

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

In the Matter of:

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

**SIERRA CLUB’S RESPONSE TO KENTUCKY POWER COMPANY’S APPLICATION
FOR DECLARATORY ORDER, REQUEST FOR EXPEDITED DISPOSITION, AND
MOTION FOR DEVIATION FROM SCHEDULING REQUIREMENTS REGARDING
OCTOBER 5, 2021, HEARING**

Sierra Club hereby submits this written response to Kentucky Power Company’s (“KPC” or the “Company”) September 29, 2021, filing styled as an application for a declaratory order, pursuant to 807 KAR 5:001, Section 19, accompanied by a motion pursuant to 807 KAR 5:001, Section 22, for a deviation from normal procedural and scheduling requirements under Section 19, as needed to comply with KPC’s further request that the Commission rule on its application for a declaratory order no later than October 8, 2021 (the “Application”). Sierra Club reserves the right to amend or supplement this written response orally tomorrow at the evidentiary hearing already scheduled in this case, if the Commission decides to address this matter at the hearing, and in the event KPC clarifies or modifies its request.

The Application seeks a declaration by this Commission that Wheeling Power Company (“Wheeling”), KPC’s West-Virginia-based sibling subsidiary of American Electric Power Company (“AEP”), is not required to obtain a certificate of public convenience and necessity (“CPCN”) from this Commission to construct capital projects necessary to comply with the federal Effluent Limitations Guidelines (“ELG”) rule so that Wheeling may keep the Mitchell Generating Station (“Mitchell”) in West Virginia, co-owned by KPC and Wheeling, operating as

a coal-fired power plant beyond the year 2028. As the Application acknowledges, this Commission has already rejected KPC's application for a CPCN for ELG projects at Mitchell, denying the Company's request to recover, from Kentucky ratepayers, 50 percent of the total cost of those projects—a denial that KPC has not challenged. In light of that ruling, Wheeling now wants to undertake the ELG capital projects itself and hopes to obtain cost recovery of the total cost of those projects from West Virginia ratepayers exclusively. The West Virginia Public Service Commission is currently considering whether to grant Wheeling's new request for cost recovery of the entirety of the ELG projects, having earlier approved recovery by Wheeling of only a 50 percent share of the costs.

Subject to potential future clarification or modification of the nature and scope of requests in KPC's Application at tomorrow's hearing, Sierra Club states that it does not oppose KPC's underlying contention that Wheeling is not required to obtain a CPCN from this Commission. Per the Application, Wheeling will not request or receive cost recovery from Kentucky ratepayers. Application at ¶ 9. However, with respect to the statement that—

Based on counsel's understanding, Staff of the West Virginia Commission indicated during that hearing that clarification from this Commission, regarding whether a certificate of public convenience and necessity is required for Wheeling to proceed with the ELG project at Mitchell, should be a condition of the West Virginia Commission's granting of the relief requested in that petition. (Application at ¶ 19, emphasis added)

Sierra Club observes that it is not entirely clear, from that paraphrasing, which utility and commission the West Virginia Commission Staff member was referring to there, or what the specific nature of the CPCN would be, in referencing the possible need for "a" CPCN there. Relatedly, Sierra Club underscores that *KPC* may be required to obtain a CPCN from this Commission, as the Commission already recognized in commencing this docket. For instance, suppose that KPC, Wheeling, and AEP are working on a broader plan in which Wheeling-funded

ELG investment is only one component or stage among others to be proposed, each of which makes sense, in their thinking, only if the whole bundle is approved. Suppose further that the plan features a new or revised contractual arrangement between KPC and Wheeling—say, with Wheeling owning Mitchell, and KPC purchasing from Wheeling power produced at the plant. Certainly such an arrangement would need to be proposed by KPC and would be subject to approval by this Commission, which would decide whether such an arrangement (versus alternatives) was prudent. There may be other plausible situations in which KPC’s customers’ rates are likewise implicated, and *KPC* is required to seek “a” CPCN. *See id.* Indeed, that important possibility is one of the stated reasons for this docket. KPC does not deny any of that, to be sure. However, Sierra Club would urge the Commission to make the foregoing explicitly clear in the course of ruling on the Application, however the Commission may otherwise rule.

That said, and likewise subject to potential future clarification or modification of the nature and scope of requests in KPC’s Application, Sierra Club states that it opposes KPC’s request for declaratory relief. This opposition is not due to a belief that Wheeling is required to obtain a CPCN from this Commission, as discussed above. Rather, Sierra Club is not convinced that the question on which KPC seeks a declaration is in fact a ripe and urgent question warranting (relatively extraordinary) declaratory relief, especially under a rushed timeline with circumscribed procedures. For one, Sierra Club does not understand this Commission ever to have stated or even suggested that Wheeling (as opposed to KPC) may be required itself to obtain a CPCN in Kentucky. Further, it is not apparent that the West Virginia Public Service Commission necessarily has questions about this, or that its forthcoming decision hinges on this Commission issuing clarification—given not only the ambiguity about Staff’s statement noted above, or this Commission’s non-overtures to the effect that Wheeling must seek a CPCN in

Kentucky, but also the fact, emphasized in the Application itself, that Wheeling has never before been subjected to this Commission’s jurisdiction. Accordingly, Sierra Club believes that the prayed-for declaratory relief is not warranted, and that it should suffice for Wheeling to speak for itself—making its own arguments, about jurisdiction and otherwise, to its own regulator.

Lastly for now, Sierra Club would note that Mitchell is not under any “jeopardy” of not being able to operate past June 2023, at least none that is not wholly within AEP’s power to avoid. *See* Application at 1 & ¶ 59. AEP remains free to decide that, if for any reason Wheeling has not obtained approval from the West Virginia Public Service Commission by the October 13, 2021, date that the Application identifies as critical—putting aside, for the moment, questions regarding whether that really is kind of a make-or-break fork in the road, *see id.* at ¶ 59 & n.82—AEP is free to decide, at that time, not to invest in the ELG projects and close Mitchell at the end of 2028, and to advise EPA accordingly. That is, insofar as AEP would otherwise prefer to keep Mitchell operating past 2028 and foist all the ELG capital costs on West Virginia ratepayers, but has not been able to obtain certain regulatory approvals in time for it to feel comfortable with forging ahead, Sierra Club respectfully submits that it would be AEP’s prerogative, in such case, to decide not to proceed down what it may feel is an unacceptably risky path.

Sierra Club reserves the right orally to amend or supplement this response tomorrow, in the event KPC’s requests are clarified or modified at the evidentiary hearing.

Dated: October 4, 2021

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that the foregoing copy of SIERRA CLUB'S RESPONSE TO KENTUCKY POWER COMPANY'S APPLICATION FOR DECLARATORY ORDER, REQUEST FOR EXPEDITED DISPOSITION, AND MOTION FOR DEVIATION FROM SCHEDULING REQUIREMENTS REGARDING OCTOBER 5, 2021, HEARING in this case is being electronically transmitted to the Commission on October 4, 2021; and that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding.



JOE F. CHILDERS