

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

In the Matter of:

The Electronic Application Of Kentucky Power	)	
Company For Approval Of Affiliate Agreements	)	Case No. 2021-00421
Related To The Mitchell Generating Station	)	

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**INITIAL BRIEF OF KENTUCKY POWER COMPANY**

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## **I. INTRODUCTION**

Kentucky Power Company (“Kentucky Power” or the “Company”) comes to the Public Service Commission of Kentucky (“Commission”) in this case for approval of the agreements needed to implement and comply with orders of this Commission and the Public Service Commission of West Virginia (“WVPSC”) that established divergent investment and operational paths for the Mitchell Plant. This docket is intended to provide a path for approval of new Mitchell Plant agreements that provide the protections and terms required by both commissions and that both this Commission and the WVPSC can approve expeditiously. The Commission should grant Kentucky Power’s application for the approvals necessary to authorize the Company to enter the proposed Mitchell Plant Operations and Maintenance Agreement (“Operations Agreement”) and the proposed Mitchell Plant Ownership Agreement (“Ownership Agreement”), as updated by the Company in March 2022 (the “Revised Ownership Agreement”).

The record establishes that the agreements fully comply with the Commission’s orders and the laws regarding the entry into the agreements. The Company also has shown that the agreements will provide the Company the authority and flexibility it needs to comply with the Commission’s recent orders on CCR and ELG investments in the years to come as the Company adapts to inevitable changes in both the markets and regulation for the benefit of Kentucky Power customers. The Company has further demonstrated the proposed agreements overall are reasonable and fair, in the public interest, and will not interfere with the Commission’s authority to ensure fair, just, and reasonable rates.

The current Mitchell Plant Operating Agreement (“Current Agreement”) has served Kentucky Power and its customers well since it went into effect at the end of 2014. However, it is now outdated due to conflicts between the orders of this Commission and the WVPSC.

Kentucky Power has been granted a certificate of public convenience and necessity (“CPCN”) for CCR and not for ELG, manifesting this Commission’s direction under the options presented that Kentucky Power should not operate the Mitchell Plant after December 31, 2028 because to do so would require an ELG investment which it has expressly prohibited. Wheeling Power Company (“Wheeling”), by contrast, was granted a CPCN by the WVPSC to construct both CCR and ELG at the Mitchell Plant, for both units, in order to develop an option for the Mitchell Plant to remain operational beyond 2028 for the benefit of the customers who pay for those upgrades – namely, Wheeling’s customers in West Virginia. As the Company established, the Current Agreement lacks flexibility to adapt to the divergent investment and ownership approaches that Kentucky Power and Wheeling will need to take at the Mitchell Plant because of these orders. The 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.

Changes are needed, and both this Commission and the WVPSC recognize this need in their respective orders. These orders directed that Kentucky Power and Wheeling, respectively, seek approval for the revisions necessary to comply with their directives, including changing the plant operator to Wheeling and shifting permits to Wheeling so that the ELG can be constructed under its full responsibility and to ensure Kentucky Power customers do not pay for Wheeling’s ELG investment. Among the key principles that guided Kentucky Power in proposing the Operations Agreement and the Revised Ownership Agreement are:

- 1) Change the operator from Kentucky Power to Wheeling to allow ELG permits to be updated to Wheeling, which allows work on both environmental projects to proceed such that Wheeling may expeditiously come into compliance with ELG rules in order for the plant to be operated successfully through at least 2028.

- 2) Adjust the allocation of capital and O&M and establish appropriate policies so that Wheeling is responsible for ELG investments and O&M, and both companies are responsible for CCR investments and O&M.
- 3) Adjust the allocation of investment for non-ELG capital investments based on the different end of life plans so that Kentucky Power is not allocated costs that relate to the period beyond 2028 after Kentucky Power exits plant operations.

The Company has also proposed terms and conditions to determine a fair transfer of Kentucky Power's remaining interest in the Mitchell Plant to Wheeling by the end of 2028 if Wheeling chooses to continue operating the Mitchell Plant. These provisions, largely focused on the "fair market value" backstop set forth in Section 9.6 of the proposed Ownership Agreement, received significant criticism from intervenors and inquiry from Staff and the Commission itself. To address these concerns, the Company amended its Application and proposed a Revised Ownership Agreement, containing a Unit Interest Swap backstop which provides Kentucky Power and this Commission even more options and flexibility.

The Company informed the Commission in its recently filed 10-day Update in Case No. 2021-00004,<sup>1</sup> which describes developments in the parallel West Virginia case, that Wheeling would defer to the WVPSC's preference if that commission believes it is more reasonable to omit 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.<sup>2</sup> To facilitate the acceptance of a single consensus agreement by both the West

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<sup>1</sup> See April 5, 2022 10-Day Update, *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 at 11 (April 13, 2022) (attached hereto as **Exhibit 1**); see also *id.*, KPCO\_SR\_KPSC\_1\_1\_Attachment43, also attached as a part of Exhibit 1. Exhibit 1 also includes the April 13, 2022 update regarding the hearing in West Virginia Case No. 20-1040-E-CN held on April 7, 2022.

<sup>2</sup> The Commission has indicated that the 10-Day Updates in Case No. 2021-00004 are an appropriate mechanism for apprising this Commission on developments in West Virginia Case No. 20-1040-E-CN that may have a bearing on these proceedings. See VR 3/30/2022; 12:42:25-12:42:56.

Virginia and Kentucky commissions that is responsive to all parties' concerns, Wheeling nevertheless requested that the WVPSC find both options acceptable (*i.e.*, continuing with Section 9.6 including the Unit Interest Swap *and* removing Section 9.6 and associated provisions in their entirety).

As described more fully herein, either path presented to the WVPSC by Wheeling is acceptable to Kentucky Power; each satisfies the requirements for approval of the proposed agreements by this Commission. If the Commission is so inclined, Kentucky Power would ask that the Kentucky Commission also provide a path to consistency between the two states and approve both options: (i) the Revised Ownership Agreement (including Section 9.6 and related provisions); and (ii) the Revised Ownership Agreement with Section 9.6 (and the related provisions) removed. Doing so will increase the potential that at least one version of the agreements is found acceptable by both commissions, thereby allowing both companies to comply promptly with their respective commission's directions. However, if the Commission is concerned with matters prematurely being defined by Section 9.6, then approving a version without a Section 9.6 backstop is also acceptable so that the agreements can be aligned and the ELG physical work can begin in Wheeling's name and not Kentucky Power.

In any case, the Company fully recognizes, and has clarified expressly in the Revised Ownership Agreement, that any transaction produced by the buyout provisions of the Revised Ownership Agreement would need to receive all necessary regulatory approvals, including approvals from this Commission. No provision of the Revised Ownership Agreement (or the Operations Agreement) restricts or limits the Commission's authority in reviewing any such future transaction. In addition, Kentucky Power would not be prohibited from selling its interest to a third party independent of the buyout or Unit Interest Swap procedures of the Revised

Ownership Agreement, again subject to the Commission’s approval, further preserving optionality. That this Commission for Kentucky Power, and the WVPSC for Wheeling, always will have the final say on any transaction gives this Commission the assurances it needs that any outcome will be reasonable and to the benefit of Kentucky Power’s customers, consistent with Kentucky law and this Commission’s precedent.

Accordingly, the Commission should promptly authorize the Company to enter into the Operations Agreement and Revised Ownership Agreement (collectively, the “New Mitchell Agreements”) and remove the uncertainty that currently hangs over the path forward for the Mitchell Plant to the detriment of the Company and its customers.

## **II. BACKGROUND AND CASE OVERVIEW**

### **A. Factual and Procedural Background.**

#### **1. The Mitchell Plant.**

The Mitchell Plant is located approximately 12 miles south of Moundsville, West Virginia on the Ohio River.<sup>3</sup> The plant comprises two super-critical pulverized coal-fired base-load generating units.<sup>4</sup> Mitchell Unit 1 has a capacity of 770 MW and Mitchell Unit 2 has a capacity of 790 MW for a total capacity of 1,560 MW.<sup>5</sup> Both units were placed in service in 1971.<sup>6</sup> Each unit is equipped with an electrostatic precipitator for control of particulate matter, a flue gas desulfurization system for sulfur dioxide control, and selective catalytic reduction

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<sup>3</sup> Kerns Direct Test. at 3.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*



technology and low-NOx burners for control of nitrogen oxide (NOx) emissions.<sup>7</sup> Both units also utilize a dry fly ash handling system.<sup>8</sup>

Kentucky Power owns an undivided 50% interest in the Mitchell Plant; the other 50% interest is owned by Wheeling, an affiliate of Kentucky Power.<sup>9</sup> By Order dated October 7, 2013 in Case No. 2012-00578,<sup>10</sup> the Commission granted Kentucky Power a CPCN 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. 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.

December 31, 2028, is the latest possible date the Mitchell Plant can operate without performing retrofits to comply with the Effluent Limitation Guidelines Rule (the "ELG Rule").<sup>11</sup> However, the plant will be able to operate past December 31, 2028, as a result of investments authorized the WVPSC, as more fully described below.<sup>12</sup>

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<sup>7</sup> *Id.*

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

<sup>9</sup> *Id.*

<sup>10</sup> *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).

<sup>11</sup> Kerns Direct Test. at 4.

<sup>12</sup> *Id.*

2. The Kentucky CCR/ELG Case (Case No. 2021-00004).

Kentucky Power filed an application with the Commission in Case No. 2021-00004<sup>13</sup> on February 8, 2021, seeking, *inter alia*, a CPCN 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”).

By Order dated July 15, 2021 in Case No. 2021-00004 (“July 15 Order”), the Commission denied Kentucky Power’s application for a CPCN to undertake the work required for Case 1. The Commission instead granted a CPCN authorizing Kentucky Power to undertake the work associated with Case 2. Under Case 2, Kentucky Power is authorized solely to construct CCR equipment which would result, as proposed by the Company, in the retirement of the Mitchell Plant as to Kentucky Power by December 31, 2028, as recognized by the Order.<sup>14</sup> That matter still remains open on rehearing. Kentucky Power files 10-day updates on the status of the West Virginia proceedings so that the Commission can remain current on changes in West Virginia and to assist in the coordination of consistent orders.<sup>15</sup>

3. The West Virginia CCR/ELG Case (Case No. 20-1040-E-CN).

On December 23, 2020, Appalachian Power Company (“Appalachian Power”) and Wheeling filed an Application seeking a CPCN to make certain internal modifications at the

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<sup>13</sup> *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).

<sup>14</sup> July 15 Order at 7. The July 15 Order is currently pending rehearing before the Commission. Order, *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. 19, 2021).

<sup>15</sup> See, e.g., Ten-Day Update, *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. Apr. 5, 2022).

Amos, Mountaineer, and Mitchell coal-fired generating facilities necessary to comply with either the CCR Rule, or both the CCR and ELG Rules.<sup>16</sup> On August 4, 2021, the WVPSC 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.<sup>17</sup> The WVPSC 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 that commission.<sup>18</sup>

On October 12, 2021 the WVPSC issued a further Order affirming the earlier order that the Wheeling and Appalachian Power proceed with ELG at all three plants.<sup>19</sup> The WVPSC also confirmed that Wheeling’s West Virginia and FERC jurisdictional customers benefitting from the Mitchell Plant beyond 2028 should pay ELG compliance costs and other capital investment and operations costs incurred to keep the plant open after 2028.<sup>20</sup> The WVPSC conditioned its directive on Kentucky jurisdictional customers neither sharing in such costs nor sharing in the capacity and energy available from the Mitchell Plant after 2028.<sup>21</sup> The WVPSC further ordered that “changes in the Operating Agreement for the Mitchell plant or changes in ownership of the Mitchell plant necessary to accommodate the continued operation of the plant without the

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<sup>16</sup> *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*, WVPSC Case No. 20-1040-E-CN (“*West Virginia CCR/ELG Proceeding*”), Petition at 3 (Dec. 23, 2020).

<sup>17</sup> *West Virginia CCR/ELG Proceeding*, Order at 19 (Aug. 4, 2021).

<sup>18</sup> *Id.*

<sup>19</sup> *West Virginia CCR/ELG Proceeding*, Order (Oct. 12, 2021) (filed in Case No. 2021-0004 as part of the Company’s October 13, 2021 10-Day Update as KPCO\_SR\_KPSC\_RH\_1\_1\_Attachment4) (October 13, 2021).

<sup>20</sup> *Id.* at 16.

<sup>21</sup> *Id.* at 15.

involvement of Kentucky Power or Kentucky jurisdictional customers shall be filed for approval by the [WVPSC].”<sup>22</sup>

4. Other Relevant Orders (Case No. 2021-00370).

This Commission also issued two orders in Case No. 2021-00370<sup>23</sup> that are relevant and served as an impetus to the Company filing its Application in this case.<sup>24</sup> First, in its order declaring that Wheeling is not required to obtain a CPCN from this Commission to complete ELG work, the Commission made clear its direction that the Current Agreement be revised to implement the differing authority granted by, and limitations imposed, by the orders of the two commissions:

The Commission expects Kentucky Power 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. The Commission further expects Kentucky Power and Wheeling to promptly seek modifications of environmental permits related to ELG currently held in Kentucky Power’s name. These modifications will be necessary to ensure Kentucky Power’s representations that neither it nor its customers will bear any of the costs of Wheeling’s ELG project.<sup>25</sup>

Second, the Commission also found, on its own motion, that Kentucky Power should request Commission approval prior to any change to the Current Agreement.<sup>26</sup>

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<sup>22</sup> *Id.* at 16.

<sup>23</sup> *In the Matter of: Electronic Investigation of the Service, Rates and Facilities of Kentucky Power Company*, Case No. 2021-00371.

<sup>24</sup> *See* Mattison Direct Test. at 8.

<sup>25</sup> *In the Matter of: Electronic Investigation of the Service, Rates and Facilities of Kentucky Power Company*, Case No. 2021-00371, Order at 9 (Ky. P.S.C. Oct. 8, 2021).

<sup>26</sup> *Id.*, Order at 9 (Ky. P.S.C. Oct. 28, 2021).

**B. The Company's Requested Relief.**

Kentucky Power presently operates the Mitchell Plant under the Current Agreement.<sup>27</sup> As the Operator, most environmental and other permits are held in the name of Kentucky Power on behalf of both Owners.<sup>28</sup> However, the Current Agreement was agreed to by Kentucky Power and Wheeling when their objectives and plans for the Mitchell Plant, including its retirement date and their type and level of investment, were congruent.<sup>29</sup> With the two companies' differing responsibilities, limitations, and requirements as a result of the July 15 Order and the West Virginia Orders, the objectives and interests of Kentucky Power and Wheeling with respect to the Mitchell Plant no longer coincide.<sup>30</sup>

Thus, consistent with the directives from the two commissions summarized above, Kentucky Power's Application sought the grant of all authority required to enter into the New Mitchell Agreements. The Ownership Agreement addresses the overall rights and responsibilities of the Company and Wheeling as fifty-percent co-owners of the Mitchell Plant through 2028.<sup>31</sup> The Operations Agreement provides a mechanism by which Wheeling would manage the day-to-day operations and maintenance of the Mitchell Plant, including dispatch, environmental, and NERC compliance on behalf of the Owners.<sup>32</sup> It also addresses topics including Operator responsibilities and the budget and reporting processes supported by the operator.<sup>33</sup> The agreements were attached to the Direct Testimony of Company Witness Mattison as Exhibits

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<sup>27</sup> Mattison Direct Test. at 4; Kerns Direct Test. at 4.

<sup>28</sup> *Id.*

<sup>29</sup> *See id.*

<sup>30</sup> *See id.* at 6.

<sup>31</sup> Amended Application at 9 ¶ 24.

<sup>32</sup> *Id.* at 10 ¶ 30.

<sup>33</sup> *Id.* at 10-11 ¶ 30.

DBM-2 and DBM-3, respectively.<sup>34</sup> Wheeling also sought approval of the New Mitchell Agreements from the WVPSC.<sup>35</sup>

The Company requested the Commission's approvals as soon as possible so that work on CCR and ELG environmental controls at the Mitchell Plant could proceed in an orderly manner that satisfies the orders of both this Commission and the WVPSC, and the companies could meet the deadlines required by the CCR and ELG rules and applicable permits.<sup>36</sup>

1. The Initial Application.

The agreements, as originally filed, reflected three principal categories of changes needed to comply with the Commission's orders:

First, Section 1.5 of the proposed Ownership Agreement makes Wheeling the operator of the Mitchell Plant in conformity with the Commission's October 8, 2021 Order in Case No. 2021-00371.<sup>37</sup> As the Commission noted in that Order, this change was appropriate given that Wheeling will be responsible for ELG compliance work necessary for Wheeling to potentially operate the Mitchell Plant beyond 2028.<sup>38</sup> Wheeling's obligations as the operator would be governed by the proposed Operations Agreement.<sup>39</sup> Neither day-to-day operations nor associated costs to operate the Mitchell Plant would be affected by changing the operator to Wheeling, and current Mitchell Plant employees would remain on-site to continue the safe and reliable operation of the plant.<sup>40</sup>

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<sup>34</sup> Mattison Direct Test. at 6.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 8-9.

<sup>37</sup> Mattison Direct Test. at 9.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Kerns Direct Test. at 6-7.

Second, in furtherance of the Commission’s directive to ensure that neither the Company nor its customers will bear any of the costs of Wheeling’s ELG project, the new Ownership Agreement also addressed the allocation of costs necessary to enable the Company to comply with CCR rules, for Wheeling to comply with both the CCR and ELG rules at the Mitchell Plant, and for Wheeling to make other capital improvements related to potential post-2028 operations (*see* Section 6.7(b) of the Ownership Agreement providing for review of CCR/ELG capital expenditures by a technical expert; Section 6.4 of the Ownership Agreement providing for cost allocation for other capital expenditures; Section 1.8 of the Ownership Agreement regarding ownership of capital additions; Section 7.1 of the Ownership Agreement regarding voting rights of the companies; and Section 6.4(d) of the Ownership Agreement providing that O&M expenses attributable to ELG upgrades will be allocated exclusively to and paid by Wheeling).<sup>41</sup>

These provisions not only address the Commission’s stated concerns regarding ELG costs but further provide clarity and certainty to ensure that Kentucky Power and its customers will not be responsible for other costs that are necessary only to continue to operate Mitchell Plant after the end of Kentucky Power’s interest in the Plant.<sup>42</sup>

Third, Section 9.6 of the new Ownership Agreement addressed the potential transfer of Kentucky Power’s 50% interest in the Mitchell Plant to Wheeling should Wheeling elect to continue operating the Plant beyond 2028.<sup>43</sup> As described below, although the first two categories of changes drafted and proposed by the Company have remained unchanged and are essentially unchallenged by intervenors, the potential transfer provided more area of concern for the parties.

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<sup>41</sup> Mattison Direct Test. at 10-11.

<sup>42</sup> *Id.* at 11.

<sup>43</sup> *Id.*

2. Section 9.6 Fair Market Value Backstop.

The language of Section 9.6 as originally proposed stated that unless an Early Retirement Event occurred, Kentucky Power and Wheeling would enter into a Member Interest Purchase Agreement whereby Kentucky Power would transfer its Ownership Interest in the Mitchell Plant to Wheeling by December 31, 2028.<sup>44</sup> The purchase price of that buyout would be determined by either mutual agreement or, as a backstop if Kentucky Power and Wheeling were unable to mutually agree on a price by June 14, 2026, a Fair Market Value approach.<sup>45</sup> Under the Fair Market Value backstop, the Buyout Price of Kentucky Power's Ownership Interest would be determined by a formula with the largest component being established by an average of appraisals of the fair market value of Kentucky's undivided 50% interest in the Mitchell Plant as of December 31, 2028.<sup>46</sup> The buyout transaction would need to be approved by the WVPSC and this Commission.<sup>47</sup> The Company replaced this backstop provision with a unit swap approach it believed to be more in line with the desires of interested parties. Approval of the Fair Market Value backstop is no longer being requested by the Company as part of the Agreements.

3. Procedural History of the Unit Interest Swap Backstop and Amended Application.

Throughout the course of this proceeding, a number of parties filed testimony and other pleadings that raised objections to the Fair Market Value backstop approach contained in Section 9.6 of the originally proposed Ownership Agreement.<sup>48</sup> Parties also objected to provisions regarding the handling of decommissioning expense and tax implications contained in Section

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<sup>44</sup> Haynes Supplemental Test. at S5.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Haynes Supplemental Test. at S2.



9.6, among other items.<sup>49</sup> In response, on February 9, 2022, Kentucky Power filed the Rebuttal Testimony of Stephan T. Haynes, wherein it indicated that the Company was open to an alternative backstop mechanism and proposed dividing the interests in the Mitchell Plant (the “Unit Interest Swap”) as that backstop.<sup>50</sup> Generally, the Unit Interest Swap backstop would divide the interests in the Mitchell Plant by unit if the plant is not retired or a mutual agreement could not be reached as to Wheeling acquiring the plant on or before the end of 2028.<sup>51</sup>

A formal hearing was held in this matter on March 1, 2022, wherein the Commission and the intervenors cross-examined the Company’s witnesses on the Company’s Application. The Unit Interest Swap backstop was the subject of extensive testimony and cross-examination at the March 1, 2022 hearing.<sup>52</sup> Thereafter, the Commission issued its March 3, 2022 Order directing Kentucky Power to “notify the Commission before March 16, 2022, whether or not Kentucky Power intends to file a proposed amendment to the Mitchell Ownership Agreement” with respect to the proposed Unit Interest Swap backstop.<sup>53</sup>

On March 15, 2022, Kentucky Power timely filed its notice of intent to file a proposed amendment to the Mitchell Ownership Agreement, a motion for leave to amend its Application, and a proposed Amended Application. As part of its Amended Application Kentucky Power filed the Revised Ownership Agreement, which revised Section 9.6 to provide for the Unit Interest Swap backstop, and the Supplemental Testimony of Stephan T. Haynes and Timothy C. Kerns in support of the same. The Commission held that Kentucky Power established good

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<sup>49</sup> *Id.*

<sup>50</sup> *See* Haynes Rebuttal Test. at R32-R33.

<sup>51</sup> *Id.* at R33.

<sup>52</sup> *See* VR 3/1/2022, 11:42:01-11:43:04, 12:04:30-12:22:35.

<sup>53</sup> Order at 2 (Ky. P.S.C. March 3, 2022).

cause to amend its Application and set a formal hearing on the Company's Amended Application for March 30, 2022.<sup>54</sup>

A formal hearing was held on March 30, 2022, wherein the Company's witnesses supporting the Amended Application (Witnesses Haynes and Kerns) testified and were cross-examined by the intervenors and the Commission. Attorney General and Kentucky Industrial Utility Customers Inc. ("KIUC") (jointly, "AG-KIUC") Witness Lane Kollen also was allowed to provide direct testimony on the witness stand in response to the Amended Application and was cross-examined by the Company and the Commission.

a. Section 9.6 Unit Interest Swap Backstop.

The Revised Ownership Agreement filed as part of the Company's Amended Application removes the Fair Market Value backstop provisions from Section 9.6 of the agreement and replaces them with the Unit Interest Swap backstop.<sup>55</sup>

As with the originally-filed version of Section 9.6 of the Ownership Agreement, under the Unit Interest Swap backstop, Kentucky Power and Wheeling may enter into a Buyout Transaction on mutually agreeable terms and conditions whereby Kentucky Power will transfer its Ownership Interest in the Mitchell Plant to Wheeling on or prior to December 31, 2028.<sup>56</sup> As set forth in Section 9.6(a) of the agreement, the purchase price would be an amount mutually agreed to by Wheeling and Kentucky Power and also is required to be approved by this Commission and WVPSC.<sup>57</sup> If Kentucky Power and Wheeling cannot reach mutual agreement on the purchase price or if any mutual agreement is not approved by this Commission or

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<sup>54</sup> Order at 3 (Ky. P.S.C. March 17, 2022).

<sup>55</sup> See Haynes Supplemental Test. at S4-S5.

<sup>56</sup> *Id.* at S6-S7.

<sup>57</sup> *Id.* at S7.

WVPSC, then as set forth in Section 9.6(b), Kentucky Power and Wheeling would seek to divide their interests in the Mitchell Plant by unit.<sup>58</sup> Upon completion of the division, the parties may operate or retire the units independently.<sup>59</sup>

Considering the PJM auction rules, Kentucky Power and Wheeling would need to determine if a mutual agreement can occur by May 2025 so that their determination is synchronized with the PJM capacity planning cycle, under which generation capacity commitments are generally made three years in advance.<sup>60</sup> However, the unit split would not be consummated until December 31, 2028, unless otherwise agreed, and plant investments made after a determination to divide the units would follow the provisions of the agreement.<sup>61</sup>

Under the Revised Ownership Agreement, with the proposed Unit Interest Swap backstop, Kentucky Power would have the following options: (1) Negotiate a sale of its undivided interest to Wheeling Power; (2) Mutually agree with Wheeling to retire the plant; (3) Split the units and operate the unit with a newly executed agreement to utilize Wheeling's ELG assets; (4) Split the units and sell the unit with a newly executed agreement to utilize Wheeling's ELG assets, or (5) Split the units and close its unit, and pay for decommissioning up front or when the entire plant retires, and record applicable tax benefits at the time of the disposition of Kentucky Power's ownership interest.<sup>62</sup>

The revised language of Section 9.6 expressly acknowledges that Kentucky Power would need to seek and obtain all necessary regulatory approvals related to the Unit Interest Swap.<sup>63</sup>

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at S7-S8.

<sup>63</sup> *Id.* at S11.

Any deviation from prior Commission orders that could occur as a result of pursuing one of the options under the Unit Interest Swap backstop would require additional approval(s) from this Commission before becoming final.<sup>64</sup>

- b. Removal of Section 9.6 (As Described In The Rebuttal Testimony Of Wheeling Witness Christian Beam In WVPSC Case No. 21-0810-E-PC)

On April 4, 2022 Appalachian Power and Wheeling filed the rebuttal testimony of Witness Christian T. Beam in the case in front of the WVPSC to approve the Operations Agreement and Revised Ownership Agreement.<sup>65</sup> Mr. Beam's rebuttal testimony covered the particulars of Section 9.6 and the Unit Interest Swap backstop contained in the Revised Ownership Agreement filed herein.<sup>66</sup> Of 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.<sup>67</sup>

Mr. Beam's rebuttal testimony recognized this Commission's Order that Kentucky Power not invest in ELG, and the Kentucky Commission's and the Staff's discussions at the March 30, 2022 hearing in this matter concerning the potential need for a CPCN in the future should Kentucky Power wish to keep Mitchell in its generation mix past December 31, 2028. Mr. Beam ultimately requested that the WVPSC find acceptable *both* options presented (*i.e.* (i) the Unit Interest Swap option; and (ii) the removal of Section 9.6 and associated provisions in its entirety)

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<sup>64</sup> *Id.*

<sup>65</sup> See Exhibit 1, Ten-Day Update, KPCO\_SR\_KPSC\_1\_1\_Attachment43.

<sup>66</sup> *Id.* at 4-8, 14-16.

<sup>67</sup> *Id.* at 17-18.

in order to provide flexibility and to reduce the potential for inconsistent decisions between the Kentucky and West Virginia commissions, and to increase the potential that the agreements are found acceptable by both commissions.<sup>68</sup> An order from this Commission likewise finding acceptable both options presented (i.e. (i) the Unit Interest Swap option; and (ii) the removal of Section 9.6 and associated provisions in its entirety) would also facilitate a consensus agreement in both West Virginia and Kentucky that is responsive to all parties' concerns.

### **III. LEGAL STANDARD**

#### **A. Approvals Required or Necessitated by the Commission's Orders.**

The Commission's Orders in Case No. 2021-00370 require Kentucky Power 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>69</sup> and to "request Commission approval prior to any change to the Current Mitchell Agreement."<sup>70</sup> The practical result of the Commission's July 15 Order in Case No. 2021-00004 granting Kentucky Power a CPCN to perform only the CCR work at the Mitchell Plant, and the WVPSC's corresponding order granting Wheeling a CPCN to perform both CCR and ELG work at the Mitchell Plant, is to necessitate modifications to the Current Agreement to fully effectuate both commissions' orders.

#### **B. KRS 278.2207**

KRS 278.2207(1) provides for the pricing of products and services between affiliated entities. It states in full:

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<sup>68</sup> *Id.* at 17.

<sup>69</sup> *In the Matter of: Electronic Investigation of the Service, Rates and Facilities of Kentucky Power Company*, Case No. 2021-00371, Order at 9 (Ky. P.S.C. Oct. 8, 2021).

<sup>70</sup> *Id.*, Order at 9 (Ky. P.S.C. Oct. 28, 2021).

(1) The terms for transactions between a utility and its affiliates shall be in accordance with the following:

(a) Services and products provided to an affiliate by the utility pursuant to a tariff shall be at the tariffed rate, with nontariffed items priced at the utility's fully distributed cost but in no event less than market, or in compliance with the utility's existing USDA, SEC, or FERC approved cost allocation methodology.

(b) Services and products provided to the utility by an affiliate shall be priced at the affiliate's fully distributed cost but in no event greater than market or in compliance with the utility's existing USDA, SEC, or FERC approved cost allocation methodology.

The statute authorizes a utility such as Kentucky Power to provide products and services to an affiliate in accordance with a FERC-approved cost allocation methodology. Absent a FERC-approved, or other federally-approved cost-allocation methodology, Kentucky Power is required by KRS 278.2207 to provide products and services to affiliates at the higher of Kentucky Power's fully-distributed costs or market.

**IV. THE COMMISSION SHOULD APPROVE THE NEW MITCHELL AGREEMENTS BECAUSE THE NEW MITCHELL AGREEMENTS ARE REASONABLE, EFFECT THIS COMMISSION'S ORDERS, ARE IN THE PUBLIC INTEREST, AND WILL NOT INTERFERE WITH THE COMMISSION'S ABILITY TO ENSURE FAIR, JUST, AND REASONABLE RATES.**

**A. Modifications To The Current Agreement Are Necessary To Comply With The Commission's Orders.**

Although the Current Agreement is equitable and has been a reasonable and appropriate foundation on which the Company and Wheeling have owned, operated, maintained, and managed the Mitchell Plant since 2014, it is now in the best interests of the Company and its Kentucky customers to terminate the agreement and replace it with the proposed Operations

Agreement and the Revised Ownership Agreement attached as Exhibit DBM-2 to the Mattison Direct Testimony and Exhibit STH-S2 to the Haynes Supplemental Testimony, respectively.<sup>71</sup>

The Current Agreement must be replaced because the owners' interests and plans for future use of the Mitchell Plant have changed.<sup>72</sup> An updated agreement is needed to ensure the ongoing operations and work done at the Mitchell Plant are appropriately apportioned and to comply with recent orders from this Commission and the WVPSC.<sup>73</sup> The Current Agreement was put in place between two AEP affiliates as co-owners when they shared a common long-term strategic plan for the Mitchell Plant, including the desired retirement dates and planned levels of investment.<sup>74</sup> The recent environmental compliance decisions from this Commission and the WVPSC have led the Company's and Wheeling's long-term plans related to Mitchell to diverge, necessitating replacement of the Current Agreement.<sup>75</sup>

As a result, changes are needed, and both this Commission and the WVPSC recognize this need in their respective orders. These orders directed that Kentucky Power and Wheeling, respectively, seek approval for the revisions necessary to comply with their directives, including changing the plant operator to Wheeling and shifting permits to Wheeling so that the ELG investments can be constructed under Wheeling's full responsibility and to ensure Kentucky Power customers do not pay for Wheeling's ELG investment. Among the key principles that guided Kentucky Power in proposing the Operations Agreement and the Revised Ownership Agreement are:

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<sup>71</sup> See Mattison Direct Test. at 5.

<sup>72</sup> *Id.* at 6.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

- 1) Change the operator from Kentucky Power to Wheeling to allow ELG permits to be updated to Wheeling, which allows work on both environmental projects to proceed such that Wheeling may expeditiously come into compliance with ELG rules in order for the plant to be operated successfully through at least 2028.
- 2) Adjust the allocation of capital and O&M and establish appropriate policies so that Wheeling is responsible for ELG investments and O&M, and both companies are responsible for CCR investments and O&M.
- 3) Adjust the allocation of investment for non-ELG capital investments based on the different end of life plans so that Kentucky Power is not allocated costs that relate to the period beyond 2028 after Kentucky Power exits plant operations.

The New Mitchell Agreements also are appropriate to govern the relationship regarding the Mitchell Plant whether or not the ownership of the Company changes, as they address the requirements of this Commission and the WVPSC.<sup>76</sup>

1. The Current Agreement Cannot Just Be Extended.

The Current Agreement is inadequate to ensure compliance with the orders of this Commission and the WVPSC regarding CCR and ELG environmental compliance.<sup>77</sup> As detailed further below, the Current Agreement lacks detailed provisions that would ensure Kentucky Power is not allocated costs related to ELG investments made by Wheeling or the costs of O&M related to that equipment.<sup>78</sup> The Current Agreement also lacks detailed provisions to ensure that Kentucky Power customers do not pay for capital investments at the plant to the extent that the units would have useful lives beyond 2028.<sup>79</sup> The Current Agreement also does not provide Kentucky Power with a defined path to exit plant operations in 2028 or to change the operator to Wheeling Power and move ELG and other environmental permits into Wheeling's name.<sup>80</sup> In

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<sup>76</sup> *Id.* at 14.

<sup>77</sup> Haynes Rebuttal Test. at R30.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*



addition, the Current Agreement will terminate if either Owner is sold and is no longer affiliated with AEP, and it does not contain certain provisions typically found in contracts between unrelated third parties, such as creditworthiness, default, termination, or indemnification.<sup>81</sup>

Moreover, although separate agreements, the two documents are inextricably intertwined and designed to work together to achieve the overall objective of ensuring that the Mitchell Plant is owned and operated by the two companies under appropriate terms and conditions.<sup>82</sup>

2. The New Mitchell Agreements Effect the Commission's Mandate that Kentucky Customers Not Pay for ELG Upgrades.

In furtherance of the Commission's directive to ensure that neither the Company nor its customers will bear any of the costs of Wheeling's ELG project, the Revised Ownership Agreement addresses the allocation of costs necessary to enable the Company to comply with CCR rules, for Wheeling to comply with both the CCR and ELG rules at the Mitchell Plant, and for Wheeling to make other capital improvements related to potential post-2028 operations.<sup>83</sup>

For example, Section 6.7(b) of the Revised Ownership Agreement provides that capital expenditures for CCR and ELG compliance projects will be analyzed by a technical expert who will recommend an allocation of those costs to the Company and Wheeling.<sup>84</sup> The Company will pay half of the costs that the technical expert identifies as enabling it to comply with the CCR rules at the Mitchell Plant, and Wheeling will pay the other half of those costs and all costs that are identified as enabling Wheeling to comply with the ELG rules at the Mitchell Plant.<sup>85</sup>

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<sup>81</sup> *Id.* at R30-R31.

<sup>82</sup> *Id.* at R30.

<sup>83</sup> *See* Mattison Direct Test. at 10.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

Section 6.4 of the Revised Ownership Agreement addresses cost allocation for other capital expenditures.<sup>86</sup> Capital expenditures for assets that go into service after 2028 will be allocated entirely to Wheeling Power (Section 6.7(c)).<sup>87</sup> Capital expenditures for assets that go into service before 2028 and have a depreciable life beyond 2028 are allocated ratably such that Kentucky Power pays only its half of the capital costs for the asset up to the end of 2028 (Section 6.7(d)).<sup>88</sup> Wheeling would pay the remaining capital costs of those projects, including all of the post-2028 costs.<sup>89</sup> All other capital expenditures will be allocated 50% to each owner (Section 6.7(e)), the same as under the Current Agreement.<sup>90</sup>

Section 1.8 of the Revised Ownership Agreement provides that if either owner of Mitchell Plant funds more than 50% of any capital expenditure, such as would occur under the sections mentioned above, then the resulting capital addition will be owned by the two companies and reflected in their books and records in proportion to the respective amounts they each funded.<sup>91</sup>

Finally, per Section 6.4(d), operation and maintenance expenses attributable to ELG upgrades will be allocated exclusively to and paid by Wheeling Power.<sup>92</sup> Other O&M expenses are generally allocated proportionately under Section 6.4 to each owner's dispatch of the Mitchell Plant, the same as under the Current Agreement.<sup>93</sup>

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 10-11.

<sup>91</sup> *Id.* at 11.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

These provisions not only address the Commission's stated concerns regarding ELG costs but further provide clarity and certainty to ensure that Kentucky Power and its customers will not be responsible for other costs that are necessary only to continue to operate Mitchell Plant after the end of Kentucky Power's interest in the Mitchell Plant.<sup>94</sup> The Current Agreement does not contain any similar provisions and therefore would not be compliant with the Commission's orders regarding Wheeling's payment of ELG upgrade costs.

**B. The Mitchell Agreements Are Fair, In The Public Interest, And Reasonable Whether Or Not Kentucky Power Is Sold To Liberty.**

As 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.<sup>95</sup> Those orders necessitate replacement of the Current Agreement with the New Mitchell Agreements to ensure that future investment in and operation of the Mitchell Plant are undertaken consistent with each company's ownership and participation with respect to the Mitchell Plant, as well as to ensure that costs are appropriately allocated and assigned between Mitchell's owners.<sup>96</sup> In short, the changes reflected in the New Mitchell Agreements are necessary regardless of the identity of Kentucky Power's corporate parent.

As Mr. Mattison further testified, the New Mitchell Agreements are appropriate to govern the relationship regarding the Mitchell Plant whether or not the ownership of the Company changes, as they address the requirements of this Commission and the WVPSC.<sup>97</sup> Specifically, the New Mitchell Agreements will benefit Kentucky Power and its customers by providing transparency, clarity, and certainty regarding Mitchell's continued operations, environmental

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<sup>94</sup> *Id.*

<sup>95</sup> Mattison Direct Test. at 13.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 14.

compliance, cost allocation, and ownership.<sup>98</sup> They also ensure that Kentucky Power and its customers will not bear any costs solely associated with operating Mitchell Plant beyond 2028.<sup>99</sup> Finally, they 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.<sup>100</sup> The agreements further will not affect the Commission's ability to ensure fair, just, and reasonable rates, either currently or in the future should the sale of the Company to Liberty be consummated.<sup>101</sup>

The fairness and reasonableness of the New Mitchell Agreements is supported by the fact that they were also subject to negotiation with and found to be acceptable by a third party, Liberty, whose interest in Kentucky Power is unfettered by any affiliate considerations. The Operations Agreement and original Ownership Agreement filed by the Company in this case are the same agreements attached to the Stock Purchase Agreement to which Liberty is a party.<sup>102</sup> After the transaction closes, Liberty will step into the shoes of Kentucky Power and must accept the resulting agreements as its own.<sup>103</sup> Emphasizing the importance to Liberty, obtaining approvals of the New Mitchell Agreements from all three jurisdictions – Kentucky, West Virginia and FERC – became a condition precedent to the closing of the overall transaction.<sup>104</sup> If these approvals are not obtained, or if the orders negatively deviate from what was proposed,

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 15.

<sup>102</sup> Haynes Rebuttal Test. at R14.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

Liberty has certain rights under the Stock Purchase Agreement which, depending on the nature of the orders, could give rise to the termination of the Stock Purchase Agreement.<sup>105</sup>

Liberty also reviewed the Revised Ownership Agreement containing the Unit Interest Swap backstop proposal and authorized Kentucky Power to again assert the importance of this Commission's, the WVPSC's, and the FERC's approval of the New Mitchell Agreements, and that those approvals are a prerequisite to the closing of Liberty's acquisition of Kentucky Power.<sup>106</sup>

Accordingly, while Liberty requires regulatory approval of the New Mitchell Agreements in order to close the transaction to purchase Kentucky Power, the drivers for the New Mitchell Agreements are those that relate to compliance with this Commission's orders concerning the CCR and ELG work. The Company is not driven solely by concerns that a third party may have stepping into what was previously an affiliate arrangement. Provisions regarding the cost allocation for CCR and ELG upgrades and compliance, as well as the buyout provisions, are needed to provide a pathway for the Owners to comply with this Commission's and the WVPSC's orders and are needed regardless of the ownership of either party. Accordingly, the New Mitchell Agreements are needed for reasons independent of AEP's sale of Kentucky Power and are fair, reasonable, and in the public interest regardless of any sale of the Company.

**C. KRS 278.218 Does Not Apply To The New Mitchell Agreements.**

KRS 278.218 mandates Commission approval for the change in ownership of, control, or the right to control, Kentucky Power's 50 percent undivided interest in the Mitchell Plant.<sup>107</sup> Approval is required upon the Commission's finding that the transaction is for a proper purpose

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<sup>105</sup> *Id.*

<sup>106</sup> Haynes Supplemental Test. at 8.

<sup>107</sup> KRS 278.218(1).

and consistent with the public interest.<sup>108</sup> The New Mitchell Agreements do not effect a change in ownership of, control, or the right to control, Kentucky Power's 50 percent undivided interest in the Mitchell Plant. Kentucky Power retains full ownership under the New Mitchell Agreements of its 50 percent undivided interest in the Mitchell Plant.

The New Mitchell Agreements, including their provisions appointing Wheeling Power as Operator of the Mitchell Plant, likewise do not effect a change in control or the right to control the Mitchell Plant. Control of the Mitchell Plant under the New Mitchell Agreements remains with the Operating Committee. Under the New Mitchell Agreements, the membership of the Operating Committee remains unchanged, including Kentucky Power's status as one of the two Operating Committee members. Kentucky Power retains its equal vote with Wheeling Power on all Operating Committee matters.

For these reasons, KRS 278.218 does not apply to this matter where the Company requests approval of agreements that provide a road map for a potential future transfer. The Company does not dispute that KRS 278.218 would apply to any future transaction that effects a change in ownership of, control, or the right to control, Kentucky Power's 50 percent undivided interest in the Mitchell Plant. The Company also has acknowledged that the Company will obtain all necessary regulatory approvals when the Company determines the future treatment of its interest in the Mitchell Plant prior to December 31, 2028.

**D. The New Mitchell Agreements Satisfy KRS 278.2207.**

As explained in the Company's Amended Application, the New Mitchell Agreements are consistent with the requirements of Kentucky's regulatory framework for transactions between affiliates. Specifically, and consistent with the Current Agreement, under the proposed

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<sup>108</sup> KRS 278.218(2).

agreements Wheeling will provide products and services to Kentucky Power at Wheeling's fully-distributed costs.<sup>109</sup> This pricing satisfies the requirements of KRS 278.2207 because the products and services provided to Kentucky Power are provided by the co-owner/operator of the Mitchell Plant (*i.e.* Wheeling ) to the sole co-owner of the Mitchell Plant (*i.e.*, Kentucky Power), and as such there is no lower (nor higher) market price for the products and services provided between these affiliated entities.<sup>110</sup>

In pertinent part, KRS 278.2207(1)(b) provides as follows:

Services and products provided to the utility by an affiliate shall be priced at the affiliate's fully distributed cost but in no event greater than market or in compliance with the utility's existing USDA, SEC, or FERC approved cost allocation methodology.

As explained by Company Witness Kerns, as the Mitchell Plant continues to provide service in the future with Wheeling as the plant's operator and the plant will be operated, maintained, managed, and planned by the same employees responsible for that work today.<sup>111</sup> Consequently, it is anticipated that there will not be any changes in the operation of the Mitchell Plant, or the associated costs, as a result of Wheeling becoming the operator of the plant.<sup>112</sup> Significantly, and consistent with how Kentucky Power bills Wheeling today, the products and services that Wheeling will provide to its affiliate Kentucky Power once Wheeling becomes the operator of the Mitchell Plant will not be provided at a cost greater than market, and will be provided at Wheeling's fully distributed costs.<sup>113</sup> Similarly, third-party services and products to

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<sup>109</sup> See Direct Testimony of Company Witness Mattison at Exhibit DBM-2, Section 7.2.1.

<sup>110</sup> Application at 10 ¶ 35.

<sup>111</sup> See Kerns Direct Test. at 7.

<sup>112</sup> *Id.*

<sup>113</sup> See Mattison Direct Test. at Exhibit DBM-2, Section 7.2.1.

be used or acquired by Wheeling in connection with operation of the Mitchell Plant will be acquired by Wheeling at market and provided to Kentucky Power without mark-up.<sup>114</sup>

Additionally, and also consistent with the manner in which these costs are allocated under the Current Agreement, the pricing of the products and services that the Company will receive from Wheeling as operator of the Mitchell Plant under the proposed Agreements will be consistent with a FERC-approved cost allocation methodology once the Company causes the New Mitchell Agreements to be filed with FERC, as is expected subsequent the approval of the agreements by both this Commission and the WVPSC.<sup>115</sup> As explained in the Application, the expected approval by FERC of the cost allocation methodologies of the New Mitchell Agreements provides an alternative basis for the New Mitchell Agreements' conformity to KRS 278.2207.

The allocation methodology and pricing of products and services to be provided by Wheeling as operator of the Mitchell Plant under the New Mitchell Agreements are reasonable. They mirror the pricing of products and services provided by Kentucky Power, as current operator of the Mitchell Plant, to Wheeling since December 31, 2014, except for excluding the ELG costs the Commission has directed Kentucky Power not to incur.<sup>116</sup> To the extent approval of the New Mitchell Agreements would require any deviation from the affiliate pricing requirements of KRS 278.2207, granting such a deviation would be in the public interest for the same reasons and as illustrated above.

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<sup>114</sup> *Id.*; *see also* Section 14.4.1

<sup>115</sup> *See, e.g.*, Mattison Direct Test. at 5, 14.

<sup>116</sup> *See, e.g. id.* at 4-5, 10-11.



**E. The Proposed Change To Make Wheeling The Operator Will Not Negatively Impact The Mitchell Plant's Future Operation Or Associated Costs.**

One of the cornerstones of why the New Mitchell Agreements are in the public interest and should be approved is the simple undisputed fact that the change to make Wheeling the operator of the Mitchell Plant will not result in any material difference in the future operation of the plant, or its associated costs.<sup>117</sup> As stated previously, all plant employees will become employees of Wheeling, and the Mitchell Plant will continue to be operated, managed, and planned in the same way and by the same team responsible for that work today.<sup>118</sup>

The New Mitchell Agreements provide the necessary framework for the continued operation of the Plant with Wheeling Power as the operator of the plant, consistent with the Commission's directive to substitute Kentucky Power as the operator of the Mitchell Plant in its October 8 and October 28, 2021 orders in Case No. 2021-00370. The New Mitchell Agreements effect this change without negatively impacting the plant's future operations or associated costs, and are therefore in the public interest.<sup>119</sup>

Significantly, the New Mitchell Agreements are consistent with, and implement, the Commission's directive that Kentucky Power not incur costs associated with Wheeling's ELG upgrades at the Mitchell Plant.<sup>120</sup> The proposed change to make Wheeling the operator of the Mitchell Plant under the terms of the proposed Agreements implements and furthers this Commission's directive.

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<sup>117</sup> See Kerns Direct Test. at 6-7.

<sup>118</sup> *Id.*

<sup>119</sup> *See, e.g.*, Kerns Direct Test. at 6-7, Mattison Direct Test. at 8-9; *see also* Kerns Supplemental Test. at 2-3.

<sup>120</sup> *See* Mattison Direct Test. at 10-11.

**F. The New Mitchell Agreements Are In The Public Interest And Will Not Interfere With The Commission’s Ability To Ensure Fair, Just, And Reasonable Rates.**

The New Mitchell Agreements are in the public interest because, first and foremost, they benefit Kentucky Power and its customers by providing transparency, clarity, and certainty regarding Mitchell’s continued operations, environmental compliance, cost allocation, and ownership.<sup>121</sup> The New Mitchell Agreements are also appropriate to govern the relationship regarding the Mitchell Plant whether or not the ownership of the Company changes, as they address the requirements of this Commission and the WVPSC.<sup>122</sup> They ensure that Kentucky Power and its customers will not bear any costs solely associated with operating Mitchell Plant beyond 2028. Finally, the Revised Ownership Agreement provides a process through which Kentucky Power can divest itself of its ownership interest in the Mitchell Plant and otherwise comply with this Commission’s orders in Case No. 2021-00004.<sup>123</sup>

None of the intervenors’ testimony in this case questioned the appropriateness of the agreements’ provisions other than the buyout provisions in Section 9.6 and related provisions and definitions in the Ownership Agreement. Indeed, other than Section 9.6 and definitions related to the buyout itself, AG-KIUC Witness Kollen did not contest or express disapproval of any other provisions of the Revised Ownership Agreement, including, significantly, those provisions designed to segregate investment in ELG and related O&M costs between the Company and Wheeling.<sup>124</sup> And, at hearing under cross examination, when he was asked to

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<sup>121</sup> *Id.* at 14.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Haynes Rebuttal Test. at R6.

identify any other provisions of the Revised Ownership Agreement which he opposed, Mr. Kollen failed to offer any coherent criticism of any other sections of the agreement.<sup>125</sup>

Remarkably, as to the proposed Unit Interest Swap itself, Mr. Kollen states his belief that it leaves too many unknowns for later agreement by Kentucky Power and Wheeling, and postulates a series of what-ifs to try to prove his point.<sup>126</sup> By contrast, Mr. Kollen does *not* criticize the mutual agreement buyout option or the potential sale of the Company's interest to third parties, notwithstanding that they are even more open-ended and flexible options, with even more decisions to be made by the parties in the future, than the Unit Interest Swap. In every case, any transaction resulting from the Company's commercial negotiations – whether a sale to a third party, a mutually agreed transaction with Wheeling, or a Unit Interest Swap – will be reviewed by the Commission with the full opportunity to address any defects in whatever future proposal, if any, is recommended by the Company. Even Mr. Kollen does not seriously dispute that this Commission has its full, unfettered jurisdiction to apply to any transaction proposed by the Company in the future.<sup>127</sup>

Mr. Kollen's only criticism of the of the proposed Operations Agreement was that it included, in his estimation, too many references to the Ownership Agreement and was "carefully integrated" with that document.<sup>128</sup> As Mr. Haynes explained, it is entirely appropriate that the two agreements would refer to each other to ensure they are effective in achieving their goals and in fully expressing the intent of the parties.<sup>129</sup> Although separate agreements, the two documents

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<sup>125</sup> See VR 3/30/22; 15:03:10-15:19:30.

<sup>126</sup> *Id.* at 15:11:58-15:12:07.

<sup>127</sup> *Id.*

<sup>128</sup> Kollen Direct Test. at 35.

<sup>129</sup> Haynes Rebuttal Test. at R30.

are designed to work together to achieve the overall objective of ensuring that the Mitchell Plant is owned and operated by the two companies under appropriate terms and conditions.<sup>130</sup>

Accordingly, the focus of this brief below is on the only portion of the New Mitchell Agreements with which intervenors expressed any actual concerns: the provisions of Section 9.6 of the Ownership Agreement, including the alternative provisions proposed in the Company's Amended Application and related testimony regarding the Unit Interest Swap. The Unit Interest Swap backstop proposal set forth in the Revised Ownership Agreement addresses the concerns raised by the Attorney General and KIUC to the original agreement.<sup>131</sup> In particular, it

- (a) Provides Kentucky Power with multiple options for the disposition of its current undivided interest in the Mitchell Plant. These would include acquiring a unit and continuing to operate it after 2028 (with Commission authorization); acquiring a unit and selling the unit to a third-party; or some combination of the two.
- (b) Provides Kentucky Power with the increased optionality with respect to the retirement of its undivided interest in the Mitchell Plant, including acquiring a unit and retiring the unit; or agreeing with Wheeling to retire the entire generating station.
- (c) Provides multiple means of addressing the Company's liability for decommissioning costs and timing, and the tax implications of the disposition of Kentucky Power's ownership interest in the Mitchell Plant.<sup>132</sup>

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<sup>130</sup> *Id.*

<sup>131</sup> Haynes Supp. Test. at S12.

<sup>132</sup> *Id.* at S12-S13.

1. The Unit Interest Swap Backstop Is A Reasonable And Fair Approach In The Event The Parties Cannot Mutually Agree On A Buyout Price And Do Not Exercise The Mutual Agreement Option.

In addition to Section 9.6 as originally proposed in the Ownership Agreement, the Company has proposed an alternative backstop proposal, superseding the original proposal, under which the Owner's the interests in the Mitchell Plant would be divided by unit if the plant is not retired or a mutual agreement cannot be reached as to Wheeling Power acquiring the plant on or before the end of 2028 (the Unit Interest Swap).<sup>133</sup> Under the Revised Ownership Agreement, there are several steps in the revised Section 9.6 and related sections regarding a potential transaction with Wheeling in 2028 under which Wheeling would purchase Kentucky Power's undivided interest in the Mitchell Plant or the parties would split the Mitchell Units and each independently control specific generating units.

As a first step, and consistent with the original version of the Ownership Agreement, Kentucky Power and Wheeling may enter into a Buyout Transaction on mutually agreeable terms and conditions whereby Kentucky Power will transfer its Ownership Interest in the Mitchell Plant to Wheeling Power on or prior to December 31, 2028.<sup>134</sup> As set forth in Section 9.6(a), the purchase price would be an amount mutually agreed to by Wheeling and Kentucky Power.<sup>135</sup> A transaction also is required to be approved by this Commission and WVPSC.<sup>136</sup>

If Kentucky Power and Wheeling cannot reach mutual agreement on the purchase price or if any mutual agreement is not approved by this Commission or WVPSC, then as set forth in Section 9.6(b), Kentucky Power and Wheeling will seek to divide their interests in the Mitchell

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<sup>133</sup> Haynes Rebuttal Test. at R33.

<sup>134</sup> Haynes Supp. Test. at S5-S6.

<sup>135</sup> *Id.* at S6.

<sup>136</sup> *Id.*

Plant by unit.<sup>137</sup> Considering the PJM auction rules, Kentucky Power and Wheeling would need to determine if a mutual agreement can occur by May 2025 so that their determination is synchronized with the PJM capacity planning cycle, under which generation capacity commitments are generally made three years in advance.<sup>138</sup> However, the unit split would not be consummated until December 31, 2028, unless otherwise agreed, and plant investments made after a determination to divide the units would follow the provisions of the parties' agreement.<sup>139</sup>

The Owners will use the Operating Committee to determine a fair division of the undivided interests and then seek the appropriate regulatory approvals, including the necessary approvals from both state commissions.<sup>140</sup> The Operating Committee can meet and determine the need for real estate and property professionals and/or engineering consultants to establish the real property/land division between Kentucky Power and Wheeling.<sup>141</sup>

The Unit Interest Swap provides Kentucky Power with additional options than it had under the original Section 9.6 of the Ownership Agreement. Under the original version of the Ownership Agreement, there were three alternatives: (1) Wheeling had the option to choose to retire the plant; (2) if not retired by Wheeling, Kentucky Power could negotiate a sale of its undivided interest to Wheeling; and (3) if not retired by Wheeling and a mutually agreed sale of Kentucky Power's undivided interest to Wheeling is not negotiated, Kentucky Power would sell its interest to Wheeling under the Fair Market Value transaction mechanism in Section 9.6.<sup>142</sup> The Unit Interest Swap, by comparison, provides further options to sell or operate an individual

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> Haynes Rebuttal Test. at R33.

<sup>141</sup> *Id.*

<sup>142</sup> Haynes Supp. Test. at S6-S7.

Mitchell unit once a split has been accomplished and an agreement related to investments made to comply with the ELG Rule has been executed by Kentucky Power and Wheeling. Under the proposed Unit Interest Swap backstop, Kentucky Power also has several more options that comply with the Commission's current orders, which include:

- Negotiate a sale of its undivided interest to Wheeling;
- Mutually agree with Wheeling to retire the plant; or
- Split the units and close its unit, and pay for decommissioning up front or when the entire plant retires, and record applicable tax benefits at the time of the disposition of Kentucky Power's ownership interest.<sup>143</sup>

Each of these options can be implemented by Kentucky Power with the flexibility needed to comply with this Commission's orders and adapt to changing facts and circumstances in the future. The Company could and would implement processes and procedures that would allow decisions and costs to be properly accounted for and allocated between the two companies in the event Mitchell Plant ownership moves to divided interests in the two units.<sup>144</sup> This would include operation, maintenance, planning, and investment at each units.<sup>145</sup> AEP subsidiaries have a long history of successfully operating co-owned plants, including their common facilities, where individual units are owned by separate companies,<sup>146</sup> and the same could be accomplished here.

The Company also established that neither unit is more preferable to own after 2028 based on what is known today. At hearing, KIUC presented documentation regarding the

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<sup>143</sup> *Id.*

<sup>144</sup> Kerns Supp. Test. at S2.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

performance of the units for approximately the last five historical years.<sup>147</sup> In response, Company Witness Kerns testified that such historic performance measures provided little insight into which unit would be “better” to own in 2028.<sup>148</sup> Mr. Kerns testified that such numbers do not tell the full story and magnify the significance of large, single events which yield a distorted view of unit performance that may not predict future performance.<sup>149</sup> As Mr. Kerns testified, both units are maintained by the Company to the same standards; therefore, a unit should be selected only after conducting thorough due diligence.<sup>150</sup> In any event, as described further below, no unit could be unilaterally selected for Kentucky Power, and the decision to acquire either unit would require the approval of this Commission.

Accordingly, the alternate Section 9.6 provisions offered by the Company, including the sequential mutual agreement and Unit Interest Swap approaches proposed by the Company as part of the overall provisions of the Revised Ownership Agreement, are fair and reasonable, and the Company should be authorized to enter into the agreement inclusive of those terms and conditions. Moreover, as shown below, those provisions facilitate the Company’s compliance with Kentucky law and the orders of this Commission, while affording the Company the commercial and regulatory flexibility needed to manage future changes in facts and circumstances.

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<sup>147</sup> VR 3/1/22; 9:34:07-9:43:16; KIUC Hearing Exhibit 1.

<sup>148</sup> VR 3/1/22; 9:44:43-9:46:53; VR 3/30/22; 10:55:54-10:57:35.

<sup>149</sup> VR 3/30/22; 10:57:50-11:00:18.

<sup>150</sup> VR 3/1/22; 9:45:35-9:45:47; VR 3/30/22; 10:57:07-10:57:30.



2. The Unit Interest Swap Provisions In Section 9.6 Of The Revised Ownership Agreement Will Enable The Company To Satisfy The Commission's CCR And ELG Orders.

As discussed above, the Company is not seeking approval in this case to transfer its interest in the Mitchell Plant to Wheeling under the original or alternative Section 9.6 of the Revised Ownership Agreement; rather, the Revised Ownership Agreement provides a procedural mechanism that provides a framework through which the current Owners could elect to exercise that option in the future.<sup>151</sup> No transfer would be consummated until Kentucky Power has received all necessary regulatory approvals from the Commission, the WVPSC and FERC, as well as any other applicable regulatory approvals.<sup>152</sup>

The Commission's current orders are clearly built on the premise that Kentucky Power exits the Mitchell Plant at the end of 2028 and therefore does not need to share in the ELG costs that enable those future operations.<sup>153</sup> That premise would be rendered untrue if Kentucky Power continues running its assigned unit.<sup>154</sup> Witness Kollen also recognizes this would be a change in circumstance that would require different arrangements than those currently in place if Kentucky Power desired to continue to operate its interest in the Mitchell Plant.<sup>155</sup> Of course, Kentucky Power would comply with the Commission's orders by ceasing active involvement with the plant effective December 31, 2028, and has a path to do so under the Unit Interest Swap by simply retiring its unit.

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<sup>151</sup> Mattison Direct Test. at 12; Haynes Rebuttal Test. at R8.

<sup>152</sup> *Id.*

<sup>153</sup> Haynes Rebuttal Test. at R35.

<sup>154</sup> *Id.*

<sup>155</sup> AG-KIUC Response to Company Data Requests Nos. 17, 18 (Feb. 4, 2022).

In exercising the Unit Interest Swap, the Company will be able to maintain its compliance with the Commission's directives in its recent orders related to CCR and ELG. Under the original Ownership Agreement and the Revised Ownership Agreement, regardless of the provisions of Section 9.6, the operator of the Mitchell Plant will be shifted to Wheeling Power and all permits related to ELG equipment will be assigned to Wheeling, in compliance with the Commission's orders in Case No. 2021-00370.<sup>156</sup> In addition, under the terms of the Revised Ownership Agreement, Kentucky Power is not and cannot be required to pay for ELG equipment or its operation and maintenance costs. This same principle is expressed in Section 9.6.<sup>157</sup> The mutual agreement buyout is voluntary and, although the Unit Interest Swap is required if a mutual agreement buyout is unsuccessful, no terms or agreement structure are required that would cause Kentucky Power to pay for ELG without its express agreement. Under the Unit Interest Swap, Kentucky Power would not be required to pay for ELG equipment without its consent, and Kentucky Power could cause its unit to be removed from service and retired, consistent with the overall directives from the Commission in its orders accepting Case 2 in the CCR/ELG case under which the Mitchell Plant would be retired and Kentucky Power would exit its active involvement with the plant at the end of 2028.

3. The Company Has Committed To Obtain Any Approvals Needed In The Future To Carry Out The Provisions Of The Agreement.

The revised language of Section 9.6 expressly acknowledges that Kentucky Power would need to seek and obtain all necessary regulatory approvals related to the Unit Interest Swap.<sup>158</sup> This includes the approval of this Commission, as well as from the WVPSC, for the terms and

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<sup>156</sup> Order, *In the Matter of the Electronic Investigation of the Service, Rates and Facilities of Kentucky Power Company*, Case No. 2021-00370 at 9 (Ky. P.S.C. October 8, 2021).

<sup>157</sup> VR 3/30/22; 14:34:48-14:35:14.

<sup>158</sup> Haynes Supp. Test. at S11.

conditions of the transaction itself.<sup>159</sup> Any deviation from prior Commission orders that could occur as a result of pursuing one of the options in the Unit Interest Swap backstop would require additional Commission approval before being final.<sup>160</sup>

For example, to the extent that any agreement with Wheeling to own and/or operate the ELG equipment as a result of the Unit Interest Swap would deviate from the July 15 Order, Kentucky Power would first need to seek approval from the Commission for the deviation if the Company intends to use the Mitchell Plant as an asset for the benefit of customers after December 21, 2028, including if it intends to operate a single unit under the Unit Interest Swap option.<sup>161</sup> This is another important facet of the Company's compliance with this Commission's CCR and ELG orders.

The Company's understanding of these requirements, which is also reflected in the terms and conditions of the Revised Ownership Agreement, to in the future seek any authority of the Commission required to implement the Unit Interest Swap, as well as any mutual agreement buyout, is fully consistent with Kentucky law. Under Kentucky law neither this company nor the Commission has the authority by contract to supersede this Commission's regulatory authority. In *Board Of Education Of Jefferson County v. William Dohrman, Inc.*, 620 S.W.2d 328 (KY Court App. 1981), the Kentucky Court of Appeals reviewed whether a privately negotiated contract between a regulated water company and a school district, which included an arbitration clause to resolve future rates if the parties disagreed, could displace this Commission's rate

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<sup>159</sup> VR 3/30/22; 14:42:53-14:44:00.

<sup>160</sup> *Id.* at 14:36:14-14:36:23; Haynes Supp. Test. at S12.

<sup>161</sup> VR 3/30/22; 12:26:04-12:28:15; 12:47:30-12:50:14. As described therein, a CPCN may or may not be required depending on the structure of any future proposal.

regulation. The court held that it could not, holding that “the Commission had the right and duty to regulate rates and services, no matter what a contract provided.”<sup>162</sup>

4. The Revised Ownership Agreement Provides Future Flexibility For Kentucky Power And Does Not Constrain The Potential Future Sale Of Kentucky Power’s Interest In Mitchell To Wheeling Or A Third-Party.

Section 9.6 of the Revised Ownership Agreement provides Kentucky Power with the necessary flexibility to comply with this Commission’s orders and adapt to changing future facts and circumstances, while at the same time reserving to the Owners’ respective state commissions the final authority to approve any course of action. As discussed earlier in this brief, both the mutual agreement option set forth in Section 9.6(a) and the Unit Interest Swap set forth in Section 9.6(b) expressly require any such transaction to receive all applicable regulatory approvals before being consummated, including orders from this Commission. The Revised Ownership Agreement also contains a pathway in Section 9.1 for the Company to sell its interest in the Mitchell Plant to a third party outside of the process outlined in Section 9.6.

Furthermore, the numerous elements of the Unit Interest Swap that need to be addressed in order to bring a proposal to the commissions are assigned to the Mitchell Operating Committee. That committee, with equal representation by Kentucky Power and Wheeling, would determine a fair division of the undivided interests and then seek the appropriate regulatory approvals.<sup>163</sup> The Operating Committee would need to properly divide the common facilities shared by both units and associated costs, and any inventories of coal and consumables present when the interests are divided.<sup>164</sup> Exhibit C of the Revised Ownership Agreement

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<sup>162</sup> 620 S.W.2d at 329.

<sup>163</sup> Haynes Supp. Test. at S9.

<sup>164</sup> *Id.*

provides guidance to the Operating Committee on the matters they will need to take into account in carrying out the Unit Interest Swap.<sup>165</sup>

Significantly, because Kentucky Power and Wheeling each have equal representation on the Operating Committee and equal voting rights, neither party can unilaterally impose any solution on the other party. Thus, Wheeling could not impose any costs or obligations on Kentucky Power as part of the Unit Interest Swap (or the Mutual Agreement Option), including costs related to ELG investments, to which Kentucky Power did not first agree and of which this Commission also did not approve through the appropriate regulatory proceedings in this jurisdiction.<sup>166</sup> This applies to all of the elements for the Unit Interest Swap within the Operating Committee's purview, including, for example, determination of the particular unit to be owned by each Owner, any economic equalization payments between the Owners to account for differences between the units or unequal ownership of plant facilities, disposition of inventories, arrangements for purchasing or using the common facilities, arrangements when units are retired at different dates, the need for real estate and other consultants, and operational and cost responsibilities of the Owners for each unit.<sup>167</sup>

Accordingly, the Unit Interest Swap provisions, as well as the other provisions of the Revised Ownership Agreement related to the sale by the Company of its interests to either Wheeling or a third party, provide needed flexibility without unnecessarily constraining the Company to any particular option, and preserve the regulatory authority of this Commission to ensure that any future transaction is fair, reasonable, and appropriate for the Company and its customers.

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<sup>165</sup> *Id.*

<sup>166</sup> VR 3/30/22; 14:33:50-14:35:14.

<sup>167</sup> Haynes Supp. Test. at 10.

5. The Revised Ownership Agreement's Arbitration Provisions, Including Section 12.4 Regarding Arbitration Of Disputes Related To The Unit Interest Swap, Are Reasonable And Do Not Affect This Commission's Jurisdiction.

In the event there is a dispute concerning the Unit Interest Swap or other issues related to the Revised Ownership Agreement, after the parties have exhausted the escalation process up to and including referring the matter to senior executives for resolution as set forth in Section 12.2, a third party will arbitrate any dispute regarding the Unit Interest Swap as set forth in Section 12.4.<sup>168</sup> In this manner, any impasse between the Owners will be overcome such that the Unit Interest Swap can and will be implemented, subject to all necessary regulatory approvals.<sup>169</sup>

However, the arbitration provisions of the Revised Ownership Agreement do not affect the jurisdiction of this Commission, and the Company is not attempting through those provisions to bypass any regulatory requirement.<sup>170</sup> The parties are powerless through their agreement, including by virtue of an arbitration clause, to limit the Commission's powers over matters within its jurisdiction.<sup>171</sup> This is particularly true for the Section 12.4 which sets forth an arbitration process for disputes related to the Unit Interest Swap. Section 9.6(b) expressly states that the companies will seek all necessary regulatory approvals before implementing the swap, which the Company agrees includes seeking the applicable regulatory orders from this Commission, as well as the WVPSC. As set forth in Section 12.4 of the Revised Ownership Agreement, the arbitration clause pertains to resolving differences between Kentucky Power and

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<sup>168</sup> Haynes Supp. Test. at S11.

<sup>169</sup> *Id.*

<sup>170</sup> VR 3/30/22; 12:22:22-12:25:30.

<sup>171</sup> *William Dohrman, Inc.*, 620 S.W.2d at 328. The contract at issue in *Dohrman* required rates to be set by mutual agreement of the parties and, failing an agreement, by binding arbitration. Nonetheless, the court held that the terms and conditions of the contract did not displace this Commission's exclusive right to regulate rates and terms of service. 620 S.W.2d at 329.

Wheeling so that they can bring a single, joint proposal to their respective commissions for approval. As indicated by Section 9.6(b) and Attachment C thereto, there are numerous issues that the companies will need to resolve between them which collectively will form the Unit Interest Swap proposal for which they will seek approval. In the normal course, the parties would expect to resolve those issues commercially. However, if there is an impasse on any particular issue that could prevent the parties from reaching a joint proposal, that issue could be resolved through the Section 12.4 arbitration process. While the parties may not be able to deviate from the resolution of the arbitrator in creating their proposal, the overall Unit Interest Swap proposal, and every negotiated element and every arbitrated element, would still remain subject to approval by each commission before a transaction could go forward as set forth in Section 9.6(b).<sup>172</sup> If the proposal is not approved by each commission, then Wheeling and Kentucky Power would essentially need to start over and reach a new proposal to again be brought before the commissions for approval.

The parties have also selected a reasonable overall approach to the arbitration process set forth in Section 12.4.<sup>173</sup> They have selected arbitration in accordance with the widely-accepted AAA commercial arbitration rules.<sup>174</sup> They have also selected an approach under which the arbitrator, absent mutual agreement of the parties, must select one of the two proposals by the companies, and not a modified approach. Such an approach generally requires the parties to an arbitration to be more reasonable in their offerings to the arbitrator, helping to drive

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<sup>172</sup> VR 3/30/22; 12:01:28-12:02:30.

<sup>173</sup> It is important to point out that if the Commission approves the Revised Ownership Agreement without Section 9.6, the Section 12.4 arbitration provisions would be removed because they only relate to Section 9.6's Unit Interest Swap backstop.

<sup>174</sup> *Id.* at 12:37:58-12:38:40.]

commonality and reducing the overall likelihood of disputes, as well as ensuring compliance with commission orders.<sup>175</sup>

Accordingly, the arbitration provisions of the Revised Ownership Agreement are reasonable and the Commission should authorize the Company to enter into the Revised Ownership Agreement inclusive of those terms and conditions.

6. It Is Premature And Unnecessary For This Commission To Determine Whether Section 9.6 Of The Revised Ownership Agreement Satisfies KRS 278.2207 And In Any Event The Company Will Have Options For Satisfying The Statute If And When A Transaction Is Proposed.

In his direct testimony, AG-KIUC Witness Kollen presents arguments that, in his lay opinion, the fair market value buyout provisions of Section 9.6 as originally proposed in the Ownership Agreement violates KRS 278.2207 and that the Commission should establish a net book value floor price.<sup>176</sup> These arguments have been thoroughly rebutted by the Company.<sup>177</sup> The fact that the price for the buyout transaction is set by the Ownership Agreement at fair market value does not automatically run afoul of Kentucky's affiliate pricing rules. The fair market value price originally proposed by the Company was a fallback in case the parties do not reach mutual agreement on a buyout price (assuming the Mitchell Plant is not earlier retired).<sup>178</sup> Any price that the parties agree to would need to be judged in accordance with Kentucky as well as West Virginia law as they apply to the facts at the time of the sale.<sup>179</sup>

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<sup>175</sup> *Id.* at 12:02:33-12:04:30; 12:38:42-12:39:42; 14:40:10-14:41:22.

<sup>176</sup> Kollen Direct Test. at 11-14.

<sup>177</sup> Haynes Rebuttal Test. at R7-R19. In addition, Messrs. Haynes and Cash, as well as Ms. Keaton, in their rebuttal testimony fully refuted Mr. Kollen's allegations regarding the fair market value backstop set forth in the original version of Section 9.6 of the Ownership Agreement.

<sup>178</sup> *Id.* at R16.

<sup>179</sup> *Id.* at R16-R17.



These principles continue to be true under the alternative Section 9.6 of the Revised Ownership Agreement proposed by the Company, which supersedes the Company's original proposal for Section 9.6 containing the Fair Market Value backstop.<sup>180</sup> Whatever price is proposed, and assuming KRS 278.2207 applies in the future, Kentucky Power would seek all necessary regulatory approvals for any sale including a deviation from the Kentucky affiliate pricing rules, if any should be necessary.<sup>181</sup> Kentucky Power is not seeking approval for any actual buyout transaction at this time; thus, it would be premature for the Commission to determine how Kentucky law will apply to such a future transaction, should it ever occur.<sup>182</sup> The Commission also retains its authority to review any sale based on its particular facts and circumstances, and does not need to judge those issues now.<sup>183</sup>

7. The Company Would Accept Removing 9.6 And Related Provisions Of The Mitchell Plant Ownership Agreement If Deemed Reasonable By The Commission.

As described *supra*, on April 4, 2022 Appalachian Power and Wheeling filed the Rebuttal Testimony of Christian T. Beam Unit containing the Unit Interest Swap backstop contained in the Revised Ownership Agreement. Of special note in Mr. Beam's rebuttal testimony was an alternative offered by Appalachian Power and Wheeling to the WVPSC to remove in its entirety the provisions governing the transfer of Kentucky Power's Mitchell Plant interest by 2028 (Section 9.6 and related provisions and definitions) and rather focus the agreements on the operation of and investment in the plant between now and December 31, 2028. Kentucky Power proffers this same option for this Commission if the Commission feels it is more reasonable to move forward without

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<sup>180</sup> VR 3/30/22; 12:36:07-12:36:43.

<sup>181</sup> Haynes Rebuttal Test. at R17.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

Section 9.6 and allow for Wheeling to become the plant operator and the CCR/ELG work to move forward with the safeguards for Kentucky customers otherwise outlined in the New Mitchell Agreements.

Accordingly, while Kentucky Power has presented a framework (*i.e.*, the mutual agreement buyout and Unit Interest Swap provisions set forth in Section 9.6 of the Revised Ownership Agreement) which permits the joint owners to explore over time the a path for unwinding their joint ownership in the plant effective at the end of 2028, the Company also recognizes that it may be deemed reasonable to wait until there are more facts in the future, when the usefulness of the plant beyond 2028 is better known, before defining the commercial structure for any future transaction. This offer also recognizes the intervenors' discomfort, and potentially the Commission's based on questions asked at hearing, with locking into a backstop too early. As a result, while the Company has shown that the Section 9.6 of the Revised Ownership Agreement is reasonable, it would also be reasonable to exclude Section 9.6 and associated provisions (such as the arbitration provisions in Section 12.4 and related definitions) and leave the commercial structure of any buyout of Kentucky Power's interest, or any Unit Interest Swap or other backstop, to a later date.

Wheeling further requested that the WVPSC find both options acceptable (*i.e.* (i) the Unit Interest Swap option; and (ii) the removal of Section 9.6 and associated provisions in its entirety), in order to facilitate the acceptance of a consensus agreement in both West Virginia and Kentucky that is responsive to all parties' concerns. As a result, the Commission could also find that both the Unit Interest Swap provision and removing Section 9.6 altogether are reasonable options for Kentucky Power. This dual option approval would provide a more collaborative opportunity to sync up the approvals between Kentucky and West Virginia.

## V. CONCLUSION

For the reasons set forth above, the Company has demonstrated the proposed Operations Agreement and Revised Ownership Agreement are necessary, comply with Kentucky law and this Commission's orders, and overall are reasonable and fair, in the public interest, and will not interfere with the Commission's authority to ensure fair, just, and reasonable rates. Accordingly, the Commission should promptly authorize the Company to enter into the New Mitchell Agreements and help remove the uncertainty that currently hangs over the path forward for the Mitchell Plant to the detriment of the Company and its customers. Finally, with respect to Section 9.6 of the Revised Ownership Agreement, the Company requests that this Commission (i) approve the Revised Ownership Agreement (including Section 9.6 and related provisions) as proposed; (ii) approve the Revised Ownership Agreement with Section 9.6 (and the related provisions) removed; or (iii) approve both options (i) and (ii). Approving both options increases the potential that at least one version of the agreements is found acceptable by both commissions, thereby allowing both companies to comply promptly with their respective commission's directions in their orders. But if the Commission has reservations about the backstop provisions in Section 9.6, it could just find it reasonable to authorize Kentucky Power to enter into the agreements without Section 9.6 and related provisions.

Respectfully submitted,



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**Counsel for Kentucky Power Company**

# **EXHIBIT 1**

Kentucky Power Company  
KPSC Case No. 2021-00004  
Commission Staff's Rehearing Data Requests  
Dated August 19, 2021  
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**DATA REQUEST**

**RH\_1\_1** Explain Kentucky Power and Wheeling Power's plan regarding Mitchell. Provide updated status reports every ten days through the pendency of this proceeding.

**RESPONSE**

Kentucky Power and Wheeling Power currently are implementing plans to ensure the construction of the CCR project to allow the operation of the Mitchell Generating Station through December 31, 2028.

Kentucky Power Company and Wheeling Power Company are reviewing their alternatives regarding the Mitchell Generating Station in light of the July 15, 2021 decision of this Commission, and the August 4, 2021 decision of the Public Service Commission of West Virginia. No decision regarding a plan for the Mitchell Generating Station beyond that described above has been reached by either Company.

Kentucky Power will file updated status reports every ten days during the pendency of this proceeding.

**September 13, 2021 Update**

Wheeling Power Company and Appalachian Power Company on September 8, 2021 filed with the Public Service Commission of West Virginia their "Petition to Reopen Case and to Take Further Action" in Case No. 20-1040-E-CN. The petition requests the West Virginia Commission to provide certain confirmations, acknowledgements, and commitments regarding, *inter alia*, the Mitchell Generating Station, in light of the inconsistent orders of the Kentucky and West Virginia commissions regarding the proposed ELG work at the Mitchell Generating Station. The petition further requests that the West Virginia Commission provide the confirmations, acknowledgements, and commitments prior to the October 13, 2021 deadline under the ELG Rule for notifying the West Virginia Department of Environmental Protection concerning the ELG modifications at the Mitchell Generating Station. Finally, Wheeling Power and Appalachian Power Company indicated in the petition that there were matters in need of resolution should West Virginia decide to fully fund the ELG investment and maintain the plant in order to preserve an option to run the Mitchell Generating Station past 2028.

A copy of the petition is attached as KPCO\_SR\_KPSC\_RH\_1\_1\_Attachment1.

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The West Virginia commission by order dated September 9, 2021 established a procedural schedule, and provided for a September 24, 2021 evidentiary hearing, in connection with the petition.

A copy of the September 9, 2021 order is attached as KPCO\_SR\_KPSC\_RH\_1\_1\_Attachment2.

Kentucky Power Company and Wheeling Power Company continue to review their alternatives regarding the Mitchell Generating Station pending action by the West Virginia Commission on the petition. Kentucky Power Company also intends to explore these issues and will work to bring the Commission a recommendation on how to handle the Mitchell operating agreement in a new docket for review.

Kentucky Power will continue to file updated status reports every ten days during the pendency of this proceeding on the status of the West Virginia decision on ELG investment.

**September 23, 2021 Update**

Wheeling Power Company and Appalachian Power Company on September 20, 2021 filed with the Public Service Commission of West Virginia their Reply in support of their "Petition to Reopen Case and to Take Further Action."

A copy of the Reply is attached as KPCO\_SR\_KPSC\_RH\_1\_1\_Attachment3.

Kentucky Power Company and Wheeling Power Company continue to review their alternatives regarding the Mitchell Generating Station pending action by the West Virginia Commission on the petition. Kentucky Power Company will work to bring the Commission a recommendation on how to handle the Mitchell operating agreement either in Case No. 2021-00370 or in a separate docket.

Kentucky Power will continue to file updated status reports every ten days during the pendency of this proceeding.

**October 4, 2021 Update**

The Public Service Commission of West Virginia held an evidentiary hearing on September 24, 2021 in Case No. 20-1040-E-CN. The purpose of the hearing was to address the issues raised in Wheeling Power Company and Appalachian Power Company's September 8, 2021 "Petition to Reopen Case and to Take Further Action."

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Kentucky Power Company and Wheeling Power Company continue to review their alternatives regarding the Mitchell Generating Station pending action by the West Virginia Commission on the petition. Kentucky Power Company will work to bring the Commission a recommendation on how to handle the Mitchell operating agreement either in Case No. 2021-00370 or in a separate docket.

Kentucky Power will continue to file updated status reports every ten days during the pendency of this proceeding.

**October 13, 2021 Update**

On October 12, 2021 the Public Service Commission of West Virginia issued its Order regarding Wheeling Power Company and Appalachian Power Company's September 20, 2021 "Petition to Reopen Case and to Take Further Action" affirming the earlier order that the Companies proceed with ELG at all three plants.

Please see KPCO\_SR\_KPSC\_RH\_1\_1\_Attachment4 which provides a copy of the October 12, 2021 Order and all other documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN since October 2, 2021<sup>1</sup> through October 12, 2021.

Kentucky Power will continue to file updated status reports every ten days during the pendency of this proceeding.

**October 25, 2021 Update**

Wheeling Power Company is moving forward with CCR/ELG work at the Mitchell Generating Station given the recent action by the West Virginia Commission on the petition. Kentucky Power Company will work to bring the Commission a recommendation on how to handle the Mitchell operating agreement either in Case No. 2021-00370 or in a separate docket. The Company expects to make the operating agreement filing in fourth quarter 2021 and further plans to address through that filing that Kentucky Power will only pay for CCR-related costs associated with the CCR/ELG project.

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<sup>1</sup> The Commission Staff's data request 2-6 dated September 17, 2021 sought, as a continuing request, that the Company provide a copy of any documents filed by Wheeling Power or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN and to be provided in the Company's 10-day status reports. The Company's response to 2-6 provided these documents through October 1, 2021.



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Kentucky Power will continue to file updated status reports every ten days during the pendency of this proceeding.

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN from October 13, 2021 through October 24, 2021.

**November 4, 2021 Update**

AEP has entered into an agreement to sell its Kentucky operations, which include Kentucky Power and AEP Kentucky Transco, to Liberty Utilities Corp., the regulated utility business of parent company Algonquin Power & Utilities Corporation. Liberty will own and obtain power from Kentucky Power's 50% portion of the Mitchell Plant through 2028. The sale is expected to close in the second quarter of 2022, pending regulatory approvals. The Company expects that an application for Commission approval of the transaction will be made in the fourth quarter 2021.

Kentucky Power Company will work to bring the Commission a recommendation on how to handle the Mitchell operating agreement either in Case No. 2021-00370 or in a separate docket. The Company expects to make the operating agreement filing in the fourth quarter 2021.

Kentucky Power will continue to file updated status reports every ten days during the pendency of this proceeding.

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN from October 25, 2021 through November 3, 2021.

**November 15, 2021 Update**

On November 5, 2021, Kentucky Power filed its notice of intent to file an application for approval of affiliate agreements related to the Mitchell Generating Station. The Commission assigned this proceeding Case No. 2021-00421. The Company will file its application before November 30, 2021. A comparable filing will be made at the same time in West Virginia.

Kentucky Power will continue to file updated status reports every ten days during the pendency of this proceeding.

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There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN from November 4, 2021 through November 14, 2021.

**November 24, 2021 Update**

On November 19, 2021, Kentucky Power filed its application for approval of its proposed Mitchell Plant Operations and Maintenance Agreement and Mitchell Plant Ownership Agreement (collectively the “New Mitchell Agreements”) in Case No. 2021-00421. Please see KPCO\_SR\_KPSC\_1\_1\_Attachment5 for a copy of the Company’s application, including the supporting testimonies of D. Brett Mattison and Timothy C. Kerns. A comparable filing was made contemporaneously in West Virginia under Case No. 21-0810-E-PC. Please see KPCO\_SR\_KPSC\_1\_1\_Attachment6 for a copy of this filing.

Additionally, American Electric Power Service Corporation (on behalf of Wheeling Power and Kentucky Power) filed the New Mitchell Agreements and cancellation of Rate Schedules No. 303 (current Mitchell Plant Operating Agreement) with FERC on November 19, 2021. Please see KPCO\_SR\_KPSC\_1\_1\_Attachment7 for a copy of this filing.

Kentucky Power will continue to file updated status reports every ten days during the pendency of this proceeding.

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN from November 15, 2021 through November 23, 2021.

**December 3, 2021 Update**

On November 30, 2021 an informal meeting was held following the hearing in Case No. 2021-00370 to discuss a procedural schedule for Case No. 2021-00421. The Commission entered an Order on December 3, 2021 in Case No. 2021-00421 establishing the procedural schedule for Case No. 2021-00421.

As of December 2, 2021 a procedural schedule has not been established in the comparable filing made in West Virginia (21-0810-E-PC).

Copies of the FERC eLibrary docket for FERC Case No. ER22-453-000 (Kentucky Power Company) and FERC Case No. ER22-452-000 (Wheeling Power Company) are filed as KPCO\_SR\_KPSC\_1\_1\_Attachment8 and KPCO\_SR\_KPSC\_1\_1\_Attachment9 respectively.

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Kentucky Power will continue to file updated status reports every ten days during the pendency of this proceeding.

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN during the period November 24, 2021 through December 2, 2021.

**December 13, 2021 Update**

On December 13, 2021, the Commission established a hearing date in Case No. 2021-00421. The hearing is to be held on March 1, 2022 through March 3, 2022.

As of December 12, 2021 a procedural schedule has not been established in the comparable filing made in West Virginia (21-0810-E-PC).

Copies of the FERC eLibrary docket for FERC Case No. ER22-453-000 (Kentucky Power Company) and FERC Case No. ER22-452-000 (Wheeling Power Company) are filed as KPCO\_SR\_KPSC\_1\_1\_Attachment10 and KPCO\_SR\_KPSC\_1\_1\_Attachment11 respectively.

Kentucky Power will continue to file updated status reports every ten days during the pendency of this proceeding.

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN during the period December 3, 2021 through December 12, 2021.

**December 22, 2021 Update**

The Company will be filing its responses to the first set of discovery requests in Case No. 2021-00421 today.

As of December 21, 2021 a procedural schedule has not been established in the comparable filing made in West Virginia (21-0810-E-PC).

Copies of the FERC eLibrary docket for FERC Case No. ER22-453-000 (Kentucky Power Company) and FERC Case No. ER22-452-000 (Wheeling Power Company) are filed as KPCO\_SR\_KPSC\_1\_1\_Attachment12 and KPCO\_SR\_KPSC\_1\_1\_Attachment13 respectively.

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Kentucky Power will continue to file updated status reports every ten days during the pendency of this proceeding.

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN during the period December 13, 2021 through December 21, 2021.

**January 3, 2022**

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN during the period December 22, 2021 through December 31, 2021.

On December 22, 2021 the Staff of the Public Service Commission of West Virginia issued its initial memorandum and first set of data requests in Case No. 21-0810-E-PC. The proceeding seeks approval of the Mitchell Plant Operations and Maintenance Agreement and the Mitchell Plant Ownership Agreement. Copies of the filed memo and the data requests are attached as KPCO\_SR\_KPSC\_1\_1\_Attachment14 and KPCO\_SR\_KPSC\_1\_1\_Attachment15 respectively. As of December 29, 2021 a procedural schedule has not be established in Case 21-0810-E-PC.

Copies of the FERC eLibrary docket for FERC Case No. ER22-453-000 (Kentucky Power Company) and FERC Case No. ER22-452-000 (Wheeling Power Company) are filed as KPCO\_SR\_KPSC\_1\_1\_Attachment16 and KPCO\_SR\_KPSC\_1\_1\_Attachment17 respectively.

**January 13, 2022**

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN during the period January 1, 2022 through January 12, 2022.

Responses to the Staff of the Public Service Commission of West Virginia's first set of data requests in Case No. 21-0810-E-PC were filed on January 11, 2022. A copy of these responses is attached as KPCO\_SR\_KPSC\_1\_1\_Attachment18. As of December 29, 2021 a procedural schedule has not be established in Case 21-0810-E-PC.

Copies of the FERC eLibrary docket for FERC Case No. ER22-453-000 (Kentucky Power Company) and FERC Case No. ER22-452-000 (Wheeling Power Company) are filed as KPCO\_SR\_KPSC\_1\_1\_Attachment19 and KPCO\_SR\_KPSC\_1\_1\_Attachment20 respectively.

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**January 24, 2022**

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN during the period January 13, 2022 through January 23, 2022.

A proposed procedural schedule was filed by West Virginia Staff in Case No. 21-0810-E-PC on January 14, 2022. On January 20, 2022 the "Objections of Appalachian Power Company and Wheeling Power Company to the Consumer Advocate Division's First Request for Information" were filed. A copy of these documents are attached as KPCO\_SR\_KPSC\_1\_1\_Attachment21 and KPCO\_SR\_KPSC\_1\_1\_Attachment22.

Copies of the FERC eLibrary docket for FERC Case No. ER22-453-000 (Kentucky Power Company) and FERC Case No. ER22-452-000 (Wheeling Power Company) beginning November 24, 2021 are filed as KPCO\_SR\_KPSC\_1\_1\_Attachment23 and KPCO\_SR\_KPSC\_1\_1\_Attachment24 respectively.

**February 3, 2022**

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN during the period January 24, 2022 through February 2, 2022.

The West Virginia Commission's procedural order in Case No. 21-0810-E-PC was entered on January 25, 2022. Appalachian Power Company's and Wheeling Power Company's responses to the Consumer Advocate Division and the West Virginia Energy Users Group first data requests were filed on January 26, 2022. A copy of these documents are attached as KPCO\_SR\_KPSC\_1\_1\_Attachment25 through KPCO\_SR\_KPSC\_1\_1\_Attachment27.

Copies of the FERC eLibrary docket for FERC Case No. ER22-453-000 (Kentucky Power Company) and FERC Case No. ER22-452-000 (Wheeling Power Company) beginning December 4, 2021 are filed as KPCO\_SR\_KPSC\_1\_1\_Attachment28 and KPCO\_SR\_KPSC\_1\_1\_Attachment29 respectively.

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**February 14, 2022**

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN during the period February 3, 2022 through February 13, 2022.

In Case No. 21-0810-E-PC, Appalachian Power Company's and Wheeling Power Company's response to the Consumer Advocate Division's motion to compel was filed on February 7, 2022. On February 8, 2022 the West Virginia Commission granted intervention two petitions to intervene: 1) West Virginia Coal Association and 2) West Virginia Citizens Action Group, Solar United Neighbors, and Energy Efficient West Virginia. A copy of these documents are attached as KPCO\_SR\_KPSC\_1\_1\_Attachment30 through KPCO\_SR\_KPSC\_1\_1\_Attachment31.

On February 7, 2022 American Electric Power Service Corporation on behalf of Kentucky Power and Wheeling Power Company filed a motion to withdraw the rate filing submitted on November 19, 2021 in dockets ER22-452-000 and ER22-453-000.

**February 24, 2022**

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN or Case No. 21-0810-E-PC during the period February 14, 2022 through February 23, 2022.

**March 7, 2022**

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN during the period February 24, 2022 through March 6, 2022.

The Company inadvertently omitted from its last 10-day status update that in Case No. 21-0810-E-PC, Appalachian Power Company's and Wheeling Power Company's responses to West Virginia Energy Users Group second set of data requests were filed on February 23, 2022. A copy of these responses is attached as KPCO\_SR\_KPSC\_1\_1\_Attachment32.

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The Commission held a hearing in Case No. 2021-00421 on March 1, 2022. After that hearing, the Kentucky Public Service Commission issued an order requiring the Company to notify the Commission whether or not the Company intended to file a proposed amendment to the Mitchell Ownership Agreement concerning the Company's alternate proposal to divide the Mitchell units between Kentucky Power and Wheeling Power. The Company is evaluating this option and will file its response regarding such a proposal as soon as is practical before March 16, 2022.

**March 16, 2022**

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN during the period March 7, 2022 through March 15, 2022.

In Case No. 21-0810-E-PC, on March 8, 2022 the West Virginia Commission granted two requests for admission Pro Hac Vice of West Virginia Citizens Action Group, Solar United Neighbors and Energy Efficient West Virginia. On March 9, 2022, Appalachian Power Company and Wheeling Power Company filed a response to the third set of data requests from West Virginia Energy Users Group. A copy of the response is attached as KPCO\_SR\_KPSC\_1\_1\_Attachment33. On March 11, 2022 the West Virginia Commission approved the Consumer Advocate Division's (CAD) Motion to Compel. A copy of the Order is attached as KPCO\_SR\_KPSC\_Attachment34.

**March 28, 2022**

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN during the period March 16, 2022 through March 27, 2022.

In Case No. 21-0810-E-PC, on March 16, 2022, Appalachian Power Company and Wheeling Power Company filed responses to CAD's first set of data requests as required by the Public Service Commission of West Virginia's order granting CAD's motion to compel. A copy of the public responses are attached as KPCO\_SR\_KPSC\_1\_1\_Attachment35. On March 17, 2022 Appalachian Power Company and Wheeling Power Company filed their response to CAD's motion to amend the procedural schedule. A copy of the response is attached as KPCO\_SR\_KPSC\_1\_1\_Attachment36. On March 18, 2022 Appalachian Power Company and Wheeling Power Company filed supplemental direct testimony of Christian Beam. A copy of the supplemental testimony is attached as KPCO\_SR\_KPSC\_1\_1\_Attachment37. On March 18, 2022 the Public Service Commission of West Virginia issued an Order amending the procedural schedule. A copy of this Order is attached as KPCO\_SR\_KPSC\_1\_1\_Attachment38. On March

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23, 2022, Appalachian Power Company and Wheeling Power Company filed a motion for protective treatment. A copy of this motion is attached as KPCO\_SR\_KPSC\_1\_1\_Attachment39.

**April 5, 2022**

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN during the period March 28, 2022 through April 6, 2022.

In Case No. 21-0810-E-PC, on March 28, 2022, the Staff of the Public Service Commission of West Virginia filed the direct testimonies of James Weimer, P.E., and Geoffrey M. Cooke. A copy of these testimonies is attached as KPCO\_SR\_KPSC\_1\_1\_Attachment40.

On March 31, 2022 the Public Service Commission of West Virginia issued an Order granting the request for admission *Pro Hac Vice* of Melissa Anne Legge. A copy of the Order is attached as KPCO\_SR\_KPSC\_Attachment41.

On April 1, 2022, the Staff of the Public Service Commission of West Virginia filed the supplemental direct testimony of James Weimer, P.E. A copy of the supplemental direct testimony is attached as KPCO\_SR\_KPSC\_1\_1\_Attachment42.

On April 4, 2022 Appalachian Power Company and Wheeling Power Company filed the Rebuttal Testimony of Christian T. Beam. A copy of Mr. Beam's rebuttal testimony is attached as KPCO\_SR\_KPSC\_1\_1\_Attachment43. Mr. Beam's Rebuttal Testimony covered the particulars of Section 9.6 and the Unit Interest Swap option contained in the amended proposed Mitchell Plant Ownership Agreement. Mr. Beam also supported the remaining elements of the agreements overall.

**Of special note in Mr. Beam's Rebuttal Testimony was an alternative offered by Appalachian Power and Wheeling Power to the West Virginia Commission to remove in its entirety the provisions governing the transfer of Kentucky Power's plant interest by 2028 (Section 9.6 and related provisions and definitions) and rather focus the agreements on the operation of and investment in the plant between now and December 31, 2028.**

The Rebuttal Testimony recognizes the Kentucky Commission's Order that Kentucky Power not invest in ELG, and the Kentucky Commission's discussions at its recent hearing in Case No. 2021-00421 concerning the potential need for a certificate of public convenience and necessity in the future should Kentucky Power wish to keep Mitchell in its generation mix past December 31, 2028.



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The Rebuttal Testimony also recognizes the Kentucky Commission's requirement to update the Kentucky Commission on the West Virginia proceeding every 10 days, and recognizes these updates as an avenue for informing the Commission about the West Virginia proceeding.

Ultimately, though, the Rebuttal Testimony requests that the West Virginia Commission find acceptable *both options presented*: the Unit Interest Swap option *and* the removal of Section 9.6 (and associated provisions) in its entirety, in order to provide flexibility and to reduce the potential for inconsistent decisions between the Kentucky and West Virginia Commissions, and to increase the potential that the agreements are found acceptable by both commissions.

As presented in the Rebuttal Testimony, the West Virginia Commission could authorize Wheeling Power to enter into the agreements except for Section 9.6 of the Mitchell Ownership Agreement (including associated definitions and provisions such as the arbitration clause in Section 12.4 that are specific to that clause) if it finds that to be reasonable. That could also facilitate Kentucky Power entering into the agreements on those same terms, assuming that the Kentucky Commission approves the agreements absent Section 9.6 and authorizes Kentucky Power to enter into the agreements on the same basis. If the West Virginia Commission sees both options as reasonable, it could issue an order finding it reasonable for Wheeling Power to enter into an agreement containing either option to facilitate consistency.

Finally, a hearing is set for April 7, 2022 on Appalachian Power and Wheeling Power's application in 21-0810-E-PC. On April 4, 2022 Appalachian Power and Wheeling Power filed an agreed order of witnesses for the April 7, 2022 hearing. A copy of this document is attached as KPCO\_SR\_KPSC\_1\_1\_Attachment44.

**April 13, 2022**

There were no documents filed by either Wheeling Power Company or the Public Service Commission of West Virginia in Case No. 20-1040-E-CN during the period April 6, 2022 through April 12, 2022.

In Case No. 21-0810-E-PC, on April 7, 2022 a hearing was held concerning the New Mitchell Agreements. A copy of the transcript is attached as KPCO\_SR\_KPSC\_1\_1\_Attachment45.

The transcript includes the testimony of two Wheeling Power witnesses (President Christian Beam and Timothy Kerns), as well as Staff and intervenor witnesses. The hearing concerned the same New Mitchell Agreements as those filed with the Kentucky Commission (i.e., the Mitchell Plant Operations and Maintenance Agreement and the Revised Mitchell Plant Ownership Agreement) and also includes testimony regarding the removal of Section 9.6 and related definitions and provisions from the Ownership Agreement if the WVPSC determined that was a

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more reasonable option and to assist in promoting consistency in the agreements approved by both this Commission and the WVPSC. The transcript also includes testimony by Wheeling Power and an intervenor witness regarding the need for timely approval of the New Mitchell Agreements in order to move permits into Wheeling Power's name and for Wheeling Power to move forward with the ELG physical work.

Kentucky Power provides this update earlier than the required 10 days in consideration of the Commission's comments at the March 30, 2022 hearing in Case No. 2021-00421 that the Commission relies on these updates to inform it of the status of the West Virginia proceedings in the Commission's consideration of Case No. 2021-00421.

Witness: Deryle B. Mattison



Keith D. Fisher  
Senior Counsel  
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Charleston, WV 25301  
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April 4, 2022

Via Electronic Mail

Karen Buckley  
Acting Executive Secretary  
Public Service Commission of West Virginia  
201 Brooks St.  
Charleston, WV 25301

04:13 PM APR 04 2022 EXEC SEC DIV

**Re: Case No. 21-0810-E-PC**  
**Appalachian Power Company and Wheeling Power Company**  
*Petition for Commission Consent and Approval to Enter into Ownership and  
Operating Agreements for the Mitchell Plant*

Dear Ms. Buckley:

On behalf of Appalachian Power Company and Wheeling Power Company, please find enclosed for filing in the above-referenced matter the Rebuttal Testimony of Christian T. Beam. On this date, copies thereof were served in accordance with the Certificate of Service.

This filing is made via electronic mail in accordance with the Commission's General Order No. 262.3 *Regarding Processing of Cases During COVID-19 West Virginia State of Emergency.*

Thank you for your attention to this matter. Should you have any questions regarding this correspondence, please do not hesitate to contact me.

Sincerely,

Keith D. Fisher (WV State Bar #11346)  
Counsel for Appalachian Power Company  
and Wheeling Power Company

Enclosure

cc: Certificate of Service

04:13 PM APR 04 2022 EXEC SEC DIV

COMPANY EXHIBIT CTB-R

**REBUTTAL TESTIMONY OF  
CHRISTIAN T. BEAM  
ON BEHALF OF APPALACHIAN POWER COMPANY AND  
WHEELING POWER COMPANY  
BEFORE THE PUBLIC SERVICE COMMISSION OF  
WEST VIRGINIA IN CASE NO. 21-0810-E-PC**

1 **Q. PLEASE STATE YOUR NAME.**

2 A. My name is Christian T. Beam.

3 **Q. ARE YOU THE SAME CHRISTIAN T. BEAM WHO FILED DIRECT AND  
4 SUPPLEMENTAL TESTIMONY IN THIS PROCEEDING?**

5 A. Yes.

6 **Q. FOR WHOM ARE YOU OFFERING REBUTTAL TESTIMONY?**

7 A. I am testifying on behalf of Appalachian Power Company ("APCo") and Wheeling  
8 Power Company ("WPCo") (collectively, the "Companies").

9 **Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?**

10 A. I will address certain claims made in the direct testimony of Commission Staff ("Staff")  
11 witnesses James Weimer and Geoffrey M. Cooke, West Virginia Citizen Action  
12 Group/Solar United Neighbors/Energy Efficient West Virginia ("CAG/SUN/EEWV")  
13 witness James F. Wilson, and Consumer Advocate Division ("CAD") witness Emily S.  
14 Medine. Having addressed those claims, I offer my recommendation that the  
15 Commission approve the revised proposed Mitchell Plant Ownership Agreement  
16 ("Revised Ownership Agreement") that was submitted with my supplemental testimony  
17 on March 18, 2022, as well as the proposed Mitchell Plant Operations and Maintenance  
18 Agreement ("O&M Agreement") that was submitted with the Companies' initial filing  
19 (sometimes collectively referred to herein as the "Mitchell Agreements"). I also offer a  
20 suggested path should the Commission find it more reasonable to defer decisions about

1 the transfer process until a later time as a further rebuttal of the concerns that are at the  
2 root of many of the other parties' apparent discomfort with the Revised Ownership  
3 Agreement.

4 **Q. WHAT ARE THE GUIDING PRINCIPLES DRIVING THE COMPANIES'**  
5 **PROPOSED MITCHELL AGREEMENTS?**

6 A. As described in further detail in my earlier testimony, the Companies are fundamentally  
7 guided by two principles. First, the Companies seek to have WPCo enter into  
8 agreements that will facilitate compliance with the Commission's orders that they  
9 should invest in equipment to comply with both the Coal Combustion Residuals  
10 ("CCR") and Effluent Limitation Guidelines ("ELG") at the Mitchell Plant in order to  
11 preserve the plant's ability to run beyond 2028. The Companies further seek to comply  
12 with the Commission's directives in those orders that they should pay for those  
13 upgrades and ensure that their future value beyond 2028 is reserved for the benefit of  
14 West Virginia customers to the extent they have exclusively paid for those upgrades.  
15 Second, the Companies want to ensure that the terms and conditions of the Mitchell  
16 Agreements are fair to both WPCo and Kentucky Power Company ("KPCo")  
17 (collectively, "the Owners"). This is a bedrock need because WPCo and KPCo each  
18 own an undivided 50 percent interest in the Mitchell Plant (i.e., each owns half of each  
19 of the two coal-fired units and common equipment at the plant), and also because both  
20 parties require authorization from their respective state public service commissions to  
21 enter into the agreements.

22 **Q. DO THE MITCHELL AGREEMENTS ABIDE BY THOSE GUIDING**  
23 **PRINCIPLES?**

1 A. Yes. They provide the parties the necessary flexibility to comply with the directives of  
2 both commissions. Instead of mandating a specific solution that may be unacceptable  
3 to either commission or that may prove to be unworkable or impractical in the future,  
4 the agreements ensure that both Owners can adapt to changing and future needs. Both  
5 Owners recognize that the agreements provide a commercial framework within which  
6 they can resolve many details of the future operation and ownership of the Mitchell  
7 Plant, just as they do today and as the two parties (and as the Companies) have done  
8 with jointly owned plants throughout the past. The Owners further recognize that those  
9 actions will be subject to future review by their respective commissions for prudence  
10 and reasonableness. The Companies make no attempt here to circumvent those  
11 reviews, nor could they under law use a contract to limit either commission's authority.

12 **Q. HOW DO THE ALTERNATIVE PROVISIONS IN SECTION 9.6 OF THE**  
13 **REVISED OWNERSHIP AGREEMENT PROVIDE FLEXIBILITY FOR WPCO**  
14 **AND THIS COMMISSION?**

15 A. The alternative buyout and unit interest swap provisions of Section 9.6 provide a  
16 commercial framework to assist the Owners in navigating their future decisions.  
17 Ultimately, however, the terms and conditions of any agreement they may reach  
18 pursuant to Section 9.6 will be subject to numerous regulatory approvals, including  
19 those of the two commissions. For that reason, the concerns raised by other parties –  
20 and, in particular, witnesses Weimer and Wilson – are misplaced because the Owners'  
21 commercial framework does not alter the fundamental competitive balance of their  
22 interests in the Mitchell Plant; the Owners are, and will remain, equal co-owners until  
23 such time as the commissions jointly and equally approve a different approach. In

1 addition, the parties' concerns in their direct testimony regarding the buyout and unit  
2 interest swap provisions are premature.

3 **Q. PLEASE EXPLAIN FURTHER WHY THESE CONCERNS ARE BEING**  
4 **RAISED PREMATURELY.**

5 A. Section 9.6 of the Revised Ownership Agreement provides the mechanism for  
6 addressing the ownership and operation of the two Mitchell units leading up to, and  
7 after, 2028. To summarize, the Owners are required to negotiate in good faith either a  
8 buyout of KPCo's interest by WPCo or, failing that, a unit swap arrangement whereby  
9 WPCo would own in whole one of the Mitchell units and be able to operate it on its  
10 own beyond 2028. Regulatory approval by this Commission and the Kentucky Public  
11 Service Commission ("KPSC") is required for either of those mechanisms to be  
12 implemented in the future. Therefore, all of the theoretical and hypothetical scenarios  
13 that are troubling the other parties today may be amicably resolved in future years. The  
14 parties' concerns, therefore, are the result of speculation that would be premature to  
15 address. In any event, all of the parties to this case will be able to present their  
16 positions and make their arguments about whatever actual and specific scenarios may  
17 be presented to this Commission in the future for its decision. There is no need to  
18 borrow potential disagreements from the future and attempt to resolve them today.

19 For instance, Mr. Wilson spends the majority of his testimony arguing that  
20 WPCo should not acquire KPCo's 50% share of the Mitchell Plant, which, again, is a  
21 matter for a future proceeding. There is no determination of need contemplated at this  
22 time because there is no transaction that is being put before this Commission. All  
23 potential outcomes require regulatory approval in the future when such determinations  
24 are ripe for review.

1 **Q. IS THE UNIT INTEREST SWAP AS PROPOSED IN SECTION 9.6 OF THE**  
2 **REVISED OWNERSHIP AGREEMENT A REASONABLE OUTCOME?**

3 A. Yes. Even though WPCo owns 50% of the Mitchell Plant and will pay for 100% of  
4 ELG, it is not possible to assert 100% unilateral control over the Mitchell Plant under  
5 any condition because KPCo has equal rights to the other 50% undivided interest in all  
6 non-ELG parts of the plant. The Revised Ownership Agreement allows for more  
7 possible outcomes that at the very least ensure WPCo has an ability to own and operate  
8 a single unit at the Mitchell Plant. The unit interest swap creates a path for WPCo to  
9 exercise independent control over its ownership share. If, in fact, this Commission  
10 were to decide at some point in the future that it is in West Virginia customers' best  
11 interest for WPCo to acquire KPCo's interest in the plant, that remains a possibility that  
12 must also meet the needs of KPCo and observe any future rulings of the KPSC as well.

13 **Q. CAD WITNESS MEDINE SUGGESTS AT PAGES 8-9 OF HER DIRECT**  
14 **TESTIMONY THAT THE UNIT SWAP PROVISION OF SECTION 9.6 OF THE**  
15 **REVISED OWNERSHIP AGREEMENT IS UNWORKABLE BECAUSE OF**  
16 **THE DIFFICULTY, COST, AND PRACTICALITY OF DIVIDING THE**  
17 **MITCHELL PLANT. DO YOU AGREE?**

18 A. No. The unit swap mechanism would not require any 'division of the physical assets'  
19 as asserted by Ms. Medine. Today, the two Mitchell generating units are independently  
20 dispatched and operated. As with any jointly owned power plant, there are costs  
21 associated with unit-specific equipment and there are costs that are common to both  
22 units (i.e., common facilities that are used by both units). This is true for both capital  
23 investments and operations and maintenance ("O&M") expenses. The Companies have  
24 relevant experience with other plants, such as the Amos Plant and the (now closed)



1 Sporn Plant where there were different owners for each unit (Sporn), or owners shared  
2 units (Amos), and shared common facilities. Thus, this exact same approach to  
3 ownership is not novel and has been dealt with for decades.

4 For the Owners to move from an undivided to a divided interest, it would be  
5 necessary to assign the costs of existing equipment to Unit 1, Unit 2, or to common  
6 facilities. This would be primarily an accounting, tax, and legal exercise rather than an  
7 operational exercise. The units are already dispatched differently in that they have  
8 different capabilities and varying underlying costs. Such an undertaking might not be  
9 simple, but it is certainly be achievable.

10 In sum, Ms. Medine's suggestion of the need for physical separation is inaccurate  
11 at best, and the true work to divide the units, while complex, is achievable, regardless of  
12 how the Mitchell Plant appears to her on Google Earth.

13 **Q. CAD WITNESS MEDINE CONTENDS THAT THE OWNERSHIP**  
14 **AGREEMENT SHOULD SET A PARTICULAR VALUE FOR KPCO'S**  
15 **INTEREST IN MITCHELL THAT MIGHT BE TRANSFERRED TO WPCO IN**  
16 **THE FUTURE. DO YOU AGREE WITH THAT APPROACH?**

17 A. I do not agree. Ms. Medine's approach is not realistic, for several reasons.

18 First, this approach implies that WPCo has unilateral control of the Mitchell Plant.  
19 WPCo has a 50% undivided interest and must work with KPCo on the disposition of  
20 KPCo's undivided interest in the plant, which is one element that the Revised Ownership  
21 Agreement defines. Second, during the FERC proceeding, there were objections from  
22 parties to the Fair Market Value ("FMV") approach set forth in Section 9.6 of the original  
23 proposed Mitchell Plant Ownership Agreement, with parties questioning whether it  
24 yielded a fair and reasonable price for WPCo. In the end, any transfer price must be

1 negotiated by *both* Owners and is subject to the future regulatory approval of *both* this  
2 Commission and the KPSC. Such actions may take place, and in that event approvals  
3 will be sought at the appropriate time.

4 Simply put, it is not for witness Medine alone, in 2022 and only considering the  
5 interests of one party in West Virginia, to dictate that the future FMV of KPCo's share of  
6 the Mitchell Plant is one dollar. KPCo and the KPSC may take a different view. It will  
7 take time, thoughtful discussions, and good faith negotiations between the Owners to  
8 produce a potential transaction if WPCo seeks to purchase KPCo's share of the Mitchell  
9 Plant at some point in the future.

10 The proposed agreements provide a framework and timeline for those discussions,  
11 while recognizing that one party cannot infringe upon the rights of the other solely for its  
12 own benefit. It is my testimony that the Revised Ownership Agreement is reasonable,  
13 and fairly represents WPCo's interest in the Mitchell Plant.

14 **Q. CAD WITNESS MEDINE RECOMMENDS THAT THE PARTIES TO THE**  
15 **OWNERSHIP AGREEMENT PROVIDE AN OPTION FOR KPCO (OR A**  
16 **POSSIBLE SUCCESSOR) TO ENTER INTO A POST-2028 CAPACITY**  
17 **AGREEMENT WITH RESPECT TO MITCHELL. WHAT IS YOUR**  
18 **REACTION TO THAT RECOMMENDATION?**

19 A. To begin, witness Medine has not explained how this option would be in compliance with  
20 commission orders both here and in Kentucky. And furthermore, WPCo and KPCo will  
21 be free to negotiate such an agreement in the future if they regard it as being in the  
22 respective interests of those companies and their customers. To insert such a "right" in  
23 the Ownership Agreement now would be pointless since the price and other terms of a  
24 capacity agreement, if both parties decide years from now that they desire one, would

1 have to be subject to future negotiation. An option right without an agreed price is  
2 effectively not an option right at all.

3 **Q. IS THERE ANY REASON TO BELIEVE THAT KPSCO WILL PURPOSEFULLY**  
4 **IMPAIR ITS SHARE OF THE MITCHELL PLANT, AS MS. MEDINE**  
5 **SUGGESTS?**

6 A. No, there is no valid reason to believe that. Ms. Medine speculates that KPSCO may  
7 reduce dispatch if its parent ownership changes and thereby impair the value of the  
8 Mitchell Plant to WPCo. However, she ignores that KPSCO, regardless of upstream  
9 ownership, will need to meet its customers' needs based on typical integrated resource  
10 planning in Kentucky, which will take time and is subject to regulatory oversight and  
11 stakeholder input. She also ignores WPCo's role as operator of the plant under the  
12 proposed O&M Agreement. In addition, Ms. Medine does not acknowledge that the  
13 KPSC authorized KPSCO to invest in CCR equipment so that the Mitchell Plant *would be*  
14 *able to operate* through 2028 for the benefit of KPSCO's customers.

15 Regardless of who owns KPSCO, Mitchell ownership is split evenly. The two  
16 Owners will need to work together on all operational and investment decisions and  
17 achieve outcomes that are appropriate for both parties. The new Mitchell Agreements do  
18 not change these fundamental facts. KPSCO, regardless of who owns it, would still be  
19 required to participate as a party to the agreements, and cannot simply cease investing in  
20 or operating the Mitchell Plant.

21 In addition, the agreements ensure that WPCo can make investment decisions for  
22 the plant that may benefit WV customers beyond 2028, and KPSCO does not have the  
23 ability to make unilateral decisions that will negatively impact the operation of the  
24 Mitchell Plant.

1 **Q. CAD WITNESS MEDINE TESTIFIES THAT THE PROPOSED MITCHELL**  
2 **AGREEMENTS WERE NEGOTIATED BY KPCO AND LIBERTY, WITHOUT**  
3 **THE INPUT OF WPCO, TO THE DETRIMENT OF WEST VIRGINIA**  
4 **CUSTOMERS. IS THAT TRUE?**

5 A. Not at all. As WPCo's representative on the Operating Committee ("OC"), it is my  
6 responsibility to represent WPCo's 50% interest in the Mitchell Plant and the interests of  
7 West Virginia customers. I was involved in the creation and approval of the agreements  
8 originally presented with my direct testimony in this proceeding, and in the creation of  
9 the Revised Ownership Agreement that was filed with, and addressed in, my  
10 supplemental testimony in this proceeding. All of those agreements were approved by  
11 the OC, of which WPCo and KPCo are the only voting members.

12 I do understand in general that KPCo is currently the subject of a potential sale to  
13 another company, but I have not been involved in any sales discussions that occurred  
14 between KPCo and any other parties. My responsibility is to ensure that the terms of  
15 any agreements regarding the Mitchell Plant allow the Companies to comply with prior  
16 Commission orders, and are fair to WPCo and its West Virginia customers. The  
17 original and revised agreements do exactly that – they allow WPCo and APCo to  
18 preserve the value of the Mitchell Plant beyond 2028, while also recognizing that  
19 WPCo does not own 100% of the Mitchell Plant and that neither WPCo nor this  
20 Commission can make decisions on KPCo's behalf.

21 **Q. IS FURTHER CLARITY NEEDED IN THE REVISED OWNERSHIP**  
22 **AGREEMENT REGARDING THE TECHNICAL EXPERT AND KPCO'S**  
23 **USAGE OF AND PAYMENT FOR ELG EQUIPMENT IN THE EVENT KPCO**

1           **WANTS TO RUN A UNIT PAST 2028, AS THE STAFF WITNESSES**  
2           **SUGGEST?**

3       A.    No. As answered by the Companies in response to Staff data request 1-3, Burns &  
4            McDonnell has already been selected as the technical expert (“TE”), and the firm’s  
5            review is ongoing at this time. That selection was made by WPCo and KPCo, who are  
6            voting members of the OC under the current Mitchell operating agreement, and who  
7            will continue to constitute the OC under the proposed Mitchell Agreements.

8                        However, while the TE will assist the OC, the OC itself is ultimately responsible  
9            for making the commercial decisions needed to ensure compliance with both  
10           commissions’ orders on payment for ELG. The TE will make recommendations to the  
11           OC, and the OC must make the allocation decisions, subject to review and approval of  
12           both commissions.

13                      Mr. Weimer’s concerns regarding the cost allocation process itself on page 7 of  
14           his testimony are also misplaced. The proposed Mitchell Agreements outline the  
15           process for cost allocation for both capital and O&M. The Owners will share the TE’s  
16           costs incurred in determining the appropriate allocation for CCR and ELG upgrades per  
17           the orders from both commissions.

18                      Mr. Cooke’s concern, at page 6 of his testimony, regarding payment for ELG  
19           equipment, should it be used by KPCo beyond 2028, is already addressed by “Exhibit  
20           C” to the Revised Ownership Agreement, and would be premature to address in any  
21           event. Pursuant to Exhibit C, WPCo and KPCo can negotiate “economic equalization  
22           payments” in the event the unit interest swap provision is triggered, such payments  
23           would account for differences between the two companies, including any unequally  
24           shared capital expenditures like ELG.

1 **Q. IS WITNESS WEIMER'S CONCERN REGARDING THE REVISED**  
2 **OWNERSHIP AGREEMENT ON COST ALLOCATION, AS NOTED AT**  
3 **PAGES 6-7 OF HIS TESTIMONY, RELEVANT TODAY?**

4 A. No, it is not. KPCo, just like WPCo, is responsible for gaining regulatory approval of  
5 costs incurred as a result of its participation in the Mitchell Plant's ownership and  
6 operations. Potential future issues around regulatory approval in Kentucky, as  
7 mentioned by witness Weimer, are not a concern that needs to, or can be, addressed by  
8 this Commission at this time. In addition, cost allocation is determined by the OC, in  
9 which each Owner has a 50% interest. I believe it is speculative, at best, to assume  
10 today that the Owners and the OC will not be able to agree to reasonable terms that are  
11 in the best interest of the Owners and their customers.

12 **Q. IN YOUR OPINION, ARE STAFF WITNESS WEIMER'S OTHER CONCERNS**  
13 **REGARDING EMISSIONS TRADING AND POSSIBLE REPOWERING OF**  
14 **THE MITCHELL PLANT AN IMPEDIMENT TO APPROVAL OF THE**  
15 **PROPOSED AGREEMENTS?**

16 A. No. These particular concerns of Mr. Weimer are a bit of a red herring. Not only are  
17 they wholly speculative, but they would be issues regardless of the proposed Mitchell  
18 Agreements. Carbon dioxide ("CO2") is currently not a regulated pollutant, and it is  
19 impossible to know whether that will change. A possible future repowering of a unit  
20 could be negotiated by the Owners under any scenario. Until CO2 regulation becomes  
21 a reality or a specific repowering initiative is proposed, there is no point in engaging in  
22 premature speculation about such matters. The proposed Mitchell Agreements pose no  
23 impediment to consideration of either matter in the future.

1 **Q. DOES MR. WEIMER MAKE ANY STATEMENTS THAT ARE FACTUALLY**  
2 **INCORRECT?**

3 A. Yes. At page 2 of his direct testimony, Mr. Weimer identifies APCo as the owner of  
4 WPCo and KPCo. APCo has no ownership interest in either of those companies.  
5 Furthermore, the sale of KPCo to a third party is not a matter before this Commission.

6 **Q. ARE THE PROPOSED MITCHELL AGREEMENTS CONSISTENT WITH THE**  
7 **COMMISSION'S ORDERS IN CASE NO. 20-1040-E-CN?**

8 A. Yes, they are. The terms of the revised Ownership Agreement provide the flexibility  
9 and options that afford the best chance of consistent decisions in the two states. WPCo  
10 is proceeding with CCR and ELG. The agreements specifically address all the concerns  
11 brought up in the testimony of the other parties to this proceeding. They do so in a  
12 fashion that is reflective of the 50/50 ownership and that recognizes that all future  
13 decisions require regulatory approvals from both commissions.

14 The proposed Mitchell Agreements allow the Owners to act consistently with  
15 the Commission's directive that West Virginia customers should receive the full benefit  
16 of ELG beyond 2028. The agreements state that, if KPCo or another party were to  
17 derive benefit from the plants post-2028, the Owners should in good faith negotiate  
18 compensation to WPCo for its ELG investment, and both commissions would need to  
19 approve such an agreement at that time. This is wholly consistent with this  
20 Commission's prior orders.

21 In addition, the proposed Mitchell Agreements will make WPCo the operator  
22 and permit holder for the Mitchell Plant. This is necessary to comply with prior  
23 Commission Orders and to move forward with the ELG investments this Commission  
24 has required. The Commission already recognized this need when it expressly directed

1 WPCo to make changes to the current Mitchell operating agreement. The KPSC  
2 likewise directed KPCo to effect the changes necessary for WPCo to become the  
3 operator and assume responsibility for environmental permitting.

4 **Q. DO YOU RECOMMEND THAT THE COMMISSION APPROVE THE**  
5 **REVISED OWNERSHIP AGREEMENT AND THE PROPOSED O&M**  
6 **AGREEMENT?**

7 A. Yes, for the reasons stated herein and in my earlier-filed Direct and Supplemental  
8 testimony in this matter. The Revised Ownership Agreement contains revisions  
9 presented in my Supplemental testimony that are reasonable and yield a fair and  
10 balanced outcome for the Owners of Mitchell and their customers.

11 **Q DO THE OTHER PARTIES' PROPOSALS TO MODIFY PROVISIONS OF THE**  
12 **MITCHELL AGREEMENTS RUN THE RISK OF DIVERGENT DECISIONS**  
13 **BETWEEN THE TWO COMMISSIONS?**

14 A. Unfortunately, they do. What appears to be lost on Ms. Medine, and other witnesses, is  
15 that making unnecessary changes to the Mitchell Agreements almost ensures a round of  
16 diverging decisions that will have the potential to delay permitting and the ELG  
17 upgrades and possibly endanger the Mitchell Plant's ability to achieve the necessary  
18 ELG milestones that were presented in Case No. 20-1040-E-CN.

19 **Q. DO UPDATED AGREEMENTS NEED TO BE ADOPTED BY THE PUBLIC**  
20 **SERVICE COMMISSIONS OF BOTH WEST VIRGINIA AND KENTUCKY?**

21 A. In order to implement the orders of the two commissions, updated agreements need to be  
22 adopted by both. WPCo and KPCo, as co-owners of equal 50% undivided interests in the  
23 Mitchell Plant, are regulated by the West Virginia and Kentucky commissions, have filed  
24 the same Mitchell Agreements, including the alternative unit interest swap provisions



1 included in my supplemental testimony, with both state commissions (and will later file  
2 the approved agreements at FERC) for their respective approval. Staff witness Weimer  
3 takes the position in his supplemental direct testimony that the Commission should not  
4 approve the Revised Ownership Agreement. But both the West Virginia and Kentucky  
5 commissions will need to concur on a new Ownership Agreement in some form.

6 **Q. HOW DO THE PROCEEDINGS IN KENTUCKY IMPACT THIS CASE?**

7 A. KPCo has an undivided 50% interest in the Mitchell Plant, and WPCo is investing in  
8 ELG in the entire plant to preserve the option to operate the plant past 2028. The KPSC  
9 has found in its previous orders that the Mitchell Plant will essentially no longer be in  
10 KPCo's generation mix beyond 2028. In fact, my understanding from counsel is that  
11 KPCo may need to obtain a certificate of need from its commission to run Mitchell  
12 beyond 2028 like any other incremental generation resource for its interest to be added  
13 back to KPCo's asset mix. So, the main outstanding questions are how WPCo can make  
14 the ELG investments while both owners make CCR investments, and how KPCo will  
15 unwind its undivided interest at the conclusion of its usage in 2028.

16 **Q. IS THE QUESTION OF HOW TO UNWIND THE JOINT OWNERSHIP**  
17 **SOMETHING THAT HAS TO BE DECIDED NOW?**

18 A. No. The Companies and KPCo have proposed in their respective state proceedings that it  
19 would be prudent to defer that decision. The Companies have presented a framework  
20 (i.e., the buyout and unit interest swap provisions set forth in Section 9.6 of the  
21 Ownership Agreement) which permits the joint owners to explore over time the various  
22 commercial scenarios and establish a path for unwinding their joint ownership at the  
23 conclusion of KPCo's use of the plant. But, the Companies also recognize that it may be  
24 deemed reasonable to wait until there are more facts in the future, when the usefulness of

1 the plant beyond 2028 is better known, before defining the commercial structure for that  
2 future transaction.

3 **Q. WHAT DOES THAT MEAN FOR THE AGREEMENTS BEFORE THE**  
4 **COMMISSION NOW?**

5 A. Setting aside Section 9.6, WPCo still needs approval of the terms of both proposed  
6 Mitchell Agreements to ensure operations by WPCo and to ensure protections for both  
7 owners and their customers regarding ELG and other expenditures, particularly  
8 considering the potential that the relationship could move to a non-affiliate ownership  
9 structure. As to Section 9.6 and its related provisions, while these are reasonable  
10 provisions, in my opinion it would also be reasonable to exclude them and leave the  
11 commercial structure of the acquisition of KPCo's 50% interest in Mitchell to a future  
12 date. WPCo would defer to the Commission's preference as to including it or not.

13 **Q. ARE THE OWNERS INCENTIVIZED TO RESOLVE OWNERSHIP ISSUES BY**  
14 **MID-2025 IF SECTION 9.6 IS REMOVED FROM THE REVISED MITCHELL**  
15 **OWNERSHIP AGREEMENT?**

16 A. Yes. KPCo and WPCo each own an undivided 50% interest in the Mitchell Plant  
17 including its capacity and energy. As a result, WPCo can only bid its 50% share of the  
18 Mitchell Plant's capacity and energy into PJM after 2028 if it has not acquired KPCo's  
19 interest. Therefore, both Owners have an appropriate incentive to resolve post-2028  
20 ownership by mid-2025 when capacity commitments would need to be made by the  
21 Owners to PJM under a typical three-year advance timeline. WPCo has incentive to  
22 preserve the ability for the Mitchell Plant to operate past 2028 in conformance with the  
23 orders of this Commission, and KPCo can exit Mitchell Plant operations after 2028 given  
24 the directives of its commission. Thus, the Owners' rights would be preserved in the

1 absence of Section 9.6, and they would have the flexibility needed to reach an agreement  
2 and any confirming changes for after 2028 in accordance with these directives.

3 **Q. IF THE COMMISSION WANTED WPCO TO LEAVE THE STRUCTURE OF**  
4 **THE ACQUISITION OF KPSCO'S UNDIVIDED INTEREST IN MITCHELL TO A**  
5 **FUTURE DATE, WHAT COULD IT DO IN THIS CASE?**

6 A. The Commission in this case could authorize WPCo to enter into the agreements except  
7 for Section 9.6 of the Mitchell Ownership Agreement (including associated definitions  
8 and provisions such as the arbitration clause in Section 12.4 that are specific to that  
9 clause) if it finds that to be reasonable. That could also facilitate KPSCO entering into the  
10 agreements on those same terms, assuming that the KPSC approves the agreements  
11 absent Section 9.6 and authorizes KPSCO to enter into the agreements on the same basis.  
12 If the Commission sees both options as reasonable, it could issue an order finding it  
13 reasonable for WPCo to enter into an agreement containing either option to facilitate  
14 collaboration with the KPSC.

15 **Q. REGARDING YOUR LAST POINT, HOW COULD THIS APPROACH BE**  
16 **RAISED IN KENTUCKY?**

17 A. KPSCO is required to file status updates every ten days on the overall status of the Mitchell  
18 Agreements, including the instant proceeding, through which it informs the KPSC and  
19 staff of developments. My understanding is that KPSCO would and is required to use those  
20 updates to provide information about this proceeding, and could include any available  
21 information about this case, particularly if it would facilitate the orderly creation of a  
22 common set of agreements that satisfies both commissions.

23 **Q. WILL WPCO BE ABLE TO PROTECT ITS INTERESTS THROUGH THE**  
24 **PROPOSED AGREEMENTS WITH OR WITHOUT SECTION 9.6?**

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- 1 A. Yes, it will. WPCo will be the operator of Mitchell and it will continue to participate in  
2 the OC and have equal input into every decision at the plant. WPCo will be able to  
3 ensure prudence of the operations and maintenance plans of the plant, including the  
4 capital budget and planning, on an equal footing with KPCo. This remains true  
5 regardless of either Owner's plans for future, and regardless of Section 9.6.
- 6 **Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?**
- 7 A. Yes, it does.

**PUBLIC SERVICE COMMISSION  
OF WEST VIRGINIA  
CHARLESTON**

**CASE NO. 21-0810-E-PC**

**APPALACHIAN POWER COMPANY and  
WHEELING POWER COMPANY,**  
public utilities.

*Petition for Commission Consent and Approval  
to Enter into Ownership and Operating Agreements  
for the Mitchell Plant*

**CERTIFICATE OF SERVICE**

I, Keith D. Fisher, counsel for Appalachian Power Company and Wheeling Power Company, do hereby certify that a true and correct copy of the foregoing filing was served upon the following, via electronic mail, on this 4th day of April, 2022:

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