

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF BIG RIVERS)	CASE NO.
ELECTRIC CORPORATION FOR)	2021-00378
ENFORCEMENT OF COMMISSION ORDER)	

ORDER

Big Rivers Electric Corporation (BREC) filed an application pursuant to 807 KAR 5:001, Section 19, and KRS 278.030, 278.040, 278.200, and 278.390 requesting the Commission use its discretionary authority granted under KRS 278.390 to enforce its final Order in Case No. 2019-00269¹ against the city of Henderson and Henderson Utility Commission (collectively, Henderson) through application to Franklin Circuit Court. Henderson filed a motion to intervene on October 5, 2021. On October 11, 2021, the Commission, on its own motion, placed this matter in abeyance pending additional orders from the Franklin Circuit Court,² which is currently considering an appeal of Case No. 2019-00269 in Civil Action No. 21-CI-00667.³ On October 18, 2021, BREC filed a motion to remove this matter from abeyance, Henderson responded to the motion October 21, 2021, and BREC replied on October 26, 2021. The Commission held a hearing on November 29, 2021, in which Henderson's motion to intervene and various procedural

¹ Case No. 2019-00269, *Electronic Application of Big Rivers Electric Corporation for Enforcement of Rate and Service Standards* (Ky. PSC Aug. 2, 2021).

² Order (Ky. PSC Oct. 11, 2021).

³ *City of Henderson, Kentucky, and Henderson Utility Commission, d/b/a Henderson Municipal Power & Light v. Kentucky Public Service Commission, et al.*, Franklin Circuit Div. 1, Civil Action No. 21-CI-00667, Complaint (Sept. 15, 2021).

issues were discussed. This matter has remained in abeyance since that time and the Franklin Circuit Court has not issued a final order on the pending appeals.⁴

LEGAL STANDARD

The only person who has a statutory right to intervene in a Commission case is the Attorney General of the Commonwealth of Kentucky, by and through the Office of Rate Intervention (Attorney General), pursuant to KRS 367.150(8)(b). Intervention by all others is permissive and is within the sole discretion of the Commission.⁵ Commission regulation 807 KAR 5:001, Section 4(11), requires a person to set forth in the motion to intervene either (1) a special interest in the proceeding that is not otherwise adequately represented in the case, or (2) that intervention is likely to present issues or develop facts that will assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings.

DISCUSSION

In Case 2019-00269,⁶ BREC submitted an application, pursuant to KRS 278.200, 278.030, and 278.040, seeking an order from the Commission enforcing the rates and service standards contained in a series of contracts between Henderson and BREC related to the Station Two generating units (the Station Two Contracts). After finding that it had jurisdiction, which Henderson disputed, the Commission entered an Order partially granting BREC's requested relief.⁷ Henderson appealed the final Order in Case No.

⁴ Briefing on the Franklin Circuit Court appeals were completed in the second quarter of 2022, and the cases have been under submission for about one year.

⁵ *Inter-County Rural Electric Cooperative Corporation v. Public Service Commission of Kentucky*, 407 S.W.2d 127, 130 (Ky. 1966).

⁶ Case No. 2019-00269, July. 31, 2019 Application.

⁷ Case No. 2019-00269, Aug. 2, 2022 Order.

2019-00269 to the Franklin Circuit Court Civil Action No. 21-CI-00667.⁸ The appeal is currently pending but was consolidated with an appeal in Civil Action No. 18-CI-00078, which arose from another matter before the Commission relating to the Station Two contracts.⁹

BREC's application in this matter requests that the Commission exercise its authority under KRS 278.390 to enforce its order in Case No. 2019-00269 by filing a mandamus, injunction, or other pleading at the Franklin Circuit Court in order to compel Henderson to obey the Commission's Order. BREC asserted that Henderson's appeal of the Order in Case No. 2019-00269 does not stay the legal effectiveness of the Order or excuse Henderson from complying with it. BREC argued that without action by the Commission to enforce its Order in Case No. 2019-00269 pursuant to KRS 278.390, Henderson will continue to disregard the Commission's statutory authority over the rates and service standards set forth in the Station Two Contracts.¹⁰

Henderson filed a motion to intervene in this matter on October 5, 2021. Henderson noted that it was permitted to intervene in Case No. 2019-00269. Henderson asserts that BREC "wants the Commission to seek entry of a judgement against Henderson in an unspecified an unverified sum as reimbursement for Henderson's

⁸ *City of Henderson, Kentucky, and Henderson Utility Commission, d/b/a Henderson Municipal Power & Light v. Kentucky Public Service Commission, et al.*, Franklin Circuit Div. 1, Civil Action No. 21-CI-00667, Complaint (Sept. 15, 2021).

⁹ *City of Henderson, Kentucky, and Henderson Utility Commission, d/b/a Henderson Municipal Power & Light v. Kentucky Public Service Commission, et al.*, Franklin Circuit Div. 1, Civil Action No. 21-CI-00667, Order (May 23, 2022); see also *City of Henderson, Kentucky, and Henderson Utility Commission, d/b/a Henderson Municipal Power & Light v. Kentucky Public Service Commission, et al.*, Franklin Circuit Div. 2, Civil Action No. 18-CI-00078, Complaint (Feb. 1, 2018).

¹⁰ Application at 1–3, 11–12.

purported share of past and future decommissioning costs and other expenses.”¹¹ While it notes that it has appealed the final Order in that Case No. 2019-00269 and that it disputes the Commission’s jurisdiction over the Station Two Contracts, Henderson argues that it has a substantial and special interest in a Commission determination in this proceeding that is not and cannot be otherwise adequately represented by any other party and that it will assist the Commission in fully developing the record in this matter without unduly complicating or disrupting the proceedings.¹² BREC agreed that Henderson has a special interest in this matter and should be entitled to intervene.

The Commission agrees with Henderson that it has a special interest in this matter, which pertains to the enforcement of the Station Two contracts, and finds that Henderson has established that it is entitled to intervene pursuant to 807 KAR 5:001, Section 4(11). Further, while the Commission is not currently removing this matter from abeyance, the Commission finds that it is appropriate to recognize Henderson’s status in this case and allow it to intervene to make it clear that Henderson is entitled to make and respond to procedural motions. Thus, the Commission finds that Henderson’s motion to intervene should be granted.

The Commission also notes that this matter has been in abeyance for about a year and a half and that the parties’ current efforts to close out the Station Two Contracts are unknown. To determine whether action is appropriate in this case, the Commission, on its own motion, finds that the parties, either jointly or individually, should provide an update

¹¹ Henderson’s Motion to Intervene (filed Oct. 5, 2021) at 2.

¹² Henderson’s Motion to Intervene at 3.

on their position regarding whether this matter should remain in abeyance and that the parties should be permitted to respond to each other's positions.

IT IS THEREFORE ORDERED that:

1. Henderson's motion to intervene is granted.
2. Henderson is entitled to the full rights of a party and shall be served with the Commission's Orders and with filed testimony, exhibits, pleadings, correspondence, and all other documents submitted by parties after the date of this Order.
3. Henderson shall comply with all provisions of the Commission's regulations, 807 KAR 5:001, Section 8, related to the service and electronic filing of documents.
4. Pursuant to 807 KAR 5:001, Section 8(9), within seven days of service of this Order, Henderson shall file a written statement with the Commission that:
 - a. Certifies that it, or its agent, possesses the facilities to receive electronic transmissions; and
 - b. Sets forth the electronic mail address to which all electronic notices and messages related to this proceeding shall be served.
5. Within 21 days of the date of service of this Order, each party, either jointly or individually, shall file a notice stating and briefly explaining its current position regarding whether this matter should remain in abeyance.
6. Within 35 days of the date of service of this Order, any party may file a response to the notice of another party filed pursuant to ordering paragraph 5.
7. Except as stated above, this matter shall remain in abeyance pending further order by the Commission removing it from abeyance.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner



ATTEST:


Executive Director

*Dawn Kelsey
City Attorney
City of Henderson
222 First Street
Henderson, KENTUCKY 42420

*Sharon W Farmer
King, Deep & Branaman
127 North Main Street
P.O. Box 43
Henderson, KENTUCKY 42419

*Jody Kyler Cohn
Boehm, Kurtz & Lowry
36 East Seventh Street
Suite 1510
Cincinnati, OHIO 45202

*Tyson Kamuf
Corporate Attorney
Big Rivers Electric Corporation
710 West 2nd Street
P. O. Box 20015
Owensboro, KY 42304

*Honorable Kurt J Boehm
Attorney at Law
Boehm, Kurtz & Lowry
36 East Seventh Street
Suite 1510
Cincinnati, OHIO 45202

*Honorable Michael L Kurtz
Attorney at Law
Boehm, Kurtz & Lowry
36 East Seventh Street
Suite 1510
Cincinnati, OHIO 45202

*Big Rivers Electric Corporation
710 West 2nd Street
P. O. Box 20015
Owensboro, KY 42304

*H. Randall Redding
King, Deep & Branaman
127 North Main Street
P.O. Box 43
Henderson, KENTUCKY 42419

*Senthia Santana
Big Rivers Electric Corporation
710 West 2nd Street
P. O. Box 20015
Owensboro, KY 42304