

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF BIG RIVERS ELECTRIC)	CASE NO.
CORPORATION FOR ENFORCEMENT OF RATE)	2019-00269
AND SERVICE STANDARDS)	

ORDER

This matter arises upon the motion of the city of Henderson, Kentucky, and Henderson Utility Commission d/b/a Henderson Municipal Power & Light (jointly Henderson), requesting that the matter be dismissed on grounds that the Commission lacks jurisdiction to determine the issues raised in the application submitted by Big Rivers Electric Corporation (BREC) and that BREC has failed to state a claim upon which relief may be granted. In the alternative, Henderson requests that the matter be held in abeyance pending adjudication of identical issues before the Franklin Circuit Court.

In support of the motion, Henderson states that BREC asks the Commission to interpret the various contracts between Henderson and BREC associated with the operation of the Station Two generation plant (Station Two Contracts) regarding the costs associated with the production of unwanted Excess Henderson Energy; the cost of decommissioning Station Two; the cost of maintaining Station Two coal combustion residuals stored in BREC's Green Station landfill; and BREC's continued use of facilities owned by Henderson but located on BREC's property. Henderson contends that it is not a "utility" as that term is defined in KRS 278.010(3)(a) and is therefore generally not regulated by the Commission. Henderson notes that while the Commission may have

jurisdiction over contracts between utilities and municipalities pursuant to KRS 278.200, such jurisdiction only vests where it involves the utilities' rates or service. Henderson contends that none of the issues raised in BREC's application relate to any rate or service and therefore KRS 278.200 is not applicable to this matter.

Henderson asserts that the Commission is not authorized to engage in contractual interpretations to resolve financial disputes unrelated to rates or service standards. Henderson contends that BREC has previously sought Commission relief with respect to the unwanted Excess Henderson Energy, associated production costs, and ownership of fuel and lime reagent and that those issues remain on appeal before the Franklin Circuit Court. Thus, Henderson argues that the Commission cannot properly assert jurisdiction over an issue that not only has been presented in a prior case, but also has given rise to a pending challenge to the Commission's exercise of jurisdiction in the same case.

Henderson contends that any interpretation of the Station Two Contracts in order to grant the relief that BREC seeks would necessarily require the Commission to supply missing contractual terms, such as assigning a meaning to the term "decommissioning," which, according to Henderson, is not defined in the Station Two Contracts. Henderson further states that "the Commission must impose future liability for 'ongoing environmental monitoring, remediation and permitting' activities, despite the fact that none of those terms has been defined and no activities associated with those terms has been deemed necessary or inevitable."¹ Henderson further contends that BREC's requested relief would impose upon the Commission the obligation of collecting any unpaid costs from Henderson.

¹ Henderson Motion at 6-7.

Henderson maintains that the Commission does not have jurisdiction to provide the relief that BREC seeks because the issues raised by BREC relate to assigning responsibility for future costs that are unknown, that might not be incurred, and that are not ripe for litigation. Henderson avers that BREC should not be permitted to avail itself of Commission jurisdiction simply by predicting a potential downstream effect on rates. Henderson notes that every expense incurred by BREC eventually results in increased rates, but unless the expense is incurred as a result of a contract for utility services between Henderson and BREC, the Commission is without jurisdiction to address the claim.

Lastly, Henderson characterizes BREC's requests for payment of certain costs associated with the operation of Station Two pursuant to the Station Two Contracts as a request for monetary damages. Henderson contends that the Commission does not have the statutory authority to award monetary damages, noting that the expenses for which BREC seeks recovery are not related to retail service or to any utility service provided to or by BREC.

In the alternative, Henderson requests that the matter be held in abeyance pending the appeal of the final Order in Case No. 2016-00278² that is currently before the Franklin Circuit Court. Henderson points out that the appeal involves similar claims raised by BREC in the instant matter and also involves the issue of the Commission's jurisdiction to review the Station Two Contracts.

BREC filed a response, arguing that Henderson's motion to dismiss should be denied. BREC states that the Commission has repeatedly exercised jurisdiction over the

² Case No. 2016-00278, *Application of Big Rivers Electric Corporation for a Declaratory Order* (Ky. PSC Jan. 5, 2018).

Station Two Contracts. BREC notes that the Commission approved the original versions on October 22, 1970, in Case No. 5406 and ruled on several contract amendments and various other issues arising over the contract's nearly 50-year life. BREC contends that the Franklin Circuit Court has determined that the Commission should rule first on the issue of whether the Commission has jurisdiction over the Station Two Contracts, pointing out that the Franklin Circuit Court entered an Order on September 3, 2019, staying all matters related to BREC's counterclaims as well as any issues relating to the Commission's jurisdiction, pending resolution of the matter at bar.

BREC contends that the issues raised in its application directly relate to both rates and service standards as set forth in the Station Two Contracts. BREC states that its first request for relief seeks a determination of the amounts due under the subject contracts and thus falls within the definition of the types of contract rates and service standards that the Commission can establish, change, and enforce pursuant to its exclusive jurisdiction under KRS 278.200. BREC argues that the disputed amounts are directly related to charges and compensation for the electric service rendered under the Station Two Contracts.

BREC maintains that its second and third requests for relief similarly invoke rates and service standards set forth in the subject contracts. BREC states that the requests involve a finding that Henderson has both a current and ongoing contractual obligation to share in the Station Two decommissioning costs and the costs of maintaining Station Two generation waste in BREC's Green Station landfill. BREC asserts that these costs and service obligations were expressly agreed to by Henderson when it executed the Station Two Contracts.

With respect to its fourth and last request for relief, BREC is seeking a finding that Henderson is contractually obligated to allow BREC to continue utilizing city-owned joint use facilities. BREC contends that this issue concerns service standards under the Station Two Contracts and enforcement of the provisions of the contracts is necessary to uphold BREC's service quality.

Contrary to Henderson's contention that the Commission is not authorized to interpret the provisions of the Station Two Contracts to resolve financial disputes unrelated to rates or service standards, BREC contends that the contracts at issue clearly relate to rates or service standards and, therefore, interpretation of these contracts are within the purview of the Commission.

BREC argues that enforcement of the Station Two Contracts will directly impact the rates of its ultimate members and that there is nothing speculative about the expenses associated with those contracts. Based on its calculations of the Excess Henderson Energy amounts, the Henderson Native Load costs, other operating costs, and decommission costs, BREC states that Henderson owes it \$718,942 and that this amount grows every month. BREC contends that it projects the decommissioning cost alone to exceed \$10 million and that Henderson's share of this obligation is approximately 22.76 percent based upon Henderson's percent of usage over the last 50 years.

Having reviewed Henderson's motion, BREC's response, and being otherwise sufficiently advised, the Commission finds that the issues raised by BREC in its complaint involve the enforcement of the rates and service standards contained in the Station Two Contracts. We note that the Station Two Contracts involve a series of contracts related to the operation of the Station Two generation facility and that those contracts set forth

the obligations and rights of BREC, a utility within the Commission's regulatory jurisdiction, and the city of Henderson. The Station Two Contracts consist of a Power Sales Contract, a Power Plant Construction and Operation Agreement, a Joint Facilities Agreement, and a System Reserves Agreement. The Station Two Contracts were also amended in 1993, 1998, and 2005. These contracts were executed by BREC and Henderson on August 1, 1970, and approved by the Commission on October 22, 1970.³ The three amendments to the contracts were also approved by the Commission.⁴ Under the terms of the Station Two Contracts, BREC operates Station Two and purchases the capacity generated above and beyond the capacity that Henderson needs to serve the residents of Henderson, Kentucky. The Station Two Contracts allocate Station Two's fixed costs and operating expenses between BREC and Henderson based upon their annual share of plant capacity. The issues raised in BREC's complaint concern the amounts owed to BREC under the Station Two Contracts; Henderson's share of the decommissioning costs under Section 8 of the 1993 amendments; Henderson's share of the costs of maintaining Station Two coal combustion residuals that were disposed of at

³ Case No. 5406, *Application of the City of Henderson, Kentucky, and City of Henderson Utility Commission for a Certificate of Convenience and Necessity for the Purpose of Constructing Additional Generating Facilities and Related Transmission Facilities as an Extension and Permanent Improvement of its Municipal Light and Power System, and, Application for Approval of Power Plant Construction and Generation Agreement, Joint Facilities Agreement and Power Sales Contract Between City of Henderson, Kentucky and City of Henderson Utility Commission, and Big Rivers Electric Cooperative Corporation* (Ky. PSC Oct. 22, 1970).

⁴ The 1993 amendments were approved in Case No. 1994-00032, *Big Rivers Electric Corporation Application for Approval of Contract Amendments with the City of Henderson and City of Henderson, Utility Commission and to File Plan for Compliance with Clean Air Act and Environmental Surcharge* (Ky. PSC Mar. 31, 1995). The 1998 amendments were approved in Case No. 1998-00267, *Application of Big Rivers Electric Corporation for Approval of the 1998 Amendments to Station Two Contracts Between Big Rivers Electric Corporation and the City of Henderson, Kentucky and the Utility Commission of the City of Henderson* (Ky. PSC July 14, 1998). The 2005 amendments were approved in Case No. 2005-00532, *Application of Big Rivers Electric Corporation, LG&E Energy Marketing, Inc., Western Kentucky Energy Corp., WKE Station Two, Inc., and WKE Corp. for Approval of Amendments to Station Two Agreements* (Ky. PSC Feb. 24, 2006).

BREC's Green Station landfill under various provisions of the Joint Facilities Agreement; and BREC's ability to utilize city-owned joint use facilities in order to continue operation of its Green generating units. These issues implicate the service and rates under the various Station Two Contracts, and such issues are clearly within the scope of the Commission's jurisdiction under KRS 278.200.⁵

The Commission will also deny Henderson's alternative request to hold the matter in abeyance in light of the fact that the Franklin Circuit Court has issued an order holding the complaint, in which Henderson seeks review of the Commission's decision in Case No. 2016-00278, in abeyance pending the resolution of the instant matter.

Lastly, the Commission notes that BREC has filed a motion requesting that an informal conference be scheduled to provide the parties an opportunity to clarify the issues in this proceeding and explore whether a settlement of some, or all, of the issues in this case is possible. Henderson filed a motion requesting leave to file out of time its response to BREC's motion. Henderson's response states that the informal conference that is requested by BREC is premature and should not be scheduled, if at all, until after discovery has been conducted. Henderson further questions whether settlement discussions would be productive given the parties' past history of unsuccessful settlement

⁵ KRS 278.200 provides, in full, as follows:

The Commission may, under the provisions of this chapter, originate, establish, change, promulgate and enforce any rate or service standard of any utility that has been or may be fixed by any contract, franchise or agreement between the utility and any city, and all rights, privileges and obligations arising out of any such contract, franchise or agreement, regulating any such rate or service standard, shall be subject to the jurisdiction and supervision of the commission, but no such rate or service standard shall be changed, nor any contract, franchise or agreement affecting it abrogated or changed, until a hearing has been had before the commission in the manner prescribed in this chapter.

negotiations. In its reply in support of its motion, BREC asserts that an informal conference would allow the parties to discuss and clarify the issues, which could streamline the discovery phase of this matter and reduce the time and costs of the discovery process. BREC further asserts that Henderson's skepticism regarding the possibility of a settlement does not lessen the need for an informal conference, which would allow the parties and Commission Staff an opportunity to ask clarifying questions and to agree upon a procedural schedule that will facilitate a quicker resolution of the issues in this matter.

The Commission finds that BREC has established good cause to permit the scheduling of an informal conference in this matter to allow the parties an opportunity to discuss and clarify the issues in this matter, which may lead to a resolution of some or all of those issues.

IT IS HEREBY ORDERED that:

1. Henderson's motion to dismiss is denied.
2. Henderson's alternate motion to hold this the matter in abeyance pending adjudication of identical issues before the Franklin Circuit Court is denied as moot.
3. Henderson's motion for leave to file out of time its response to BREC's motion for an informal conference is granted.
4. BREC's motion for an informal conference is granted.
5. An informal conference shall be held on February 27, 2020, at 1 p.m. Eastern Standard Time, at the Commission's offices at 211 Sower Boulevard, Frankfort, Kentucky.

By the Commission

ENTERED
FEB 04 2020
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:



Executive Director

Case No. 2019-00153

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

*Honorable John N Hughes
Attorney at Law
124 West Todd Street
Frankfort, KENTUCKY 40601

*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
201 Third Street
P. O. Box 24
Henderson, KY 42420

*Tyson Kamuf
Corporate Attorney
Big Rivers Electric Corporation
201 Third Street
P. O. Box 24
Henderson, KY 42420