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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

PUBLIC SERVICE
COMMISSION

IN THE MATTER OF:

APPLICATION OF BIG RIVERS)
ELECTRIC CORPORATION FOR) CASE NO. 2016-00278
A DECLARATORY ORDER)

POST-HEARING BRIEF OF CITY OF HENDERSON, KENTUCKY,
AND HENDERSON UTILITY COMMISSION, d/b/a
HENDERSON MUNICIPAL POWER & LIGHT

The City of Henderson, Kentucky, and the Henderson Utility Commission, d/b/a Henderson Municipal Power & Light (jointly referenced hereinafter as "Henderson"), by counsel, and pursuant to the Order dated January 18, 2017, hereby submit this post-hearing brief.

INTRODUCTION

Big Rivers Electric Corporation (hereinafter "Big Rivers") has filed an application asking the Kentucky Public Service Commission (hereinafter "Commission") to interpret provisions of a series of contracts between Big Rivers and Henderson governing the production of energy at Henderson's Station Two power-generation facility, and establishing the rights and obligations of the parties with regard to their respective shares of that energy. The issue Big Rivers presents for Commission review centers on disputed liability for variable production costs associated with the generation of energy that is unwanted by either party to the contract.

Historically, energy which exceeded Henderson's native load in a given hour, but which fell within the amount of generating capacity Henderson had reserved for that hour, could be sold in the wholesale energy market at a price that exceeded production costs associated with the generation of that energy. These favorable market conditions produced substantial profits for

1 entities that sold power into the wholesale market. For this reason, Big Rivers historically
2 exercised its contractual option to generate and take all or part of any "Excess Henderson
3 Energy," which is defined in Section 3.8 of the Power Sales Contract, as amended, as "energy
4 not scheduled or taken by City." Big Rivers also historically complied with the contractual
5 directive that the party taking the energy be responsible for variable production costs, and with
6 the contractual requirement to pay Henderson \$1.50 for each megawatt hour of "Excess
7 Henderson Energy" that Big Rivers elected to take. In past practice, Big Rivers did not generate
8 any "Excess Henderson Energy" until after it had generated energy associated with the Station
9 Two capacity allocated to Big Rivers (*Big Rivers' Responses to Commission Staff's First*
10 *Request for Information, Item 4(a)(1), and Item 7*). This practice enabled Big Rivers to increase
11 its profit margin, since the energy it was generating for sale to its member cooperatives or other
12 third parties, and characterizing as energy associated with its allocation, included some energy
13 that fell within Henderson's reserved capacity, and whose fixed costs Henderson had already
14 paid.

15 On May 25, 2016, in response to a downward fluctuation in market prices, Big Rivers
16 announced a change in practice in which it would generate the full amount of energy associated
17 with Henderson's capacity reservation prior to generating any energy associated with the Station
18 Two capacity allocated to Big Rivers (*Big Rivers' Response to Commission Staff's First Request*
19 *for Information, Item 7*). Big Rivers also announced that, under this new practice, it would no
20 longer necessarily exercise its option to take and pay the variable production costs associated
21 with "Excess Henderson Energy." Rather, Big Rivers would exercise its option only "from time
22 to time," presumably at times when wholesale energy market prices made it profitable to do so
23 (*Big Rivers' Application for a Declaratory Order, Exhibit 11*). At all other times, "Excess

1 Henderson Energy” would be generated despite its character as energy unwanted by Henderson,
2 and the variable production costs would be allocated to Henderson’s account. The effect of this
3 altered practice was to ensure that Big Rivers retained the ability to reap profits, while
4 simultaneously shifting any losses to Henderson.

5 On June 1, 2016, Big Rivers implemented the new policy over Henderson’s objection.
6 Since that time, and continuing to date, Big Rivers has generated “Excess Henderson Energy” in
7 accordance with Big Rivers’ new formula, although such energy is, by definition, energy which
8 Henderson has neither called for, nor scheduled for sale to a third party. Big Rivers continues to
9 generate what it characterizes as “Excess Henderson Energy” whether economic or not, reaping
10 profit where the energy is economic, and passing losses on to Henderson where it is not
11 (*Audiotaped Transcript of PSC Hearing, February 7, 2017, at 10:52 a.m.*). This opportunistic
12 approach represents not only a departure from past practice, but also a unilateral reinterpretation
13 of contractual terms. The parties’ contracts simply provide no basis or support for such an
14 alteration in the terms of one party’s contractual performance.

15 As discussed in greater detail below, Big Rivers seeks Commission approval for the
16 unilateral modification of a privately negotiated contract that Big Rivers has long manipulated to
17 its advantage. Since the inception of the parties’ contractual relationship, Big Rivers has
18 followed a calculation that allowed it to profit from the sale of energy on the wholesale market.
19 Big Rivers now reinterprets the contract to permit a different calculation that shifts all economic
20 risk to Henderson, while preserving Big Rivers’ ability profit when market conditions are
21 favorable. Big Rivers’ application amounts to a continued attempt to manipulate the contract in a
22 way that benefits Big Rivers. Big Rivers even concedes that its application may require the

1 Commission to engage in contractual interpretation (*Big Rivers Response to Henderson's First*
2 *Request for Information, Item 4*). This, the Commission simply is not empowered to do.

3 The question Big Rivers presents in no way involves the regulation of utility rates or
4 service within the meaning of KRS Chapter 278, and thus is insufficient to invoke Commission
5 jurisdiction, or to trigger the inevitable and otherwise impermissible infringement of
6 Henderson's contract rights. For the Commission to exercise jurisdiction over the dispute would
7 be to invade the province of the courts, infringe upon the contract rights of a municipality
8 exempt from Commission regulation where neither rates nor service are implicated, and exceed
9 the scope of the authority the legislature granted.

10 For the reasons set forth herein, Henderson respectfully requests that the Commission
11 decline to exercise jurisdiction over Big Rivers' application for a declaratory order.

12 ARGUMENT

13 **I. The Commission does not have jurisdiction to grant the relief Big Rivers requests.**

14 The Kentucky Supreme Court has held that, where, as here, the sole issue is a matter of
15 contract interpretation, jurisdiction lies with the courts of the Commonwealth, and not with the
16 Commission. *Simpson County Water Dist. v. City of Franklin*, 872 S.W.2d 460 (Ky. 1994). See
17 also *Carr v. Cincinnati Bell, Inc.*, 651 S.W.2d 126, 128 (Ky. App. 1983) (Where issues of rates
18 or services are not implicated, matters of contract interpretation and enforceability are more
19 appropriately addressed by the court). The Supreme Court's statement that contract interpretation
20 is a matter for the courts and not the Commission where there is no direct impact on rates or
21 service arises from KRS 278.040(2):

22 The Commission shall have exclusive jurisdiction over the
23 regulation of rates and service of utilities, but with that exception
24 nothing in this chapter is intended to limit or restrict the police

1 jurisdiction, contract rights or powers of cities or political
2 subdivisions.
3

4 Only where a city contracts with a regulated utility in a way that affects rates or service
5 does the exception delineated in KRS 278.040(2) apply to bring the city within the ambit of
6 Commission regulation. *Simpson* at 462-63. Such is not the case here. Henderson is not a
7 “utility” as defined in KRS 278.010(3)(a), and Big Rivers is not a customer who compensates
8 Henderson for rates or service as defined in KRS Chapter 278. Henderson is a city within the
9 meaning of KRS 278.040(2), and the contract at issue here, known collectively as the Power
10 Sales Agreement and its various amendments, is unrelated to rates or services. Thus, the nature
11 of the parties’ contractual relationship is exempt from Commission regulation.

12 The term “rate” is defined in KRS 278.010(12) to mean:

13 [A]ny individual or joint fare, toll, charge, rental, or other
14 **compensation for service** rendered or to be rendered by any
15 utility, and any rule, regulation, practice, act, requirement, or
16 privilege in any way relating to such fare, toll, charge, rental, or
17 other compensation, and any schedule or tariff or part of a schedule
18 of tariff thereof (Emphasis added).
19

20 Meanwhile, the term “service” is defined broadly in KRS Chapter 278 to include
21 practices or requirements related to the quality, quantity, and pressure of a commodity or product
22 to be used for or in connection with the business of a utility. The Kentucky Court of Appeals
23 further clarified the meaning of the term when it concluded:

24 [T]he legislature only intended for the word ‘service’ to apply to
25 and comprehend ‘**quality**’ and ‘**quantity**’ of the product to be
26 served, and to that end for the word to also include and
27 comprehend any part of the facility of the utility that bottle-necked
28 the required service of quantity and quality; but did not transfer
29 jurisdiction on the commission over other portions of facilities
30 which did not obstruct, prevent or interfere with the quality and
31 quantity of the furnished product.” *Benzinger v. Union Light, Heat*
32 *& Power Co.*, 170 S.W.2d 38, 41 (Ky. App. 1943) (Emphasis
33 added).

1
2 The Kentucky Supreme Court construed Commission jurisdiction even more narrowly,
3 finding its jurisdiction limited to regulation of rates for "usual service rendered to the public
4 generally." *Bee's Old Reliable Shows, Inc. v. Kentucky Power Co.*, 334 S.W.2d 765 (Ky. 1960).
5 In that case, a traveling carnival show challenged charges for connecting and disconnecting
6 electrical service. Because the issue was peculiar to the individual complainant, and did not
7 involve questions concerning rates and services generally, the Court held on page 767 that
8 Commission jurisdiction was improper:

9 These parties have entered into a contract for service, which,
10 obviously, is not akin to the usual service rendered to the public
11 generally. The contract here is of private concern to these parties.
12 Under the circumstances, jurisdiction is not exclusive with the
13 Public Service Commission, and the case should be submitted to
14 the court.
15

16 Big Rivers and Henderson have executed a series of complex contracts for the operation
17 of the Station Two power-generation facility, specifically a Power Plant Construction &
18 Operation Agreement, a Power Sales Agreement, and a System Reserves Agreement. The Power
19 Sales Agreement allows each party a percentage of generating capacity and power from Station
20 Two, assigns responsibility for related expenses, and sets forth the procedure to be followed by
21 each party in taking its share of power either for the provision of utility service to its own
22 customers, or to offer for sale to third parties. Nothing in the agreement establishes rates for
23 utility service, or parameters for the delivery of such service. Nothing in the agreement calls for
24 either party to furnish utility service to the other, or to pay or collect a rate in compensation for
25 such service. The contract at issue embodies the unique relationship between the parties and the
26 peculiar rights and obligations arising from it. The agreement bears no relation to rates or service
27 at all, much less usual service to the public generally.

1 Even Big Rivers concedes that the approval or denial of its application will not impact
2 the quantity and/or quality of service to its customers (*Big Rivers Response to Henderson's First*
3 *Request for Information, Item 2*). With that concession made, the only potential basis for an
4 exercise of Commission jurisdiction is the implication of a rate issue. And a review of the record
5 confirms that no such issue exists.

6 First, Big Rivers acknowledges that it has not notified the Commission, its customers, or
7 anyone else, that it intends to increase, decrease, or otherwise modify rates (*Big Rivers Response*
8 *to Henderson First Request for Information, Item 3*). Big Rivers even concedes that the
9 purported impact on rates is currently unknown (*Id.*). A review of the pleadings confirms that the
10 relief Big Rivers seeks is not based upon any rate: "Big Rivers files this application ... seeking
11 an order from the Kentucky Public Service Commission (Commission) finding that the rate and
12 service standards under Big Rivers' existing Power Sales Contract with the City of Henderson ...
13 require Henderson to be responsible for the variable production costs...." (*Big Rivers*
14 *Application, p. 1*). In its request for relief, Big Rivers seeks an order "finding that Big Rivers is
15 not responsible for the Variable Costs of any Excess Henderson Energy that Big Rivers declines
16 to take in accordance with its rights under the Power Sales Contract and that Henderson is
17 responsible for those Variable Costs...." (*Big Rivers Application, p. 6*). Should that argument
18 fail, Big Rivers alternatively requests that the Commission find that this requirement is not fair,
19 just and reasonable, and exercise its authority under KRS 278.200 and KRS 278.030 to hold that
20 Big Rivers is not responsible under the Station Two Contracts for the Variable Costs of any
21 Excess Henderson Energy." (*Big Rivers Application, p. 7*). These variable costs are, of course,
22 the result of Big Rivers' decisions to generate energy whether it is economic or not, and do not
23 constitute rates nor bear any relationship to any disputed rate Big Rivers has identified.

1 Nevertheless, in its attempt to fashion a contract dispute into an issue implicating rates,
2 Big Rivers describes something of a domino effect in which liability for variable costs associated
3 with the generation of “Excess Henderson Energy” could impact the Fuel Adjustment Clause,
4 which in turn could impact charges to members (*Big Rivers Response to Henderson First*
5 *Request for Information, Item 1*). But the “Fuel Adjustment Clause” as defined by the
6 Commission is “a mechanism that permits jurisdictional utilities to regularly adjust the price of
7 electricity to reflect fluctuations in the cost of fuel, or purchased power, used to supply that
8 electricity.” *Fuel Adjustment Clause Frequently Asked Questions*, available at
9 <http://psc.ky.gov/agencies/psc/consumer/FAC%20QandA.pdf>. In this case, any increase in Big
10 Rivers’ share of fuel costs would be attributable to the increased volume of energy Big Rivers
11 opts to generate, and not the natural fluctuation in fuel prices that the clause was designed to
12 accommodate. For this reason, the argument must fail.

13 Big Rivers next argues that the \$1.50 it pays to Henderson for each megawatt hour of
14 “Excess Henderson Energy” taken constitutes a “rate” within the meaning of KRS Chapter 278
15 (*Big Rivers Response to Henderson’s First Request for Information, Item 1 and Item 30*). But
16 this argument impermissibly contorts the statutory meaning of the word. Even Big Rivers
17 appears to recognize as much when it makes multiple references in the record to the \$1.50
18 “premium” paid to Henderson for each megawatt hour of “Excess Henderson Energy” taken (*Big*
19 *Rivers Response to Commission’s Supplemental Requests for Information, Item 2; Big Rivers*
20 *Post-Hearing Brief, p. 5, lines 11, 12, and 16; p. 6, line 11; and p. 10, line 10*). Regardless of any
21 change to the Fuel Adjustment Clause, however, the \$1.50 “rate” will not change. By statute, a
22 rate is **compensation for service** rendered to a utility customer. KRS 278.010(12). In the case at
23 bar, Big Rivers is not a customer of Henderson, and Big Rivers has cited no rate that is or has

1 been imposed, changed, or modified by Henderson. Henderson has not changed any rate,
2 contract term, or condition of service concerning Big Rivers.

3 The dispute Big Rivers asks the Commission to resolve does not involve a rate. Rather,
4 the dispute centers on a longstanding practice altered in response to fluctuating market
5 conditions, and a request to interpret the contract in a way that would sanction this new practice
6 without regard to the benefit Big Rivers has enjoyed over the years under its prior practice. A
7 review of the record confirms that the relief Big Rivers seeks is an Order declaring that
8 Henderson – and not Big Rivers – is liable under the Power Sales Contract for the variable costs
9 associated with the production of “Excess Henderson Energy,” or, in the alternative, that a
10 requirement holding Big River liable for variable costs is not “fair, just and reasonable.” (*Big*
11 *Rivers' Application*, pp. 6-7). Nowhere does the application refer to a rate charged by or paid to
12 Henderson.

13 Even if the Commission were to stretch reason so far as to find that the \$1.50 payment
14 per megawatt hour of “Excess Henderson Energy” taken is a rate, the Commission is still without
15 jurisdiction because the rate remains unchanged. It is important to note here that the applicability
16 of the \$1.50 payment was the subject of a lengthy arbitration proceeding, which culminated in
17 the issuance of an award in Henderson’s favor. In fact, Big Rivers referred to the issue involving
18 unwanted “Excess Henderson Energy” during that proceeding in its cross-examination of former
19 Henderson Municipal Power & Light General Manager Gary Quick (*Big Rivers Exhibit 8,*
20 *American Arbitration Association, Case No. 52 19800173 10, Deposition of Gary Quick, Video*
21 *Transcript beginning at 11:42*). Big Rivers nonetheless failed to adjudicate the issue it now
22 brings before the Commission. Only now, after the arbitration award was confirmed and
23 affirmed by the trial and appellate courts, and discretionary review denied by the Kentucky

1 Supreme Court, does Big Rivers seek to characterize this payment as a “rate.” If Big Rivers
2 reasonably believed the \$1.50 payment to be a rate, then Big Rivers would have made that
3 assertion and brought the issue before the Commission in 2009, when instead it filed a Petition
4 with the Henderson Circuit Court to refer the dispute to arbitration. By seeking referral of the
5 dispute to arbitration rather than bringing the issue before the Commission, Big Rivers conceded
6 that the \$1.50 payment is not a rate subject to Commission jurisdiction.

7 Additionally, it should be noted that an eventual impact on rates is even more unlikely in
8 view of Big Rivers’ affirmation that WKE Energy Corp. (hereinafter “WKE”) has agreed to
9 indemnify Big Rivers for any losses stemming from litigation over “Excess Henderson Energy”
10 (*Audiotaped Transcript of PSC Hearing, February 7, 2017, at 10:26*). If Big Rivers is correct in
11 its assertion that the arbitration award necessitated a change in the formula for calculating
12 “Excess Henderson Energy,” and that financial losses are now attributable to that formula, then
13 Big Rivers should pursue recovery from WKE under the terms of the Indemnification
14 Agreement, and not seek to invoke Commission jurisdiction by manufacturing a non-existent
15 rate issue.

16 Assuming, *arguendo*, that an interpretation of certain contractual provisions in
17 Henderson’s favor could potentially impact rates and/or quantity or quality of utility service to
18 Big Rivers’ customers, that argument is premature, and the purported impact is no more than
19 speculative. A request to interpret a contract for fear of uncertain collateral effects is still a
20 request for contractual interpretation, and, absent involvement of rates or service, exceeds the
21 scope of the Commission’s jurisdiction. Any decision affecting rates would not be based upon
22 known and measurable factors.

1 Furthermore, an exercise of Commission jurisdiction in this instance would violate the
2 prohibition of KRS 278.040(2) against the infringement of a city's contract rights.

3 The legislative intent expressed in KRS 278.040(2) "clearly and unmistakably" limits
4 Commission jurisdiction to matters of rates and service. *Benzinger, supra*, at 41. As the
5 *Benzinger* Court explained:

6 The enactment of the inserted clause ... of the statute clearly
7 manifests an intention on the part of the legislature to prescribe a
8 rule for the interpretation of the entire act. It knew that the
9 authority it was taking from municipalities, and exclusively
10 conferring jurisdiction thereof with the utility commission, was
11 more or less revolutionary and might be construed as invading
12 contract rights of the municipality, or its police jurisdiction over all
13 matters relating to public utilities within their corporate limits.
14 Therefore, to forestall such an interpretation of any part of the act
15 it was expressly stated that the intention was to confer jurisdiction
16 only over the matter of rates and service.
17

18 The jurisdiction of the Commission is strictly limited by statute to the regulation of rates
19 and service, and was not intended to usurp functions properly left to the courts, or to impede the
20 contract rights of municipalities where rates or services are not impacted. Kentucky law is clear
21 that, under these circumstances, the Commission is without jurisdiction to grant the relief Big
22 Rivers requests.

23 **II. Big Rivers should bear the losses associated with a soft energy market, just as it**
24 **reaped profits when market conditions were favorable.**
25

26 Traditionally, all Station Two energy was economic energy (*Direct Testimony of Robert*
27 *Berry, Big Rivers Application, Exhibit 10, p. 10, lines 1-2*). As the entity that physically controls
28 the generation of power, Big Rivers has exploited this advantage in the past by refusing to
29 approve a protocol that would have allowed Henderson to schedule its energy for sale to third
30 parties, opening the door for Big Rivers to exercise its contractual option to take and sell the
31 energy for its financial benefit. (*Henderson's Response to Commission Staff's First Request for*

1 *Information, Item 2*). After depriving Henderson of the right to schedule its excess energy for
2 sale to third parties when market conditions were favorable, Big Rivers now seeks to deprive
3 Henderson of the right to decline the generation and sale of unprofitable excess energy. Neither
4 the Power Sales Agreement nor any of its amendments address a division of losses when
5 engineering realities force the generation of energy which is not economically competitive, and
6 which neither party wants. Big Rivers' answer is to unilaterally supply a missing contractual
7 term and adopt a practice that allows it to benefit when the market is thriving, and shift the losses
8 to Henderson when it is not. This lopsided arrangement is simply untenable.

9 Big Rivers argues in sum that Henderson forces the generation of uneconomic "Excess
10 Henderson Energy" by insisting that Station Two remain in continuous operation. However, it is
11 not Henderson that imposes the requirement of continuous operation. Rather, it is the Power
12 Sales Agreement itself that makes continuous operation mandatory. (*Big Rivers Application,*
13 *Exhibit 2, Power Plant Construction and Operation Agreement, Section 13.2*). Big Rivers further
14 complains that Henderson refuses to discuss options for reducing Station Two output,
15 particularly an option that would decommission or place one or both units in economic
16 commitment status, meaning that the unit or units would be operational only when economically
17 competitive energy can be generated. In reality, Henderson has merely declined Big Rivers'
18 invitation to modify the existing contract in the absence of assurances that Henderson will be
19 able to fulfill its obligation as a public entity to provide electricity to city inhabitants at the same
20 or lesser cost than Henderson's Station Two production costs. The ownership and operation of
21 Station Two enables Henderson to offer power to the city and its inhabitants at consistent rates
22 that are not subject to market fluctuations. Henderson remains willing to explore all options for
23 stemming losses associated with the production of uneconomic energy at Station Two, provided

1 Henderson receives assurances that it will be able to maintain that consistency. In the meantime,
2 if Big Rivers is experiencing diminished profit margins, the losses are attributable to a mix of
3 contractual obligations, current market conditions, and engineering realities, and not from an
4 inflexible demand on Henderson's part. If either party is to bear the losses associated with an
5 anemic energy market, then it should be the party that enjoyed the benefit when market
6 conditions were favorable. Henderson should not be required to subsidize Big Rivers' profit
7 margins during periods of market downturn.

8 Big Rivers seeks Commission approval to exercise its "discretion" to take or not take
9 "Excess Henderson Energy." (*Big Rivers Application*, p. 5). That discretion does not require
10 Commission approval. It is a management decision to be exercised or not exercised by Big
11 Rivers pursuant to the terms of Power Sales Contract. In reality, Big Rivers seeks Commission
12 approval to shift the losses associated with uneconomic energy to Henderson. Nothing in the
13 parties' contracts permits such a shift.

14 Big Rivers claims without citing empirical data that the Station Two units must generate
15 a minimum of 115 Mwh and 120 Mwh respectively in order to remain in continuous operation, a
16 claim that appears to be based upon the alleged requirements of the SCR system. (*Big Rivers'*
17 *Response to Henderson's First Request for Information, Item 9*). The cost of generating power
18 exceeding Henderson's native load is best characterized as a discretionary operational expense.
19 And yet, Big Rivers provides no study or other data addressing the possibility of cycling any of
20 its other generating units. Big Rivers has segregated Station Two from its total capacity, targeted
21 Station Two as the sole source of the excess energy problem, and identified the decommissioning
22 of one or both units as the sole solution.

1 Although Big Rivers has characterized its application as a request for enforcement of a
2 contract, the request is better characterized as a request for the Commission to improperly
3 engage in contractual interpretation, and alter the rights and responsibilities of the parties under a
4 privately negotiated contract. Big Rivers asks the Commission to interpret the Power Sales
5 Agreement in a way that deems Henderson responsible for variable costs associated with
6 producing energy not taken or scheduled for sale by either party. In the alternative, and in the
7 event the Commission finds that Big Rivers rather than Henderson is liable for those variable
8 costs, Big Rivers asks the Commission to declare the provision not fair, just and reasonable.

9 In plain terms, Big Rivers is asking the Commission to sanction its unilateral decision to
10 change the way in which it has historically handled variable production costs associated with
11 energy neither taken nor scheduled for sale by either party. Big Rivers' new practice of
12 allocating to Henderson's account the variable costs of fuel and reagent associated with
13 unwanted energy simply finds no support in the parties' agreement.

14 Neither KRS 278.200 nor KRS 278.030, the statutes Big Rivers cites in its request for
15 relief, confers upon the Commission authority to grant the request. The legislature vested the
16 Commission with exclusive jurisdiction to enforce a statutory provision that allows utilities to
17 collect fair, just, and reasonable rates for services, except where the contract is between a utility
18 and a municipality exempt from Commission regulation in the absence of a question involving
19 rates or service.

20 As explained previously, Section 3.8 of the Power Sales Agreement defines "Excess
21 Henderson Energy" as "energy not scheduled or taken by City." Therefore, if Henderson does
22 not take or schedule energy associated with its reserved capacity, Henderson has communicated
23 to Big Rivers that it does not want this energy. Big Rivers in its discretion may then choose to

1 generate or not generate this unwanted energy. The decision whether to generate unwanted
2 energy, and the decision whether take or not take that energy, are management decisions that do
3 not require Commission approval. KRS 278.200 refers to review of contract rates, and not
4 discretionary management decisions such as the generation and disposition of energy. If the
5 statutory definition of "rate" is broad enough to invoke Commission oversight of such day-to-
6 day management decisions affecting routine operating costs, then there is no limit to the extent of
7 the Commission's supervisory role. Virtually every management decision affects either rates or
8 service to some degree, as rates as the source of a utility's operating revenue, and service is the
9 reason a utility exists. The Commission recognized the limitations on its authority in *City of*
10 *Lawrenceburg, Kentucky, v. South Anderson Water District*, Case No. 96-256, June 11, 1998, p.
11 5: "Lawrenceburg's definition of "practice," however, is so broadly drawn that it would bring
12 virtually every act, function, and operation remotely involved in the provision of utility service
13 within the Commission's jurisdiction and subsume the statutory limitations upon that
14 jurisdiction." Such pervasive Commission oversight would almost certainly have a deterrent
15 effect on municipalities contemplating a contractual relationship with a regulated entity.

16 The limits of Commission authority over contract management matters is further stated in
17 *City of Newport v. Campbell County Water District and Charles Atkins and Steven Franzen v.*
18 *Campbell County Water District, et al.*, Case Nos. 89-014; 89-029 and 89-179, Order dated
19 January 31, 1990, p. 19: "It must never be forgotten that, while the state may regulate with a
20 view to enforcing reasonable rates and charges, it is not the owner of the property of public
21 utility companies, and is not clothed with the general power of management incident to
22 ownership." *State of Missouri ex rel. Southwestern Bell Telephone Co.*, 262 U.S. 276, 289, 43 S.
23 Ct. 544, 67 L. Ed. 981 (1923).

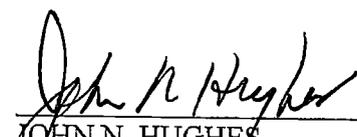
1 In a reference to regulatory authority to modify a contract because of its alleged
2 uneconomic consequence to the utility, the same claim Big Rivers asserts here, the Michigan
3 Supreme Court stated:

4 ...[T]he commission argues that its authority to fix and regulate
5 reasonable utility rates, of necessity, encompasses the power to
6 prevent noneconomic management practices which threaten the
7 integrity of the ratemaking process. As this Court asserted in
8 *Detroit v. Public Service Comm.*, 308 Mich. 706, 716, 14 N.W.2d
9 784 (1944), “[i]t is the duty of the commission, under its statutory
10 power, to fix a just and reasonable rate.” See also M.C.L. Sec.
11 460.6a(1), (2); M.S.A. Sec. 22.13(6a)(1), (2). The commission’s
12 argument, though it may be economically supportable, is legally
13 unsound. The commission is a creature of the Legislature and, as
14 such, possesses only those powers conferred upon it by statute. . . .
15 The power to fix and regulate rates, however, does not carry with
16 it, either explicitly or by necessary implication, the power to make
17 management decisions. . . . *Missouri ex rel. Southwestern Bell*
18 *Telephone Co. v. Public Service Comm.*, 262 U.S. 276, 289, 43
19 S.Ct. 544, 547, 67 L.Ed. 981 (1923). *Union Carbide Corporation,*
20 *Plaintiff, and Consumers Power Company, Intervening Plaintiff-*
21 *Appellant v. Public Service Commission, Defendant-Appellee.*
22 Docket Nos. 79148, 79150, 428 N.W.2d 322, 328, Supreme Court
23 of Michigan. August 23, 1988.
24

25 The *Union Carbide*, supra, decision is consistent with the authority established in *United*
26 *Fuel Gas Company v. Railroad Commission of Kentucky No. 1*, 278 U.S. 300, 320 (1929) 49
27 S.Ct. 150, 73 L.Ed. 390 United States Supreme Court, Jan. 2, 1929: “We recognize that a public
28 service commission, under the guise of establishing a fair rate, may not usurp the functions of the
29 company’s directors and in every case substitute its judgment for theirs as to the propriety of
30 contracts entered into by the utility.”

31 In *City of O’Fallon, Missouri and City of Ballwin, Missouri, Appellants v. Union*
32 *Electric Company d/b/a Ameren Missouri, Respondent*, WD78067, 462 S.W.3d 438, 444 Court
33 of Appeals of Missouri, Western District, Second Division, April 28, 2015, the Court said:

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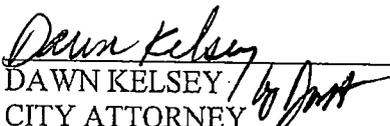


JOHN N. HUGHES
ATTORNEY AT LAW
Professional Service Corporation
124 West Todd Street
Frankfort, Kentucky 40601
Telephone: (502) 227-7270
jnhughes@johnnhughespsc.com

and



H. RANDALL REDDING
SHARON W. FARMER
KING, DEEP & BRANAMAN
127 North Main Street
P.O. Box 43
Henderson, Kentucky 42419-0043
Telephone: (270) 827-1852
Facsimile: (270) 826-7729
rredding@kdblaw.com
sfarmer@kdblaw.com
Attorneys for Henderson Municipal Power & Light



DAWN KELSEY
CITY ATTORNEY
CITY OF HENDERSON
222 First Street
Henderson, Kentucky 42420

CERTIFICATE OF SERVICE

I hereby certify that the original and ten (10) copies of the foregoing were forwarded this 14th day of March, 2017, via U.S. Mail, postage prepaid, or via facsimile, electronic mail, and/or hand delivery, to the following:

1 James M. Miller
2 R. Michael Sullivan
3 Tyler Kamuf
4 SULLIVAN, MOUNTJOY, STAINBACK & MILLER, P.S.C.
5 100 St. Ann Street
6 P.O. Box 727
7 Owensboro, Kentucky 42302-0727
8 *Attorneys for Big Rivers Electric Corp.*
9

10 Original to:

11
12 Dr. Talina R. Mathews
13 Executive Director
14 Kentucky Public Service Commission
15 211 Sower Boulevard
16 P.O. Box 615
17 Frankfort, Kentucky 40602-0615
18
19
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