

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC INVESTIGATION OF THE)	CASE NO.
SERVICE, RATES AND FACILITIES OF)	2021-00370
KENTUCKY POWER COMPANY)	

ORDER

The Commission, on its own motion, finds that Kentucky Power Company (Kentucky Power) and its officers, agents, and employees should show cause why they should not be subject to the assessment of a civil penalty pursuant to KRS 278.990(1) for the alleged violation of the Commission’s October 28, 2021 Order requiring Kentucky Power to “request Commission approval prior to any change to the Mitchell Operating Agreement.”¹ The Commission further finds that a hearing should be scheduled on Friday, February 25, 2022, at 9 a.m. Eastern Standard Time in the Richard Raff Hearing Room at the offices of the Public Service Commission at 211 Sower Boulevard, Frankfort, Kentucky, to take evidence on this matter.

On September 15, 2021, the Commission initiated this investigation due to significant concerns regarding, among other things, American Electric Power’s (AEP) potential sale of Kentucky Power and Kentucky Power’s assets, including Kentucky Power’s interest in the Mitchell Power Plant (Mitchell). Kentucky Power and another AEP subsidiary, Wheeling Power Company (Wheeling Power), each own a 50 percent undivided interest in Mitchell, which is located in Moundsville, West Virginia, and is

¹ Order (Ky. PSC Oct. 28, 2021), at 1, and ordering paragraph 1 at 2.

subject to the jurisdiction of this Commission and the Public Service Commission of West Virginia. Mitchell is operated under an agreement (Mitchell Operating Agreement) between Kentucky Power and Wheeling Power that prescribes areas of responsibility and cost sharing, among other things.

On October 28, 2021, this Commission entered an Order that directed, “Kentucky Power shall request Commission approval prior to any change to the Mitchell Operating Agreement.”² On November 19, 2021, Kentucky Power filed an application with this Commission requesting approval of revisions to the Mitchell Operating Agreement and a new document, an ownership agreement (Mitchell Ownership Agreement) between Kentucky Power and Wheeling Power.³ Also on November 19, 2021, AEP Service Corporation (AEPSC) filed a request with the Federal Energy Regulatory Commission (FERC) on behalf of Kentucky Power for approval of the revised Mitchell Operating Agreement and Mitchell Ownership Agreement (jointly, Mitchell Agreements).⁴

The Commission ordered Kentucky Power to obtain Commission approval prior to any change to the Mitchell Operating Agreement based upon, among other things, Kentucky Power’s history of pursuing FERC approvals on matters that are related to, and conflict with, proceedings at this Commission that ultimately result in poor outcomes for Kentucky Power ratepayers. This is because once a rate or contract is FERC-jurisdictional, a state is preempted from ruling on or altering that FERC-approved rate or

² *Id.*

³ Case No. 2021-00421, *Electronic Application of Kentucky Power Company for Approval of Affiliate Agreements Related to the Mitchell Generating Station* (filed Nov. 19, 2021).

⁴ FERC Docket No. ER22-453, Kentucky Power (filed Nov. 19, 2021). AEPSC also filed a request with FERC for approval of the Mitchell Agreements on behalf of Wheeling Power on November 19, 2021, which was assigned Docket No. ER22-452.

cost allocation methodology.⁵ Thus, even if this Commission determines that certain rates are unreasonable based on the evidence of record, because the rate or cost allocation methodology was FERC-jurisdictional, Kentucky Power is entitled under law to recover the FERC-approved costs through rates charged to Kentucky Power ratepayers.

One instance of Kentucky Power seeking FERC approval after the Commission found an expense unreasonable involves a purchase power agreement. In Case No. 8271, the Commission denied Kentucky Power's request for a Certificate of Public Convenience and Necessity (CPCN) to purchase a 15 percent undivided interest in two 1,300 MW generating units being constructed near Rockport, Indiana, finding that the case record "unequivocally" demonstrated that it would be less costly "by tens of millions of dollars annually" to purchase capacity from an AEP power pool than purchase of the interest in Rockport.⁶ Kentucky Power did not request rehearing of the Commission's denial of the CPCN. Instead, Kentucky Power applied for FERC approval to enter into a unit power agreement to purchase 15 percent of the output of the Rockport units (Rockport UPA) and the rates included in the Rockport UPA, which Kentucky Power would pay to the Rockport units' owners, who were Kentucky Power sister entities and wholly owned subsidiaries of Kentucky Power's parent, AEP.⁷ At the same time Kentucky Power sought FERC approval of the Rockport UPA, Kentucky Power filed a second

⁵ See *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953 (1986).

⁶ Case No. 8271, *Application of Kentucky Power Company for a Certificate of Public Convenience and Necessity* (Ky. PSC Aug. 2, 1984), Order at 5.

⁷ Case No. 9061, *General Adjustments in Electric Rates of Kentucky Power Company* (Ky. PSC Dec. 4, 1984), Order at 4-5, 7 (*citing* FERC Docket No. ER84-579-000); *Kentucky Power Co. v. Public Serv. Comm'n*, Ky. Ct. App. No. 86-CA-1031-MR (June 3, 1988) (unpublished); and Case No. 8904, *Investigation of the Necessity and Usefulness of and the Cost Responsibility for the Hanging Rock-Jefferson 765 kV Transmission Line Under Construction by Kentucky Power Company* (Ky. PSC Aug. 3, 1984).

application with this Commission seeking approval to recover costs associated with the Rockport UPA.⁸ In Case No. 9061, intervening parties, including the Attorney General of the Commonwealth of Kentucky, by the through the Office of Rate Intervention (Attorney General), and Kentucky Industrial Utility Customers, Inc. (KIUC), argued that the Rockport UPA was “in direct contravention” of the Commission’s Order in Case No. 8271.⁹ The Commission determined that the Rockport UPA had the same effect as if Kentucky Power had been authorized to purchase a 15 percent interest in the Rockport units that was denied in Case No. 8271, and that the evidence of record continued to reflect that it was significantly less costly to purchase capacity through the AEP power pool than the costs attributed to the Rockport UPA.¹⁰ Kentucky Power sought judicial review of the Commission’s decision concurrently with ongoing FERC consideration of the Rockport UPA rates and Return on Equity. In 1986, the Kentucky Court of Appeals held that, because the same parties and issues were before the Court of Appeals and FERC, once FERC found the Rockport UPA rates reasonable, the Court of Appeals and this Commission’s jurisdiction was preempted by *Nantahala*, and thus the Commission no longer had jurisdiction regarding the reasonableness of expenses tied directly to FERC-approved rates.¹¹

In the same opinion, the Court of Appeals also found the Commission no longer had jurisdiction to determine the reasonableness of certain transmission costs. In 1974,

⁸ *Id.*

⁹ Case No. 9061, *General Adjustments in Electric Rates of Kentucky Power Company* (Ky. PSC Dec. 4, 1984), Order at 5.

¹⁰ *Kentucky Power Co. v. Public Serv. Comm’n*, Ky. Ct. App. No. 86-CA-1031-MR at 4–6.

¹¹ *Id.*

the Commission granted Kentucky Power a CPCN to construct a 765 kV transmission line from Hanging Rock, Ohio, to Jefferson, Indiana (Hanging Rock-Jefferson) at an estimated cost of \$55 million that would be shared by Kentucky Power and other AEP subsidiaries.¹² In a 1983 rate case, Kentucky Power testified that the cost of Hanging Rock-Jefferson had risen to \$123 million, and the cost allocation had changed, with Kentucky Power paying a larger portion of the costs.¹³ The Commission opened an investigation to examine the reasonableness of the costs that Kentucky Power would pay for the construction and operation and maintenance costs for Hanging Rock-Jefferson. The Commission found that the costs for Hanging Rock-Jefferson that Kentucky Power requested to recover from its ratepayers was unreasonable, because the line was developed and built for the benefit of the AEP system and Kentucky Power's direct benefits from Hanging Rock-Jefferson would be limited.¹⁴ As a result, Kentucky Power ratepayers would "pay for transmission lines which greatly exceed" Kentucky Power's needs.¹⁵ The Commission approved Kentucky Power to recover in rates a significantly lower amount based upon AEP's own allocation methodology.¹⁶ Kentucky Power sought judicial review of the Commission's Order and, concurrently, Kentucky Power and the AEP subsidiaries sought approval from FERC for the cost allocation for Hanging Rock-Jefferson. When the Commission's Order was upheld by Circuit Court, Kentucky Power

¹² Case No. 8904, *Investigation of the Necessity and Usefulness of and the Cost Responsibility for the Hanging Rock-Jefferson 765 kV Transmission Line Under Construction by Kentucky Power Company*, (Ky. PSC Aug. 3, 1984), Order at 2.

¹³ *Id.* at 3.

¹⁴ *Id.* at 7.

¹⁵ *Id.*

¹⁶ *Id.* at 8.

filed an appeal with the Court of Appeals.¹⁷ During the pendency of the appeal, FERC issued a decision addressing the Hanging Rock-Jefferson expenses and cost allocation. The Court of Appeals again found that its jurisdiction and the Commission's jurisdiction were preempted by the FERC decision.¹⁸ Yet again, Kentucky Power was entitled to recover in rates the costs that this Commission found were unreasonable, exclusively because Kentucky Power sought FERC jurisdiction over the rates, seemingly after Kentucky Power determined it would be more beneficial to AEP and its myriad subsidiaries to do so, rather than respect the jurisdiction and decisions of this Commission.

The case before us presents an almost identical issue. This Commission required Kentucky Power to seek "approval prior to any change to the Mitchell Operating Agreement." Instead of following the Commission's explicit direction, Kentucky Power, on its own or at the behest of AEP, modified the Mitchell Operating Agreement and sought FERC approval of those amendments prior to this Commission reviewing, never mind approving, the changes. At the February 25, 2022 hearing, the Commission finds that Nicholas K. Akins, Kentucky Power's chief executive officer; D. Brett Mattison, Kentucky Power's president and chief operating officer; and Lisa M. Barton, Kentucky Power's vice president, should testify in person on the process and justification for willfully violating a Commission Order. Counsel for other parties may file a motion requesting Commission approval to participate virtually. In the unlikely event Kentucky Power's actions, in contravention of the clear language of the Commission's order regarding approval of the

¹⁷ *Kentucky Power Co. v. Public Serv. Comm'n*, Ky. Ct. App No. 86-CA-1031-MR at 5.

¹⁸ *Id.*

amended Mitchell Operating Agreement, was inadvertent or an oversight, Kentucky Power can dispel of this proposed hearing by rectifying its oversight and withdrawing its amended agreements filed with FERC. This would thus provide an opportunity for Kentucky Power to satisfy the Commission's initial direction and receive prior Commission approval to the amendments of the Mitchell Operating Agreement.

IT IS HEREBY ORDERED that:

1. A hearing in this matter shall be held on February 25, 2022, at 9:00 a.m. Eastern Standard Time in the Richard Raff Hearing Room at the offices of the Public Service Commission at 211 Sower Boulevard, Frankfort, Kentucky.

2. Nicholas K. Akins, Kentucky Power's chief executive officer; D. Brett Mattison, Kentucky Power's president and chief operating officer; and Lisa M. Barton, Kentucky Power's vice president, shall participate in the February 25, 2022 hearing in person.

3. Parties may file a motion on or before February 14, 2022, requesting to participate virtually in the February 25, 2022 hearing.

4. Pursuant to KRS 278.360 and 807 KAR 5:001, Section 9(9), a digital video transcript shall be made of the hearing.

By the Commission

ENTERED
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KENTUCKY PUBLIC
SERVICE COMMISSION

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