

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

In the Matter of:

Electronic Investigation Of The Service, Rates And     )  
Facilities Of Kentucky Power Company                     )     Case No. 2021-00370

**Kentucky Power Company’s Supplement to Notice of  
Objection to Hearing Topics**

On November 24, 2021, Kentucky Power Company gave notice pursuant to the Commission’s Order of November 22, 2021 that D. Brett Mattison will be available at the November 30, 2021 hearing to address to the extent possible the topics identified in the Commission’s November 22, 2021 Order and the Attorney General’s November 23, 2021 Notice Regarding Hearing Topics. The Company further objected to the scope of the topics identified for the hearing, which are substantially broader than the topic identified in the Commission’s October 28, 2021 Order, and reserved the right to supplement its objection after all lists of hearing topics had been filed by all parties.

Now that the deadline established by the Commission for parties to file hearing topics has passed and all such lists have been submitted, including the list of eleven topics submitted by Kentucky Industrial Utility Customers, Inc. (“KIUC”), the Company supplements its objection. The Company further provides written answers to the topics identified for the November 30, 2021 hearing by the Commission and the Attorney General in order to aid the Commission in its inquiry and notwithstanding the Company’s objection to the lack of reasonable notice provided with respect to those questions.

Finally, in the Commission's September 15, 2021 Order opening this proceeding, the Commission asked Kentucky Power to use this docket to propose recommendations related to the Mitchell Plant and other matters, including investments in the AEP Kentucky Transmission Company ("Kentucky Transco"), other transmission investment by Kentucky Power's utility affiliates, and the announced Kentucky Power sale process. However, as the issues raised by the Commission and intervenors themselves reveal, events have overtaken the investigation initiated by this docket. Since then, the Company has made recommendations related to the Mitchell Plant by filing new agreements on November 19, 2021 in Case No. 2021-00421 to replace the current Mitchell Operating Agreement. In addition, the sale of Kentucky Power and Kentucky Transco to Liberty Utilities Co. ("Liberty") has been announced and Liberty and Kentucky Power will soon file for approval of that transaction with the Commission. That case, when it is filed, will be the best vehicle to answer questions about the sale and all of the other issues raised in the Commission's September 15, 2021 Order about which the Commission and intervenors have understandable curiosity. Those questions cannot be fully addressed without recognizing the impact of the sale of the Company to a new owner, which will be addressed in the new, joint proceeding. For these reasons, the Company respectfully requests that the Commission decide those matters and review the issues that bear upon them in those separate, docketed proceedings.

**I. Background**

The Commission's October 28, 2021 Order setting the November 30, 2021 hearing indicated that the hearing would concern issues related to the need for Commission approval of changes to the Current Mitchell Operating Agreement. The Company on November 19, 2021 addressed the need for this question to be considered on November 30, 2021 when it filed the existing and proposed Mitchell agreements and supporting testimony in Case No. 2021-00421 for

Commission approval. It therefore moved to cancel the November 30, 2021 hearing in this case in light of its filings in Case No. 2021-00421. The issues related to the Mitchell operating agreement changes should proceed in an orderly fashion within the scope of that case and not a general open investigation.

However, on November 22, 2021, the Commission entered an Order identifying seven topics for the November 30, 2021 hearing.<sup>1</sup> The identified topics related principally to the recently announced acquisition of Kentucky Power by Liberty. Also identified were “all other related matters.” The same Order directed the other parties to file no later than November 24, 2021 their topics for the November 30, 2021 hearing, and required the Company to file its witness list by the same deadline. The Attorney General on November 23, 2021 filed five topics relating principally to the Mitchell Agreements filed in Case No. 2021-00421. Kentucky Industrial Utility Customers, Inc. filed its proposed 11 additional hearing topics at approximately 11:00 a.m. November 24, 2021.

## **II. Supplemental Argument**

The Company objects to the Commission’s November 22, 2021 Order expanding the scope of the November 30, 2021 hearing, broadening it to eight other topics including “[a]ll other related matters.” The Commission’s October 28, 2021 order providing the required notice for the November 30, 2021 hearing centered on the need for Commission approval of changes to the current Mitchell Operating Agreement. The breadth of the questions now posed to the Company for response, a mere two business days before the hearing in the case of intervenors, illustrates the difficulty and unfairness in using the instant investigation proceeding as a means to obtaining the information concerning these matters properly considered in other dockets.

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<sup>1</sup> The Commission’s November 22, 2021 Order did not address the Company’s November 19, 2021 motion to cancel the November 30, 2021 hearing in this case in light of its filings in Case No. 2021-00421.

Although Kentucky Power understands the Commission's and the parties' interest in both the Mitchell Operating Agreement update and the impending request for ownership transfer, this general and open-ended investigatory docket is not an appropriate proceeding in which to address those issues. Litigating in this proceeding the issues that have or will be raised in those other cases would circumscribe due process in the other dockets, risks prejudging issues that the Commission needs to consider in the context of the future case filed under KRS 278.020(6) and KRS 278.020(7), and otherwise creates confusion and the potential for appealable error.

In the case of the Mitchell agreements, the Company filed the two new agreements separately, in their own docket in Case No. 2021-00421, which would be the appropriate place for interested parties to intervene, request additional information, and develop a record related to that filing in accordance with the due process standards of this Commission.

The bulk of topics now identified for the November 30 hearing relate not merely to Mitchell itself but rather to the pending transaction to transfer the ownership of Kentucky Power and Kentucky Transco to Liberty and beyond. Again, Liberty and Kentucky Power will in the near future jointly be seeking approval from the Commission for that transaction. That case is currently under development by both companies, and Liberty, as the acquirer, has the leading role for charting a future course for Kentucky Power and sharing its vision and values for the Company's future with the Commission. Accordingly, any information that could be provided by the Company in this proceeding without the benefit of Liberty's joint input and participation will be premature, incomplete, and fundamentally unfair.

The Company further objects to the 11 additional topics posed by the KIUC in its November 24, 2021 Notice Regarding Hearing Topics. The topics listed by KIUC stray far afield from even the most expansive interpretation of the October 28, 2021 Order-identified topics, as

well as those listed in the Commission’s November 22, 2021 Order. KIUC’s topics include Kentucky Power’s and Liberty’s transmission cost plans, the use by Liberty of savings related to the Rockport Unit Power Agreement, Liberty’s participation in PJM, the Company’s unprotected excess ADIT balance, potential future rate increases related to Liberty press releases, expense recovery, and capital expenditure costs by Liberty, future no-load fuel costs at Mitchell, specific sections of the proposed New Mitchell Agreements, issues related to KRS 278.2207, and the potential preemptive effect of a FERC filing on the Commission’s jurisdiction. KIUC’s proposed topics almost entirely exceed the scope of the November 22, 2021 Order, which indicated that the November 30, 2021 hearing would address only the seven identified topics and “all other *related* matters” to the questions the Commission posed. KIUC’s identified topics for the most part range far from the topics related to the Commission’s Order.

The topics that KIUC is seeking to introduce into the hearing on November 30, 2021 underscores the fundamental unfairness of conducting a broad and uncircumscribed investigation in this matter when other matters that have been or soon will be filed related to the same issues. The reach of the Commission’s authority under KRS 278.260 is not unbounded. Putting aside Kentucky constitutional limits on the Commission’s authority,<sup>2</sup> the General Assembly has prescribed specific statutes for handling Liberty’s proposed acquisition of Kentucky Power. Moreover, KRS 278.020(6) and (7) define the scope, and in the case of KRS 278.020(7) the timeline, of such inquiries.

It is in the interest of the Commission, the intervenors, and the Company alike that matters as complex and important as the Mitchell Agreements and the proposed acquisition of Kentucky Power by Liberty Utilities Co. be considered in an orderly fashion where all parties participate on

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<sup>2</sup> *E.g.*, Sections 2, 27, and 28 of the Kentucky Constitution, among others.

a level playing field. The Commission’s traditional method of handling cases before it, which the Commission uses in matters much less complex, provides just such an orderly and fair method of proceeding. The parties and staff first are allowed to identify, develop, and take discovery on the issues to be decided by the Commission through testimony and written data requests. Only then is a full due process hearing conducted.

Due process requires at a minimum notice adequate to “apprise the affected individual of, and permit adequate preparation for, an impending hearing.”<sup>3</sup> Notice that permits adequate preparation means that the notice must provide the time required for the parties to avail themselves of their due process rights at the hearing for which the notice is being provided. These due process rights include “the right to meet such charges by competent evidence; and ... the right to be heard by counsel on the probative force of the evidence adduced by both sides, and upon the law applicable thereto.”<sup>4</sup> Respectfully, three business days in the case of the Commission’s topics, two business days in the case of the Attorney General’s topics, and a single business day in the case of KIUC’s notice provide constitutionally insufficient notice and time for the Company to identify and prepare its witnesses, even if the topics were within the scope identified for this hearing in either the Commission’s October 28, 2021 or November 22, 2021 Orders.

Without waiving these objections, Kentucky Power will endeavor to address through Mr. Mattison to the extent possible the topics identified by the Commission and the Attorney General for the November 30, 2021 hearing. And, in order to assist the Commission in conducting an efficient and thorough hearing on November 30, 2021 in this matter, the Company provides answers in an attachment to this supplemental pleading to several of the questions posed by the

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<sup>3</sup> *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978) (internal quotations omitted); *see also Mullane Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

<sup>4</sup> *Mayfield Gas Co. v. Pub. Serv. Comm’n*, 259 S.W.2d 8, 10-11 (Ky. 1953).

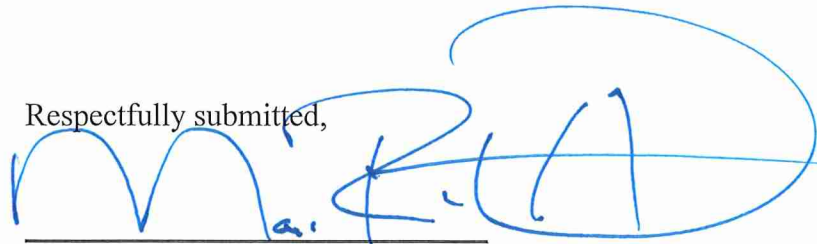
Commission in its Order in the case dated November 22, 2021, and subsequently filed by the Attorney General in this Case pursuant to ordering Paragraph 3 of the Order. As noted previously, the topics presented by the KIUC are almost wholly beyond the scope of either the October 28, 2021 or November 22, 2021 Orders, and the Company is not providing written responses to those topics for the reasons set forth herein.

### **III. Conclusion**

Events that have or soon will have their own statutorily mandated proceedings have overtaken this investigation proceeding. Conflating all the issues into an apparently unlimited and free-ranging general docket places Kentucky Power in an unfair position and undermines the record of the distinct issues in each case. Pending before the Commission is the Company's application in Case No. 2021-00421 for all approvals required for the New Mitchell Agreements. An application seeking approval of the proposed sale of Kentucky Power will be filed before the end of the year. The Company respectfully requests that the Commission utilize its long-standing and time-proven procedural process and decide those matters in those docketed proceedings.

Furthermore, regarding the November 30, 2021 hearing, the Company requests that the Commission limit the scope of the hearing to the original scope for which the Commission provided notice to the Company and intervenors in its October 28, 2021 Order, which related to the obligation to seek approval prior to the Company entering into any changes to the current Mitchell Operating Agreement.

Respectfully submitted,



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## **Responses to Questions from the Commission**

**1. All changes to the Mitchell Operating Agreement that Kentucky Power anticipates will be necessary as a result of the pending transaction between Liberty Utilities Co. (Liberty), Kentucky Power, and AEP Kentucky Transmission Company (Kentucky Transco).**

**Answer:** On November 19, 2021, in Case No. Case No. 2021-00421, the Company filed an application and testimony seeking approval for the Company to enter into a proposed Mitchell Plant Operations and Maintenance Agreement and a proposed Mitchell Plant Ownership Agreement (collectively, the “New Mitchell Agreements”) to replace the current Mitchell Plant Operating Agreement. As described on pages 13-14 of the Direct Testimony of D. Brett Mattison filed in that case, the need for and terms of the New Mitchell Agreements are driven by the Commission’s and the Public Service Commission of West Virginia’s recent orders regarding CCR and ELG compliance at the Mitchell Plant. As further set forth in that testimony, the proposed New Mitchell Agreements are necessary regardless of the identity of Kentucky Power’s corporate parent, and are appropriate to govern the relationship regarding the Mitchell Plant whether or not the ownership of the Company changes. In addition, the Company has requested approval to enter into the New Mitchell Agreements by February 17, 2022, in order to ensure that environmental compliance at the Mitchell Plant can proceed efficiently, in conformance with the recent commission orders, and permit deadlines can timely be satisfied.

The Company would also respectfully request that the Commission keep the new docket for approval of the New Mitchell Agreements, Case No. Case No. 2021-00421, separate and distinct from the actions in this docket. The New Mitchell Agreements have been filed in their own docket, with the parties that have and will intervene in that matter separate from this matter, and that docket is appropriate for development of issues related to the New Mitchell Agreements.

**2. The federal, state, and local regulatory approvals that must be obtained regarding the pending transaction between Liberty, Kentucky Power, and Kentucky Transco. Kentucky Power should be prepared to identify with specificity all local, state, and federal tariffs, permits, and agreements that will be affected by the pending transaction.**

**Answer:** The pending transaction to transfer the ownership of all of the issued and outstanding common stock of Kentucky Power from American Electric Power Company, Inc. (“AEP”) to Liberty Utilities Co. (“Liberty”) will require approval from the Commission pursuant to KRS 278.020(6) and (7) (“Kentucky Approval Proceeding”). The transfer of Kentucky Power’s common stock to Liberty, as well as the transfer of Kentucky Transco’s common stock from AEP Transmission Company, LLC to Liberty, will require approval from the Federal Energy Regulatory Commission under section 203 of the Federal Power Act (“FERC 203 Proceeding”). Appropriate notice will be provided under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 and to the Committee on Foreign Investment in the United States pursuant to the Defense Production Act of 1950, as amended. Approval by the Federal Communications Commission (“FCC”) to transfer or

assign any applicable FCC licenses will also be required. Additional tariffs, permits, and agreements that will be affected are described on pages 5-9 of the Direct Testimony of D. Brett Mattison filed in this matter on September 30, 2021. Additional information regarding any such impacts is being prepared in conjunction with Liberty which, as the acquirer, will also have a significant interest in providing further information to the Commission and which will be applicants with Kentucky Power in seeking approval from the Commission in the Kentucky Approval Proceeding. In addition, approvals from the Commission, Public Service Commission of West Virginia, and Federal Energy Regulatory Commission are also required to be obtained prior to the closing with respect to the termination and replacement of the existing Mitchell Operating Agreement.

**3. A tentative timeline of the proposed transaction, including but not limited to the anticipated date the proposed transaction is expected to be filed with the Commission for approval.**

**Answer:** The Kentucky Approval Proceeding and the FERC 203 Proceeding are required to be filed within 60 days of October 26, 2021, the date the transaction was announced. The sale is expected to close in the second quarter of 2022, pending regulatory approvals.

**4. To the extent that Kentucky Power knows, the impact of the pending transaction on the relationship between Kentucky Power and Kentucky Transco.**

**Answer:** The sale is a common stock transfer meaning that while Liberty will control Kentucky Power and Kentucky Transco, both companies will continue in their current corporate form. Therefore, other than the transfer of ownership of the companies to Liberty, the Company is not currently aware of any impact of the pending transaction on the relationship between Kentucky Power and Kentucky Transco. Such impacts, if any, could potentially be addressed in the Kentucky Approval Proceeding by Liberty as the acquirer.

**5. Concerns and comments received by Kentucky Power from its customers regarding the pending transaction, and how the customer concerns and comments have been addressed.**

**Answer:** Customers, employees and other stakeholders have expressed curiosity about the transaction generally speaking. However, there have been no complaints or, as explained below, any comments from customers that the Company has needed to escalate for a response. Since the announcement of the transaction in late October, the Company has been proactively communicating news about the sale to employees, residential, commercial and industrial customers, elected officials and other stakeholders. The Company has also spent significant time over the past month with our employees to make sure they have information about the transaction process to equip them to answer questions as they work with our customers. The Company also has a process to elevate any comments or concerns to the customer service team in the field, local management and/or to Liberty, in this instance, as appropriate. To date, we have not received any comments or concerns from customers regarding the transaction that have caused the activation of that process.

**6. Describe the nature of the pending transaction, such as whether there will be an assumption of liabilities, and if this is a stock purchase or asset purchase.**

**Answer:** Subject to the receipt of regulatory approvals and satisfaction of various conditions to closing, Liberty will purchase all of the outstanding common shares of Kentucky Power from AEP and all of the outstanding common shares of Kentucky Transco from AEP Transmission Company, LLC for the amount of approximately \$2.846 billion, including assumption of approximately \$1.221 billion of existing corporate debt. Additional information regarding the nature of the transaction was publicly filed with the U.S. Securities and Exchange Commission and provided to the Commission on October 28, 2021, and would also be available for review as part of the Kentucky Approval Proceeding.

**7. What agreements are in place between Kentucky Power and Liberty, such as a memorandum of understanding, stock purchase agreement, or asset purchase agreement.**

**Answer:** The only agreement currently in place between Kentucky Power and Liberty is a Common Interest Agreement by and among counsel on behalf of themselves and for AEP and its affiliates, including Kentucky Power and Kentucky Transco, and Algonquin Power & Utilities Corp. and its affiliates, including Liberty. The transaction is governed by a Stock Purchase Agreement by and among Liberty, AEP and AEP Transmission Company, LLC, which sets forth the terms and conditions of the transaction under which Liberty will acquire all of the common stock, and assume all of the existing debt, of Kentucky Power.

**8. Any comments and/or concerns expressed by Kentucky Power employees related to the transaction and the general impact of the potential sale on employees.**

**Answer:** Please refer to the Answer to Question 5. The sale directly impacts 360 employees, including 315 who work for Kentucky Power and 45 from AEP whose roles directly support Kentucky operations. These employees will transfer to Liberty when the sale is completed, subject to the unique employment situation of each employee. Separately, as part of the assumption by Wheeling Power of operational responsibilities at the Mitchell Plant, the 200 employees who operate Mitchell Plant will be transferred from Kentucky Power to Wheeling Power upon approval of the New Mitchell Agreements.

**Responses to Questions from Attorney General of the Commonwealth of Kentucky**

**9. Whether further changes/amendments to the Mitchell Operating Agreement, beyond those referenced in the Case No. 2021-00421 docket, are anticipated if and when the potential sale is finalized.**

**Answer:** No further changes or amendments are currently anticipated. Please refer to the Answer to Question No. 1.

**10. Whether and to what extent Liberty Utilities Company (“Liberty”) had input on the changes to the Mitchell Operating Agreement referenced in the Case No. 2021-00421 docket.**

**Answer:** As described on Page 13 of the Direct Testimony of D. Brett Mattison filed in Case No. 2021-00421, Liberty has agreed to and accepted the terms of the New Mitchell Agreements as part of the pending transaction.

**11. The substance of any terms of any agreement in place between Kentucky Power and Liberty as those terms relate to the future operation of Mitchell.**

**Answer:** There currently is no agreement in place between Kentucky Power and Liberty related to the future operation of Mitchell. As described in the Answer to Question 2, regulatory approvals are required to be obtained prior to the closing with respect to the termination and replacement of the existing Mitchell Operating Agreement with the New Mitchell Agreements. Kentucky Power will remain a party to the New Mitchell Agreements after the closing of the transaction.

**12. Filings made or to be made at the West Virginia Public Service Commission related to the proposed Mitchell Operating Agreement.**

**Answer:** On November 19, 2021, Wheeling Power filed a petition with the Public Service Commission of West Virginia in Case No. 21-0810-E-PC seeking consent and approval to enter into the New Mitchell Agreements pursuant to that commission's orders and West Virginia law. Wheeling requested approval to enter into the New Mitchell Agreements by February 17, 2022.

In addition, on the same date, Wheeling Power and Kentucky Power jointly submitted the New Mitchell Agreements for filing to the Federal Energy Regulatory Commission pursuant to Section 205 of the Federal Power Act, and filed to cancel the current Mitchell Operating Agreement pursuant to 18 C.F.R. § 35.15, in Docket No. ER22-452-000. The companies further requested an effective date of January 19, 2022, 61-days after filing, consistent with FERC's tariff standards.