

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

In the Matter of:

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

**KENTUCKY POWER COMPANY’S RESPONSE DEMONSTRATING GOOD CAUSE**

In accordance with the February 3, 2022 Order of the Public Service Commission of Kentucky (“Commission”), Kentucky Power Company (“Company”) is contemporaneously filing with the Commission the notice of the withdrawal of the filings, made pursuant to Section 205 of the Federal Power Act, with the Federal Energy Regulatory Commission (“FERC”) in FERC Docket Nos. ER22-452 and ER22-453 on November 19, 2021 (“FERC Application”). As further explained in the Company’s notice of withdrawal, the Company has further requested in its notice that the Commission enter an Order declaring that the Company has satisfied the Commission’s October 28, 2022 Order and cancelling the February 25, 2022 hearing, in accordance with the terms of the Commission’s February 3, 2022 Order.

The Company wishes to further clarify that the FERC Application was filed by American Electric Power Service Corporation (“AEPSC”) on behalf of Kentucky Power and Wheeling Power Company (“Wheeling”) without intent to violate any Commission order. Rather, the FERC Application was filed to effectuate the Commission’s orders, and with the Company’s understanding that it was acting in full compliance with the Commission’s orders in doing so.

The Company’s withdrawal of the FERC Application also is intended to address head-on the Commission’s concerns about the Company’s intent in filing the FERC Application, as well as to allay the concerns expressed by the Commission in its February 3, 2022 Order about the

effect of the FERC Application on this Commission’s jurisdiction. The withdrawal of the FERC Application will allow the Commission and the parties to address without distraction the substantive issues regarding the Mitchell Agreements now pending before the Commission in Case No. 2021-00421. It also allows the Commission, as indicated in its February 3, 2022 Order, to dispense with the February 25, 2022 hearing.

**Kentucky Power Did Not Willfully Violate The Commission’s October 28, 2021 Order.**

1. Background

The Commission’s October 8, 2021 Order in this case directed the Company 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.”<sup>1</sup> On October 28, 2021, the Commission issued a second Order, scheduling a hearing on November 30, 2021, to “take evidence on the pending matters,” including AEP’s announced sale of Kentucky Power and the conflicting decisions between the Commission and the Public Service Commission of West Virginia (“PSCWV”) regarding ELG at Mitchell.<sup>2</sup> In the October 28, 2021 Order, the Commission directed that “Kentucky Power should request Commission approval prior to any change to the Mitchell Operating Agreement.”<sup>3</sup>

The proposed Mitchell Plant Ownership Agreement and proposed Mitchell Plant Operations and Maintenance Agreement (“Proposed Mitchell Agreements”) require the approval of three regulatory commissions: this Commission, the FERC, and the PSCWV.<sup>4</sup> The

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<sup>1</sup> Order at 9 (Ky. P.S.C. Oct. 8, 2021).

<sup>2</sup> Order at 1 (Ky. P.S.C. Oct. 28, 2021).

<sup>3</sup> *Id.* at 1-2.

<sup>4</sup> KPCO\_R\_KPSC\_PHDR\_005 (filed Dec. 14, 2021) (“As this Commission has previously recognized, operating agreements related to Mitchell are subject to FERC’s jurisdiction. Order, *In the Matter of: Application of Kentucky*

November 19, 2021 filings with the Commission, the PSCWV, and the FERC to obtain approval of the Proposed Mitchell Agreements were made in furtherance of the Commission’s October 8 and 28, 2021 directives.<sup>5</sup>

The Company notified the Commission of its filings before the PSCWV and the FERC on November 19, 2021, contemporaneously with those filings.<sup>6</sup> On November 22, 2021, the Commission issued an Order “put[ing Kentucky Power] on notice of the subjects for which the Commission expects Kentucky Power to offer testimony at the November 30, 2021 hearing in this matter.”<sup>7</sup> Those subjects included “[t]he federal, state, and local regulatory approvals that must be obtained regarding the pending transaction between Liberty, Kentucky Power, and Kentucky Transco.”<sup>8</sup> The FERC Application was the subject of discussion and testimony at the November 30, 2021 hearing. Among other things, counsel for the Company explained at the hearing that the FERC Application advised FERC that AEPSC, the Company, and Wheeling “have filed for approval of the Mitchell Agreements with the WVPSC and KPSC” and that “[t]o the extent that either the WVPSC or KPSC require changes to the Mitchell Agreements, the Parties may need to amend the agreements as filed herein and, in that case, will make the necessary filings with the [FERC].”<sup>9</sup>

In its December 14, 2021 response to a post-hearing data request from Commission Staff

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*Power Company for (1) A Certification of Public Convenience and Necessity Authorizing the Transfer to the Company of an Undivided Fifty Percent Interest in the Mitchell Generating Station and Associated Assets; (2) Approval of the Assumption by Kentucky Power Company of Certain Liabilities in Connection with the Transfer of the Mitchell Generating Station; (3) Declaratory Rulings; (4) Deferral of Costs Incurred in Connection with the Company’s Efforts to Meet Federal Clean Air Act and Related Requirements; and (5) All Other Required Approvals and Relief, Case No. 2012-00578, Order at 10-11 (Ky. P.S.C. Nov. 15, 2013)”*

<sup>5</sup> KPCO\_R\_KPSC\_PHDR\_005 (filed Dec. 14, 2021).

<sup>6</sup> Kentucky Power Company’s Motion to Cancel November 30, 2021 Hearing (Nov. 19, 2021).

<sup>7</sup> Order at 1 (Ky. P.S.C. Nov. 22, 2021).

<sup>8</sup> *Id.* at 2.

<sup>9</sup> FERC Application at 7.

after the November 30, 2021 hearing, the Company further explained its basis for filing the FERC Application, and confirmed that by filing the FERC Application Kentucky Power did not intend to “preclude or limit Commission review or approval of the proposed agreements.”<sup>10</sup> The Company also stated on the record in the same data request response that the FERC Application would not preclude or limit this Commission’s review of the Mitchell Agreements.<sup>11</sup> Finally, in a separate data request response Kentucky Power again disclaimed its intent to argue that the FERC Application limited this Commission’s ability to review and approve the Mitchell Agreements:

*As such, Kentucky Power does not intend to argue before this Commission that a FERC order would automatically preclude this Commission from ruling on the agreements in Case No. 2021-00421 or that Kentucky Power would not comply with a Commission ruling regarding whether it is authorized to enter into the Proposed Mitchell Agreements simply because of a prior FERC order. Kentucky Power (and Wheeling Power) would carefully review any orders by this Commission, as well as the orders of the Public Service Commission of West Virginia and FERC, to determine what changes might be needed to comply with those orders.*<sup>12</sup>

2. Neither the Company, Nor Any of its Officers, Agents, or Employees, Violated the Commission’s October 28, 2021 Order or are Otherwise Liable for Civil Penalties Under KRS 278.990(1).<sup>13</sup>

The Company’s filing of the Proposed Mitchell Agreements with FERC was in furtherance of this Commission’s October 8 and 28, 2021 Orders. There was no intent to contravene this Commission’s Orders or circumvent its jurisdiction over the Proposed Mitchell Agreements, as the Commission’s February 3, 2022 Order suggests.<sup>14</sup> Moreover, the Company’s

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<sup>10</sup> KPCO\_R\_KPSC\_PHDR\_005 (filed Dec. 14, 2021).

<sup>11</sup> *Id.*

<sup>12</sup> KPCO\_R\_KPSC\_PHDR\_003 (filed Dec. 14, 2021) (emphasis supplied).

<sup>13</sup> The Commission’s February 3, 2022 Order also is premature. KRS 278.990(1) applies only to those Commission Orders “from which all rights of appeal have been exhausted.” This proceeding is ongoing and the Company has not been afforded an opportunity to exhaust its rights of appeal of the October 28, 2021 Order.

<sup>14</sup> *See* February 3, 2022 Order at 2-6. The Company respectfully maintains that each of the cases cited in the

FERC Application did not circumvent this Commission’s jurisdiction with respect to the Mitchell Agreements.<sup>15</sup>

The Company did not understand any of the Commission’s orders in this case to require the Company to seek and obtain the Commission’s approval of the Proposed Mitchell Agreements prior to filing a similar application for approval with FERC or the WVPSC. Respectfully, the Commission’s Order required Kentucky Power to “request Commission approval prior to any change to the Mitchell Operating Agreement.”<sup>16</sup> Kentucky Power’s Application filed in Case No. 2021-00421 effectuated that directive.

Finally, as Kentucky Power has explained, the Proposed Mitchell Agreements “are unexecuted by the parties and remain subject to approval by the three regulatory bodies.”<sup>17</sup> Even had the FERC approved the Proposed Mitchell Agreements prior to approval by this Commission, the agreements would have remained subject to the approval of this Commission and the PSCWV. The current Mitchell Operating Agreement remains unchanged until the new agreements are approved by all three commissions and executed by the parties to the contracts, regardless of the order in which the commissions render their decisions. Nonetheless, the Company’s withdrawal of the FERC Application should allay the Commission’s concerns regarding the timing of the FERC’s review of the Proposed Mitchell Agreements.

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February 3, 2022 Order are distinguishable from the situation here. The Company further respectfully maintains that the Company never intended to contravene the Commission’s jurisdiction as suggested in the February 3, 2022 Order.

<sup>15</sup> KPCO\_R\_KPSC\_PHDR\_003 (filed Dec. 14, 2021).

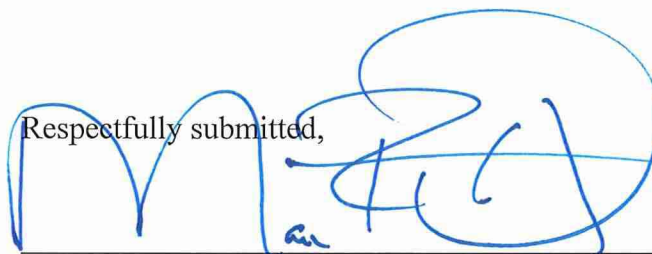
<sup>16</sup> Order, at 1-2 (Ky. P.S.C. Oct. 28, 2021).

<sup>17</sup> KPCO\_R\_KPSC\_PHDR\_005 (filed Dec. 14, 2021).

### Conclusion

For the reasons stated herein, neither the Company nor any of its officers, agents, or employees violated the Commission's October 28, 2021 Order. There is no basis for the assessment of any civil penalty under KRS 278.990(1). Nonetheless, as the Commission's February 3, 2022 Order requested, the FERC Application has been withdrawn. As that Order provided, there is thus no need for the February 25, 2022 hearing. Accordingly, the Company reiterates the request made in its contemporaneously filed notice that the Commission enter an Order declaring that the Company has satisfied the Commission's October 28, 2022 Order and cancelling the February 25, 2022 hearing.

Respectfully submitted,

A handwritten signature in blue ink, appearing to be 'M. Overstreet', written over a horizontal line.

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