

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

In the Matter of:

ELECTRONIC APPLICATION OF)	
KENTUCKY POWER COMPANY)	
FOR APPROVAL OF AFFILIATE)	Case No. 2021-00421
AGREEMENTS RELATED TO THE)	
MITCHELL GENERATING STATION)	

JOINT RESPONSE TO AMENDED APPLICATION

Pursuant to the Kentucky Public Service Commission’s (“Commission”) March 17, 2022 Order, the Intervenors, the Attorney General of the Commonwealth of Kentucky, by his Office of Rate Intervention (“Attorney General” or “AG”), and Kentucky Industrial Utility Customers (“KIUC”) submit this Joint Response to the Amended Application filed by Kentucky Power Company (“Kentucky Power” or “Company”).

I. The Commission Should Not Approve the Amended Application Without Providing Due Process to Interested Stakeholders.

In its Amended Application, Kentucky Power requests approval of a proposed new Mitchell Plant Ownership Agreement that would govern the potential dissociation of Kentucky Power and Wheeling Power Company (“Wheeling”) in the Mitchell Generating Plant investment. That new Ownership Agreement differs materially from the Ownership Agreement originally submitted by the Company. Yet Kentucky Power requests that the new Ownership Agreement be reviewed and approved on an expedited basis without the benefit of any discovery by Staff and/or intervenors and without an opportunity for testimony. Given the importance of the matters at issue

in this proceeding to the future operations of Kentucky Power and to the ratepayers of Eastern Kentucky, AG/KIUC respectfully disagree with this approach.

Kentucky Power's Amended Application was not filed in this proceeding until after the discovery stage of the proceeding was already completed and an evidentiary hearing was held on March 1, 2022. While parties discussed the "*alternative unit division proposal*" first described conceptually and very generally in the Rebuttal Testimony of Company witness Stephan Haynes at the March 1, 2022 hearing, no proposed agreement was provided for intervenor review at that time. Further, the Commission itself indicated that if Kentucky Power wished to proceed with its alternative unit division proposal, the Company would need to support that proposal with additional detail.¹ Accordingly, the alternative proposal could best be described as simply in the initial brainstorming stage by the time of the hearing.

On March 3, 2022, the Commission ordered Kentucky Power to "*notify the Commission whether or not Kentucky Power intends to file a proposed amendment to the Mitchell Ownership Agreement*" by March 16, 2022. On March 9, 2022, the Commission held an Informal Conference in which Kentucky Power generally described its alternative unit division proposal through a PowerPoint and parties were given an opportunity for initial responses. Again, no proposed agreement was circulated. Not until March 15, 2022 did Kentucky Power file its Motion for Leave to amend its Application which included the newly proposed ownership agreement language. *With the filing of the amended application on March 15, 2022, the Attorney General and KIUC saw the proposed agreement for the first time.* The Commission granted Kentucky Power's Motion on March 17, 2022.

In its March 17, 2022 Order granting Kentucky Power's Motion, the Commission stated

¹ Tr. (March 1, 2022) at 15:32.

that “*an informal conference was held on March 9, 2022, during which Kentucky Power presented the proposed modifications to the Ownership Agreement....*” This description overstates the extent of Kentucky Power’s representations to intervenors at the Informal Conference. Again, while Kentucky Power provided a PowerPoint generally describing potential amendments related to the alternative unit swap proposal, the intervenors were not given a copy of a revised ownership agreement nor any other form of contractual language at the Informal Conference. Further, intervenors were not provided any opportunity to conduct follow-up discovery on the information presented at the Informal Conference.

At the Hearing of March 1, 2022, Commissioner Cabbage said, “*I think for me it’s hard to really even tell you what the questions are until we see what a firm proposal is...*”² She went on to say she “*wouldn’t even know where to start without the language in front of [her].*”³ Respectfully, AG/KIUC are in the same boat. AG/KIUC had no ability to vet a proposal that did not exist until the March 15, 2022 filing.

Additionally, the Commission states that AG/KIUC “*jointly filed a response objecting to the motion for leave to file an amended application, contending that the parties were not afforded sufficient time to review the proposed modifications to the Ownership Agreement.*” To clarify, AG/KIUC did not object to amendment of the Application. Rather, AG/KIUC objected to the procedure proposed for review of the Amended Application. Despite those objections, the Commission adopted Kentucky Power’s proposed procedural schedule, setting a hearing thirteen days later without any opportunity for intervenors to conduct discovery. Moreover, the Commission established a hearing date at the tail-end of another substantial hearing in Case 2021-00481 for which AG/KIUC must prepare.

² *Id.* at 15:37.

³ *Id.*

Time is not of the essence here. All parties are aware of the proposed transfer of control of Kentucky Power to Liberty Utilities in Case No. 2022-00481. But this case should be decided independently of that case, on its own merits, and by its own process. The issues involved are too important to ratepayers to address without a fully developed record. Kentucky Power made the informed decision to amend its Application. As such, the Company should expect that approval of the Amended Application will not happen automatically and will be subjected to an appropriate and normal review process.

Despite these serious due process concerns, AG/KIUC will do their best to contribute to the development of the issues in this proceeding. But given the lack of opportunity for in-depth review of Kentucky Power's proposal, it is difficult for AG/KIUC to comprehensively assess whether modification of its current litigation position (rejection of the Ownership Agreement altogether or replacement of the original Fair Market Value fallback proposal with Net Book Value as required by KRS 278.2207) is warranted. While AG/KIUC see some merit in the alternative unit swap proposal, in the absence of an opportunity for in-depth review of that proposal, AG/KIUC likely will not recommend its adoption.

II. The Commission Should Address Several Ambiguities in the Proposed Ownership Agreement.

In reviewing the Amended Application, several ambiguities and pressing questions should be addressed, including the following:

- Whether approval of the Amended Ownership Agreement would undermine or usurp the Commission's statutory authority to protect Kentucky ratepayers, including the impacts of a binding arbitration decision provided for under new Section 12.4 or a FERC decision provided for under Section 12.6 of the Ownership Agreement on the

Commission's authority.

- Whether the Amended Ownership Agreement grants too much power to the Operating Committee.
- Whether the Amended Ownership Agreement provides adequate specificity regarding the apportionment of decommissioning costs, ELG costs, and/or tax savings between Kentucky Power and Wheeling.
- Whether the Amended Ownership Agreement provides for a reasonable apportionment of decommissioning costs, ELG costs, and/or tax savings between Kentucky Power Company and Wheeling.
- Whether the Amended Ownership Agreement would allow Kentucky Power Company to annually elect to continue operating its Mitchell unit beyond 2028, consistent with the changes cited in the Company's Amended Application.
- Whether the Amended Ownership Agreement would require Kentucky Power to procure a financial hedge product to protect the Company from PJM capacity performance penalties in the event of a forced outage, and if so, the cost of the hedge product to the Company.
- Whether the Unit Interest Swap Alternative will be structured as two transactions (one for Kentucky Power Company to acquire Wheeling's 50% interest in one of the units and another for Kentucky Power Company to sell its 50% interest in the other unit to Wheeling).
- Whether the structure of the Unit Interest Swap transaction(s) will be in the form of a sale and purchase or a like kind exchange for accounting and/or tax purposes.
- The accounting, tax, and ratemaking implications of the proposed structure of the

transaction(s) if the Unit Interest Swap Alternative is pursued and completed.

- Whether there will be a “*make-whole*” between Kentucky Power and Wheeling to ensure that neither party is disadvantaged nor advantaged by the ultimate ownership of one unit compared to the other unit for performance and/or cost differences between the units if the Unit Interest Swap Alternative is pursued and completed.
- Whether Kentucky Power intends to seek approval of the Amended Ownership Agreement at the Federal Energy Regulatory Commission.

This is merely a preliminary list, which AG/KIUC expressly reserve their right to supplement at the hearing and in post-hearing briefs. But AG/KIUC wanted to present several of its most pressing concerns to the Commission as soon as possible in the hopes that these matters would be thoroughly examined before any decision in this proceeding. These are concerns that normally would be assessed after reviewing responses to written discovery and addressed in pre-filed testimony.

Respectfully submitted,

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Certificate of Service and Filing

Pursuant to the Commission's Orders and in accord with all other applicable law, Counsel certifies that, on March 23, 2022, an electronic copy of the forgoing was served by e-mail to the following.

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this 23rd day of March, 2022.

A handwritten signature in blue ink, appearing to read "J. Michael West". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Assistant Attorney General