement be in place before it moves forward with the purchase of KPCo from AEP is of no importance to WPCo, this Commission, or West Virginia ratepayers. Meanwhile, getting that deal accomplished would appear to be of utmost importance to AEP.

Proposed Replacement Mitchell Operations & Maintenance Agreement

The CAD is concerned that the proposed Operations & Maintenance Agreement lacks language that would ensure the operation of Mitchell through 2028 will benefit West Virginia ratepayers and their ELG investment. While the agreements transfer the

operating responsibility to WPCo, each party (i.e., WPCo and KPCo) retains significant operating rights including the right to dispatch their respective ownership shares.¹⁸

As noted above, Liberty Utilities and AEP have jointly requested the Kentucky PSC's approval for the transfer of ownership and control of KPCo to Liberty. Assuming the sale to Liberty is closed, Liberty will have operating rights even though the operating responsibility switches to WPCo. The CAD is concerned that West Virginia ratepayers' interest in Mitchell will not be protected absent some modifications to the proposed Operating Agreement.

Algonquin, the parent company of Liberty, has made clear that its intention is to replace all of KPCo's fossil generation with renewables¹⁹, presumably as soon as possible. As a result, WPCo and KPCo would no longer share the same interest in preserving the plant for continued operations. It is well documented that lower capacity factors impair coal plant performance and increase wear and tear.²⁰ The proposed sale of KPCo to a company whose primary interest is in closing the fossil generation, raises a legitimate concern as to how well the asset will be preserved.

Of particular concern is WPCo's operating rights that address KPCo's obligation to support operation of the Mitchell stations through 2028. Based upon the CPCN filing to the Kentucky PSC²¹, the primary justification for the CCR investment in Mitchell was

¹⁸ Direct Testimony of Christian T. Beam Exhibit CTB-D2.

¹⁹<https://www.globenewswire.com/news-release/2021/10/26/2321226/0/en/Algonquin-Power-Utilities-Corp-Announces-Agreement-to-Acquire-Kentucky-Power-Company-and-Concurrent-Bought-Deal-Common-Equity-Financing.html>

²⁰ <https://pubs.naruc.org/pub/7B762FE1-A71B-E947-04FB-D2154DE77D45>

²¹ https://psc.ky.gov/psccf/2021-00004/sebishop%40aep.com/02082021020420/KPCO_Application_02082021.pdf at 8.

the need for capacity. If only capacity is needed, Liberty could significantly reduce dispatch which would impair the operations of the station.

The current operating agreement between WPCo and KPCo includes a provision which allows one 50% owner to commit and dispatch 100% of the plant energy production when the other 50% owner does not commit to call in its share of the plant. (Tr. pp. 176-177; Section 7.6.2 of the currently effective Mitchell operating agreement between APCo and KPCo). Once WPCo is the designated operator of the plant, the CAD believes that WPCo should be similarly have the right and ability to call 100% of the Mitchell plant into service and be fully utilized by WPCo as the remaining 50% owner, even when KPCo declines to call on its share of the plant.

To protect West Virginia ratepayers' investment in ELG, the language of the Operations & Maintenance Agreement must ensure plant operations maintain the value of the assets.

CONCLUSION AND RECOMMENDATION

The priority in this case must be to facilitate commencement of the physical ELG work at Mitchell as soon as possible. For the reasons set forth above, an Ownership Agreement is not necessary for WPCo to move forward with that work. Therefore, the parties' disagreements as to the contents of the proposed Ownership Agreement can be set aside by the Commission at this time. Those disagreements need not be decided now because the proposed Ownership Agreement is unnecessary to moving forward with the ELG work.

Further, this Commission was clear in its Orders²² that its agreement to fund ELG for the entire Mitchell station (given the Kentucky PSC's denial of ELG investment) was the equivalent of KPCo retiring its 50 percent of the Mitchell station by the end of 2028. As is customary in plant retirements, the outstanding net book value (NBV) remains with the ratepayers, in this case KPCo's ratepayers. With that, any value remaining, along with the sale of capacity and energy, transfers to West Virginia ratepayers no later than at the end of 2028. Any Ownership Agreement approved by this Commission must contain language that makes this clear. The proposed agreement fails to do so and, therefore, is flawed in addition to being unnecessary at this time.

With respect to the proposed Operations & Maintenance Agreement, the CAD understands and agrees that WPCo will assume operation of Mitchell and an agreement should be in place to reflect that. With that said, the Operations & Maintenance Agreement must also ensure that plant operations maintain the value of these assets, to protect the ELG investment being made by West Virginia ratepayers.

Respectfully,



Heather B. Osborn

WV Bar No. 9074

Consumer Advocate Division

Public Service Commission of WV

Suite 810

300 Capitol Street

Charleston, West Virginia 25301

304.558.0526

²² Case No. 20-1040-E-CN.

CERTIFICATE OF SERVICE

I, Heather B. Osborn, counsel for the Consumer Advocate Division of the Public Service Commission of West Virginia (CAD), certify that I have served a copy of the foregoing *The Consumer Advocate Division's Initial Brief* upon the following counsel of record in accordance with the Commission's Order of April 7, 2020.

William C. Porth, Esquire
Anne C. Blankenship, Esquire
Robinson & McElwee PLLC
P.O. Box 1791
Charleston, WV 25326
wcp@ramlaw.com
acb@ramlaw.com
*Counsel for Appalachian Power
Company and Wheeling Power Company*

James R. Bacha, Esquire
American Electric Power Service
Corporation
1 Riverside Plaza
Columbus, OH 43215
jrbacha@aep.com
*Counsel for Appalachian Power
Company and Wheeling Power Company*

Keith D. Fisher, Esquire
American Electric Power Service
Corporation
500 Lee Street East, Suite 800
Charleston, WV 25301
kdfisher@aep.com
*Counsel for Appalachian Power Company
and Wheeling Power Company*

Derrick P. Williamson, Esq.
Barry A. Naum, Esq.
Spilman Thomas & Battle PLLC
1100 Bent Creek Blvd., Suite 101
Mechanicsburg, PA 17050
dwilliamson@spilmanlaw.com
bnaum@spilmanlaw.com
Counsel for WVEUG

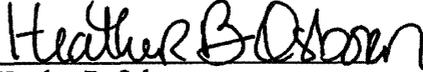
Susan J. Riggs, Esq.
Jason C. Pizatella, Esq.
Spilman Thomas & Battle PLLC
P.O. Box 273
Charleston, WV 25321-0273
sriggs@spilmanlaw.com
jpizatella@spilmanlaw.com
Counsel for WVEUG

Lucas Head, Esq.
lhead@psc.state.wv.us
Counsel for PSC Legal Division

Jacob C. Altmeyer, Esq.
61 Fourteenth St.
Wheeling, WV 26003
jacobaltmeyer@pgka.com
Counsel for West Virginia Coal Ass'n

Emmett Pepper, Esq.
8 Hale St.
Charleston, WV 25301
emmett@eewv.org
Counsel for CAG/SUN/EEWV

Shannon Fisk, Esq.
Raghava Murthy, Esq.
Earthjustice
48 Wall St., 15th Floor
New York, NY 10005
sfisk@earthjustice.com
rmurthy@earthjustice.org


Heather B. Osborn
State Bar No. 9074

DATED: April 19, 2022

03:53 PM APR 19 2022 EXEC SEC DIV

**PHILLIPS, GARDILL, KAISER & ALTMAYER, PLLC
LAWYERS**

JAMES C. GARDILL
CHARLES J. KAISER, JR.
H. BRANN ALTMAYER *
EDWARD M. GEORGE, III
DENISE KNOUSE-SNYDER
RICHARD N. BEAVER
J. CHRISTOPHER GARDILL
ROBERT D. PLUMBY *
ANDREW R. THALMAN **
JACOB C. ALTMAYER *
JEFFERY D. KAISER *

61 FOURTEENTH STREET
WHEELING, WEST VIRGINIA 26003
TELEPHONE (304) 232-6810
FAX (304) 232-4918

JOHN D. PHILLIPS
(1906-2000)
WILLIAM A. KOLIBASH
OF COUNSEL
RAY A. BYRD
OF COUNSEL

*ALSO ADMITTED IN OH
**ALSO ADMITTED IN PA AND IN

April 19, 2022

Ms. Karen Buckley
Acting Executive Secretary
Public Service Commission of West Virginia
201 Brooks Street
Charleston, WV 25301

Via Electronic Mail:
caseinfo@psc.state.wv.us

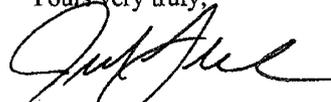
**Re: CASE NO. 21-0810-E-PC
APPALACHIAN POWER COMPANY and
WHEELING POWER COMPANY**
Petition for Commission Consent and Approval to Enter into Ownership
and Operating Agreements for the Mitchell Plant

Dear Ms. Graley:

Please find enclosed for filing in the above-styled matter the West Virginia Coal Association, Inc.'s Initial Brief, service of which was made this date as indicated. This filing is being made electronically pursuant to the Public Service Commission of West Virginia's Order No. 262.3.

Thank you for your attention to this matter. Please feel free to contact me with any questions or concerns.

Yours very truly,



Jacob C. Altmeyer, Esq.

JCA/

Enclosure

cc: Chris R. Hamilton (via e-mail)
Jason D. Bostic (via e-mail)
Evan Midler (via e-mail)

03:53 PM APR 19 2022 EXEC SEC DIV

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

CASE NO. 21-0810-E-PC

APPALACHIAN POWER COMPANY and WHEELING POWER COMPANY
Petition for Commission Consent and Approval to Enter into Ownership and Operating
Agreements for the Mitchell Plant

**INITIAL BRIEF OF THE
WEST VIRGINIA COAL ASSOCIATION, INC.**

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

CASE NO. 21-0810-E-PC

APPALACHIAN POWER COMPANY and WHEELING POWER COMPANY
Petition for Commission Consent and Approval to Enter into Ownership and Operating
Agreements for the Mitchell Plant

TABLE OF CONTENTS

I.	INTRODUCTION & SUMMARY OF AGRUMENT.....	1
II.	STATEMENT OF THE CASE.....	2
III.	ARGUMENT.....	4
	A. The modified Ownership Agreement is not compliant with this Commission's Order in Case No. 20-1040-E-CN.....	4
	B. The Companies' urgency regarding this matter is only in service to their parent company's pending sale of Kentucky Power Company to AQN and not necessary in order for the ELG improvements to proceed.....	7
IV.	CONCLUSION	8

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

CASE NO. 20-1040-E-CN

APPALACHIAN POWER COMPANY and WHEELING POWER COMPANY

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

**INITIAL BRIEF OF THE
WEST VIRGINIA COAL ASSOCIATION, INC.**

I. INTRODUCTION & SUMMARY OF ARGUMENT

The modified Ownership Agreement now before this Commission, as revised by the Companies, is in direct contradiction to this Commission's Order issued last year in Case No. 20-1040-E-CN. The modified Ownership Agreement cedes all control of the operation of half of the Mitchell Plant to Kentucky Power, soon to be owned by Liberty Utilities, an indirect subsidiary of Algonquin Power & Utilities Corp. (hereinafter "AQN"), beyond 2028. If approved, AQN would have an unencumbered right to close one unit of the Mitchell Plant at any time, without any mechanism by which the Companies, or any other party, could compel its transfer to an entity committed to operating the plant to the benefit of West Virginia ratepayers. While the Companies' witnesses repeatedly ask us to trust that AQN would not simply close their portion of the plant in lieu of receiving some payment or benefit from its transfer, AQN's President and Chief Executive Officer Arun Banskota described the acquisition as "an opportunity to replace over 1 GW of [Kentucky Power's] rate-based fossil fuel generation with renewable energy, and add long lived, regulated assets to its portfolio" in a statement given at the time of the

announcement of the pending purchase of Kentucky Power.¹ Those are not the words of a company whose primary focus will be maximizing value for their ratepayers or shareholders.

Knowing that the proposed Ownership Agreement stands little chance of approval by this Commission, and under the auspices of urgent permitting requirements, the Companies are now urging this Commission to approve the Ownership Agreement and O&M Agreement with Section 9.6 of the Ownership Agreement removed. However, given that the Companies to date have been acting in service solely to AQN, the Kentucky Public Service Commission and/or Kentucky stakeholders, this Commission cannot allow them to further postpone addressing what is far and away the most critical aspect of the proposed Agreements – ownership and operation of the Mitchell Plant by Wheeling Power Company for the benefit of West Virginia ratepayers beyond 2028. Despite Witness Beam's attempts to suggest otherwise, there is nothing stopping the Companies from obtaining the necessary permits in the name of Kentucky Power Company and transferring the permits at a later date once the Agreements are fully approved. So long as no costs of the ELG improvements are booked to Kentucky Power Company, the Companies would remain compliant with the West Virginia and Kentucky ELG Orders.

II. STATEMENT OF THE CASE

On November 19, 2021, Appalachian Power Company and Wheeling Power Company (hereinafter, collectively the "Companies") filed a Petition for Commission Consent and Approval to Enter into Ownership and Operating Agreements for the Mitchell Plant (hereinafter the "Petition"). In their Petition the Companies state that the Agreements will allow the Companies to make the necessary improvements to the Mitchell Power Plant, as approved by

¹ <https://www.utilitydive.com/news/aep-to-sell-kentucky-operations-to-liberty-for-285b-use-proceeds-for-ren/608973/>

this Commission in Case No. 20-1040-E-CN, in order to keep both coal-fired units at the Mitchell Plant operating beyond 2028.

In the Petition, the Companies offer two proposed agreements: an Operations and Maintenance Agreement (hereinafter "O&M Agreement") and a Mitchell Plant Ownership Agreement (hereinafter "Ownership Agreement"). The Ownership Agreement included with the Petition included Section 9.6, which provided "the Owners shall enter into the Mitchell Interest Purchase Agreement pursuant to which KPCo shall sell, transfer and assign to WPCo, and WPCo shall purchase and assume from KPCo, all of KPCo's Ownership Interest" [emphasis added]. The purchase price would then be either agreed upon between the parties or determined by neutral, third-party appraisers.

However, in response to discovery and discussions with stakeholders in the Kentucky proceeding, on March 18, 2022, the Companies offered Supplemental Direct Testimony from Christian T. Beam sponsoring a modified Ownership Agreement.² In the modified Ownership Agreement, the Companies deleted the compulsory buyout provisions of Section 9.6 and replaced it with a "Unit Interest Swap Transaction", wherein if the parties do not agree on a purchase price, the two units would be divided between Wheeling Power Company and Kentucky Power Company on or before 12/31/2028, with no language compelling Kentucky Power Company to transfer its interest to Wheeling Power Company or requiring it to continue to operate its unit beyond 2028. At the hearing in this matter, Witness Beam clarified that the modified Ownership Agreement replaces the original proposal, and the original Ownership Agreement is no longer an option.³

² Supplemental Direct Testimony of Christian T. Beam (Companies' Ex. CTB-S) pp. 2-3

³ See Transcript, pp. 83-84.

Four (4) parties petitioned to intervene and have been granted intervenor status in this matter by the Commission: (1) the Consumer Advocate Division (hereinafter "CAD"); (2) the West Virginia Energy Users Group; (3) Earthjustice; and (4) the WVCA.

Direct, supplemental direct and rebuttal testimony was filed by the Companies. The CAD offered the direct testimony of witness Emily S. Medine, Earthjustice offered the direct testimony of Witness James F. Wilson and the WVPSC Staff offered the direct and supplemental direct testimony of witnesses Geoffrey M. Cooke and James C. Weimer. Principally, each party has advocated against the approval of the modified Ownership Agreement, with the possible exception of the WVEUG who has not made clear their position.

An evidentiary hearing was held on April 7, 2022, in Charleston, West Virginia, where each party's counsel appeared in person. The witnesses for the Companies, CAD and Commission Staff all appeared in person at the hearing.

III. ARGUMENT

A. The modified Ownership Agreement is not compliant with this Commission's Order in Case No. 20-1040-E-CN.

On October 12, 2021, in Case No. 20-1040-E-CN, this Commission issued an Order granting a certificate of public necessity and authorizing the Companies to recover the full cost of ELG improvements at the Mitchell Plant, among others, from West Virginia ratepayers, as requested by the Companies (hereinafter the "ELG Order"). In that Order, the PSC directed that "the changes in the Operating Agreement for the Mitchell plant or changes in ownership of the Mitchell plant necessary to accommodate the continued operation of the plant without the involvement of Kentucky Power Company or Kentucky jurisdictional customers shall be filed for approval by this Commission." [Emphasis added]. In no uncertain terms, this Commission directed that the Companies present Agreements for approval that would provide for the

continued operation of the entire Mitchell plant, not just one unit, without any involvement of Kentucky Power or Kentucky customers. It cannot be argued that the modified Ownership Agreement is anything but a direct violation of that ELG Order.

Section 9.6 of the original Ownership Agreement proposed by the Companies complied with the ELG Order by providing that, in the absence of a mutual agreement, Kentucky Power was compelled to transfer its interest in the Mitchell Plant to Wheeling Power Company for Fair Market Value (which is determined pursuant to a process involving the balancing of multiple appraisals and offsetting decommissioning costs). While we would like to have seen that provision provide a price certain of a nominal amount for Kentucky Power Company's interest, and also allow for Wheeling Power Company to designate a third-party, such as the newly re-constituted Public Energy Authority, to exercise its buyout rights, the original proposal did comply to the ELG Order.

However, Section 9.6 of the modified Ownership Agreement removes any language compelling Kentucky Power Company to transfer its interest in the Mitchell Plant and replaces that obligation with an unfettered, discretionary right to close one unit of the Mitchell plant after 2028. Witness Beam testified that the revisions to Section 9.6 of the Ownership Agreement were made to address "discovery and discussions with stakeholders in the Kentucky proceeding".⁴ In the matter now pending before the Kentucky Public Service Commission regarding these same Agreements (Case No.2021-00421) Kentucky Power Company's witness Stephan T. Haynes testified that the revisions were designed to provide Kentucky Power and Wheeling Power Company with "fair and reasonable options available regarding future operations of the Mitchell Plant".⁵

⁴ Supplemental Direct Testimony of Christian T. Beam (Companies' Ex. CTB-S) pp. 2-3

⁵ KY PSC Case No.2021-00421 - Supplemental Direct Testimony of Stephan T. Haynes p. 3

Respectfully, Kentucky Power Company and its potential purchaser, AQN, are not subject to the jurisdiction of this Commission and not parties to this matter. The concerns of parties to the Kentucky matter and Kentucky Power Company's stakeholders are of no consequence to this Commission. The revisions to the modified Ownership Agreement are a seismic shift of leverage and control of the Mitchell Plant beyond 2028 from Wheeling Power Company to Kentucky Power Company and away from West Virginia ratepayers who are providing all of the funding necessary to allow the plant to be operational beyond 2028. Perhaps that is why the revisions were made with no input from this Commission or the parties to this matter. The Companies asking this Commission to approve the modified Ownership Agreement is so disingenuous and insulting that we must question the motives and sincerity of all testimony offered by the Companies in this matter.

As a final matter, the modified Ownership Agreement attempts to address the obvious inequity of allowing Kentucky Power to continue to own and operate one unit after 2028 when they contributed \$0 to the ELG improvements by providing for "economic equalization payments". Essentially, the Companies are suggesting that Kentucky Power Company should be allowed to assume no risk in investing in ELG modifications but enjoy all the benefit if the continued operation of the Mitchell Plant would prove necessary or economical. As CAD Witness Medine pointed out, this is akin to allowing Kentucky Power to split the winnings of a bet after the outcome is determined by simply refunding their share of the stake. Understandably, Kentucky Power Company, its soon to be owner AQN, and its stakeholders may be regretting their decision to abandon its interest in the Mitchell plant in light of the volatile energy market and prices. However, West Virginia ratepayers should not be asked to surrender

half of their investment in the Mitchell plant if Kentucky Power changes its mind and decides it'd like to keep it in its portfolio.

B. The Companies' urgency regarding this matter is only in service to their parent company's pending sale of Kentucky Power Company to AQN and not necessary in order for the ELG improvements to proceed.

As Witness Beam acknowledged, the approval of these Agreements is a pre-requisite condition to the Companies' parent, American Electric Power, closing of the sale of Kentucky Power Company to AQN, for \$2.846 billion dollars.⁶ Despite Witness Beam's repeated testimony⁷, there is nothing preventing the Companies from proceeding with the ELG improvements under the current Mitchell Plant Operating Agreement.

Witness Beam insists that Wheeling Power Company has to replace Kentucky Power Company as the operator of the Mitchell Plant in order for the Companies to apply for and get the permits necessary to begin the ELG improvement work to the Mitchell Plant. However, as CAD Witness Medine testified⁸, the Kentucky Order does not mandate any action by Kentucky Power Company regarding its role as operator of the Mitchell Plant or dictate any requirements regarding ongoing permitting processes. In fact, as Witness Medine testified, Environmental Protection Agency permit transfers are both allowable and common⁹.

As one would expect, the pending sale of Kentucky Power Company to AQN is by far the primary impetus for the urgency of this matter. Presumably, AQN has agreed to close the transaction if the Agreements are approved with the removal of Section 9.6, otherwise the Companies would not have offered that resolution. However, allowing the Companies to proceed with the sale of Kentucky Power and operation of the Mitchell Plant without addressing

⁶ See Transcript, pp. 38-89

⁷ See Transcript, pp. 91, 98, 134-135, 150, 165

⁸ See Transcript, pp. 191-192

⁹ See Transcript, pp. 204-205

the transfer of ownership on or before 2028 would potentially be disastrous to West Virginia ratepayers. Without the urgency of the pending sale, both Wheeling Power Company and Kentucky Power Company can simply forego addressing ownership change and allow the parties to back themselves into a de facto unit-swap arrangement.

IV. CONCLUSION

The modified Ownership Agreement sponsored by the Companies in this matter and of which this Commission's approval is sought is in direct contradiction to this Commission's ELG Order and is detrimental to West Virginia ratepayers. This Commission, in approving the Companies' request to recover 100% of the ELG improvement costs at Mitchell from West Virginia ratepayers, directed the Companies to submit Agreements that would provide for the continued operation of the Mitchell Plant without the involvement of Kentucky Power Company or Kentucky jurisdictional customers beyond 2028. Undoubtedly with that directive in mind, the Companies initially offered an Ownership Agreement that did so by providing a backstop wherein, in the absence of a mutual agreement, Kentucky Power was compelled to transfer its ownership interest to Wheeling Power Company for Fair Market Value.

Thereafter, Kentucky Power Company stakeholders and parties, and presumably AQN, got involved and decided they'd like to retain full control of their share of the Mitchell plant, even beyond 2028. In complete service to those parties and to the extreme disadvantage of West Virginia ratepayers, the Companies withdrew that Ownership Agreement and replaced it with a modified version that gives Kentucky Power complete discretionary power to (1) close their half of the Mitchell Plant by 2028, (2) continue to operate their half of the Mitchell Plant beyond 2028, or (3) agree to sell its share to Wheeling Power Company, whichever it desires. The only logical explanation for this insulting proposal is the desperation of the Companies' parent

company, AEP, to get something approved that will allow them to close the sale of Kentucky Power Company to AQN.

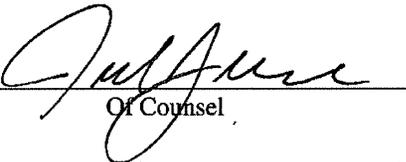
No genuine argument can be made that the revised Ownership Agreement is anything but a direct contradiction of this Commission's ELG Order and made solely for the benefit of Kentucky parties and stakeholders. In response, this Commission should deny approval of any part of the proposed Agreements and remind that Companies who they are before and whose best interests they are required to serve – West Virginians.

WHEREFORE, the West Virginia Coal Association, Inc., respectfully requests that this Commission enter an Order denying the Companies' Petition.

Dated: April 19, 2022.

Respectfully submitted,

**WEST VIRGINIA COAL
ASSOCIATION, INC.**

By: 
Of Counsel

H. Brann Altmeyer, Esq.
WV Bar No. 118
Jacob C. Altmeyer, Esq.
WV Bar No. 11919
Phillips, Gardill, Kaiser, & Altmeyer, PLLC
61 Fourteenth Street
Wheeling, WV 26003
E: brannaltmeyer@pgka.com
jacobaltmeyer@pgka.com
T: (304) 232-6810
F: (304) 232-4918
*Counsel for the West Virginia
Coal Association, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2022, a copy of the foregoing Initial Brief was served upon all parties and/or counsel of record in this proceeding by electronic mail, inviting any party who so desires to request a hard copy, addressed as follows:

William C. Porth, Esq.
Anne C. Blankenship, Esq.
Robinson & McElwee PLLC
P.O. Box 1791
Charleston, WV 25326
wcp@ramlaw.com
acb@ramlaw.com

James R. Bacha, Esq.
American Electric Power
Service Corporation
1 Riverside Plaza
Columbus, OH 43215
jrbacha@aep.com

Keith D. Fisher, Esq.
American Electric Power
Service Corporation
500 Lee Street East, Suite 800
Charleston, WV 25301
kdfisher@aep.com

Derrick P. Williamson, Esq.
Barry A. Naum, Esq.
Spilman Thomas & Battle, PLLC
100 Bent Creek Blvd., Suite 101
Mechanicsburg, PA 17050
dwilliamson@spilmanlaw.com
bnaum@spilmanlaw.com

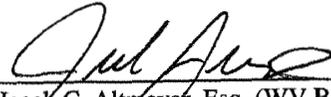
Emmett Pepper, Esq.
Pepper & Nason
8 Hale Street
Charleston, WV 25301
emmett@cewv.org

Susan J. Riggs, Esq.
Jason C. Pizatella, Esq.
Spilman Thomas & Battle, PLLC
Spilman Center
300 Kanawha Boulevard, East
Charleston, WV 25301
sriggs@spilmanlaw.com
jpizatella@spilmanlaw.com

Wendy S. Braswell, Esq.
Lucas R. Head, Esq.
Public Service Commission of WV
201 Broos Street
Charleston, WV 25301
wbraswell@psc.state.wv.us
lhead@psc.state.wv.us

Robert F. Williams, Esq.
Heather B. Osborn, Esq.
John R. Auville, Esq.
Consumer Advocate Division
Public Service Commission of WV
300 Capitol Street, Suite 810
Charleston, WV 25301
rwilliams@cad.state.wv.us
hosborn@cad.state.wv.us
jauville@cad.state.wv.us

Melissa Anne Legge, Esq.
Raghava Murthy, Esq.
Shannon Fisk, Esq.
Earthjustice
48 Wall Street, 15th Floor
New York, NY 10005
mlegge@earthjustice.org
sfisk@earthjustice.org
rmurthy@earthjustice.org



Jacob C. Altmeyer, Esq. (WV Bar No. 11919)
Counsel for West Virginia Coal Association, Inc.



Barry A. Naum
717.795.2742
bnaum@spilmanlaw.com

April 19, 2022

VIA E-MAIL

Ms. Karen Buckley
Acting Executive Secretary
Public Service Commission of West Virginia
201 Brooks Street
Charleston, WV 25301

05:02 PM APR 19 2022 EXEC SEC DIV

Re: **CASE NO. 21-0810-E-PC**
APPALACHIAN POWER COMPANY and
WHEELING POWER COMPANY
Petition for consent and approval to enter into
Ownership and Operating Agreements for the
Mitchell Plant

Dear Ms. Buckley:

Please find enclosed for filing the "*Initial Brief of the West Virginia Energy Users Group*" in the above-referenced case.

This filing is made via email in accordance with the Public Service Commission's General Order No. 262.3 *Regarding Processing of Cases During COVID-19 West Virginia State of Emergency*.

Please contact the undersigned if you have any questions concerning this filing.

Sincerely,

Derrick Price Williamson
Barry A. Naum (WV State Bar #12791)
dwilliamson@spilmanlaw.com
bnaum@spilmanlaw.com

Susan J. Riggs (WV State Bar #5246)
Jason C. Pizatella (WV State Bar #10532)
Spilman Thomas & Battle, PLLC
300 Kanawha Boulevard, East
Charleston, WV 25301
sriggs@spilmanlaw.com
jpizatella@spilmanlaw.com

BAN.sds
Enclosures
c: Certificate of Service

05:02 PM APR 19 2022 EXEC SEC DIV

CERTIFICATE OF SERVICE

I, Barry A. Naum, counsel to the West Virginia Energy Users Group, do hereby certify that on this 19th day of April, 2022, a copy of the "*Initial Brief of the West Virginia Energy Users Group*" was served upon the parties and/or counsel of record in this proceeding as follows:

VIA E-MAIL

William C. Porth, Esquire
Anne C. Blankenship, Esquire
Robinson & McElwee PLLC
P.O. Box 1791
Charleston, WV 25326
wcp@ramlaw.com
acb@ramlaw.com
and
James R. Bacha, Esquire
American Electric Power Service
Corporation
1 Riverside Plaza
Columbus, OH 43215
jrbacha@aep.com
and
Keith D. Fisher, Esquire
American Electric Power Service
Corporation
500 Lee Street East, Suite 800
Charleston, WV 25301
kdfisher@aep.com
*Counsel for Appalachian Power
Company and Wheeling Power Company*

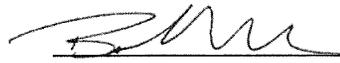
Lucas Head, Esquire
Staff Attorney
Public Service Commission of West
Virginia
201 Brooks Street
Charleston, WV 25301
lhead@psc.state.wv.us
Counsel for Commission Staff

Robert F. Williams, Esquire
Heather B. Osborn, Esquire
John Auville, Esquire
Consumer Advocate Division
700 Union Building
723 Kanawha Boulevard, East
Charleston, WV 25301
rwilliams@cad.state.wv.us
hosborn@cad.state.wv.us
jauville@cad.state.wv.us
*Counsel for Consumer Advocate
Division*

H. Brann Altmeyer, Esquire
Jacob C. Altmeyer, Esquire
Phillips, Gardill, Kaiser, & Altmeyer, PLLC
61 Fourteenth Street
Wheeling, WV 26003
brannaltmeyer@pgka.com
jacobaltmeyer@pgka.com
*Counsel for West Virginia Coal
Association*

Certificate of Service
Page 2
Case No. 21-0810-E-PC

Emmett Pepper, Esquire
Pepper & Nason
8 Hale Street
Charleston, WV 25301
Emmett@eewv.org
*Counsel for West Virginia Citizen Action
Group, Solar United Neighbors, and
Energy Efficient West Virginia*



Barry A. Naum (WV State Bar #12791)

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

CASE NO. 21-0810-E-PC

**APPALACHIAN POWER COMPANY and
WHEELING POWER COMPANY**

Petition for consent and approval to enter into
Ownership and Operating Agreements for the
Mitchell Plant

**INITIAL BRIEF OF THE
WEST VIRGINIA ENERGY USERS GROUP**

The Chemours Company, LLC

Constellium Rolled Products Ravenswood, LLC

Eagle Natrium (Westlake)

Marathon Petroleum Company LP (MarkWest)

WVA Manufacturing, LLC

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

CASE NO. 21-0810-E-PC

**APPALACHIAN POWER COMPANY and
WHEELING POWER COMPANY**

Petition for consent and approval to enter into
Ownership and Operating Agreements for the
Mitchell Plant

**INITIAL BRIEF OF THE
WEST VIRGINIA ENERGY USERS GROUP**

I. INTRODUCTION

On November 19, 2021, Appalachian Power Company ("APCo") and Wheeling Power Company ("WPCo") (collectively, "Companies") filed with the Public Service Commission of West Virginia ("Commission") a Petition for Commission consent and approval for WPCo to enter into a new Mitchell Plant Ownership Agreement ("Ownership Agreement") and a new Mitchell Plant Operations and Maintenance Agreement ("Operating Agreement") (collectively, "New Mitchell Agreements") ("Petition") with the Companies' affiliate, Kentucky Power Company ("KPCo"). According to the Companies, the need for the New Mitchell Agreements is the result of conflicting decisions between the Commission and Kentucky Public Service Commission ("Kentucky Commission") affecting the future of the Mitchell Plant and American Electric Power Company, Inc.'s ("AEP"), announcement regarding the sale of KPCo to Liberty Utilities Company ("Liberty"). Petition, p. 6.

The West Virginia Energy Users Group ("WVEUG") filed a Petition to Intervene to protect the interests of large industrial and manufacturing customers, which the Commission granted on December 9, 2021.

On March 28, 2022, intervening parties, to include Commission Staff ("Staff") and Consumer Advocate Division ("CAD") filed Direct Testimony addressing the Companies' Petition and supporting testimony.

On April 4, 2022, the Companies filed Rebuttal Testimony responding to evidence presented by the intervening parties. No other parties filed Rebuttal Testimony.

On April 7, 2022, the Commission convened an Evidentiary Hearing.

In accordance with the procedural schedule established by the Commission in this case, as amended at the evidentiary hearing, WVEUG hereby submits this Initial Brief.

II. ARGUMENT

A. The Commission Should Defer Approval of the Ownership Agreement until a Future Proceeding.

Throughout this proceeding, the Companies have consistently claimed that approval of the proposed Ownership Agreement is required for the Operating Agreement to be in effect. WVEUG disagrees.

First, the proposed Ownership Agreement is so speculative that it is unclear why the Companies require approval of it now. The Companies admit -- and WVEUG agrees -- that all issues related to a potential buyout transaction or "unit swap" transaction as contemplated by the proposed Ownership Agreement will require approval through future proceedings.¹ It is unclear why the Companies are seeking approval of an Ownership Agreement that they acknowledge contains "theoretical and hypothetical scenarios," which will ultimately require approval by both this Commission and the Kentucky Commission in a future proceeding.²

¹ See Rebuttal Testimony of Christian T. Beam ("Companies' Ex. CTB-R"), p. 4 lines 5-24.

² *Id.*

WVEUG agrees that nothing regarding a future buyout transaction or "unit swap" transaction, as contemplated by the proposed Ownership Agreement, can be pre-determined in this proceeding. All decisions regarding the reasonableness and prudence of all factors attendant to an unknown prospective transaction, including any proposed price, buyer, need for capacity, etc., must be reserved for a future proceeding.³ Since it appears that all parties, including the Companies, agree that much of the Ownership Agreement is premised on these speculative, future scenarios that will require Commission approval, it is unclear why the Companies are requesting the proposed Ownership Agreement's approval now. WVEUG submits that they do not need such approval and is concerned that any current approval may -- irrespective of any intent to do so -- presuppose future outcomes that have not been fully contemplated or considered at present.

Second, it appears that the Companies' proclaimed need to have the Ownership Agreement approved at this time is based on the assertion that the Operating Agreement relies on the Ownership Agreement as a condition precedent to its terms.⁴ WVEUG acknowledges that the Operating Agreement does reference the Ownership Agreement,⁵ but is perplexed why -- apart from poor negotiation and drafting -- the present and ongoing operation of the Mitchell Plant must depend on the obscure, undefined, and speculative nature of a future ownership arrangement. Surely KPCo and WPCo should be able, as present owners of the facility, to establish an arrangement whereby one owner (WPCo) is the sole operator now, irrespective of some unknown and future ownership plan. Based on WVEUG's review, the Operating Agreement appears to

³ See Hearing Transcript ("Tr."), p. 94, line 19 to p. 96, line 9 (Companies' witness Beam); Companies' Ex. CTB-R, p. 3, lines 4-11.

⁴ See Hearing Tr., p. 160, line 23 to p. 161, line 9 (Companies' witness Beam); Companies' Ex. CTB-R, p. 5, lines 6-8.

⁵ See Direct Testimony of Christian T. Beam ("Companies' Ex. CTB-D"), at Exhibit CTB-D2, Operations and Maintenance Agreement, p. 5.

memorialize this arrangement, irrespective of internal references to the Ownership Agreement. As such, it appears that the Operating Agreement can be approved and effective standing on its own.

B. The Commission Should Direct the Companies to Amend the Ownership Agreement so that it Specifically Contemplates or Permits Third-Party Acquisition of any or all of the Mitchell Plant.

If the Commission decides that approval of the proposed Ownership Agreement is warranted at this time, it should also declare that the proposed Ownership Agreement does not preclude a potential third-party acquisition of any or all of the Mitchell Plant and thus require the Companies to amend the Ownership Agreement to make that clear. In fact, WVEUG believes it may prove to be more beneficial for ratepayers if a third party acquired a share of the Mitchell Plant, and as such, it would be prudent for the Companies to also evaluate such an option in the event of a contemplated buyout transaction.⁶ As discussed above, any details regarding a future buyout (or "unit swap") transaction are entirely speculative as of now, and it would be necessary for the Commission to approve all details of such an arrangement in the future.

The Companies have expressly represented that the proposed Ownership Agreement does not preclude a third-party acquisition.⁷ WVEUG appreciates those statements; however, the New Mitchell Agreements as proposed do not make clear that a third-party acquisition is contemplated or possible. For instance, Article 9, Section 9.1 of the proposed Ownership Agreement includes express permission for either owner, WPCo or KPCo, to dispose of all of its ownership interest to a state regulated affiliate.⁸ As admitted by Companies' witness Beam during the hearing, for

⁶ Companies' witness Beam even agreed that it is possible "that a potential sale to a third party could prove to be a beneficial resolution to the ownership of all or part of the Mitchell Plant." Hearing Tr., p. 89, lines 10-15.

⁷ See Hearing Tr., p. 85, lines 13-18; p. 87, lines 21-24; p. 179, line 24 to p. 180, line 3 (Companies' witness Beam).

⁸ See Supplemental Direct Testimony of Christian T. Beam ("Companies' Ex. CTB-S") at Exhibit CTB-S1, Mitchell Plan Ownership Agreement, p. 14.

WPCo, the only state regulated affiliated that it could transfer ownership to would be APCo.⁹ It is odd that the Companies would insist on this singular contingency and fail to contemplate other beneficial options.

When asked if the Companies would be open to amending the proposed Ownership Agreement to make clear that a third-party sale is a contemplated possibility, Mr. Beam stated that the Companies would object because the same proposals are now before both this Commission and the Kentucky Commission, meaning that any modification would slow down the process.¹⁰ WVEUG views this explanation to be unpersuasive for two reasons: (1) the Companies have already once amended their proposed Ownership Agreement during this proceeding to add the "Unit Interest Swap Provision;"¹¹ and (2) the Companies admitted that it would be reasonable to exclude certain whole provisions (Article 9.6 of the Ownership Agreement) of the proposed New Mitchell Agreements, deferring to the Commission's preference whether to modify the Ownership Agreement in that regard.¹² As the Companies have already amended the Ownership Agreement once during this proceeding and have deferred other amendment decisions to the Commission, WVEUG respectfully requests the Commission direct the Companies to further amend the Ownership Agreement to make clear that any potential buyout transaction should contemplate and be available to a third party. At a minimum, however, the Commission should at least find and affirmatively declare that nothing in the New Mitchell Agreements precludes a third-party acquisition option. Indeed, WVEUG respectfully suggests that the Companies (and KPCo) should

⁹ See Hearing Tr., p. 87, lines 3-11 (Companies' witness Beam).

¹⁰ See *id.* at 90, line 20 to p. 91, line 4 (Companies' witness Beam).

¹¹ See Companies' Ex. CTB-S, p. 1, lines 12-19.

¹² See Companies' Ex. CTB-R, p. 15, lines 12.

exhaust all such possible solutions prior to committing to a buyout or "unit swap" as presently contemplated.

WVEUG understands the Companies' hesitancy to, perhaps, submit such revisions for further approval by the Kentucky Commission,¹³ but such hesitancy on their part should not dissuade the Commission. The Companies (and KPCo) bear the burden in all of these regulatory proceedings; it is their responsibility to submit and obtain approvals from both Commissions for proposals that each Commission finds to be in the best interests of their respective stakeholders. This may be a hard task, but such is the nature and risk of doing business as a regulated monopoly. Moreover, as already explained, the terms of the Operating Agreement are speculative and anticipatory of facts and circumstances that do not yet exist. The Companies (and KPCo, irrespective of whether KPCo remains an affiliate or becomes a subsidiary of another utility) have time.

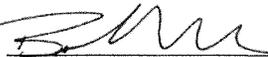
¹³ See Hearing Tr., p. 90, line 24 to p. 91, line 4 (Companies' witness Beam).

III. CONCLUSION

WHEREFORE, the West Virginia Energy Users Group respectfully requests that the Commission: (1) defer approval of the proposed Ownership Agreement until a future proceeding, or; (2) if the Commission finds approval warranted at this time, direct the Companies to amend the Ownership Agreement to make clear that a third-party acquisition is permitted.

Respectfully submitted,

SPILMAN THOMAS & BATTLE, PLLC

By 

Derrick Price Williamson
Barry A. Naum (WV State Bar # 12791)
1100 Bent Creek Boulevard, Suite 101
Mechanicsburg, PA 17050
Phone: (717) 795-2741
Fax: (717) 795-2743
dwilliamson@spilmanlaw.com
bnaum@spilmanlaw.com

Susan J. Riggs (WV State Bar #5246)
Jason C. Pizatella (WV State Bar #10532)
300 Kanawha Boulevard, East
Charleston, WV 25301
Phone: (304) 340-3800
Fax: (304) 340-3801
sriggs@spilmanlaw.com
jpizatella@spilmanlaw.com

Counsel to the West Virginia Energy Users Group

Date: April 19, 2022

04:20 PM APR 19 2022 EXEC SEC DIV



Keith D. Fisher
Senior Counsel
500 Lee Street East, Suite 800
Charleston, WV 25301
304.348.4154
kdfisher@aep.com

April 19, 2022

Via Electronic Mail

Karen Buckley
Acting Executive Secretary
Public Service Commission of West Virginia
201 Brooks St.
Charleston, WV 25301

Re: Case No. 21-0810-E-PC
Appalachian Power Company and Wheeling Power Company
*Petition for Commission Consent and Approval to Enter into Ownership and
Operating Agreements for the Mitchell Plant*

Dear Ms. Buckley:

Please find enclosed for filing in the above-referenced matter the Initial Brief of Appalachian Power Company and Wheeling Power Company. On this date, copies thereof were served in accordance with the Certificate of Service.

This filing is made via electronic mail in accordance with the Commission's General Order No. 262.3 *Regarding Processing of Cases During COVID-19 West Virginia State of Emergency*.

Thank you for your attention to this matter. Should you have any questions regarding this correspondence, please do not hesitate to contact me.

Sincerely,

Keith D. Fisher (WV State Bar #11346)
*Counsel for Appalachian Power Company
and Wheeling Power Company*

Enclosure

cc: Certificate of Service

04:20 PM APR 19 2022 EXEC SEC DIV

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

CASE NO. 21-0810-E-PC

**APPALACHIAN POWER COMPANY and
WHEELING POWER COMPANY,**
public utilities.

*Petition for Commission Consent and
Approval to Enter into Ownership and
Operating Agreements for the Mitchell Plant
Pursuant to W. Va. Code § 24-2-12*

**INITIAL BRIEF OF APPALACHIAN POWER COMPANY
AND WHEELING POWER COMPANY**

COME NOW Appalachian Power Company (“APCo”) and Wheeling Power Company (“WPCo”) (jointly “the Companies”), by counsel, and respectfully file their Initial Brief following the evidentiary hearing in this matter. In support hereof, the Companies state as follows:

INTRODUCTION

To comply with the previous environmental compliance orders of this Commission in Case No. 20-1040-E-CN and of the Kentucky Public Service Commission (“KPSC”), the Companies have presented for approval a proposed Mitchell Plant Operations and Maintenance Agreement (“O&M Agreement”) and a proposed Mitchell Plant Ownership Agreement as updated by the Companies on March 18, 2022 (“Revised Ownership Agreement”) (sometimes collectively referred to herein as the “New Mitchell Agreements”). Together, the New Mitchell Agreements replace the current Mitchell Plant Operating Agreement that has been in effect since December 31, 2014. The need to replace that current agreement is undisputed, making the point of this proceeding the best manner in which to accomplish that end. The evidentiary record in this case establishes that the New Mitchell Agreements, with the Commission option to remove Section 9.6

if preferred, should be approved. The terms and conditions of the proposed agreements are fair and reasonable, do not give the parties thereto, or either state, an undue advantage over the other, do not adversely affect the public in West Virginia, and afford the authority and flexibility needed to comply with the aforementioned orders that established divergent investment and operational paths for the Mitchell Plant. Moreover, the Revised Ownership Agreement and the Companies' supporting testimony address the concerns raised by the Staff and other parties in this matter. This Commission should grant the necessary approvals for WPCo to enter into the New Mitchell Agreements, both with and without Section 9.6 and related sections of the Revised Ownership Agreement, so that federally mandated environmental upgrades can be made to the Mitchell Plant in accordance with the applicable deadlines, ensuring the continued operation of that plant.

ARGUMENT

1. The need to replace the current Mitchell Plant Operating Agreement is clear and undisputed.

Since the Commission's December 30, 2014 order in Case No. 14-0546-E-PC, WPCo and Kentucky Power Company ("KPCo") have each owned a 50% undivided interest in the Mitchell Plant, and KPCo has served as the operator of that plant under the current Mitchell Plant Operating Agreement. KPCo serves approximately 165,000 retail customers in eastern Kentucky and is subject to the jurisdiction of the KPSC.

As more fully explained in Case No. 20-1040-E-CN, the federal Environmental Protection Agency ("EPA") has promulgated a rule to regulate the disposal and beneficial re-use of coal combustion residuals ("CCR") and a rule revising effluent limitation guidelines ("ELG") for electric generating facilities, including the Mitchell Plant. The ELG rule, not finalized until October 2020, establishes discharge limits that must be achieved as soon as possible between October 13, 2021 and December 31, 2025. Furthermore, under the ELG rule, December 31, 2028

is the latest possible date the Mitchell Plant can operate without performing the required environmental retrofits. As a result of WPCo's and KPCo's joint ownership of the Mitchell Plant, the work required to comply with the CCR and ELG rules is subject to the jurisdiction of both this Commission and the KPSC.

The Companies filed a petition with this Commission, on December 23, 2020, seeking approval and cost recovery for CCR/ELG upgrades to the Mitchell Plant (and two other plants owned by APCo). KPCo filed a petition with the KPSC, on February 8, 2021, seeking approval and cost recovery for the same upgrades to the Mitchell Plant. Following evidentiary hearings in both jurisdictions, the two commissions issued divergent orders regarding the Mitchell Plant. First, the KPSC issued an order approving compliance work to meet the CCR Rule requirements but denying approval for the compliance work to meet the ELG Rule requirements. In effect, under the CCR and ELG rules, KPCo will be unable to operate the Mitchell Plant past the year 2028. In contrast, this Commission issued an order granting the Companies a certificate of convenience and necessity to carry out both CCR and ELG projects at Mitchell, which would allow WPCo to operate the plant past the year 2028. This Commission conditioned its order on Kentucky jurisdictional customers neither sharing in ELG costs nor sharing in the capacity and energy available from the Mitchell Plant after 2028. *See* Case No. 20-1040-E-CN, Oct. 12, 2021 Order, at 15.

Both commissions recognized the resulting need to replace the current Mitchell Plant Operating Agreement. This Commission directed "that the changes in the [current] Operating Agreement for the Mitchell plant or changes in ownership of the Mitchell plant necessary to accommodate the continued operation of the plant without the involvement of Kentucky Power

Company or Kentucky jurisdictional customers shall be filed for approval by this Commission.”

Id. at 16. Likewise, the KPSC stated that it

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.

In the Matter of: Electronic Investigation of the Service, Rates and Facilities of Kentucky Power Company, Case No. 2021-00371, Order at 9 (Ky. P.S.C. Oct. 8, 2021).

The divergent orders of the two commissions as to CCR and ELG upgrades necessitate replacement of the current Mitchell Operating Agreement so that future investment in and operation of the Mitchell Plant are undertaken consistent with each company's ownership and participation with respect to the plant, as well as to ensure that costs are appropriately allocated and assigned between its two owners. The current agreement lacks the detailed and necessary provisions to comply with those orders. Accordingly, WPCo and KPCo initiated parallel proceedings before their respective commissions for approval of the New Mitchell Agreements.

2. Time is of the essence in replacing the current Mitchell Plant Operating Agreement, and it is imperative to receive consistent decisions from this Commission and the KPSC respecting the New Mitchell Agreements.

While the orders of this Commission and KPSC necessitating the New Mitchell Agreements may be divergent, the orders requested by WPCo and KPCo to approve those agreements must be consistent. To explain, the Companies have committed to performing the necessary work at the Mitchell Plant to comply with the CCR and ELG rules. And, while detailed engineering for the ELG work is underway, physical construction (i.e., “moving dirt”) is not

scheduled to begin until permits are transferred to WPCo. April 7, 2022 Hearing Transcript (“Tr.”) at 69, 98, 135, 138, 181. The permits for the Mitchell Plant are currently in the name of KPCo, given its current role as operator, and the KPSC did not grant KPCo a CPCN for the ELG project. Among other things, the New Mitchell Agreements will cause the transfer of permits and operations to WPCo and will allow physical ELG work to commence. Company Exhibit CTB-R at 12-13.

In its initial filing in this matter, the Companies requested this Commission’s approval as soon as possible so that work on CCR and ELG environmental controls at the Mitchell Plant could proceed in an orderly manner that satisfies the orders of both this Commission and the KPSC and meets the deadlines required by the CCR and ELG rules and applicable permits. Simply put, if the New Mitchell Agreements are not approved in this proceeding, then ELG work cannot proceed as planned to meet milestones and the Mitchell Plant’s ability to run, even in the near term, will be in jeopardy. CAD witness Emily Medine remarked that it would be “catastrophic” to delay approval of the New Mitchell Agreements to the point that ELG milestones could not be met. Tr. at 203. Time is truly of the essence and, therefore, it is imperative that the Companies and KPCo receive consistent regulatory approvals of those agreements. Another round of divergent decisions would cause significant delay and endanger not only the ELG construction process but the ability of the Mitchell Plant to run.

Accordingly, this Commission should grant the necessary approvals for WPCo to enter into the New Mitchell Agreements, both with and without Section 9.6 and related sections of the Revised Ownership Agreement, so that federally mandated environmental upgrades can be made to the Mitchell Plant in accordance with the applicable deadlines, ensuring the continued operation of that plant.

3. The New Mitchell Agreements include numerous provisions intended to address the requirements of the orders of this Commission and the KPSC, and the Companies' request provides the flexibility to ensure consistent decisions from the two commissions.

With their initial filing in this matter, the Companies included a proposed Mitchell Plant Ownership Agreement and the proposed O&M Agreement, which together replace the current operating agreement. *See* Company Exs. CTB-D2 and CTB-D3. The Companies also included summaries of the principal terms of those agreements. *See* Company Exs. 1 and 2. The Companies updated their filing on March 18, 2022 with the supplemental testimony of Company witness Beam, wherein he presented a Revised Ownership Agreement that focused on changes to Section 9.6 of that agreement. As further described below, Section 9.6 provides a process whereby WPCo would either purchase KPCo's interest in Mitchell at the end of 2028 in a mutually agreed transaction or, absent an agreement or the earlier retirement of the plant, obtain one of the two units which it could continue to operate independently.

Other parties have aimed almost all of their misplaced criticism and speculation at Section 9.6 of the Revised Ownership Agreement, which details a transaction that may not occur, if at all, until 2028. In contrast, the bulk of that agreement implements both commissions' orders in the years before 2028 during which WPCo and KPCo will each continue to have respective 50% undivided interests in the Mitchell Plant. The Revised Ownership Agreement contemplates the following key changes from the current operating agreement designed to address the allocation of costs necessary to enable WPCo to comply with both the CCR and ELG rules at the Mitchell Plant and KPCo to comply with only the CCR rule:

- WPCo will replace KPCo as the operator of the Mitchell Plant immediately upon approval and execution of the ownership agreement;

- WPCo will bear the full cost of, and own outright, the ELG compliance upgrades at the Mitchell Plant, while KPCo will share in the cost and ownership of other capital expenditures made at the plant with an in-service date through December 31, 2028, including CCR compliance upgrades;
- A technical expert will determine which capital expenditures are ELG versus CCR;
- If a non-ELG capital item has a depreciable life that extends beyond December 31, 2028, KPCo will pay 50% of the expenditures for such capital item, multiplied by (A) the number of months (not to exceed the depreciable life of such capital item) between the reasonably anticipated in-service date of such capital item and December 31, 2028, divided by (B) the depreciable life of such capital item, and WPCo shall be responsible for the remaining amount of such capital expenditure not allocated to KPCo pursuant to the foregoing;
- Capital expenditures for assets that go into service after December 31, 2028 will be allocated entirely to WPCo;
- Operation and maintenance expenses attributable to ELG upgrades will be allocated exclusively to and paid by WPCo;
- An initial capital budget for the period of effective date through December 31, 2028, together with an initial annual operating budget and initial forecast of operating and capital costs for the same period, will be attached to the Mitchell Plant Ownership Agreement and amendments to such budgets must be approved by the Operating Committee;
- The voting rights of WPCo and KPCo on the Operating Committee remain 50/50 even if one owner has more capital invested in the Mitchell Plant than the other owner; and

- If an early retirement event occurs, the members of the Operating Committee will meet and work in good faith to amend the capital budget to remove any future ELG capital expenditures and any other future capital expenditures no longer required, to the extent practicable and consistent with applicable law.

Company Exhibit CTB-S1, S2. These provisions, *inter alia*, not only address the two commissions' orders regarding ELG costs but further provide clarity and certainty to ensure that WPCo can continue to operate the Mitchell Plant after 2028. They also ensure that only WPCo and its customers will be responsible for costs that are necessary to continue to operate the Mitchell Plant after 2028 and exclusively own the ELG assets necessary for post-2028 operations. The current agreement does not contain any similar provisions and therefore would not be compliant with the commissions' orders.

The proposed O&M Agreement carries out the intentions of the Revised Ownership Agreement that WPCo is to replace KPCo as operator of the Mitchell Plant and, therefore, become responsible for managing the day-to-day operations and maintenance of the plant, including dispatch, environmental, and NERC compliance. It also addresses topics including operator responsibilities and the budget and reporting processes supported by the operator. *See generally* Company Exhibit CTB-D2. As explained by Company witness Kerns, Mitchell Plant operations will not be impacted by the transfer of operator responsibilities to WPCo; all plant employees will become employees of WPCo and will remain on site and continue to safely and reliably operate the Mitchell Plant as they have in the past. Company Exhibit TCK-D at 6-7.

- a. **Section 9.6 of the proposed Mitchell Plant Ownership Agreement has evolved to address the concerns of interested parties.**

In addition to the key changes noted above, the Revised Ownership Agreement provides a process through which WPCo can acquire KPCo's ownership interest in the Mitchell Plant prior

to the end of 2028, which process is set forth in Section 9.6. As originally proposed in the Companies' initial filing, Section 9.6 provided that WPCo shall purchase KPCo's ownership interest in the Mitchell Plant on or before December 31, 2028 (the "Buyout Transaction"), unless an early retirement event occurs, with the purchase price being either an agreed-upon price or Fair Market Value (determined by an appraisal process), adjusted for coal inventory, excess ELG expenditures by WPCo, and decommissioning costs, and approved by the parties' respective commissions in either case. *See* Company Exhibit CTB-D3. The originally proposed Ownership Agreement has been replaced, however, and is no longer being pursued by the Companies in this case to be responsive to the concerns raised by interested entities in both West Virginia and Kentucky.

On March 18, 2022, the Companies filed the supplemental testimony of Company witness Beam, wherein he presented the Revised Ownership Agreement and discussed it at length, including the process by which it was negotiated and created. *See generally* Company Exhibit CTB-S. The revisions to the original agreement center on Section 9.6 and related provisions, including the addition of a dispute resolution process. Company Exhibit CTB-S2. The Revised Ownership Agreement is pending in the parallel Kentucky proceeding. In both states, the Revised Ownership Agreement was submitted in response to objections to the Fair Market Value approach raised in Kentucky, *see* Case No. 2021-00421, and in a related FERC informal conference (including objections from West Virginia stakeholders).

In his supplemental testimony, Company witness Beam explains the genesis of the Revised Ownership Agreement and how it responds to the aforementioned objections. Company Exhibit CTB-S at 2-7. Later, in rebuttal testimony filed on April 4, 2022, Mr. Beam addressed the other parties' concerns and also indicated that the Companies were open to the Commission approving

that Agreement with or without Section 9.6 and related provisions. Company Exhibit CTB-R at 4-16. Contrary to the unfounded beliefs of CAD in this proceeding, WPCo had an equal role in crafting the Revised Ownership Agreement and the interests of West Virginia customers were fully represented in that process. *Id.* at 9.

b. Section 9.6 of the Revised Ownership Agreement addresses earlier concerns and complies with this Commission's environmental compliance orders.

The Revised Ownership Agreement removes from Section 9.6 the Fair Market Value provisions criticized by various stakeholders and replaces them with a "Unit Interest Swap" alternative. Company Exhibit CTB-S2 at 16-20. Under the Unit Interest Swap alternative, as a first step, WPCo and KPCo may enter into a Buyout Transaction on mutually agreeable terms and conditions whereby WPCo will acquire KPCo's ownership interest in the Mitchell Plant on or before December 31, 2028. The purchase price would be an amount mutually agreed to by WPCo and KPCo and is required to be approved by this Commission and KPSC. *Id.* If WPCo and KPCo cannot reach mutual agreement on the purchase price or if any mutual agreement is not approved by either commission, then as a second step, WPCo and KPCo would seek to divide their interests in the Mitchell Plant by unit. *Id.* Upon completion of the division, WPCo may operate its unit independently.¹

Under the Unit Interest Swap alternative, WPCo and KPCo will use the Operating Committee to determine a fair division of the undivided interests and then seek the appropriate regulatory approvals, including the approval of both this Commission and the KPSC. *Id.* at 16-20,

¹ WPCo and KPCo would need to finalize the unit interest swap transaction and receive regulatory approvals by May 2025, so that their determination is synchronized with the PJM capacity planning cycle, under which generation capacity commitments are generally made three years in advance. However, the unit interest swap transaction would not be consummated until December 31, 2028, unless otherwise agreed, and plant investments made after a determination to divide the units would follow the provisions of the Revised Ownership Agreement.

39-40. For instance, the Operating Committee will determine the need for real estate and property professionals and/or engineering consultants to establish the division of property between the two owners. WPCo and KPCo would then implement processes and procedures allowing decisions and costs to be properly accounted for and allocated between them, including operation, maintenance, planning, and investment at each of the Mitchell units. *Id.* at 39-40. As explained by Company witness Beam, this approach to plant ownership has been used for decades at other plants such as the Amos and Sporn plants and is certainly not novel. Company Exhibit CTB-R at 5-6.

Compared to the original, the Revised Ownership Agreement, with the Unit Interest Swap Alternative, provides flexibility and additional options to WPCo and KPCo, which options still include a mutual agreement to retire the Mitchell Plant or a mutual agreement for WPCo to purchase KPCo's undivided interest. If the Unit Interest Swap is consummated, and if KPCo later decided to operate or sell its unit, a new agreement, subject to regulatory approval, would be required to utilize WPCo's ELG assets. Company Exhibit CTB-S at 4-7; CTB-R at 3-4, 10. In other words, KPCo (or a successor to its interest) cannot "free ride" off WPCo's investments in ELG compliance upgrades. *Tr.* at 173-74. In all events, any proposal related to a mutual agreement purchase or a Unit Interest Swap would be brought before this Commission for its approval in accordance with its jurisdiction, providing this Commission full opportunity to review and approve (or not) any transaction and ensure that the customers and citizens of West Virginia are protected, including protecting customers from any transaction in which WPCo's investment in ELG is not appropriately taken into account.

Again, it is crucial that consistent decisions are reached as to the New Mitchell Agreements. The Revised Ownership Agreement affords WPCo and KPCo the commercial and

regulatory flexibility needed to manage future changes in facts and circumstances and, overall, the best chance at consistent commission decisions. Moreover, Section 9.6 of that agreement expressly acknowledges that WPCo and KPCo must seek and obtain all necessary regulatory approvals related to the Buyout Transaction or Unit Interest Swap. Any deviation from prior commission orders that might occur as a result of pursuing one of the available options would require additional approval(s) from the commissions before becoming final. In other words, no provision of the Revised Ownership Agreement (or the O&M Agreement) restricts or limits either commission's authority in reviewing any such future transaction, which ensures that any outcome will be reasonable and to the benefit of customers in both jurisdictions.

c. Alternatively, this Commission can approve the Revised Ownership Agreement without Section 9.6 if it wishes.

In rebuttal testimony filed April 4, 2022, Company witness Beam addressed the concerns of other parties regarding the Revised Ownership Agreement, particularly Section 9.6. *See generally* Company Exhibit CTB-R. Additionally, Mr. Beam offered an additional alternative for the parties' and the Commission's consideration: that Section 9.6 be removed in its entirety from the Revised Ownership Agreement (and all related provisions and definitions). *Id.* at 14-17. This would place the focus of the two proposed agreements squarely on the operation of and investment in the Mitchell Plant between now and December 31, 2028, and leave for a future proceeding the particulars of WPCo's and KPCo's ownership interests in the plant. Mr. Beam ultimately requested that this Commission find acceptable both options presented: (i) approving the Revised Ownership Agreement with Section 9.6 (and the Unit Interest Swap provisions) intact; and (ii) removing Section 9.6 and associated provisions from that agreement. *Id.* This request was made in order to provide even more flexibility, address all parties' concerns, and reduce the potential for

inconsistent decisions between this Commission and the KPSC.² WPCo would defer to this Commission's preference if it believes it is more reasonable to omit Section 9.6 and related provisions (such as the arbitration provisions in Section 12.4 and related definitions) from the Revised Ownership Agreement, or if it finds it reasonable to accept both options, as recommended by WPCo.

In sum, while WPCo has presented a framework in Section 9.6 which permits the joint owners to explore over time a path for unwinding their joint ownership in the Mitchell Plant, WPCo also recognizes that this Commission may prefer to wait until there are more facts in the future, when the usefulness of the plant beyond 2028 is better known, before defining the commercial structure for that future transaction. Either option is fair and reasonable, does not give either party an undue advantage over the other, and would not adversely affect the public in West Virginia. The dual option approval recommended by WPCo would provide the most flexibility and best chance to achieve consistent decisions between the two commissions, which as noted by both WPCo and intervenors is a crucial objective to achieve.

4. The Staff's and other parties' concerns are addressed by the New Mitchell Agreements or are simply misplaced.

The concerns of the Staff and other parties in this proceeding, set forth in their direct testimony, are hardly grounds to deny the Companies' request for approval of the New Mitchell Agreements. CAG witness, James Wilson, focused his testimony on the necessity of the future buyout or unit interest swap transaction, which he admits is not presently before this Commission. *See* CAG Exhibit JFW-D; Tr. at 186-87. He also agreed at hearing that future regulatory approvals will be governed by the respective state laws in effect at the time, Tr. at 186-87, making it

² KPCo requested the same of the KPSC. *See* Case No. 2021-00421.

unnecessary to add CPCN language to the proposed ownership agreement. In general, adding or changing the language of the New Mitchell Agreements, other than as recommended by WPCo and KPCo, would only serve to decrease the likelihood of consistent commission decisions.

Similarly, Staff witness James Weimer focused his testimony prematurely on matters outside the scope of this proceeding, such as the actual ELG cost allocation/recovery and “repowering” of the Mitchell Plant. *See* Staff Exhibit JCW-D; Tr. at 210-11. And his ultimate recommendation that the New Mitchell Agreements be denied was as conclusory as that, a single sentence without explanation. *See* Staff Exhibit JCW-SD. Staff witness Geoffrey Cooke’s limited concerns are already addressed by the language within the Revised Ownership Agreement and the Exhibit C thereto. *See* Staff Exhibit GMC-D at 6; Tr. at 217-18; Company Exhibit CTB-S1.

CAD witness Emily Medine attacked the Revised Ownership Agreement more forcefully, but not any more effectively. Her concerns were addressed *seriatim* in Mr. Beam’s pre-filed rebuttal and in the testimony of Company witnesses at hearing. *See* Company Exhibit CTB-R at 4-9; Tr. at 47, 70, 94, 97-127. Notably, Ms. Medine is simply mistaken from a factual standpoint that a Unit Interest Swap cannot be carried out, and her unyielding approach to setting the value of KPCo’s interest at \$1 is wholly unrealistic and unworkable. Among her several oversights are some very basic facts, that WPCo and KPCo have undivided, equal interests in the Mitchell Plant until the year 2028, and that approval of the New Mitchell Agreements must occur in both West Virginia and Kentucky. Neither WPCo, nor Ms. Medine, can force KPCo to value its interest in the Mitchell Plant at only \$1 at this time. The value of KPCo’s interest will be thoroughly considered and negotiated in the future (subject to regulatory approval) under the Revised Ownership Agreement. Trying to set that value now, unilaterally here in West Virginia, would be a surefire way to end up with divergent commission orders and, as Ms. Medine herself admits,

would be “catastrophic” for the deadline-driven work to complete ELG upgrades. Also, there is no valid reason to believe that KPCo will purposefully impair its share of the Mitchell Plant if its parent ownership changes, as Ms. Medine speculates. In that regard, she ignores KPCo’s obligations under the KPSC’s orders to use the Mitchell Plant to serve Kentucky customers through the year 2028, as well as WPCo’s role as operator of that plant and equal representation on the Operating Committee under the New Mitchell Agreements. Overall, Ms. Medine’s opinions in her testimony appear to be guided by her mistaken belief that KPCo and Liberty Utilities Co., to the exclusion of WPCo, crafted the Revised Ownership Agreement. That belief finds no support in the record of this matter. Her unfounded, speculative, and internally inconsistent opinions should be rejected by this Commission.

5. The evidentiary record establishes that the New Mitchell Agreements should be approved and the Companies’ request granted.

The terms and conditions of the proposed O&M Agreement and Revised Ownership Agreement are fair and reasonable to both WPCo and KPCo. This is a bedrock need given their equal co-ownership of the Mitchell Plant and the fact that regulatory approvals are needed from both this Commission and the KPSC. The New Mitchell Agreements benefit the Companies and their customers by providing transparency, clarity, and certainty regarding the Mitchell Plant’s continued operations, environmental compliance, cost allocation, and ownership. The New Mitchell Agreements implement the terms of this Commission’s recent orders regarding cost allocation at the Mitchell Plant and provide a process through which WPCo can operate the plant in accordance with those orders and then continue its ownership past 2028. WPCo has the experience and resources to successfully take over duties as operator of the Mitchell Plant and, accordingly, the Companies’ customers in West Virginia will continue to receive adequate and reliable power supplies.

WPCo negotiated the proposed O&M Agreement and the Revised Ownership Agreement as it evolved over time and reached thoughtful, effective agreements that comply with both commissions' orders and create a flexible framework that can be approved now and can adapt to future and changing needs. Moreover, the Companies have offered this Commission a dual-option approach of approving the ownership agreement with or without Section 9.6, so as to afford the best chance of consistency with the decision of the KPSC. In sum, the New Mitchell Agreements offer benefits and necessary flexibility to both WPCo and KPCo (or its successor); the terms and conditions in both agreements are fair and reasonable, do not give an undue advantage to either party, and do not adversely affect the public in West Virginia.

CONCLUSION

The Companies respectfully ask the Commission for its consent and approval for WPCo to enter into the proposed Mitchell Plant Ownership Agreement, as revised, with and without Section 9.6 (and related provisions), and the proposed Mitchell Plant Operations and Maintenance Agreement pursuant to the Commission's orders in Case No. 20-1040-E-CN and, to the extent required, W. Va. Code § 24-2-12.³ The Companies have demonstrated the proposed O&M Agreement and Revised Ownership Agreement are necessary, comply with this Commission's orders, and overall are reasonable, fair, and in the public interest.

³ Subsequent to the adjudication of this matter, any necessary filing(s) will be made with the FERC for approval of the New Mitchell Agreements.

Respectfully submitted,

**APPALACHIAN POWER COMPANY and
WHEELING POWER COMPANY**

By Counsel,



William C. Porth (WV Bar #2943) wcp@ramlaw.com
Anne C. Blankenship (WV Bar #9044) acb@ramlaw.com
Robinson & McElwee PLLC
P.O. Box 1791
Charleston, WV 25326

James R. Bacha
AMERICAN ELECTRIC POWER
SERVICE CORPORATION
1 Riverside Plaza
Columbus, Ohio 43215
jrbacha@aep.com

Keith D. Fisher (WV State Bar #11346)
AMERICAN ELECTRIC POWER
SERVICE CORPORATION
500 Lee Street East, Suite 800
Charleston, West Virginia 25301
(304) 348-4154
kdfisher@aep.com

*Counsel for Appalachian Power Company
and Wheeling Power Company*

Dated: April 19, 2022

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

CASE NO. 21-0810-E-PC

**APPALACHIAN POWER COMPANY and
WHEELING POWER COMPANY,**
public utilities.

*Petition for Commission Consent and Approval
to Enter into Ownership and Operating Agreements
for the Mitchell Plant*

CERTIFICATE OF SERVICE

I, Keith D. Fisher, counsel for Appalachian Power Company and Wheeling Power Company, do hereby certify that a true and correct copy of the foregoing "Initial Brief" was served upon the following, via electronic mail, on this 19th day of April, 2022:

Lucas R. Head, Esq. Public Service Commission of West Virginia 201 Brooks Street Charleston, WV 25301 <i>Counsel for Staff of WV Public Service Commission</i>	Robert F. Williams, Esq. Heather B. Osborn, Esq. John Auville, Esq. Consumer Advocate Division 300 Capitol Street, Suite 810 Charleston, WV 25301 <i>Counsel for Consumer Advocate Division</i>
Susan J. Riggs, Esq. Jason C. Pizatella, Esq. Spilman Thomas & Battle, PLLC 300 Kanawha Blvd E Charleston, WV 25301 <i>Counsel for WVEUG</i>	Derrick P. Williamson, Esq. Barry A. Naum, Esq. Spilman Thomas & Battle, PLLC 1100 Bent Creek Blvd, Suite 101 Mechanicsburg, PA 17050 <i>Counsel for WVEUG</i>
Emmett Pepper, Esq. Pepper & Nason 8 Hale Street Charleston, WV 25301 <i>Counsel for CAG, SUN, and EEVW</i>	H. Brann Altmeyer, Esq. Jacob C. Altmeyer, Esq. Phillips, Gardill, Kaiser & Altmeyer, PLLC 61 Fourteenth Street Wheeling, WV 26003 <i>Counsel for WV Coal Association, Inc.</i>
Shannon Fisk, Esq. Earthjustice 48 Wall St., 15 th Floor New York, NY 10005 <i>Counsel for CAG, SUN, and EEVW</i>	Raghava Murthy, Esq. Earthjustice 48 Wall St., 15 th Floor New York, NY 10005 <i>Counsel for CAG, SUN, and EEVW</i>



Keith D. Fisher (WV State Bar #11346)



03:28 PM APR 22 2022 EXEC SEC DIV

JONATHON C. STANLEY
ATTORNEY AT LAW

400 FIFTH THIRD CENTER
700 VIRGINIA STREET, EAST (25301)

P.O. BOX 1791
CHARLESTON, WV 25326

DIRECT DIAL: (304) 347-8341
E-MAIL: jcs@ramlaw.com

April 22, 2022

VIA HAND DELIVERY

Karen Buckley, Acting Executive Secretary
Public Service Commission of West Virginia
201 Brooks St.
P.O. Box 812
Charleston, West Virginia 25323

Re: *Appalachian Power Co. and Wheeling Power Co. –
Petition for consent and approval to enter into Ownership
and Operating Agreements for the Mitchell Plant
P.S.C. Case No. 21-0810-E-PC*

Dear Ms. Buckley:

Please find enclosed for filing in the above-styled case an *Addendum to Motion for Protective Treatment* in the above-referenced proceeding. Included as an Exhibit to the *Addendum* is an original copy of the affidavit of Randall Short. On this date, copies of the same are being electronically provided to counsel of record in accordance with the enclosed *Certificate of Service*.

Thank you for your attention to this matter.

Very truly yours,

Jonathon C. Stanley (WV Bar #13470)
Counsel for Appalachian Power Company

Enclosures
cc: Service List

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

CASE NO. 21-0810-E-PC

**APPALACHIAN POWER COMPANY and
WHEELING POWER COMPANY,**
public utilities.

Petition for Commission Consent and Approval to
Enter into Ownership and Operating Agreements
for the Mitchell Plant

**ADDENDUM TO
MOTION FOR PROTECTIVE TREATMENT**

COME NOW Appalachian Power Company and Wheeling Power Company (together, the “Companies”) and respectfully file this Addendum to Motion for Protective Treatment (the “Addendum”). The original Motion for Protective Treatment, supported by the Affidavit of John Scalzo (the “Motion”), was filed with the Public Service Commission (the “Commission”) on March 23, 2022, and sought protective treatment of confidential documents produced to the Commission in accordance with its Order dated March 11, 2022. By this Addendum, the Companies respectfully request that the Commission likewise afford confidential and protective treatment to the information redacted from the publicly-filed versions of the following post-hearing exhibits, which were filed at the Commission’s instruction on April 15, 2022: (i) PSC PHE-1 Attachment 1, (ii) PSC PHE-3 Attachment 1, and (iii) CAD PHE-3 Attachment 1. The information redacted from each of these exhibits (the “Confidential Information”) constitutes protectable trade secret information pursuant to the West Virginia Freedom of Information Act, W. Va. Code § 29-B-1-1, *et sequens*, and should be afforded a protective order pursuant to Rule 26(c) of the West Virginia Rules of Civil Procedure, and related case law.

PSC PHE-1 Attachment 1 contains competitive market information relating to the Day-Ahead bids from the Mitchell plant into the PJM market. Disclosure of this information would put the Companies in a disadvantageous market position. Furthermore, this information is afforded confidential treatment by PJM in order to prevent identification of individual generators.

PSC PHE-3 Attachment 1 contains information relating to the negotiated sales price of the Sporn Plant. As opposed to disclosure of its net value elsewhere disclosed in the post-hearing exhibits, this negotiated sales price is highly confidential as it involves disclosure of an accepted bid and negotiated sales terms, each of which, if exposed, would put the Companies in a disadvantageous market position vis-à-vis future transactions with potential bidders.

CAD PHE-3 Attachment 1 contains information related to inventory and capacity factors at the Mitchell plant. This information, if made publicly available, would permit third parties to ascertain trends in unit production capabilities that would place the Companies in a disadvantageous market position in negotiating future generating fuel transactions.

In support of this Addendum to their Motion, the Companies incorporate by reference the entirety of the Motion with its supporting Affidavit, as if fully restated herein. Based on the arguments and facts set forth in the incorporated Motion, the Confidential Information set forth in the preceding paragraphs constitutes valuable trade secret information. In further support of this Addendum, the Companies attach as Exhibit 1 hereto the affidavit of Randall Short.

WHEREFORE, the Companies respectfully request that the Commission issue an order that protects the redacted information of the Companies' Response from public disclosure and duplication, and afford all other remedies and protections requested in the Motion with which this Addendum coincides.

Respectfully submitted this 22nd day of April, 2022.

APPALACHIAN POWER COMPANY
WHEELING POWER COMPANY

By Counsel



William C. Porth (*WV State Bar #2943*)
Anne C. Blankenship (*WV State Bar #9044*)
Jonathon C. Stanley (*WV State Bar #13470*)
ROBINSON & McELWEE PLLC
P. O. Box 1791
Charleston, West Virginia 25326
wcp@ramlaw.com
acb@ramlaw.com
jcs@ramlaw.com

Keith D. Fisher (*WV State Bar #11346*)
AMERICAN ELECTRIC POWER
SERVICE CORPORATION
500 Lee Street East, Suite 800
Charleston, West Virginia 25301
(304) 348-4154
kdfisher@aep.com

Counsel for Appalachian Power Company
and Wheeling Power Company

Exhibit 1

AFFIDAVIT OF RANDALL R. SHORT

Randall R. Short, upon his oath, deposes and states:

1. I am Director of Regulatory Services for West Virginia. I am familiar with the Motion for Protective Treatment previously filed by Appalachian Power Company and Wheeling Power Company in Case No. 21-0810-E-PC. Hereinafter, I shall refer to Appalachian Power Company and Wheeling Power Company collectively as the “Companies.”

2. I am familiar with the Companies’ recent submission of three post-hearing exhibits containing confidential information: PSC PHE-1 Attachment 1, PSC PHE-3 Attachment 1, and CAD PHE-3 Attachment 1. Respectively, these documents contain information relating to Day-Ahead bids from the Mitchell plant into the PJM market, the sales price of the Sporn plant, and inventory and capacity factor information relating to the Mitchell plant (the “Confidential Information”).

3. Each of these information categories are treated by the Companies and their American Electric Power Company (“AEP”) affiliates as highly confidential, because, should they be publicly disclosed, the Companies would be placed in an unfair competitive position, whether in the PJM market, in the gathering of bids and negotiating contracts for the transfer of real property (including generating facilities), or in negotiating contracts with suppliers of fuel for electric generation.

4. I have personal knowledge of the confidential, proprietary, competitively sensitive, and trade secret nature of the Confidential Information. I have personal knowledge of efforts taken by the Companies and their AEP affiliates (these entities collectively referred to hereinafter as the “AEP Companies”) to maintain the secrecy of that Confidential Information

Exhibit 1

through direct contact with these efforts and through my review of these efforts with other employees who work directly with these procedures.

4. The AEP Companies will have occasion to negotiate future transactions, whether these relate to operation, acquisition, or sale of AEP assets. If the Confidential Information became publicly available, parties with which the AEP Companies may negotiate, or competitors thereof, could use this knowledge to the detriment of the AEP Companies and their customers. Knowledge of these terms by other potential transactional parties would establish certain benchmarks in future negotiations, or disclose valuable insights into the negotiation process used by the AEP Companies, potentially increasing costs incurred by them and their ratepayers.

6. Apart from data reported to the Commission pursuant to W. Va. Code § 24-2-14 and accessed pursuant to the terms of that statute, the information available through review of the Confidential Information is not generally known or readily ascertainable by other parties through other means, including legitimate independent research.

7. The Confidential Information has been the subject of efforts that are reasonable under the circumstances to maintain its secrecy. The AEP Companies limit public access to buildings housing the Confidential Information by use of security guards. Persons not employed by the AEP Companies who are allowed past security guards at buildings where the Confidential Information is kept are subject to additional security measures such as supervision and escorts. The AEP Companies' files containing the Confidential Information are maintained separately from the AEP Companies' general records, and access to those files is restricted. Within the AEP Companies, access to this Confidential Information has been and will continue to be disclosed only to those employees, officers, and representatives of AEP Companies who have a need to know about such information due to their job and management responsibilities. Outside

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

CASE NO. 21-0810-E-PC

**APPALACHIAN POWER COMPANY and
WHEELING POWER COMPANY,**
public utilities.

*Petition for Commission Consent and Approval
to Enter into Ownership and Operating Agreements
for the Mitchell Plant*

CERTIFICATE OF SERVICE

I, Jonathon C. Stanley, counsel for Appalachian Power Company and Wheeling Power Company, hereby certify that true copies of the foregoing filing were provided electronically on this 22nd day of April, 2022, addressed to the following:

Lucas R. Head, Esquire
Public Service Commission of West Virginia
201 Brooks Street
Charleston, West Virginia 25301
Counsel for Public Service Commission

Robert F. Williams, Esquire
Heather B. Osborn, Esquire
John Auville, Esquire
Consumer Advocate Division
300 Capitol Street, Suite 810
Charleston, West Virginia 25301
Counsel for Consumer Advocate Division

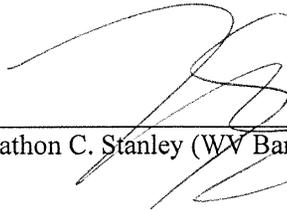
Susan J. Riggs, Esquire
Jason C. Pizatella, Esquire
Spilman Thomas & Battle, PLLC
300 Kanawha Blvd., East
Charleston, WV 25301
Counsel for WVEUG

Derrick P. Williamson, Esquire
Barry A. Naum, Esquire
Spilman Thomas & Battle, PLLC
1100 Bent Creek Blvd., Suite 101
Mechanicsburg, PA 17050
Counsel for WVEUG

H. Brann Altmeyer, Esquire
Jacob C. Altmeyer, Esquire
Phillips, Gardill, Kaiser & Altmeyer, PLLC
61 Fourteenth Street
Wheeling, WV 26003
Counsel for West Virginia Coal Association, Inc.

Emmett Pepper, Esquire
Pepper & Nason
8 Hale Street
Charleston, WV 25301
Counsel for CAG/SUN/EEWV

Raghava Murthy, Esquire
Shannon W. Fisk, Esquire
Earthjustice
48 Wall St., 15th Floor
New York, NY 10005
Counsel for CAG/SUN/EEWV



Jonathon C. Stanley (WV Bar #13470)

VERIFICATION

The undersigned, Brett Mattison, being duly sworn, deposes and says he is President and COO of Kentucky Power Company, that he has personal knowledge of the matters set forth in the foregoing responses and the information contained therein is true and correct to the best of his information, knowledge, and belief after reasonable inquiry.

Brett Mattison

Brett Mattison

Commonwealth of Kentucky)

County of Boyd)

Case No. 2021-00004

Subscribed and sworn before me, a Notary Public, by Brett Mattison this 21st day of April, 2022.

Scott E. Bishop

Notary Public

My Commission Expires June 24, 2025

