

**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 MEMORANDUM BRIEF REGARDING**  
**MINIMUM NOTICE REQUIRED FOR FUTURE HEARINGS**

Kentucky Power Company (“Kentucky Power” or the “Company”) files in accordance with the September 27, 2021 Order of the Public Service Commission of Kentucky (“Commission”) its memorandum brief regarding the minimum notice required for future hearings in this matter.

**A.     Applicable Law.**

1.     KRS 278.260(2).

KRS 278.260 establishes not less than 20 days as the minimum notice required for all hearings in complaint cases:

The commission shall fix the time and place *for each hearing* held by it, and shall serve notice thereof upon the utility and the complainant not less than twenty (20) days before the time set for the hearing. The commission may dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest or for the protection of substantial rights.<sup>1</sup>

The General Assembly’s use of the phrase “for each hearing” in KRS 278.260 unequivocally establishes 20 days as the minimum notice required for all hearings<sup>2</sup> in a complaint case.

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<sup>1</sup> KRS 278.260(2) (emphasis supplied).

<sup>2</sup> See *Smith v. Hall*, 290 S.W. 480, 482 (Ky. 1927) (defining “each” to mean “every individual of a group of two or more, especially when applied to a definite number....”)

## 2. Procedural Due Process.

Beyond the requirements of KRS 278.260(2), the Due Process Clause of the United States Constitution,<sup>3</sup> and Section 2 of the Kentucky Constitution<sup>4</sup> mandate that the notice of any future hearing in this matter provide Kentucky Power and the parties to this proceeding with due process.<sup>5</sup> “It is beyond dispute that the traditional concepts of procedural due process apply with full force to administrative proceedings.”<sup>6</sup> “There is no rote formula for sufficient protections under the Due Process Clause.”<sup>7</sup> Rather, “[p]rocedural due process ... calls for such procedural protections as the particular situation may demand.”<sup>8</sup>

Constitutionally adequate notice is that which is “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”<sup>9</sup> In particular, the notice must “apprise the affected individual of, and permit adequate preparation for, an impending hearing.”<sup>10</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,

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<sup>3</sup> *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

<sup>4</sup> *Smith v. O’Dea*, 939 S.W.2d 353, 357 (Ky. App. 1997).

<sup>5</sup> *American Beauty Homes Corp. v. Louisville & Jefferson Cnty. Planning & Zoning Com’n*, 379 S.W.2d 450, 456 (Ky. 1964).

<sup>6</sup> *Standard Oil Co. v. F.T.C.*, 475 F. Supp. 1261, 1273 (N.D. Ind. 1979) (citing *Morgan v. United States*, 304 U.S. 1 (1938)).

<sup>7</sup> *Wilson v. MVM, Inc.*, 475 F.3d 166, 178 (3<sup>rd</sup> Cir. 2007).

<sup>8</sup> *Kentucky Cent. Life Ins. Co. v. Stephens*, 897 S.W.2d 583, 590 (Ky. 1995).

<sup>9</sup> *Mullane Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Jones v. Bailey*, 576 S.W.3d 128, 150 (Ky. 2019) (citing *Mullane*, 339 U.S. at 314.)

<sup>10</sup> *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978) (internal quotations omitted); see also *Mullane*, 339 U.S. at 314.

and upon the law applicable thereto.”<sup>11</sup> In sum, any notice should particularly identify the issues to be addressed at a hearing, and provide sufficient time after the issues are identified for the parties to prepare for the hearing on the issues identified.

## **B. Argument**

The 20-day notice period required by KRS 278.260 establishes the minimum statutory period for the notice required for any future hearing in this case. The Commission, like all administrative agencies, cannot “amend, alter, enlarge or limit the terms of a statutory enactment.”<sup>12</sup> Rather, the Commission is “authorized only to administer the law as written.”<sup>13</sup> The law as written provides for notice of “not less than twenty (20) days before the time set for the hearing.”

The 20-days statutory minimum notice required by KRS 278.260 likely will prove constitutionally inadequate in this broad-ranging investigation given both the number and the scope of the issues that have been identified to date by the Commission. Indeed, it is necessary to look no further than the caption of the case, which indicates the investigation seemingly could touch upon each and every aspect of the Company and its business.<sup>14</sup>

Even when narrowed by subsequent orders, the issues presented tend to be wide-ranging. For example, in its Order establishing the investigation, the Commission identified the following topics for discussion at the September 23, 2021 formal conference: “the AEP strategic review of Kentucky assets; ownership of Mitchell ...; transmission planning and operation; and other related matter.”<sup>15</sup> The breadth of the issues the Commission is considering is further evidenced

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

<sup>12</sup> *Camera Center, Inc. v. Revenue Cabinet*, 34 S.W.3d 39, 41 (Ky. 2000).

<sup>13</sup> *Johnson v. Correll*, 332 S.W.2d 843, 845 (Ky. 1960).

<sup>14</sup> “*In the Matter of: Electronic Investigation Of The Service, Rates And Facilities Of Kentucky Power Company.*”

<sup>15</sup> Order, *In the Matter of: Electronic Investigation Of The Service, Rates, And Facilities Of Kentucky Power*

by the topics the Commission identified in September 27, 2021 Order regarding the October 5, 2021 hearing: “[h]ow American Electric Power’s (AEP) strategic review of Kentucky assets has impacted Kentucky Power’s operations, service, financial, planning, and business decisions, including those related to distribution, transmission and generation functions ... [w]hich documents will be implicated should the strategic review result in AEP’s divestment of Kentucky Power, and how those documents will affect Kentucky Power and their customers... [and] [t]he follow-on impact to Kentucky Power and its customers should it become its own PJM zone, including the interaction with the PJM base residual auction (BRA).”<sup>16</sup> Each of these have the potential to present broad issues, affecting multiple aspects of the Company’s operations, and which would require more than the 20-day minimum notice established by KRS 278.260.

Further affecting the notice required for any future hearing is the procedure employed to date. In a more traditional case, prior to any hearing the issues are shaped, refined, and narrowed through discovery, as well as testimony filed by the Company and intervenors. Here, there has not yet been an opportunity for any such narrowing and refinement. Other factors that could affect the notice required prior to any future hearing are the number of witnesses the Commission designates to appear at the hearing, the complexity of the factual issues to be addressed, and the clarity of the governing legal issues.

Finally, the Commission must take into account the time necessary to publish notice of the hearing in accordance with 807 KAR 5:001, Section 9(2)(b). Generally, if the Company receives notice that a hearing has been set by the Commission on a Monday, the notice can be published in each of the 20 newspapers of general circulation in the Company’s service territory

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*Company*, Case No. 2021-00370 (Ky. P.S.C. September 27, 2021).

<sup>16</sup> Order, *In the Matter of: Electronic Investigation Of The Service, Rates, And Facilities Of Kentucky Power Company*, Case No. 2021-00370 (Ky. P.S.C. September 27, 2021).

the following week. If the Company receives notice that a hearing has been set later in the week, for example on Wednesday, Thursday, or Friday, publication could take an additional week.

The specific details regarding publication timing are contained in the Affidavit of Scott E. Bishop being filed herewith.

Although it is not possible to suggest a bright line for the required notice prior to all hearings, 30 days notice is a minimum notice period.

WHEREFORE, Kentucky Power Company respectfully requests that the Commission provide the Company at least 30 days notice of any hearing in this matter; and that the Commission grant such further relief as may be appropriate.

Respectfully submitted,



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