

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

APPLICATION¹ FOR DECLARATORY ORDER,
REQUEST FOR EXPEDITED DISPOSITION, AND MOTION FOR DEVIATION
FROM SCHEDULING REQUIREMENTS

Kentucky Power Company (“Kentucky Power” or the “Company”) applies to the Public Service Commission of Kentucky (“Commission”) pursuant to 807 KAR 5:001, Section 19 for an Order: (1) declaring that Wheeling Power Company (“Wheeling”) is not required to obtain a certificate of public convenience and necessity to construct “any plant, equipment, property, or facility” at the Mitchell Generating Station (“Mitchell”) necessary to comply with the United States Environmental Protection Agency’s Steam Electric Effluent Guidelines (“ELG”) Rule; (2)

¹ 807 KAR 5:001, Section 19 provides the Commission may “upon application” issue a declaratory order. Applications typically commence a new proceeding before the Commission and are assigned a new case number. The issue to be resolved by the declaratory order requested by Kentucky Power by this filing was among the issues the Commission identified in its September 15, 2021 Order establishing this case. 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 15, 2021) (“September 15 Order”). The September 15 Order also provided that Kentucky Industrial Utility Customers, Inc. (“KIUC”), the Attorney General of the Commonwealth of Kentucky (“Attorney General”), and the Sierra Club, *inter alia*, would be made parties to this proceeding upon filing notice of their intent to participate in this matter as parties. Only KIUC, the Attorney General, and Sierra Club to date have indicated their intent to participate in this case. In addition, the issue to be resolved by the requested declaratory order was identified by Kentucky Power, upon inquiry by the Chairman at the September 23, 2021 formal hearing in this matter, as one the Company desired to brief in this matter if the Commission intended to resolve the issue. Administrative efficiency, the convenience of the Commission and the parties, as well as the need for expedited grant of the requested declaratory order, all constitute good cause for any deviation from 807 KAR 5:001, Section 19, to the extent required, to permit the filing of this application for declaratory relief in this case.

granting a deviation from the scheduling provisions of 807 KAR 5:001, Section 19 as required to permit the Commission to issue the requested declaratory order on or before October 8, 2021; and (3) granting all other required approvals or relief.

Kentucky Power requests that the Commission issue its declaratory order no later than **October 8, 2021**. Time is of the essence in this proceeding. Lack of clarity from this Commission and the Public Service Commission of West Virginia that Wheeling's completion of ELG compliance work (at no cost to Kentucky customers) may go forward pursuant to the ELG Rule schedule puts in jeopardy Mitchell's ability to operate after June 2023, unless AEP files with the EPA by October 13 to close the plant by the end of 2028. The West Virginia Commission has committed to providing a decision regarding this question by October 13, 2021. Kentucky Power respectfully submits that this Commission's timely input is also critically important to make a decision regarding Mitchell's future. The Company further moves the Commission pursuant to 807 KAR 5:001, Section 22 for a deviation from the provisions of 807 KAR 5:001, Section 19, to the extent required, to permit the issuance of the requested declaratory order by the Commission no later than **October 8, 2021**.

Kentucky Power states in support of its application:

Introduction

1. The following grounds support the Company's request that the Commission issue an order declaring that Wheeling is not required to obtain a certificate of public convenience and necessity to construct "any plant, equipment, property, or facility" at Mitchell for the purposes of complying with the ELG Rule:

(a) The Commission lacks subject matter jurisdiction to require Wheeling to obtain a certificate of public convenience and necessity to undertake the ELG work. The Commission also lacks personal jurisdiction over Wheeling;

(b) KRS 278.020(1) does not require Wheeling to obtain a certificate of public convenience and necessity to perform the work;

(c) Any requirement that Wheeling obtain authorization from this Commission to perform the work would violate the dormant Commerce Clause of the Constitution of the United States;

(d) Application of KRS 278.020(1) to Wheeling's activities in West Virginia would violate the presumption under Kentucky law against the extraterritorial application of Kentucky statutes.

Applicant And Other Entities

2. Kentucky Power was organized July 21, 1919 under the laws of the Commonwealth of Kentucky and is in good standing.² Its mailing address is 1645 Winchester Avenue, Ashland, Kentucky 41101. The Company's electronic mail address is

² A Certificate of Existence dated September 27, 2021, and attesting to Kentucky Power's date of organization under the laws of the Commonwealth, and that it currently is in good standing, is attached to this Application as **EXHIBIT 1**.

kentucky_regulatory_services@aep.com. Kentucky Power is a wholly-owned subsidiary of American Electric Power Company, Inc. (“AEP”).

3. Kentucky Power is the sole applicant seeking a declaratory order.

4. Kentucky Power is engaged in the generation, purchase, transmission, distribution and sale of electric power. The Company serves approximately 165,000 retail customers in the following 20 counties of eastern Kentucky: Boyd, Breathitt, Carter, Clay, Elliott, Floyd, Greenup, Johnson, Knott, Lawrence, Leslie, Letcher, Lewis, Magoffin, Martin, Morgan, Owsley, Perry, Pike and Rowan. In addition, the Company also supplies electric power at wholesale to other utilities and municipalities in Kentucky for resale. Kentucky Power is a utility as that term is defined at KRS 278.010(3).

5. Wheeling is a corporation organized under the laws of the State of West Virginia. It is a wholly-owned subsidiary of AEP. Its business address is 4201 Jacob Street, Wheeling, West Virginia. Wheeling provides retail electric service only within the State of West Virginia.

6. Wheeling does not provide retail electric service, nor any other service described in KRS 278.010(3), within the territorial boundaries of the Commonwealth. Wheeling has never sought, nor otherwise been granted pursuant to KRS 278.020(1), a certificate to provide utility service to or for the public in the Commonwealth. Wheeling has never been an applicant before the Commission.

7. Wheeling is not authorized to transact business in Kentucky. It likewise is not transacting business in the Commonwealth. Wheeling has no retail customers within the Commonwealth. Wheeling has no utility plant or utility facilities located in the Commonwealth. Wheeling has no employees in the Commonwealth.

8. The Commission has never exercised jurisdiction over, or otherwise regulated, the rates and services of Wheeling. Wheeling does not file tariffs with the Commission.

9. If the ELG project is constructed at Mitchell, Kentucky Power will not be responsible for, and its customers will not pay for, any costs beyond those amounts authorized by the Commission for CCR-only (Case 2) in the July 15 Order.

10. Wheeling is not an applicant for the requested declaratory relief and is not a party to this proceeding.

Background

A. Mitchell.

11. Mitchell is a 1,570 MW coal-fired, steam generating plant located in Moundsville, West Virginia. By Order dated October 7, 2013 in Case No. 2012-00578,³ the Commission granted Kentucky Power a certificate of public convenience and necessity and related relief, authorizing the Company to acquire an undivided 50 percent interest in Mitchell. Kentucky Power acquired its 50 percent undivided interest in Mitchell at midnight, December 31, 2013. Kentucky Power operates Mitchell under a FERC-approved operating agreement with Wheeling.

12. Wheeling acquired the remaining undivided 50 percent interest in Mitchell through merger on January 28, 2015 with Newco Wheeling Inc. Wheeling's acquisition of a 50 percent undivided interest in Mitchell was authorized by order of the West Virginia Public Service Commission in Case No. 14-0546-E-PC. The Commission has never asserted

³ *In the Matter of: Application Of Kentucky Power Company For (1) A Certificate 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 (Ky. P.S.C. Oct. 7, 2013).

jurisdiction over Wheeling in connection with Wheeling's ownership of its 50% interest in Mitchell.

B. The Kentucky Certificate Proceeding (Case No. 2021-00004).

13. Kentucky Power filed an application with the Commission in Case No. 2021-00004⁴ on February 8, 2021 seeking, *inter alia*, a certificate of public convenience and necessity to undertake work at Mitchell to permit Mitchell to comply with EPA's Coal Combustion Residuals ("CCR") Rule and the ELG Rule ("Case 1"). The Company's application also described a CCR-only option ("Case 2").

14. By Order dated July 15, 2021 in Case No. 2021-00004, the Commission denied Kentucky Power's application for a certificate of public convenience and necessity to undertake the work required for Case 1. The Commission instead granted a certificate of public convenience and necessity authorizing Kentucky Power to undertake the work associated with Case 2.

15. Kentucky Power sought rehearing⁵ of the July 15 Order. The motion for rehearing was limited to issues other than the Commission's denial of a Certificate and grant by the Commission of a certificate of public convenience and necessity to undertake work required for Case 2. The Commission granted Kentucky Power's motion for rehearing.⁶ The rehearing proceeding remains pending before the Commission.

⁴ *In the Matter of: Electronic Application Of Kentucky Power Company For Approval of A Certificate of Public Convenience And Necessity For Environmental Project Construction At The Mitchell Generating Station, An Amended Environmental Compliance Plan, And Revised Environmental Surcharge Tariff Sheets*, Case No. 2021-00004 (Ky. P.S.C. Feb. 8, 2021).

⁵ Kentucky Power Company Motion for Rehearing, *In the Matter of: Electronic Application Of Kentucky Power Company For Approval of A Certificate of Public Convenience And Necessity For Environmental Project Construction At The Mitchell Generating Station, An Amended Environmental Compliance Plan, And Revised Environmental Surcharge Tariff Sheets*, Case No. 2021-00004 (Ky. P.S.C. Aug. 2, 2021).

⁶ Order, *In the Matter of: Electronic Application Of Kentucky Power Company For Approval of A*

C. The West Virginia Certificate Proceeding.

16. On December 23, 2020, Appalachian Power Company (“Appalachian Power”) and Wheeling filed an Application seeking a certificate of public convenience and necessity to make certain internal modifications at the Amos, Mountaineer, and Mitchell coal-fired generating facilities necessary to comply with either the CCR Rule or both the CCR and ELG Rules.⁷ In addition to seeking a certificate, Wheeling and Appalachian Power requested approval of an environmental compliance surcharge to ensure timely recovery of the costs associated with the compliance work.⁸

17. On August 4, 2021, the Public Service Commission of West Virginia granted a certificate authorizing the CCR and ELG projects at Appalachian Power’s Amos and Mountaineer plants, and at the Mitchell plant jointly owned by Wheeling and Kentucky Power.⁹ The West Virginia Commission directed in its August 4, 2021 Order that if there are changes in ownership or cost allocations that are required by decisions in other states, Wheeling and Appalachian Power should bring such changes to the attention of the Commission.¹⁰

18. On September 8, 2021, Wheeling and Appalachian Power filed a petition to reopen the West Virginia CCR and ELG certificate proceeding.¹¹ In their petition, Wheeling and Appalachian Power sought:

Certificate of Public Convenience And Necessity For Environmental Project Construction At The Mitchell Generating Station, An Amended Environmental Compliance Plan, And Revised Environmental Surcharge Tariff Sheets, Case No. 2021-00004 (Ky. P.S.C. Aug. 19, 2021).

⁷ *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*, WVPS Case No. 20-1040-E-CN (“*West Virginia CCR/ELG Proceeding*”), Petition at 3 (Dec. 23, 2020).

⁸ *Id.* at 5.

⁹ *West Virginia CCR/ELG Proceeding*, Order at 19 (Aug. 4, 2021).

¹⁰ *Id.*

¹¹ *West Virginia CCR/ELG Proceeding*, Petition to Reopen Case and to Take Further Action (Sept. 8,

- (a) A ruling from the West Virginia Commission that it wants Wheeling and Appalachian Power to proceed with the ELG projects at all three plants, including on Kentucky Power's undivided 50% interest in Mitchell, notwithstanding the new cost estimates, or if not at all plants, then on which plants or units;
- (b) An acknowledgement from the West Virginia Commission that additional investments and O&M expenses at the plants will be needed prior to 2028, and will be the responsibility of West Virginia customers, if the plants are to operate beyond 2028;
- (c) A commitment from the West Virginia Commission that it will continue to authorize recovery of the costs described in items 1 and 2 above, so long as they are reasonable and prudently incurred, once Wheeling and Appalachian Power incur such costs at the West Virginia Commission's direction; and
- (d) Instruction from the West Virginia Commission that Wheeling propose a plan in a future docket that recognizes the changes needed to deal with the issues resulting from any directive from the West Virginia Commission to perform the ELG work at Mitchell.¹²

Wheeling and Appalachian Power explained in their petition that the ELG Rule requires them to notify the West Virginia Department of Environmental Protection by October 13, 2021, if they do not intend to make ELG modifications at one or more of the facilities' units and instead will commit to cease combustion of coal by refueling or retiring the unit(s) before December 31, 2028.¹³ Accordingly, Wheeling and Appalachian Power asked that the West Virginia Commission provide the requested rulings before October 13, 2021.¹⁴

19. The West Virginia Commission conducted an evidentiary hearing September 24, 2021 regarding the petition by Wheeling and Appalachian Power to reopen the West Virginia

2021) (filed in KPSC Case No. 2021-0004 as KPCO_SR_KPSC_RH_1_1_Attachment1).

¹² *Id.* at 5.

¹³ *Id.* at 2.

¹⁴ *Id.* at 5.

proceeding.¹⁵ 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.

D. The Proposed ELG Work

20. Kentucky Power is not authorized to “begin the construction of any plant, equipment, property, or facility” at Mitchell to comply with the ELG Rule. If the ELG project is constructed at Mitchell, Kentucky Power will not be responsible for, and its customers will not pay for, any costs beyond those amounts authorized by the Commission for CCR-only (Case 2) in the July 15 Order.¹⁶

Kentucky Power Has A Cognizable Interest In The Requested Declaratory Order

21. 807 KAR 5:001, Section 19 (1) provides that “[t]he commission may, upon application by a person substantially affected, issue a declaratory order with respect to the jurisdiction of the commission, the applicability to person, property or state of facts of an order or administrative regulation of the commission or provision of KRS Chapter 278, or with respect to the meaning and scope an order or administrative regulation of the commission or provision of KRS Chapter 278.”

¹⁵ *West Virginia CCR/ELG Proceeding*, Order at 5 (Sept. 9, 2021) (filed in KPSC Case No. 2021-0004 as KPCO_SR_KPSC_RH_1_1_Attachment2).

¹⁶ The Commission incorporated the record of Case No. 2021-00004 into the record of this proceeding. There, Company Witnesses Sherrick and Spitznogle described the different compliance and construction paths for the CCR-only and CCR/ELG options. *See* Direct Testimony of Brian D. Sherrick at 11 and Exhibit BDS-1; Direct Testimony of Gary O. Spitznogle at 8-9. If Wheeling were to pursue construction of the CCR/ELG option, Kentucky Power would be responsible for costs equal to 50 percent of the cost of the CCR-only option.

22. Kentucky Power, as the owner of an undivided 50 percent interest in Mitchell, is a person, as the term is defined at KRS 278.010(2), substantially affected by the issue of whether Wheeling is required to obtain from this Commission a certificate of public convenience and necessity to construct “any plant, equipment, property, or facility” at the Mitchell Generating Station that is required to comply with the ELG Rule (“a Certificate”). Further, among the issues identified by the Commission’s September 15 Order to be addressed in this proceeding is “the need for a CPCN [from this Commission] even if the WV PSC approves Wheeling’s petition”¹⁷. The Chairman also inquired at the September 23, 2021 Formal Conference regarding the potential for briefing the Certificate issue. Finally, the subject of the requested declaratory order is the applicability to Kentucky Power, as well as the underlying “state of facts” set forth above, of a “provision of KRS Chapter 278.”¹⁸

Basis For The Requested Declaratory Relief

23. The grounds below require the Commission to issue an order declaring that Wheeling is not required to obtain a Certificate from the Commission.

A. The Applicable Statutes Do Not Require Wheeling To Obtain A Certificate.

1. The Commission’s Subject Matter Jurisdiction Does Not Extend To The Regulation Of Wheeling’s Activities At Mitchell.

24. Administrative agencies are statutory creatures,¹⁹ and as such, any exercise of authority by an agency must be grounded in statute.²⁰ Administrative agencies have no inherent

¹⁷ September 15 Order at 8-9.

¹⁸ The provision is KRS 278.020(1).

¹⁹ *Dep’t for Natural Res. & Envtl. Prot. v. Stearns Coal & Lumber Co.*, 563 S.W.2d 471, 473 (Ky. 1978).

²⁰ *S. Cent. Bell Tel. Co. v. Util. Regulatory Com’n*, 637 S.W.2d 649, 653 (Ky. 1982).

powers of their own,²¹ and an administrative agency may not add to its statutory grant of authority.²²

25. Jurisdiction at bottom is the general power of a governmental body of any sort “to exercise authority over all persons and things within its territory.”²³ “An administrative agency is created to perform specific function(s) and if there is any reasonable doubt concerning a particular power it should be resolved against the ... [agency].”²⁴ An agency must ground “any exercise of authority” by it in the language of its organic statutes.²⁵ The Commission’s organic statutes, as applicable to Kentucky Power, are found in Chapter 278 of the Kentucky Revised Statutes.

26. KRS 278.040(2) provides that “[t]he jurisdiction of the commission shall extend to all utilities *in this state*.”²⁶ The statute simultaneously establishes and bounds the Commission’s subject matter jurisdiction. The Kentucky Supreme Court has cautioned that subject matter is not something for any governmental body “to ‘take,’ ‘assume,’ or ‘allow.’ [S]ubject-matter jurisdiction cannot be born of waiver, consent, or estoppel”²⁷

²¹ *Kerr v. Ky. State Bd. of Registration for Prof’l Eng’r & Land Surveyors*, 797 S.W.2d 714, 717 (Ky. App. 1990).

²² *Camera Ctr., Inc. v. Revenue Cabinet*, 889 S.W.2d 788, 792 (Ky. 1994).

²³ *Black’s Law Dictionary* (9th Ed. 2009).

²⁴ *N. Ky. Emergency Med. Serv., Inc. v. Christ Hosp. Corp.*, 875 S.W.2d 896, 898 (Ky. App. 1993).

²⁵ *Curtis v. Belden Elec. Cable & Wire*, 760 S.W.2d 97, 99 (Ky. App. 1988).

²⁶ (Emphasis supplied).

²⁷ *Nordike v. Nordike*, 231 S.W.3d 733, 737-738 (Ky. 2007) (subject matter jurisdiction of the courts). The Kentucky Supreme Court recently recognized a second jurisdictional limit on administrative agencies. *Puckett v. Cabinet for Health & Fam. Servs.*, 621 S.W.3d 402, 410 (Ky. 2021). An administrative agency can act with respect to a putative party only where it can exercise personal jurisdiction over the putative party consistent with the limits imposed by the Due Process Clause of the Fourteenth Amendment. *Id.* (“order is void where it is entered by a[n] . . . agency which lacks personal jurisdiction.” (quoting *Siddens v. Industrial Com’n*, 304 Ill.App.3d 506, 238 (1999)). In determining whether a body may exercise personal jurisdiction, the United States Supreme Court has cautioned that,

27. The phrase “all utilities in this state” must be accorded its “plain and ordinary meaning.”²⁸ Strained or forced readings are not permissible.²⁹ The General Assembly’s use of the prepositional phrase “in this state” unambiguously limits the Commission’s jurisdiction to those utilities physically present in, or otherwise rendering service to customers physically present in, the Commonwealth.³⁰

28. Wheeling is not a utility “in this state.” It has no plant or other physical presence in the Commonwealth. It lacks employees in the state. Wheeling does not provide retail electric service to any customers in Kentucky. Indeed, because it has no certified territory within Kentucky, it lacks the legal right to provide retail electric service in the Commonwealth.³¹ Nor does it provide within Kentucky any of the other utility services described at KRS 278.010(3). Finally, Mitchell itself is located approximately 215 miles beyond the territorial boundaries of the Kentucky.

29. The Commission’s subject matter jurisdiction does not extend to Wheeling. Hence, it lacks any authority or power to require Wheeling to obtain a Certificate.

outside a corporation’s state of incorporation or principal place of business, “[w]hen (but only when) a company exercises the privilege of conducting activities within a state . . . the State may hold the company to account for related misconduct.” *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1025 (2021). Second, the Due Process Clause ensures that States with ‘little legitimate interest’ . . . do not encroach on States more affected by the controversy.” Here, no facts support the Commission’s exercise of personal jurisdiction over Wheeling. Wheeling has taken no actions within or directed at Kentucky, let alone conduct in Kentucky specifically related to Mitchell or the proposed ELG compliance project. *Id.*

²⁸ *Jefferson Cnty. Sheriff’s Office v. Ky. Retirement Sys.*, 626 S.W.3d 554, 559 n.7 (Ky. 2021).

²⁹ *Louisville Shopping Ctr., Inc. v. City of Louisville*, 635 S.W.2d 307, 311 (Ky. 1982) (rejecting construction that was “strained, to say the least, and [that] reads something into the plain wording of the statute that is not there.”)

³⁰ The preposition “in” is a “function word to indicate inclusion, location, or position within limits.” *Merriam-Webster’s Collegiate Dictionary* 584 (10th ed. 2002).

³¹ KRS 278.016 to KRS 278.018.

2. KRS 278.020(1) Does Not Require Wheeling To Obtain A Certificate.

(a) *The Statute.*

30. KRS 278.020(1) provides in pertinent part:

[n]o person, partnership, public or private corporation, or combination thereof ... shall begin construction of any plant, equipment, property for furnishing to the public any of the services enumerated in KRS 278.010 ... until that person has obtained from the Public Service Commission a certificate that public convenience and necessity require the service or construction.

31. Nothing in the certificate of public convenience and necessity statute purports to extend the subject matter jurisdiction of the Commission beyond that established by KRS 278.040(2). Moreover, KRS 278.020(1) must be read in conjunction with KRS 278.040(2).

“Statutes, of course, ‘must be read as a whole and in context with other parts of the law.’”³²

That context includes KRS 278.040(2), which establishes the outer limits of the Commission’s authority to act pursuant to the other provisions of Chapter 278.

32. Beyond the limits KRS 278.040(2) imposes on the Commission’s jurisdiction, and hence the limits on the Commission’s authority to require or issue a certificate of public convenience and necessity, the Commission itself has recognized that the plain language of KRS 278.020(1) does not extend to entities not providing retail electric service in the Commonwealth. As applied to facilities for the “generation, production, transmission, or distribution of electricity,”³³ the Commission concluded the requirement that a certificate of public convenience and necessity be obtained is limited to those “person[s], partnership[s], public or private

³² *Hall v. Hospitality Res., Inc.*, 276 S.W.3d 775, 784 (Ky. 2008)

³³ KRS 278.010(3). KRS 278.020(1) provides that a certificate of public convenience and necessity is required to begin construction of facilities “for furnishing to the public any of the services enumerated in KRS 278.010....”

corporation[s], or combinations thereof” that “provide direct retail electric service to customers in Kentucky.”³⁴

33. Among the issues examined by the Commission in Administrative Case No. 387 was the Commission’s ability to regulate merchant generating plant owners and Regional Transmission Organizations (“RTOs”) under KRS 278.020(1), KRS 278.025, and KRS 278.025. Finding that merchant plant owners and RTOs were outside its authority under the three statutes, the Commission explained:

Merchant plants and RTOs provide no direct retail electric service to customers in Kentucky. Rather, their transactions in Kentucky are at wholesale, to utilities, marketers, or brokers. ***Thus, merchant plants and RTOs are not providing service ‘to or for the public,’ as the phrase is used in defining a ‘utility’ under KRS 278.010(3)(a). Consequently, they are not ‘utilities’ under the jurisdiction of the Commission. Accordingly, merchant plants and RTOs are at liberty to construct facilities anywhere in Kentucky without undergoing siting review.***³⁵

The Commission thus concluded that “the generating facilities and transmission lines constructed by these entities will escape regulatory review by both the Commission and any local planning unit.”³⁶

34. The required nexus between the provision of retail service to Kentucky end-use customers and the Commission’s jurisdiction on the one hand, and the Commission’s ability to require a certificate of public convenience and necessity pursuant to KRS 278.020(1) on the other, was examined again by the Commission in Case No. 2011-00042.³⁷ There, AEP Kentucky

³⁴ *In the Matter of: Kentucky Generation And Transmission System*, Administrative Case No. 387, 2001 WL 1858467 (Ky. P.S.C. Dec. 20, 2001).

³⁵ 2001 WL 1858467 at * 37 (emphasis supplied).

³⁶ *Id.* at * 36.

³⁷ *In the Matter of: Application of AEP Kentucky Transmission Company, Inc. For A Certificate Of Public Convenience And Necessity Pursuant To KRS 278.020 To Provide Wholesale Transmission Service In The Commonwealth*, Case No. 2011-00042 (Ky. P.S.C. Filed February 7, 2011).

Transmission Company, Inc. (“Kentucky Transco”) sought a certificate of public convenience authorizing Kentucky Transco to provide wholesale transmission service in Kentucky. The Commission first recognized that its “jurisdiction is purely statutory.”³⁸ It then concluded that because Kentucky Transco would not be providing retail service to Kentucky end-users, that because Kentucky Transco would not be filing tariffs with the Kentucky Commission pursuant to KRS 278.160, and that because “KY Transco would not be providing a regulated service within the parameters of the Commission’s jurisdiction under KRS Chapter 278,”³⁹ the Commission lacked the authority to require and issue the certificate of public convenience and necessity.⁴⁰

35. The reasoning undergirding the Commission’s decisions in Administrative Case No. 387 and Case No. 2011-00042 similarly compels the conclusion that Wheeling, which does not provide retail service in Kentucky, does not file tariffs with the Commission, and does not provide any other regulated service within the parameters of the Commission’s jurisdiction under KRS Chapter 278, is not required to obtain a Certificate for the proposed ELG work at Mitchell.

(b) *Entities – Not Plants, Equipment, Or Property – Are Required To Obtain Certificates Under the Statute.*

36. KRS 278.020(1) is unambiguous: certificates of public convenience and necessity are required of, and are issued by the Commission to, “person[s], partnership[s], public or private corporation[s], or combination thereof,” and not the “plant, equipment, or property” to be constructed. The distinction is compelled by the plain language of the statute, as well as KRS 278.040(2), which limits the Commission’s jurisdiction to “utilities,” and not the property used

³⁸ Order, *In the Matter of: Application of AEP Kentucky Transmission Company, Inc. For A Certificate Of Public Convenience And Necessity Pursuant To KRS 278.020 To Provide Wholesale Transmission Service In The Commonwealth*, Case No. 2011-00042 at 6 (Ky. P.S.C. June 10, 2013).

³⁹ *Id.* at 7.

⁴⁰ *Id.* at 9.

to provide service “in this state.” This same distinction underlies the Commission’s decision in Administrative Case No. 387 holding that a certificate of public convenience and necessity is required by only “those utilities under the jurisdiction of the Commission...”⁴¹

37. The fact that Wheeling does not require a certificate from this Commission to perform the ELG modifications at Mitchell will not affect Kentucky Power, its customers, nor the Commission’s ability to ensure that Kentucky Power’s rates are fair, just, and reasonable. If the ELG project is constructed at Mitchell, Kentucky Power will not be responsible for, and its customers will not pay for, any project costs beyond those costs required to complete the CCR-only (Case 2) work authorized by the Commission in the July 15 Order.⁴² Moreover, the Commission retains its exclusive jurisdiction over Kentucky Power’s rates,⁴³ and its ability to ensure its rates are “fair, just and reasonable.”⁴⁴

38. Wheeling, like merchant plant owners, RTOs, and Kentucky Transco, does not provide retail electric service to customers in Kentucky, and hence is not subject to the jurisdiction of the Commission. Thus, it, and the ELG compliance work it proposes to undertake at Mitchell in West Virginia, are not subject to KRS 278.020(1)’s certificate of public convenience and necessity requirements.

⁴¹ 2001 WL 1858467 at * 37.

⁴² Kentucky Power owns an undivided 50 percent interest in Mitchell. Even if the nature of the Company’s ownership of Mitchell resulted in Kentucky Power owning a 50 percent undivided interest in the ELG facilities, KRS 278.020(1) applies to the entity undertaking the construction and not ownership. Wheeling, and not Kentucky Power, will build the ELG facilities. Moreover, all costs associated with those facilities, even if it were determined Kentucky Power would have an ownership interest in them, are to be borne by Wheeling.

⁴³ KRS 278.040(2).

⁴⁴ KRS 278.030(1).

(c) *A Requirement That Wheeling Obtain A Certificate Would Be Contrary To The Commission's Long-Standing Application Of The Statute.*

39. Further evidence of the inapplicability of KRS 278.020(1) to Wheeling, and its construction of ELG facilities at Mitchell, is the absence of any effort by the Commission since Kentucky Power acquired its interest in Mitchell at midnight on December 31, 2013 to regulate operations of the entity holding the other 50 percent undivided interest in the generating station. “It is well established that the practical construction of a statute by an administrative agency over a long period of time is controlling.”⁴⁵

40. The Commission has never construed its jurisdiction under Chapter 278, and KRS 278.020(1) in particular, to extend to the co-owner of Mitchell during the nearly eight years Kentucky Power has had an interest. For example, in Case No. 2012-00578 the Commission did not assert it had jurisdiction under KRS 278.020(1) to consider Appalachian Power Company’s ultimately unsuccessful application to acquire the remaining 50 percent interest in Mitchell. Nor did the Commission require Wheeling to seek Kentucky approval to acquire its interest in Mitchell in 2015. Similarly, in Case No. 2021-00004 the Commission did not purport to require Wheeling to obtain a certificate from the Commission to perform the CCR and ELG work that is the subject of this application.

41. Respectfully, the Commission cannot now interpret KRS 278.020(1) to require Wheeling, an out-of-state utility that neither operates nor provides service in Kentucky, to obtain

⁴⁵ *Paducah Marine Ways, Inc. v. Revenue Cabinet Commonwealth of Ky.*, 730 S.W.2d 956, 957 (Ky. App. 1987); *see also* *Hagan v. Farris*, 807 S.W.2d 488, 490 (Ky. 1991); *GTE v. Revenue Cabinet, Commonwealth of Ky.*, 889 S.W.2d 788, 792 (Ky. 1994) (*superseded on other grounds by statute*) (“This Court has held that interpretation of a statute made by an administrative agency, once made and applied over a long period of time, cannot be unilaterally revoked by the agency.”); *Grantz v. Grauman*, 302 S.W.2d 364, 367 (Ky. 1957).

a certificate of public convenience and necessity prior to commencing the ELG work authorized by the West Virginia Commission, when the Commission has never interpreted the statute to apply in any such instance before now.

42. The Company has been unable to unearth *any* decision where the Commission stretched the phrase “to or for the public” contained in KRS 278.020(1) to include “the public located outside the Commonwealth of Kentucky.” For the reasons above, the Commission cannot now interpret the phrase “to the public” as used in KRS 278.020(1) to include members of the public outside the Commonwealth of Kentucky.

B. A Requirement That Wheeling Obtain A Certificate To Undertake Construction At Mitchell Plant In West Virginia Would Violate The Dormant Commerce Clause.

43. The Commission cannot constitutionally require Wheeling, a West Virginia corporation that does not do business in Kentucky, to obtain a Certificate from a Kentucky regulatory body before undertaking work to be completed wholly in West Virginia.

44. State laws or regulations that “regulate[e] extraterritorial commerce” are “virtually *per se* invalid under the dormant Commerce Clause.”⁴⁶ “[A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature.”⁴⁷ The “critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State” as well as “how the challenged statute may interact with the legitimate regulatory regimes of other States.”⁴⁸

⁴⁶ *Am. Beverage Ass’n v. Snyder*, 735 F.3d 362, 373 (6th Cir. 2013) (quoting *Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628, 645 (6th Cir. 2010)).

⁴⁷ *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989). (citation omitted).

⁴⁸ *Id.* (citations omitted).

45. “[S]pecifically, the Commerce Clause dictates that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another.”⁴⁹ For example, in *Brown-Forman*, New York prohibited distillers and their agents from selling alcoholic beverages to wholesalers in New York except in accordance with a monthly price schedule filed with the State Liquor Authority.⁵⁰ All sales to any wholesaler in New York during the month for which the schedule is in effect were required to be at those prices.⁵¹ Then, New York passed a law requiring distillers or agents to affirm in their price schedules that the price is no higher than the price at which the item is sold to wholesalers in any other state.⁵²

46. In striking down the New York law as unconstitutional, the United States Supreme Court explained the effect of the law was to impermissibly regulate activity outside of New York’s borders: “[O]nce a distiller’s posted price is in effect in New York, it must seek the approval of the New York State Liquor Authority before it may lower its price for the same item in other States.”⁵³ Thus, the law was unconstitutional under the dormant Commerce Clause, because “[f]orcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce.”⁵⁴

⁴⁹ *Id.* at 337 (citing *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 582 (1986)).

⁵⁰ *See* 476 U.S. at 575.

⁵¹ *Id.*

⁵² *See id.* at 576.

⁵³ *Id.* at 583.

⁵⁴ *Id.* at 582.

47. This bar under the dormant Commerce Clause against extraterritorial action applies to a state’s regulation of electric power generation. In *North Dakota v. Heydinger*,⁵⁵ Minnesota passed a law prohibiting utilities from meeting Minnesota demand with electricity generated by a “new large energy facility” in a transaction that will contribute to or increase “statewide power sector carbon dioxide emissions,” and further regulating “the total annual emissions of carbon dioxide from the generation of electricity . . . imported from outside of the state and consumed in Minnesota.”⁵⁶ Plaintiffs, including three members of the Midcontinent Independent Transmission System Operator (“MISO”) that controls the grid spanning fifteen states, challenged the law.⁵⁷

48. The Eighth Circuit concluded the statutes violated the dormant Commerce Clause.⁵⁸ The court explained that “when a non-Minnesota generating utility injects electricity into the MISO grid to meet its commitments to non-Minnesota customers, it cannot ensure that those electrons will not flow into and be consumed in Minnesota;” thus, integrated regional utilities were forced to “either unplug from MISO or seek regulatory approval from [the Minnesota Department of Commerce] and [the Minnesota Public Utilities Commission].”⁵⁹ The Minnesota law therefore had “the practical effect of controlling conduct beyond the boundaries of” Minnesota and imposing Minnesota’s policy on “neighboring States by preventing MISO members from adding capacity from prohibited sources anywhere in the grid, absent Minnesota

⁵⁵ 825 F.2d 912 (8th Cir. 2016).

⁵⁶ *Id.* at 915-16 (citing Minn. Stat. § 216H.03, subd. 2).

⁵⁷ *Id.* at 915.

⁵⁸ *Id.* at 919-922.

⁵⁹ *Id.* at 921.

regulatory approval or the dismantling of the federally encouraged and approved MISO transmission system.”⁶⁰ Consequently, the law was unconstitutionally extraterritorial.⁶¹

49. Here, a requirement that Wheeling obtain a Certificate is a quintessential example of an extraterritorial regulation that violates the dormant Commerce Clause and is directly foreclosed by federal, including Supreme Court, precedent. Pursuant to *Brown-Forman* and *Healy*, Kentucky cannot constitutionally require Wheeling to obtain regulatory approval in Kentucky before undergoing work on a power plant located in another state. To do so would impinge on Congress’s sole authority to regulate interstate commerce. And, just as was the case in *Heydinger*, requiring Wheeling to obtain regulatory approval in Kentucky would have the unconstitutional effect of imposing Kentucky’s policy on West Virginia. Accordingly, Kentucky Power is entitled to the requested declaration.

C. KRS 278.020(1) Lacks The Clear And Unambiguous Indication By The General Assembly Required To Overcome The Presumption Against Extraterritoriality.

50. Kentucky recognizes “the well-established presumption against extraterritorial operation of statutes.”⁶² “That is, unless a contrary intent appears within the language of the statute, [Kentucky courts] presume that the statute is meant to apply only within the territorial boundaries of the Commonwealth.”⁶³ As the Kentucky Supreme Court has explained, “[t]his rule of construction helps to protect against unintended clashes of the laws of the Commonwealth with the laws of our sister states.”⁶⁴

⁶⁰ *Id.* at 922.

⁶¹ *Id.* at 922-23.

⁶² *Union Underwear Co. v. Barnhart*, 50 S.W.3d 188, 190 (Ky. 2001) (holding that the Kentucky Civil Rights Act (“KCRA”) does not apply extraterritorially).

⁶³ *Id.* (citing 73 Am. Jur. 2d, Statutes, § 359 (1974)).

⁶⁴ *Id.* (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20–22 (1963)).

51. *Union Underwear v. Barnhart* concerned an age discrimination claim under the Kentucky Civil Rights Act (“KCRA”) by a former employee of Union Underwear.⁶⁵ Union Underwear was a New York corporation headquartered in Bowling Green, Kentucky.⁶⁶ The plaintiff, Mr. Barnhart, was employed by Union Underwear in Alabama or South Carolina.⁶⁷ He never was employed by the defendant in Kentucky.⁶⁸

52. On discretionary review from a court of appeals opinion affirming a trial court judgment for Mr. Barnhart, the Supreme Court reversed on the grounds that the KCRA, despite its express applicability to “any individual,” did not apply to employees of a Kentucky-headquartered company who were employed outside the Commonwealth.⁶⁹

53. Addressing the question of the extraterritorial application of the KCRA, the Court recognized that “[t]he General Assembly is obviously aware of the presumption against extraterritorial application and how to overcome it,”⁷⁰ as evidenced, for example, by its express inclusion in the Workers Compensation Act, which provides for “Extraterritorial coverage.”⁷¹ Indeed, the Court held that “[u]nder the presumption against extraterritorial application, the use of the terms ‘any’ or ‘all’ to persons covered by the legislation does *not* imply that the enacting legislature intended that the legislation be applied extraterritorially.”⁷²

⁶⁵ *Id.* at 189.

⁶⁶ *Id.*

⁶⁷ *Id.* at 190

⁶⁸ *Id.*

⁶⁹ *Id.* at 191.

⁷⁰ *Id.*

⁷¹ *Id.* at 190-191. The Workers Compensation Act provision, KRS 342.670, as quoted by the Supreme Court in *Barnhart*, provides in pertinent part “Extraterritorial coverage – (1) if an employee, while working outside the territorial limits of this state, suffers an injury” *Id.* at 190.

⁷² *Id.* at 191 (citing 73 Am. Jur. 2d, Statutes, § 359 (1974) (emphasis in original)).

54. The *Barnhart* Court underscored the constitutional implications laid out above: “[i]mposing the policy choice by the Commonwealth on the employment practices of our sister states should be done with great prudence and caution out of respect for the sovereignty of other states, and to avoid running afoul of the Commerce Clause of the United States Constitution.”⁷³ The *Barnhart* Court specifically acknowledged that “[t]he Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State.”⁷⁴

55. KRS 278.020(1) lacks the express indication by the General Assembly to accord it extraterritorial application required under *Barnhart*. Certainly, there is nothing in KRS 278.020(1) or KRS 278.040(2) that approaches the clear and unequivocal declaration by the General Assembly included in the Workers Compensation laws that *Barnhart* held was the type of language required.⁷⁵ KRS 278.040(2) expressly provides to the contrary: “the jurisdiction of the commission shall extend to the all utilities *in this state*.”⁷⁶

56. In addition, the facts of this case stand in contrast with those of the unpublished case of *McKinney v. Kentucky State Bd. of Registration for Pro. Engineers & Land Surveyors*.⁷⁷ There, an engineer licensed in Kentucky argued that the Kentucky State Board of Licensure for Professional Engineers and Land Surveyors exceeded its authority in revoking his license for alleged negligence in reviewing certain engineering projects, because the projects all were

⁷³ *Id.* at 193.

⁷⁴ *Id.* (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642–43 (1982) (plurality opinion)).

⁷⁵ *Id.* at 190-191.

⁷⁶ Emphasis added.

⁷⁷ No. 2003-CA-002555-MR, 2005 WL 928642, at *1 (Ky. Ct. App. Apr. 22, 2005).

located in other states in which he was also licensed.⁷⁸ But, critically, the engineer in *McKinney* completed the review work in question *while present in Kentucky*.⁷⁹ Thus, the court reasoned, the Board did not act extratorially in violation of *Barnhart*, because the plaintiff's "acts in the practice of engineering actually occurred in Kentucky."⁸⁰ Here, unlike in *McKinney*, Wheeling's activities with respect to Mitchell would not occur in Kentucky, and indeed Wheeling has *never* taken any action in the Commonwealth. Consequently, *McKinney* does not indicate that the Commission has the statutory authority to require Wheeling to obtain the Certificate for the ELG project at Mitchell.

57. In light of *Barnhart* and the presumption against extraterritorial application of statutes, KRS 278.020(1) does not provide the Commission with the authority to regulate Wheeling's activities in West Virginia. Furthermore, recognizing the effect of the presumption against extraterritorial application avoids the necessity of engaging in the constitutional analysis laid out above.⁸¹

Request for Deviation

58. Kentucky Power requests that the Commission issue the requested declaratory order on or before **October 8, 2021**.

59. A declaratory order by October 8, 2021 is required to provide sufficient time to permit Company management to reach a final and informed decision on how to address the October 13, 2021 deadline for notifying the West Virginia Department of Environmental

⁷⁸ *Id.* at *1.

⁷⁹ *Id.*

⁸⁰ *Id.* at *2.

⁸¹ *Cf. Baker v. Fletcher*, 204 S.W.3d 589, 597-98 (Ky. 2006) (courts should "refrain from reaching constitutional issues when other, non-constitutional grounds can be relied upon").

Protection if the ELG modifications will not be made under the ELG Rule. If timely notice is not provided to the West Virginia Department of Environmental Protection and the decision is made after October 13, 2021 not to complete ELG work and instead retire Mitchell, then Mitchell must permanently cease combustion of coal by the ELG compliance date specified in its NPDES permit, which can be no later than December 31, 2025. Based on the ELG compliance date in the draft NPDES permit issued for Mitchell, Mitchell's ELG compliance date would be June 30, 2023.⁸² The failure to resolve the issue of whether Wheeling is required to seek a certificate from this Commission for the ELG compliance work to be performed at Mitchell by October 8, 2021 could have the real world consequence of requiring the retirement of Mitchell as early as June 30, 2023 unless AEP files with the EPA by October 13 to close the plant by the end of 2028. This Commission's decision by October 8, 2021 on the legal issue of the application of KRS 278.020 to Wheeling likely may inform the West Virginia Commission's consideration of Wheeling's petition to reopen and its ELG cost recovery determination, which the West Virginia Commission has committed to provide by October 13, 2021. Both commissions' perspectives are critical to ensuring a path forward for Mitchell under the ELG Rule's time constraints.

60. The schedule established by 807 KAR 5:001, Section 19(4) and (5) for submitting responses and replies to the Company's application will not permit the Commission to render a decision by October 8, 2021 as requested by the Company, or even the October 13, 2021 West Virginia Department of Environmental Protection deadline.

61. 807 KAR 5:001, Section 22 authorizes the Commission to grant deviations, for good cause shown, from the provisions of Chapter 001 of Title 807 of the Kentucky

⁸² December 31, 2025 is the latest theoretically possible date to come into compliance with the ELG Rule or to cease operation, but that date is not guaranteed and would require further modification of Mitchell's draft NPDES permit.

Administrative Regulations. 807 KAR 5:001, Section 19(4) provides the Commission may order a different period for responses.

62. Good cause exists for granting a deviation from the period for filing responses and replies. The deviation should provide any party to this proceeding a reasonable opportunity to submit a response, while providing the Commission the required to render a decision on or before October 8, 2021. In furtherance of the expedited schedule, Kentucky Power agrees to waive its right to file a reply if required to permit the Commission to render a decision by October 8, 2021.

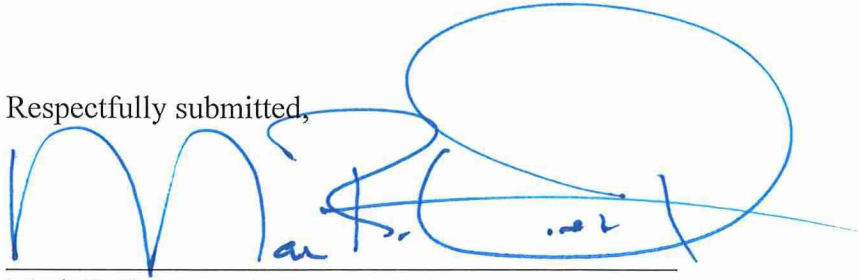
Wherefore, Kentucky Power Company respectfully requests the Commission to issue an order on or before October 8, 2021:

(1) Declaring that Wheeling Power Company is not required to seek and obtain from this Commission a certificate of public convenience and necessity to construct “any plant, equipment, property, or facility” at the Mitchell Generating Station required to comply with the ELG Rule;

(2) Granting a deviation from the scheduling provisions of 807 KAR 5:001, Section 19 as required to permit the Commission to issue the requested declaratory order on or before October 8, 2021; and

(3) Granting such further relief as may be appropriate.

Respectfully submitted,



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COUNSEL FOR KENTUCKY POWER
COMPANY

EXHIBIT 1

Commonwealth of Kentucky
Michael G. Adams, Secretary of State

Michael G. Adams
Secretary of State
P. O. Box 718
Frankfort, KY 40602-0718
(502) 564-3490
<http://www.sos.ky.gov>

Certificate of Existence

Authentication number: 255168

Visit <https://web.sos.ky.gov/ftshow/certvalidate.aspx> to authenticate this certificate.

I, Michael G. Adams, Secretary of State of the Commonwealth of Kentucky, do hereby certify that according to the records in the Office of the Secretary of State,

KENTUCKY POWER COMPANY

is a corporation duly incorporated and existing under KRS Chapter 14A and KRS Chapter 271B, whose date of incorporation is July 21, 1919 and whose period of duration is perpetual.

I further certify that all fees and penalties owed to the Secretary of State have been paid; that Articles of Dissolution have not been filed; and that the most recent annual report required by KRS 14A.6-010 has been delivered to the Secretary of State.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal at Frankfort, Kentucky, this 27th day of September, 2021, in the 230th year of the Commonwealth.



Michael G. Adams

Michael G. Adams
Secretary of State
Commonwealth of Kentucky
255168/0028317

VERIFICATION

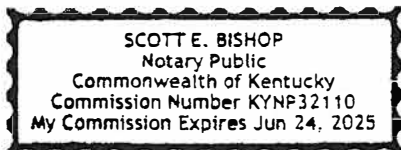
COMMONWEALTH OF KENTUCKY)
) Case No. 2021-00370
COUNTY OF BOYD)

The undersigned, Brett Mattison, being duly sworn, deposes and says that he is the President and Chief Operating Officer of Kentucky Power Company, and that the factual allegations set forth hereinabove are true and correct to the best of his information, knowledge and belief gained after a reasonable inquiry.



BRETT MATTISON

Subscribed and sworn to before me, a Notary Public in and before the said County and State, by Brett Mattison, this the 29th day of September, 2021.



Notary Public

Notary ID Number: KYNP32110

My Commission Expires: June 24, 2025