

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

In the Matter of:

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

**ATTORNEY GENERAL AND KENTUCKY INDUSTRIAL UTILITY
CUSTOMER’S JOINT POST-HEARING MEMORANDUM RESPONSE BRIEF**

Pursuant to the Kentucky Public Service Commission’s (“Commission” or “Kentucky Commission”) March 31, 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 Post-Hearing Memorandum Response Brief in response to the Initial Brief of Kentucky Power Company (“Kentucky Power”).

In their Initial Brief, AG-KIUC recommend that the Commission: 1) reject the proposed changes to the Operating Agreement, and reauthorize the current version of the Operating Agreement with limited, necessary modifications; 2) deny creation of an Ownership Agreement because it is unnecessary and inappropriate at this time; 3) find that the currently proposed, revised version of the Ownership Agreement is flawed; and, 4) find that the previously proposed version of the Ownership Agreement is also flawed. Nothing raised in Kentucky Power’s Initial Brief warrants a change in AG-KIUC’s recommended approach.

I. Kentucky Power Concedes That Section 9.6 Of The Revised Ownership Agreement Is Unnecessary At This Time.

AG-KIUC previously articulated why creating an Ownership Agreement is unnecessary and inappropriate at this time, and why the various Ownership Agreements proposed by Kentucky Power suffer from serious flaws.¹ As AG-KIUC explained, Section 9.6 of the proposed Ownership Agreement, which provides the basis for a “*Buyout Transaction*” or potentially a “*Unit Interest Swap Transaction*,” and the provisions effectuating that section (including the mandate of binding arbitration under Section 12) are particularly problematic.

Kentucky Power insinuates that it was required to provide such a framework for the transfer of Mitchell to Wheeling Power, claiming that “[a]s explained by Mr. Mattison in his direct testimony, the need for and terms of the New Mitchell Agreements are a direct result of the Kentucky and WVPSC’s previously-described orders,”² and that “[t]hey provide a process through which Kentucky Power can divest itself of its ownership interest in the Mitchell Plant in accordance with this Commission’s orders in Case No. 2021-00004.”³ This is simply incorrect. While a divestiture of its interest in Mitchell is certainly a possible result of the Commission’s Orders, the Kentucky Commission did not require Kentucky Power to provide a premature framework for that potential future transaction.

Moreover, Kentucky Power’s affiliate, Wheeling Power Company (“Wheeling”) recently told the West Virginia Public Service Commission (“WVPSC”) that it would “*defer to WVPSC’s preference if that commission believes it is more reasonable to omit*

¹ AG-KIUC Brief at 5-15.

² Kentucky Power Initial Brief at 24.

³ Kentucky Power Initial Brief at 25.

Section 9.6 (and related provisions) from the Revised Ownership Agreement, assuming the WVPSC otherwise authorizes the Company to enter into the other terms and conditions of that agreement.”⁴ Here, Kentucky Power acknowledges Wheeling’s testimony in that WVPSC matter, stating that “[o]f special note in Mr. Beam’s rebuttal testimony was an alternative offered by Appalachian Power and Wheeling to remove entirely the provisions governing the transfer of Kentucky Power’s plant interest by 2028 (Section 9.6 of the Revised Ownership Agreement and related provisions and definitions) and rather focus the agreements on the operation of and investment in the Mitchell Plant between now and December 31, 2028.”⁵ “[E]ither path presented to the WVPSC by Wheeling is acceptable to Kentucky Power[.]”⁶

Hence, Kentucky Power has now expressed a willingness to remove Section 9.6 entirely. This change of position supports a clear conclusion: the premature structuring of a transaction to divest Kentucky Power of its interest in Mitchell is now and always has been unnecessary.

II. Kentucky Power Has Failed To Justify Making Non-Essential Changes To The Current Status Quo.

Vice Chair Cabbage posed an important question to Mr. Haynes at the March 30th hearing when she asked: “*couldn’t this have all just been dealt with by changing the existing operating agreement to make Wheeling the operator; wouldn’t that have just been more simple, or is some of this also being driven by the transaction that’s been proposed?*”⁷ While Mr. Haynes stated in a conclusory fashion that he thought certain changes, including resolution of “*disposition issues*” were necessary, he altogether failed

⁴ Kentucky Power Initial Brief at 3.

⁵ Kentucky Power Initial Brief at 17.

⁶ Kentucky Power Initial Brief at 4.

⁷ Hearing Tr. (March 30, 2022) at 12:34:36.

to address *why* those changes were necessary.⁸

Kentucky Power suggests that the potential Liberty acquisition is a driver of the changes proposed here, stating that “[t]he Current Agreement also lacks the provisions it needs to adapt to third party ownership, should it arise in the future as may occur with the proposed Liberty Utilities Co. (“Liberty”) acquisition of Kentucky Power.”⁹ But Kentucky Power fails to identify why the extent of the changes proposed in this matter are necessary to effectuate the Liberty transaction.

The Commission did not make approval of the proposed agreements a condition precedent to the closing of the Liberty acquisition. Kentucky Power and Liberty did. But Kentucky Power’s attempt to leverage the statutory deadline in the acquisition case to secure approval of a premature Mitchell buyout framework should be viewed cautiously. There is no need to issue a hurried approval of unnecessary and unjustified provisions that will impact Kentucky Power’s retail rates for years to come.¹⁰

III. Kentucky Power’s Criticism Of AG-KIUC Witness Kollen Is Unwarranted.

Kentucky Power argues that AG-KIUC witness Kollen’s failure to criticize Kentucky Power’s option to sell its interest to other third-parties undermines his criticism of the proposed Unit Interest Swap Transaction. But Kentucky Power is not proposing the terms of a sale of Kentucky Power’s interest in Mitchell to a non-AEP third party in this case. The Unit Interest Swap Transaction is the proposal at issue in this matter. Accordingly, Mr. Kollen’s criticism is focused on that proposal. While it is of course important that Kentucky Power retain the authority to enter into transactions related to

⁸ Hearing Tr. (March 30, 2022) at 12:34:50.

⁹ Kentucky Power Initial Brief at 2.

¹⁰ AG-KIUC’s Initial Brief at 16-17.

assets it owns, the fact that Kentucky Power has not offered any detail related to a speculative and non-existent transaction is simply not at issue in this case.

IV. The Kentucky Commission Should Not Make Its Decision Based On Speculation About The WVPSC’s Potential Actions.

In the parallel WVPSC proceeding, a Consumer Advocates Division expert recommended that, not only should the current Section 9.6 be rejected, but Kentucky Power’s interest in Mitchell should be set at \$0 or \$1.¹¹ “*They are well aware that when they decline to fund ELG, they basically reduce the plant value to \$0, or \$1, because the plant could no longer continue to operate after 2028.*”¹² That expert went on to say, “*they converted that power plant to an idle stranded cost, period.*”¹³ There is no way to predict what the WVPSC will or will not approve as it relates to the proposed agreements. But the Kentucky Commission should not approve an Ownership Agreement simply based upon the hope that if the approved agreement is reasonable enough, then WVPSC will be willing to approve the same. The burden is on AEP, Kentucky Power, and Wheeling to present a proposal that meets everyone’s needs and does not pit one jurisdiction against another. It has yet to do so.

V. Kentucky Power’s Statement That It Will Obtain Necessary Regulatory Approvals Is Not A Guarantee That It Will Not Seek To Evade This Commission’s Review.

In its Brief, Kentucky Power argues that the proposed language of Section 9.6 requires it to seek necessary regulatory approvals. This is insufficient to guarantee that Kentucky Power will not argue to the contrary in the future or to an alternate body in

¹¹ *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, Exhibit at 201 (April 13, 2022).

¹² *Id.*

¹³ *Id.*

order to circumvent this Commission's review. As AG-KIUC discuss in their Initial Brief, jurisdictional and regulatory expectations regarding these issues should be expressed in crystal-clear fashion that absolutely forecloses misunderstandings on this topic. The inclusion of a boilerplate provision is not sufficient to provide this clarity.

CONCLUSION

For the reasons stated in AG-KIUC's Initial Brief as well as those stated herein, this Commission should reject the proposed modification of the Operating Agreement and the creation of the Ownership Agreement as proposed by AEP. Instead, the Commission should reauthorize the current Operating Agreement with only those modifications that are necessary for the immediate continued operation of Mitchell.

Respectfully submitted,

DANIEL CAMERON
ATTORNEY GENERAL



J. MICHAEL WEST
LAWRENCE W. COOK
ANGELA M. GOAD
JOHN G. HORNE II
ASSISTANT ATTORNEYS GENERAL
1024 CAPITAL CENTER DR., STE. 200
FRANKFORT, KY 40601
(502) 696-5433
FAX: (502) 564-2698
Michael.West@ky.gov
Larry.Cook@ky.gov
Angela.Goad@ky.gov
John.Horne@ky.gov

/s/ Michael L. Kurtz
Michael L. Kurtz, Esq.
Kurt J. Boehm, Esq.
Jody Kyler Cohn, Esq.
BOEHM, KURTZ & LOWRY
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202
Ph: 513.421.2255 fax: 513.421.2764
mkurtz@bkllawfirm.com
kboehm@BKllawfirm.com
jkylercohn@BKllawfirm.com
Counsel for KIUC

Certificate of Service

Pursuant to the Commission's Orders in Case No. 2020-00085, and in accord with all other applicable law, Counsel certifies that an electronic copy of the forgoing was filed and served by e-mail to the parties of record.

moverstreet@stites.com
kglass@stites.com
cmblend@aep.com
tswolffram@aep.com
jccrespo@aep.com
hgarcia1@aep.com

This 21st day of April, 2022

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

Assistant Attorney General