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Via Overnight Mail

September 11, 2019

Gwen R. Pinson, Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, Kentucky 40602

Re: Case No. 2019-00269

Dear Ms. Pinson:

Please find enclosed the original (unbound) and ten (10) copies of the BIG RIVERS ELECTRIC CORPORATION RESPONSE TO CITY OF HENDERSON, KENTUCKY d/b/a HENDERSON MUNICIPAL POWER & LIGHT'S MOTION TO DISMISS for filing in the above-referenced matter.

By copy of this letter, all parties listed on the Certificate of Service have been served. Please place this document of file.

Very Truly Yours,

Michael L. Kurtz, Esq.
Kurt J. Boehm, Esq.
Jody Kyler Cohn, Esq.
BOEHM, KURTZ & LOWRY

MLKkew
Attachment
cc: Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by electronic mail (when available) or by regular, U.S. mail, unless other noted, this 11th day of September, 2019 to the following:

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

APPLICATION OF BIG RIVERS ELECTRIC CORPORATION FOR ENFORCEMENT OF RATE AND SERVICE STANDARDS.	))))	**Case No. 2019-00269**

BIG RIVERS ELECTRIC CORPORATION'S RESPONSE TO THE MOTION TO DISMISS OF THE CITY OF HENDERSON, KENTUCKY AND THE HENDERSON UTILITY COMMISSION d/b/a HENDERSON MUNICIPAL POWER & LIGHT

Big Rivers Electric Corporation ("Big Rivers") files this Response to the Motion to Dismiss or Alternatively to Hold in Abeyance filed on September 5, 2019 ("Motion") by the City of Henderson, Kentucky and the Henderson Utility Commission d/b/a Henderson Municipal Power & Light (collectively, "Henderson").

BACKGROUND

Since August 1, 1970, Big Rivers and Henderson have been parties to a series of contracts related to the Station Two generating units located near Sebree, Kentucky (the "Station Two Contracts" or "Contracts").[1]

The Kentucky Public Service Commission ("Commission") has repeatedly exercised jurisdiction over those Contracts, approving the original versions on October 22, 1970 in Case No. 5406 and ruling on several contract amendments and various other issues arising over the Contracts' nearly fifty-year life. Case No. 94-032, Order (March 31, 1995)

[1] The Station Two Contracts include the Power Sales Contract, the Power Plant Construction and Operation Agreement, and amendments to the Station Two Contracts that were made in years 1970, 1971, 1993, 1998, and 2005.

(approving 1993 Amendments); Case No. 1998-00267, Order (July 14, 1998) (approving 1998 Amendments); Case No. 2005-00532, Order (February 24, 2006) (approving 2005 Amendments); Case No. 2016-00278, Order (January 5, 2018) (granting Big Rivers' request for Declaratory Order); Case No. 2018-00146, Order (August 29, 2018) (finding that the Station Two units were no longer economically viable).

On July 31, 2019, Big Rivers filed an Application pursuant to KRS 278.200, 278.030, and 278.040 ("Application"), seeking a new order from the Commission enforcing the rates and service standards contained in the Station Two Contracts. Specifically, Big Rivers' Application asks that the Commission find that: 1) Big Rivers correctly performed the calculations contained in the Interim Accounting Summary included with its Application and that Henderson is contractually obligated to pay its share of costs as reflected therein; 2) Henderson has both a current and an ongoing contractual obligation to share in the costs of decommissioning Station Two; 3) Henderson has both current and ongoing contractual obligations to share in the costs of maintaining Station Two waste in Big Rivers' Green Station landfill; and 4) Henderson is contractually obligated to allow Big Rivers to continue utilizing city-owned joint use facilities.

On September 5, 2019, Henderson filed its Motion, alleging that the Commission lacks jurisdiction to determine the issues presented in this matter and that Big Rivers' Application fails to state a claim upon which relief may be granted. Alternatively, Henderson asks the Commission to hold this matter in abeyance pending adjudication of duplicative jurisdictional issues currently pending on appeal of Case No. 2016-00278 in Civil Action No. 18-CI-78 before the Franklin Circuit Court (the "Franklin Circuit Case").

On September 3, 2019, two days prior to Henderson's Motion, the Franklin Circuit Court entered the attached Order staying all matters related to Big Rivers' counterclaims as well as any issues relating to the Commission's jurisdiction pending the resolution of Big Rivers' Application in this matter. In other words, on the issue of whether the Commission has jurisdiction over the Station Two Contracts, the Franklin Circuit Court has determined that the Commission should rule first.

ARGUMENT

I. The Commission Has Exclusive Jurisdiction To Address The Issues Presented In This Matter.

Henderson's Motion claims that the issues presented in Big Rivers' Application are unrelated to rates or service and therefore are outside of the Commission's jurisdiction.[2] This claim is unfounded and inconsistent with both Kentucky law outlining the Commission's jurisdiction over contracts between utilities and cities and the abundant Commission precedent relating to the Station Two Contracts.

A. KRS 278.200 Grants The Commission Exclusive Authority To Enforce The Rates And Service Standards Set Forth In The Station Two Contracts.

KRS 278.200 grants the Commission jurisdiction to *"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."* Consequently, if the issues raised in Big

[2] Motion at 1-4.

Rivers' Application involve rate or service standards set forth in the Station Two Contracts, the Commission has exclusive jurisdiction to enforce those rate and service standards.

Although Henderson concedes that the Commission has authority over rates and service standards pursuant to KRS 278.200,[3] Henderson attempts to distort the meaning of "*rate*" or "*service*" in order to advance its claim that the Commission does not have exclusive jurisdiction over the Station Two Contracts. Henderson labels the issues raised in Big Rivers' Application as *"financial disputes"* that are properly left to the civil courts. But Henderson's narrowly constricted view of what constitutes a "*rate*" or "*service*" is profoundly out-of-sync with the broad definitions of those terms set forth in Kentucky statute. Specifically, as provided by KRS 278.010(12), "*rate*" means:

> *[A]ny individual or joint fare, toll, charge, rental, or other compensation for service rendered or to be rendered by any utility, and any rule, regulation, practice, act, requirement, or privilege in any way relating to such fare, toll, charge, rental, or other compensation, and any schedule or tariff or part of a schedule or tariff thereof.*

KRS 278.010(13) defines "*service*" equally broadly, as:

> *[A]ny practice or requirement in any way relating to the service of any utility, including the voltage of electricity, the heat units and pressure of gas, the purity, pressure, and quantity of water, and in general the quality, quantity, and pressure of any commodity or product used or to be used for or in connection with the business of any utility, but does not include Voice over Internet Protocol (VoIP) service.*

Although "*rate*" and "*service*" are defined in KRS Chapter 278 in terms of service of a utility, the Kentucky Supreme Court has held that KRS 278.200 applies both to the service provided by (and the rates charged by) a utility to its customers, and to the service provided

[3] Motion at 4.

by (and the rates charged by) a utility to a city. Simpson County Water Dist. v. City of Franklin, 872 S.W.2d 460, 462–63 (Ky. 1994) ("*Thus, when a city is involved, the sentence reflects unequivocally the legislature's intent that the PSC exercise exclusive jurisdiction over utility rates and service*"). The Kentucky Court of Appeals has clearly affirmed the principle that with respect to a contract between a utility and a city, the city is subject to the jurisdiction of the Commission. City of Greenup v. Pub. Serv. Comm'n, 182 S.W.3d 535, 538 (Ky.App. 2005) ("*In summary, the PSC does not have jurisdiction over utility services furnished by a municipality except to the extent that those services are rendered pursuant to a contract with a utility which is regulated by the PSC. In such cases the municipality, in the matters covered under the contract, is subject to the jurisdiction of the PSC*").

There is no statutory requirement that Big Rivers be a "*customer*" of Henderson; only that Henderson be a "*city*" and that Big Rivers be a "*utility*." Consequently, a "*city*" such as Henderson waives its exemption from regulation by the Commission when it contracts with a regulated utility like Big Rivers upon the subjects of rates and service. Simpson County Water Dist. at 462 ("*We give no validity to the argument that since the City is exempt from regulation by the PSC, KRS 278.200 should be interpreted to apply only when the regulated utility is the provider, not the recipient, of the service. Simply put, the statute makes no such distinction. The statute has but one meaning — the City waives its exemption when it contracts with a regulated utility upon the subjects of rates and service.*").

There is a strong historical logic to the system set up by the legislature in KRS 278.200, as interpreted by the courts. KRS 278.200 was adopted as part of the original Kentucky Revised Statutes in 1942.[4] And until FERC Orders 888 and 889 in 1996, as

[4] The history of KRS 278.200 is discussed in *Simpson County Water Dist. At* 462-463 (Ky. 1994).

amended by Order 890 in 2007, there was no open access transmission and municipal electric utilities were largely forced to contract for wholesale service, including joint power plant ownership, from the adjacent utility. The legislature found that a neutral body expert in utility rates and services was needed to resolve disputes arising from these transactions. That being the Commission. In today's world, Henderson, or any of Kentucky's 28 other municipal electric utilities, are free to buy power on the wholesale market. But that was not true when Station Two was being built in 1970. The Commission has always exerted jurisdiction over the Station Two Contracts and must continue to do so as long as there are contractual disputes between Big Rivers and Henderson.

Contrary to Henderson's allegations, the issues raised in Big Rivers' Application directly relate to both "*rates*" and *"service standards"* set forth in the Station Two Contracts. Big Rivers first request for relief, regarding the amounts due under the Contracts, falls well 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. Those disputed amounts are directly related to charges and compensation for the electric service rendered under the Contracts. The types of disputed amounts at issue in Big Rivers' Application are also clearly within the expertise of the Commission.

Big Rivers' second and third requests for relief, that the Commission issue an order finding that Henderson has both a current and an ongoing contractual obligation to share in the costs of decommissioning Station Two and the costs of maintaining Station Two waste in Big Rivers' Green Station landfill, similarly invoke *"rates"* and *"service standards"* set forth in the Station Two Contracts. Those requests concern costs and service obligations that Henderson expressly agreed to when it signed the Station Two Contracts. While

Henderson now seeks to avoid its contractual cost-sharing responsibilities, the Commission can and should prevent Henderson from doing so by enforcing those responsibilities pursuant to KRS 278.200. In other words, Big Rivers entered into the Station Two Contracts in order to have the right to a certain amount of capacity and energy. In exchange for that power, Big Rivers agreed to certain obligations, including operating the Station Two units and paying its share of the costs to operate and maintain the units, being responsible for the variable costs of the energy it took from Station Two, and paying Henderson a premium over the variable costs for any Excess Henderson Energy taken by Big Rivers. If Henderson is permitted to abandon its contractual obligations to share in decommissioning costs or the costs of maintaining the Station Two waste and to shift those costs to Big Rivers, then Big Rivers will end up paying more for the power it took from Station Two. Thus, all of the parties' rights and obligations under the Station Two Contracts impact the rates Big Rivers paid for the power it purchased from Henderson, and all of those rights and obligations fall under the Commission's jurisdiction under KRS 278.200.

Big Rivers' fourth request for relief, seeking a Commission finding that Henderson is contractually obligated to allow Big Rivers to continue utilizing city-owned joint use facilities, concerns *"service standards"* under the Station Two Contracts. The use of the city-owned joint facilities outlined in the Contracts is directly related to the service of Big Rivers. The inability to use those facilities directly impacts Big Rivers' ability to run its Green units, which affects its service level and ability to engage in power sales. Hence, enforcement of the Station Two Contracts is necessary to uphold Big Rivers' service quality.

Further, as noted above, the Commission has repeatedly exercised jurisdiction over the Station Two Contracts over their nearly fifty-year lives.[5] In one of the most recent proceedings (Case No. 2016-00278), the Commission spoke directly to its jurisdictional authority with respect to the Contracts, stating that the *"inherent nature"* of one of the Contracts - the Power Sales Contract - *"necessarily involves rates and service"* because the costs associated with Excess Henderson Energy purchased under the contract *"would be passed on to Big Rivers' three distribution cooperative owner-members and those costs would ultimately be recovered through the rates charge to the retail consumers of those distribution cooperatives."*[6] A similar rationale applies to Big Rivers' requested relief here.

Additionally, in the Franklin Circuit Case where Henderson is challenging that Commission finding, the Court recently issued an Order holding the jurisdictional issue in abeyance pending the outcome of this matter. Accordingly, it would be an illogical result for the Commission to decline to exercise its jurisdiction over contract rates and service under KRS 278.200 in this matter when the Court has expressly relied upon it to do so.

B. The Commission Is Authorized To Interpret Contracts Relating To Rates Or Service.

Henderson argues that Big River's Application would require the Commission to engage in unauthorized contractual interpretation.[7] Henderson first states that *"The Commission cannot grant the relief Big Rivers requests without engaging in contractual interpretation to resolve financial disputes unrelated to rates or service standards. For the*

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[5] Case No. 94-032, Order (March 31, 1995) (approving 1993 Amendments); Case No. 1998-00267, Order (July 14, 1998) (approving 1998 Amendments); Case No. 2005-00532, Order (February 24, 2006) (approving 2005 Amendments); Case No. 2016-00278, Order (January 5, 2018) (granting Big Rivers' request for Declaratory Order); Case No. 2018-00146, Order (August 29, 2018)(finding that the Station Two units were no longer economically viable).

[6] Case No. 2016-00278, Order (January 5, 2018) at 11-12.

[7] Motion at 4-8.

Commission to do so would require an exercise of power simply not authorized under the Commission's enabling statute."[8] As explained above, the contracts that are before the Commission clearly relate to "*rates or service standards.*" As such, the interpretation of these Contracts is within the purview of the Commission.

Henderson's next argument is that Big Rivers' Application "*asks the Commission to supply missing contractual terms...*" which this "*Commission simply cannot do.*"[9] Henderson is concerned that the Application would require the Commission to "*assign meaning to the term 'decommissioning,' which is not defined in the contracts.*"[10] And that the Application would require the Commission to "*simply accept Big Rivers' invoices as evidence of legitimate expenses and impose a share of those costs upon Henderson with no oversight...*" and "*accept Big Rivers' assertion that all costs associated with the closure of the facilities are to be allocated on the percentages asserted by Big Rivers.*" [11]

Henderson's concerns regarding the process in which the Commission interprets and enforces contracts relating to rates or service standards are misplaced. Big Rivers agrees that the Commission should not simply accept Big Rivers' invoices as the only evidence of legitimate expenses or simply accept Big Rivers' statements that the allocation of decommissioning costs as asserted by Big Rivers is correct. Commission review requires that Henderson be given the opportunity to conduct discovery, submit its own testimony and cross-examine Big Rivers' witnesses in order to advance its own arguments concerning the meaning of the term "*decommissioning,*" what constitutes legitimate decommissioning expenses and the parties' relative responsibilities for paying decommissioning costs. After

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[8] Id. at 4.
[9] Id. at 6.
[10] Id. at 7.
[11] Motion at 7.

all evidence is presented the Commission will make its own determination regarding the issues presented by the parties. Big Rivers does not request that the Commission accept its interpretation of the Contracts and its presentation of the facts without scrutiny or review and without an opportunity for Henderson to present its own evidence.

The Commission has unique expertise in resolving disputes involving rates and terms of service. The PSC acts as a quasi-judicial agency utilizing its authority to conduct hearings, render findings of fact and conclusions of law, and utilizing its expertise in the area and to the merits of rates and service issues. *Simpson County Water Dist. v. City of Franklin*, 872 S.W.2d 460, 465 (Ky. 1994). The Commission has exercised jurisdiction over the Station Two Contracts from their formation in 1970. It should continue to exercise that jurisdiction over the Station Two Contracts in this proceeding.

C. Enforcement of The Station Two Contracts Will Directly Impact Member Rates.

Henderson contends that since some of the expenses associated with the Station Two Contracts will not be known until a future date, these expenses are too speculative to trigger Commission jurisdiction over the Contracts.[12] Henderson argues that a speculative impact on rates or service is insufficient to invoke Commission jurisdiction.

The only authority cited by Henderson in support of this proposition is an unpublished Kentucky Court of Appeals decision in the case of *Jessamine-South Elkhorn Water Dist. v. Forest Creek, LLC*, 2013 Ky.App. Unpub. LEXIS 577 (Ky. App. July 12, 2013). The sole issue addressed by the Court of Appeals in that case was whether the Commission had exclusive jurisdiction over a dispute between a developer and a water district

[12] Motion at 8-10.

concerning the developer's election of one of two options to pay for an extension of water service. The Court held that the mere possibility that the choice of one extension option over the other could impact future rates constitutes speculative harm which does not bring the matter under the exclusive jurisdiction of the Commission.

There is nothing speculative here. As of June 30, 2019, Big Rivers calculates that because of Excess Henderson Energy, Henderson Native Load costs, other operating costs, and decommissioning costs, the City owes it $718,942.[13] That amount grows every month. Decommissioning of Station Two began immediately upon its retirement in February 2019 and will continue for years.[14] Big Rivers forecasts that the total cost of decommissioning will greatly exceed $10 million.[15] The City's share of decommissioning costs based upon its percent of usage over the last 50 years is 22.76%.[16]

Not only is Henderson attempting to shift its responsibility for its share of the decommissioning costs to Big Rivers, Henderson's refusal to fulfill its contractual obligations is increasing the costs of decommissioning. For example, because Henderson refuses to award contracts for decommissioning, or even for the removal of the asbestos at Station Two, Big Rivers is unable to proceed with decommissioning and asbestos abatement, and is incurring additional costs just to maintain the units, including the asbestos, in their current state to ensure that they do not create a risk of harm to the public's health and safety.

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[13] Direct Testimony of Paul G. Smith at 18.
[14] Direct Testimony of Robert W. Berry at 38.
[15] Direct Testimony of Michael T. Pullen at 12.
[16] Id. at 6.

Big Rivers is a Member-owned cooperative that does not have shareholders that can absorb unrecovered costs. If the Station Two Contracts are not enforced, the costs owed to Big Rivers will have to be recovered directly from Big Rivers' Members through an increase in Member rates. As a result, rates paid by Big Rivers' Members will be excessive compared to the rates contemplated by the Commission when it approved the Station Two Contracts and the provisions in those Contracts related to the division of costs between Big Rivers and Henderson.

This direct link between the Station Two Contracts and Member rates is one of the reasons why the Commission has exercised jurisdiction over the Station Two Contracts and Amendments, repeatedly, since they were first established in 1970. The Commission-approved Station Two Contracts are clear that the parties remain obligated to share in the decommissioning costs associated with Station Two. Section 8 of the 1993 Amendments provides that "*the parties shall bear decommissioning costs of Station Two in the proportions in which they shared capacity costs during the life of Station Two.*" The Contracts contemplated how Member rates would be affected not only while Station Two was operating, but also how rates would be affected when operations cease, and decommissioning occurs.

II. Big Rivers Is Not Requesting Money Damages From The Commission.

Henderson introduces unnecessary confusion into this record by mischaracterizing Big Rivers' Application as a request for monetary damages.[17] Big Rivers is not seeking monetary damages in this matter in a civil law sense, as Henderson suggests. Ratemaking inherently involves money. But that does not turn a rate order into an assessment of

[17] Motion at 10-12.

damages. Rather, Big Rivers seeks several Commission findings clarifying and enforcing the rates and service standards in the Station Two Contracts consistent with KRS 278.200. This includes a finding that the rates set forth in the Interim Accounting Summary are correct and immediately due pursuant to the terms of the Contracts.

In the event that the Commission grants Big Rivers' requested relief by making the requested findings, and Henderson fails to uphold its rate and service standard obligations under the Station Two Contracts, the Commission could *then* seek to enforce the Commission's order in the Franklin Circuit Court pursuant to KRS 278.390. This is the process established by the legislature. Big Rivers is simply asking the Commission to comply with the law.

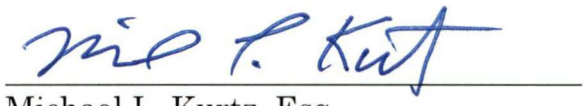
III. The Commission Should Not Hold This Matter In Abeyance.

Much of Henderson's Motion, including its request for an abeyance, hinges on the theory that the Commission should not rule on matters currently before the Franklin Circuit Court. On September 3, 2019, however, the Court rendered that theory moot. In the Franklin Circuit Case, the Court issued and ordered that stayed *"all matters related to [Big Rivers'] Counterclaim as well as any issues relating to the PSC's jurisdiction in [the Franklin Circuit Case] pending the resolution of [PSC Case No. 2019-00269] filed on July 31, 2019."* Accordingly, the Court has determined that on the issue of jurisdiction, the Commission should rule first. There is no reason for the Commission to now change 50 years of precedent asserting jurisdiction over the Station Two Contracts.

CONCLUSION

Given that all of the relief requested by Big Rivers concerns rates and service standards that fall squarely within the Commission's exclusive jurisdiction under KRS 278.200, Henderson's Motion should be denied. Additionally, given that the Franklin Circuit Court has stayed its proceeding pending the outcome of this matter, the Commission should deny Henderson's request for an abeyance.

Respectfully submitted,



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September 11, 2019

COUNSEL FOR BIG RIVERS ELECTRIC CORPORATION

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II

CIVIL ACTION No. 18-CI-78

CITY OF HENDERSON, KENTUCKY, and HENDERSON UTILITY COMMISSION d/b/a HENDERSON MUNICIPAL POWER & LIGHT — **PLAINTIFFS**

vs.

KENTUCKY PUBLIC SERVICE COMMISSION, et al. — **DEFENDANTS**

ORDER

This matter is before the Court upon Defendant Big Rivers Electric Corporation's *Motion to Stay Proceedings on Counterclaims*. The case was called before the Court during a motion hour on Wednesday, August 28, 2019. Upon review of the parties' briefs and papers, and after being sufficiently advised, the Court hereby **GRANTS** Defendant's *Motion*. The Court hereby **STAYS** all matters related to Defendant's Counterclaim as well as any issues relating to the PSC's jurisdiction in this case pending the resolution of action filed on July 31, 2019 at the PSC.

SO ORDERED, this 3 day of Sept August, 2019.

THOMAS D. WINGATE
Judge, Franklin Circuit Court

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Order was mailed, this 5 day of ~~August~~ September, 2019, to the following:

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Amy Feldman, Franklin County Circuit Court Clerk