COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC.; NSA, INC.; ALCAN INGOT; AND COMMONWEALTH ALUMINUM CORPORATION	)	
COMPLAINANTS	)	
v.	)	CASE NO. 95-011
BIG RIVERS ELECTRIC CORPORATION	)	
DEFENDANT	)	

O R D E R

Kentucky Industrial Utility Customers, Inc. ("KIUC") and three of its members have brought a complaint against Big Rivers Electric Corporation ("Big Rivers") in which they seek the refund of $5,992,736, plus interest, of unreasonable fuel charges related to Amendment No. 1 to Contract No. 527. Big Rivers has moved for dismissal of the complaint. Its motion poses the following issue: Does the prohibition against retroactive rate-making bar this Commission from re-examining the reasonableness of fuel charges previously reviewed and approved in a biennial fuel adjustment clause review? Finding in the affirmative, we grant Big Rivers' motion and dismiss the complaint.

BACKGROUND

On May 5, 1982, Big Rivers and Green River Coal Company ("Green River") entered Contract No. 527 for coal deliveries to Big Rivers' Wilson Plant over a twenty-year period. Less than two years after deliveries began, however, Green River began complaining about

the manner in which productivity changes were factored into price adjustments and requested modifications to the contract.

Contract No. 527 provided for adjusting the labor, insurance, and benefits cost elements included in the base price in direct proportion to changes in labor productivity for western Kentucky underground mines as reported by the U.S. Department of Energy. Increases in productivity reduced the contract coal price while productivity decreases raised it. Contract No. 527 established a base productivity factor of 1.45 tons per man-hour. This factor rose to 2.02 in 1983 and to 2.19 in 1984. In 1985 it fell to 2.11.

To assist its review of Green River's request, Big Rivers retained mining engineer Aubrey Cornette to report on expected changes in underground mining activity. In August 1986 Cornette reported, that "I know of no reliable way of predicting what the productivity rates might do in the future at Western KY underground coal mines."[1]

In December 1986, Big Rivers and Green River agreed to modify the productivity formula to freeze the productivity factor at 2.11 tons per man-hour. No document, however, was executed. In December 1987, Big Rivers received preliminary data for the year 1986 that showed a large improvement in productivity. Based on the preliminary productivity data, the agreed modification would have increased the 1988 price for coal by $2.84 over the price charged Big Rivers under the contract. Big Rivers withdrew the proposal.

Less than two months later in February 1988, Big Rivers and Green River executed Amendment No. 1. The Amendment fixed the productivity factor for 1988 at 2.19 tons per man-hour and limited future changes to .06 tons per man-hour per year. Big Rivers' management acted on the belief that Green River had a strong basis to claim that the

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[1] Focused Management Audit of Big Rivers Electric Corporation Fuel Procurement ("Overland Report"), May 1993, at Exhibit 15.1.

productivity index was inapplicable and that Big Rivers would have considerable exposure if Green River litigated its claim. They viewed Amendment No. 1 as safer than arbitration. The immediate effect of Big Rivers' decision to enter Amendment No. 1 was a price increase of $2.10 per ton.

After Amendment No. 1's execution, Big Rivers filed a copy of the agreement with the Commission.[2] In Cases No. 10436[3] and No. 90-360,[4] which were biennial reviews of the operation of Big Rivers fuel adjustment clause ("FAC"), the Commission reviewed, inter alia, fuel charges associated with Amendment No.1 for these periods and approved them.

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[2] Administrative Regulation 807 KAR 5:056, Section 1(7) provides:

> At the time the fuel clause is initially filed, the utility shall submit copies of each fossil fuel purchase contract not otherwise on file with the commission and all other agreements, options or similar such documents, and all amendments and modifications thereof related to the procurement of fuel supply and purchases power. Incorporation by reference is permissible. **Any changes in the documents, including price escalations, or any new agreements entered into after the initial submission, shall be submitted at the time they are entered into.** Where fuel is purchased from utility-owned or controlled sources, or the contract contains a price escalation clause, those facts shall be noted and the utility shall explain and justify them in writing. Fuel charges which are unreasonable shall be disallowed and may result in the suspension of the fuel adjustment clause. The commission on its own motion may investigate any aspect of fuel purchasing activities covered by this regulation [emphasis added].

[3] Case No. 10436, An Examination By the Public Service Commission of the Application of the Fuel Adjustment Clause of Big Rivers Electric Corporation From November 1, 1986 To October 31, 1988 (March 31, 1989).

[4] Case No. 90-360, An Examination By the Public Service Commission of the Application of the Fuel Adjustment Clause of Big Rivers Electric Corporation From November 1, 1988 To October 31, 1990 (April 3, 1991).

On July 7, 1992, the Commission initiated Case No. 90-360-C[5] to review the operation of Big Rivers' FAC for the six-month period ending April 30, 1992. While this case was pending, the Commission learned of a federal government investigation into possible criminal violations involving coal sales to Big Rivers. Big Rivers disclosed to the Commission possible conflicts of interest between its former General Manager William Thorpe and a coal supplier.

Based upon these developments and the level of Big Rivers' fuel costs, the Commission determined that a thorough investigation of Big Rivers' fuel procurement practices was necessary. It retained an independent auditing firm, Overland Consulting, Inc. ("Overland"), to identify opportunities for improvements in the management and operation of Big Rivers' fuel procurement function and to determine whether Big Rivers' fuel procurement strategies and practices were appropriate and resulted in reasonable fuel costs for the period since November 1, 1990.[6]

On May 22, 1993, Overland issued a 353-page report on its findings. As to Amendment No. 1, it concluded:

> Amendment No. 1 to Green River Coal Contract No. 527 changed the method for calculating price escalations under the contract. While Green River Coal had made a claim that the existing escalation procedure was unfair and should be modified, Green River Coal's claim had little merit. Big Rivers was not under any legal obligation to agree to Amendment No. 1 to the Green River Coal Contract No. 527. **That amendment resulted in Big Rivers incurring an immediate price increase of $2.10 per ton and $11.2 million in increased costs over the period January 1988 through December**

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5 Case No. 90-360-C, An Examination By the Public Service Commission of the Application of the Fuel Adjustment Clause of Big Rivers Electric Corporation from November 1, 1991 to April 30, 1992.

6 Case No. 90-360, Order of November 4, 1992 at 1-2; Overland Report at 1-5.

> **1992.** Amendment No. 1 to Contract No. 527 caused an increase in fuel costs of $5.2 million during the FAC audit period beginning on November 1, 1990 and ending on December 31, 1992. **The increased costs resulting from Amendment No. 1 to Contract No. 527 are unreasonable costs.**

Overland Report at 1-12 (emphasis added). Overland subsequently revised its calculation of unreasonable costs to approximately $5.85 million to reflect the period from November 1, 1990 through April 30, 1993.[7]

In its Order of July 20, 1994 in Case No. 90-360-C, the Commission concurred with Overland's conclusion and ordered, inter alia, that Big Rivers refund $5.85 million in increased fuel costs associated with Amendment No. 1 for the period from November 1, 1990 to April 30, 1993. The Commission did not address the question of unreasonable fuel costs related to Amendment No. 1 which Big Rivers may have incurred prior to November 1, 1990.

KIUC is a Kentucky corporation which is composed of large industrial users of electricity and other utility services. NSA, Inc., Alcan Aluminum Company, and Commonwealth Aluminum Corporation are members of KIUC. They represented approximately 55.07 percent of Big Rivers's annual sales for the 1995 calendar year.

During Case No. 90-360-C, the Complainants sought to raise the issue of the unreasonable Amendment No. 1 costs incurred prior to November 1, 1990. Through the written testimony of its witnesses, they sought recovery of those fuel costs. Granting Big Rivers' motion to strike references to these costs in that testimony, the Commission

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[7] Letter to Gerald Wuetcher (PSC Counsel) from Ridley M. Sandidge (Big Rivers Counsel) of 11/23/93 (submission of revised Overland estimates).

stated: "From the outset the Commission has consistently held that these proceedings are necessarily confined to the operation of Big Rivers' fuel adjustment clause ("FAC") from November 1, 1990 to April 30, 1993."[8] Leaving open the question of whether these costs might be addressed in a future proceeding, the Commission stated in a footnote:

> Questions of HOW, WHY, WHEN, et al., concerning Commission review of Big Rivers' fuel expenses for periods, prior to November 1, 1990 will, no doubt, be addressed at a later date.

Id. at 1 n.1.

Construing this footnote as an invitation for further Commission proceedings,[9] the Complainants on January 11, 1995 filed a complaint with the Commission in which they sought the refund of $5,992,736 plus interest for unreasonable fuel costs which Big Rivers incurred **prior to November 1, 1990** as a result of Amendment No. 1. Big Rivers moved to dismiss the complaint.[10] All parties have been afforded the opportunity to submit memoranda on the motion.

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8 Case No. 90-360-C, Big Rivers Electric Corp. (Oct. 1, 1993) at 1.

9 The significance which the Complainants have given to this footnote is misplaced. It was made at an early phase in the proceeding before the filing of all testimony and briefs. The Commission's subseqent actions, moreover, should have dispelled any impression that this matter was still ripe for further proceedings. In its opening statement to the parties at the hearing in Case No. 90-360 on October 27, 1993, the Commission through its Chairman stated that the Commission would not "conduct postmortems" on prior Commission proceedings. PSC Case No. 90-360-C, Transcript, Vol. I at 7. The lack of discussion on this issue in the Commission's Order of July 21, 1994 further suggested that additional proceedings were no longer considered appropriate.

10 The Attorney General of Kentucky is also a party to this proceeding. On March 1, 1995, the Commission granted his motion for leave to intervene.

DISCUSSION

In its motion to dismiss, Big Rivers argues that the relief which the Complainants seek is barred by the prohibition against retroactive rate-making. Having previously examined and approved the fuel charges in question in Cases No. 10436 and No. 90-360, it contends that the Commission may not re-examine those costs now.

Opposing this position, the Complainants argue that, in special circumstances and in the interests of justice, the Commission may set future rates to remedy past rate-making errors. Moreover, they argue, the general prohibition against retroactive rate-making does not apply to fuel adjustment clause proceedings. They further note that nothing within Administrative Regulation 807 KAR 5:056 prohibits the re-examination of previously approved fuel charges in unusual circumstances. At the time of Cases No. 10436 and 90-360, Complainants further state, the Commission did not know that Contract No. 527 and Amendment No. 1 were procured through fraud.

The rule against retroactive rate-making is a "generally accepted principle of public utility law which recognizes the prospective nature of utility rate making and prohibits regulatory commissions from rolling back rates which have already been approved and become final." MGTC, Inc. v. Pub. Serv. Comm'n, 735 P.2d 103, 107 (Wyoming 1987). It further prohibits regulatory commissions, when setting utility rates, from adjusting for past losses or gains to either the utility, consumers, or particular classes of consumers. The rule "rewards the utility's efficiency and protects the consumer from surprise surcharges allocable to the utility's losses in prior years . . . [and] ensures fairness, stability and certainty by preventing a regulatory agency from reversing prior approved rates." Wisconsin Power and Light Co. v. Pub. Serv. Comm'n, 511 N.W.2d 291, 297 (Wis. 1994)

(Abrahamson, J., dissenting). The rule is limited to traditional or general rate-making proceedings. MGTC, Inc. v. Pub. Serv. Comm'n, 735 P.2d at 107; Southern California Edison Co. v. Pub. Util. Comm'n, 576 P.2d 945.

The use of FACs, however, is not rate-making in the traditional or classical sense of that term. Business and Professional People For The Public Interest v. Illinois Commerce Comm'n, 525 N.E.2d 1053, 1058 (Ill. App. Ct. 1988). FACs are designed to pass identifiable costs directly to ratepayers. While they are thus integral to computing the amount the consumer ultimately pays, they are not used to calculate "commission-established" rates. Rather, they are used to incorporate changes in identifiable costs into "commission-established" rates. Because the pass-through of costs calculated under an FAC goes into effect without advance approval, a utility cannot validly expect that charges thus collected will be insulated from later review and modification if unreasonable. Courts have therefore concluded that a regulatory agency's use of a fuel adjustment clause is not an act of rate-making subject to the rule against retroactive rate-making.[11]

Administrative Regulation 807 KAR 5:056 perfectly illustrates this point. Pursuant to this regulation, a base fuel cost is established. Each month an electric utility makes an adjustment per kilowatt hour of sales to reflect the difference between its base cost of fuel and its actual cost of fuel. The adjustment appears on customer bills as a separate line

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[11] See, e.g., MGTC, Inc. v. Pub. Serv. Comm'n, 735 P.2d 103, 107 (Wyoming 1987); Maine Pub. Advocate v. Pub. Util. Comm'n, 476 A.2d 178 (Me. 1984); Southern California Edison Co. v. Public Util. Comm'n, 576 P.2d 945, 954-55 (Cal. 1978); Equitable Gas Co. v. Pennsylvania Pub. Util. Comm'n, 526 A.2d 823, 830-31 (Pa.Commw. 1987); Metropolitan Edison Co. v. Pennsylvania Pub. Util. Comm'n, 437 A.2d 76, 79-80 (Pa.Commw. 1981); Consumer Protection Bd. v. Pub. Serv. Comm'n, 449 N.Y.S. 65, 67 (N.Y. App.Div. 1982).

item and is added to charges resulting from "Commission-established" rates. The monthly adjustment occurs automatically and does not require immediate Commission approval. Because these adjustments are automatic, the Commission performs periodic reviews of each FAC in which it may disallow unreasonable fuel charges due to improper fuel procurement practices. 807 KAR 5:056, § 1(11) and (12).

The Commission finds no legal authority for the Complainants' contention that FAC charges are never final and are always subject to Commission review and revision. Neither Administrative Regulation 807 KAR 5:056 nor KRS Chapter 278 supports such a broad proposition. Some degree of finality and stability must be maintained. "Even a public utility," the Kentucky Court of Appeals has noted, "has some rights, one of which is the right to a final determination of its claim within a reasonable time and in accordance with due process." Kentucky Power Co. v. Energy Regulatory Comm'n, Ky.App, 623 S.W.2d 904, 908 (1981). Once the Commission has completed its biennial review of a utility's fuel costs and approved the fuel charges rendered in the biennial period, therefore, these charges achieve the status of commission-established rates. At that point, the rule against retroactive rate-making prevents the Commission from re-examining them.[12]

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[12] In another forum Big Rivers has argued that Commission approval of costs associated with a fuel procurement contract in a FAC biennial review proceeding precludes Commission review of that fuel procurement contract or its costs in future FAC review proceedings. (For example, Commission approval of Big Rivers' fuel charges for the two year period ending October 31, 1988, which included costs associated with Amendment No. 1, precludes the Commission from questioning the reasonableness of costs associated with Amendment No. 1 that Big Rivers incurred in the two year period ending October 31, 1996.) The Commission's decision this day should not be interpreted as acceptance of that argument. To the contrary, the Commission has opposed that argument in judicial proceedings and continues to maintain that Administrative Regulation 807 KAR 5:056 requires it to review the reasonableness of fuel procurement contracts and fuel cost on a constant basis. Determinations in prior FAC biennial reviews are not binding upon the Commission in subsequent FAC reviews.

In Wisconsin Power & Light Co. v. Pub. Serv. Comm'n, 511 N.W.2d 291 (Wis. 1994), the Wisconsin Power and Light Company ("WPL") appealed an order of the Wisconsin Public Service Commission which required the refund of $9 million of fuel costs which WPL incurred over a 15-year period (1974 to 1989) from its imprudent administration of a coal supply contract. The Wisconsin Public Service Commission's action came despite ten previous annual fuel adjustment reviews in which the fuel charges were approved.[13]

On appeal, the Wisconsin Supreme Court upheld a lower court's reversal of the Wisconsin Public Service Commission's Order as retroactive rate-making. It specifically rejected the argument that fuel charges collected through a fuel adjustment clause are always subject to refund. Noting that the Wisconsin Public Service Commission had specifically approved such charges in annual reviews conducted between 1974 and 1984, the Court stated:

> The record is unclear as to how carefully the commission actually did review each rate order prior to 1984. This, however, is irrelevant because, as noted above, the PSC had the power to review WPL's records. In 14 previous rate orders--some while FACs were in place and others subject to standard administrative review--the PSC never questioned the price WPL paid for coal. Former commissions that issued these orders did their jobs and discharged their statutory duty to set just and reasonable rates for the future. At no time did consumers pay more than the rate approved by the PSC. Thus, WPL did not violate the filed rate doctrine.
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> The PSC not only had the power and responsibility to audit WPL's fuel costs and rates in general, but also represented that it regularly did perform such audits. When

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[13] Between 1974 and 1984, WPL had a fuel adjustment clause which permitted an automatic passthrough of fuel costs subject to the Wisconsin Public Service Commission's annual review. In October 1984, the Wisconsin Legislature prohibited electric utilities from setting rates based upon automatic fuel adjustment clauses. See Wis. Stat. 196.20(4).

> the commission had concerns about a utility's use of a FAC, it would approve the utility's rates on an interim basis, with the explicit condition that the utility would refund fuel costs to the consumers if those costs were later found to be unreasonable. This court approved that practice in Friends of the Earth, 78 Wis.2d at 412-13, 254 N.W.2d 299. However, in that case, this court made it clear that the PSC could not order the refund of revenue collected under unconditional rates. The rate orders in question here were unconditional. Hence, the commission is now attempting to do precisely what we found to be illegal in Friends of the Earth.
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> This commission appears to be frustrated by the bounds of its authority. It is precluded by statute from correcting what it now considers to be errors made by the commission between 1974 and 1989. The current PSC believes that 14 previous rate orders, allowing WPL to recover the cost of coal under the WECO contract, were wrong. However, during that entire period, the PSC had at its disposal the mechanisms and authority to review WPL's coal costs. The commission did review WPL's costs and did audit the utility's practices and performance from 1974 to 1989 and regularly approved WPL's rates as just and reasonable.
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> In this case, WPL indisputably collected no more from consumers for its coal costs than it paid to vendors. This is exactly what the PSC approved when it issued each of the rate orders in question. The commission has now ordered WPL to refund part of these fuel costs because it believes WPL acted imprudently in managing its coal contract with WECO. **Having approved WPL's rates, including the utility's expected coal costs, 14 times, the PSC cannot now claim that WPL must return this money.** We hold that the PSC's order constitutes impermissible retroactive rate-making. Therefore, we affirm the decision of the court of appeals.

Id. at 296 - 297 (emphasis added).

The present case is very similar to Wisconsin Power & Light. As in that case, the Commission reviewed fuel charges which Big Rivers incurred under Amendment No. 1

in five different reviews. Two of these proceedings were biennial reviews. In each instance, the Commission approved Big Rivers' fuel charges. No exception or challenge against Amendment No. 1 was taken. Having approved those charges, the Commission is barred from re-examining them.[14]

Recognizing that the prohibition against retroactive rate-making precludes its requested relief, Complainants argue that an exception exists "when the utility itself causes the failure of the utility [regulatory commission] to exercise its proper regulatory oversight in setting rates." Complainants' Memorandum at 18. Several courts have recognized the existence of such an exception.[15]

Complainants further argue that, as Big Rivers misled the Commission during prior FAC proceedings, the exception is applicable to this case. In support of their contention of improper and misleading conduct, Complainants point to the failure of then Big Rivers Vice-General Manager of Fuels Joe Craig to note the execution of Amendment No. 1 when cross-examined about renegotiated coal contracts during a hearing in Case No.

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[14] Citing Mike Little Gas Co. v. Pub. Serv. Comm'n, Ky.App., 574 S.W.2d 926 (1978), and Kentucky Power Co. v. Energy Regulatory Comm'n, Ky.App, 623 S.W.2d 904 (1981), the Complainants assert that the Commission has the authority "to set future rates to remedy past ratemaking errors in special circumstances and in the interests of justice." Complaint at 11. Neither case, however, is applicable. The decision in Mike Little Gas Co. dealt with an "obvious clerical error" in a Commission order. Any errors in the Commission's Orders in prior FAC review cases were neither clerical nor obvious. The issue in Kentucky Power Co. was the scope of judicial review of Commission decisions, not retroactive rate-making.

[15] Southwest Gas Corp. v. Pub. Serv. Comm'n, 474 P.2d 379 (Nev. 1970); Richter v. Florida Power Corp., 366 So.2d 798 (Fla. App. 1979); Matter of Minnesota Pub. Util. Comm'n, 417 N.W.2d 274 (Minn. App. 1987); Salt Lake Citizens v. Mountain States Telephone & Telegraph Co., 846 P.2d 1245 (Utah 1992).

10436-C. Their allegations are similar to those which they made in Case No. 90-360-C. Citing the same evidence, Complainants' witnesses alleged that Craig falsified his testimony to conceal the existence of Amendment No. 1.[16]

Assuming arguendo that a fraud exception to the prohibition against retroactive rate-making exists, Complainants fail to cite any instance of fraud or deception upon Big Rivers' part. Contrary to Complainants' claims that Big Rivers sought to evade Commission review of Amendment No. 1, Big Rivers filed a copy of the contract with the Commission shortly after its execution.[17] In response to an Order in Case No. 90-360, it specifically identified Amendment No. 1 as a fuel contract amendment executed during the biennial review period.[18] The Complainants have identified no instance where Big Rivers' witnesses failed to disclose material information to the Commission.[19] When the Commission previously considered Complainants' charges of fraud and misconduct, moreover, it refused to accept them.[20]

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16 See, e.g., Case No. 90-360, Testimony of Keith Cardwell at 79 - 80 (filed Sep. 3, 1993).

17 Case No. 90-360-C, Rebuttal Testimony of Joe L. Craig at 78 (filed Oct. 20, 1993).

18 Case No. 10436, Big Rivers' Response to the Commission's Order of December 5, 1988, Item 16 at 2.

19 William Thorpe's conviction for conspiracy and fraud fails to advance KIUC's position. Thorpe has never been accused of providing false or misleading information to the Commission. He never testified on Amendment No. 1 or related fuel procurement issues in any Commission FAC proceeding.

20 Case No. 90-360-C, Big Rivers Electric Corp. (July 21, 1994) at 27 - 28.

In summary, re-examination of Big Rivers' prior fuel charges clearly violates the prohibition against retroactive rate-making. Were the Commission to deny Big Rivers' motion to dismiss, the scope of this proceeding would be limited to investigating the allegations of Big Rivers' misconduct. The Commission has already dealt extensively with these allegations and failed to find sufficient supporting evidence.[21] Complainants have not offered any new evidence to support their allegations. To the contrary, the existing evidence shows that Big Rivers never concealed the existence of Amendment No. 1, that it promptly filed a copy of Amendment No. 1 with the Commission, and that it noted Amendment No. 1's existence in the first FAC biennial review following its execution.

The prohibition against retroactive rate-making is a double-edged sword. On the one hand, this legal doctrine limits a utility's ability to recover extraordinary expenses (and losses) and forces the utility to bear the risks associated with management's decisions. On the other hand, it prevents regulators from retroactively correcting or altering past rate-making decisions that in hindsight were poorly or incorrectly decided. Ratepayers cannot enjoy the doctrine's protections without also accepting the limitations which it imposes.

Having considered the motion and responses thereto and being otherwise sufficiently advised, the Commission finds that:

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[21] Case No. 90-360-C, in which these allegations were examined, lasted two years, involved seven days of hearings and the testimony of 25 witnesses, and produced a record exceeding 18,000 pages.

1. A hearing in this matter is not necessary in the public interest or for the protection of substantial rights.

2. The prohibition against retroactive ratemaking bars the Complainants' requested relief.

3. Big Rivers' Motion to Dismiss the Complaint should be granted.

IT IS THEREFORE ORDERED that:

1. The record of Case No. 90-360-C is incorporated by reference into the record of this proceeding.

2. Big Rivers' Motion to Dismiss the Complaint is granted.

3. The complaint is dismissed with prejudice.

Done at Frankfort, Kentucky, this 1st day of April, 1997.

PUBLIC SERVICE COMMISSION

Linda K Breathitt
Chairman

Vice Chairman

DISSENTING OPINION OF COMMISSIONER B. J. HELTON

The evidence before the Commission clearly demonstrates that, between February 16, 1988 and October 31, 1990, Big Rivers incurred unreasonable fuel costs of $5,992,736 as a result of Amendment No. 1 and that these unreasonable costs were assessed to ratepayers through Big Rivers' FAC. Overland reached this conclusion after its exhaustive study of Big Rivers' fuel procurement practices in early 1993. The Commission's own investigation, which involved 7 days of hearings, testimony from 25 witnesses and a record

exceeding 18,000 pages, confirmed these conclusions. Big Rivers in other forums has admitted that Amendment No. 1 has produced unreasonable fuel costs.[1]

In its decision today, the majority ignores the unreasonableness of the fuel costs in question and instead focuses upon the issue of retroactive ratemaking. In doing so, it loses sight of the very reason for this Commission's existence - the protection of the consuming public. To permit Big Rivers' retention of $5,992,736 of unreasonable fuel charges which were solely the result of management incompetence and imprudence is clearly contrary to that purpose.

Moreover, I do not accept the majority's conclusion that the requested relief is barred by the rule against retroactive ratemaking. I concur with the reasoning of Justice Abrahamson's dissent in Wisconsin Power & Light Co. v. Pub. Serv. Comm'n, 511 N.W.2d 291, 297-300 (Wis. 1994) on this point. Clearly the Commission's "authority to investigate fuel cost adjustments implies the power to order corrective measures and refunds as a result of its [reviews] . . . [I]f the PSC is to be effective, its ongoing authority to investigate fuel costs must include the power to take corrective measures and order refunds for charges not properly incurred." Id. at 299. By holding that the rule against retroactive ratemaking bars the complaint, the majority not only encourages inefficient utility management but removes from the Commission's arsenal one of its most effective weapons against such management.

For these reasons, I respectfully dissent.

B. J. Helton

B. J. Helton

ATTEST:

Don Mills

Executive Director

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[1] See, e.g., Big Rivers Electric Corp. v. William H. Thorpe et al., No. 93-0110-0 (CS) (W.D. Ky. filed Aug. 30, 1993).