COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

CITY OF HENDERSON, KENTUCKY, CITY OF HENDERSON UTILITY COMMISSION, AND BIG RIVERS ELECTRIC CORPORATION APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY AND TO FILE PLAN FOR COMPLIANCE WITH CLEAN AIR ACT AND IMPOSE ENVIRONMENTAL SURCHARGE	)	CASE NO. 93-065

O R D E R

Kentucky Industrial Utility Customers ("KIUC") has applied for a show cause order against Big Rivers Electric Corporation ("Big Rivers") for an alleged violation of KRS 278.020(1). The Attorney General ("AG") has moved for dismissal of Big Rivers' application for an environmental surcharge to cover the cost of this construction. Finding no evidence that Big Rivers has violated KRS 278.020(1) and finding the AG's motion is premature, the Commission denies KIUC's application and the AG's motion.

Big Rivers is a generation and transmission electric cooperative which provides power to its four member cooperatives and to other utilities on the wholesale market. It owns and operates four coal-fired generating stations. Under the terms of an agreement with the city of Henderson ("Henderson"), Big Rivers, subject to Henderson's "ownership, management and control," provides "all operating personnel, materials, supplies and technical services required for the continuous operation" of Henderson Municipal Power & Light's Station Two ("Station Two"), a

coal-fired generating station with a total capacity of 315 MW.[1] Big Rivers purchases Station Two's excess output under the terms of a power sales contract with Henderson.[2] In 1992, it purchased approximately 83 percent of Station Two's output.

On February 19, 1993, Big Rivers, Henderson, and City of Henderson Utility Commission ("HUC") jointly filed notice of their intent to apply for a Certificate of Public Convenience and Necessity to construct and install flue gas desulfurization facilities ("scrubbers") at Station Two. Big Rivers also gave notice of its intent to submit a plan for complying with the Clean Air Act Amendments ("CAAA"), Pub. L. 101-549, which involved amending the existing power sales contract to provide for the scrubbers' installation and the imposition of an environmental surcharge to recover its share of the scrubbers' cost.

On April 16, 1993, Big Rivers and Henderson publicly announced their intent to install scrubbers on Station Two to comply with the CAAA.[3] The installation, which is estimated to cost $41 million, will be partially financed by the sale of 150,000 SO_2 emission allowances to Centre Financial Products, a New York-based broker, for approximately $26.8 million.

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[1] Power Plant Construction and Operation Agreement between the City of Henderson, Kentucky and Big Rivers Rural Electric Co-Operative Corporation ("Construction and Operation Agreement") (Aug. 1, 1970) at §13.2.

[2] The Commission has reviewed these agreements and has authorized Big Rivers to assume the obligations set forth therein. City of Henderson, Case No. 5406 (Ky. P.S.C. Oct. 27, 1970), at 2-3. The Commission takes administrative notice of these agreements.

[3] KIUC's Application, Appendix D at 2.

On April 21, 1993, Big Rivers, Henderson and HUC withdrew their notice of intent to apply for a Certificate of Public Convenience and Necessity. In support of their action, they stated that no certificate was required since Henderson, a municipal corporation, would construct and own the scrubbers.

On April 28, 1993, KIUC applied for a show cause order against Big Rivers for an alleged violation of KRS 278.020(1). KIUC contended that Big Rivers had begun construction of the Station Two scrubbers without obtaining a Certificate of Public Convenience and Necessity. It also sought an order halting all Station Two construction activity pending a decision on its application.

While KIUC's application was pending, the AG moved for dismissal of this proceeding. The AG contended that the Commission lacked jurisdiction to consider any request by Big Rivers for the imposition of an environmental surcharge to recover the costs associated with the construction and installation of scrubbers at Station Two.

We first consider KIUC's application. KIUC contends that Big Rivers has commenced construction and installation of the scrubbers without obtaining a Certificate of Public Convenience and Necessity in violation of KRS 278.020(1). Big Rivers does not deny that construction of the Station Two scrubbers has begun, but asserts that no certificate is required because Henderson is Station Two's sole owner and is exempt from the requirements of KRS 278.020.

KRS 278.020(1) provides in part that:

> No person, partnership, public or private corporation, or combination thereof shall

> begin the construction of any plant, equipment, property or facility for furnishing to the public any of the services enumerated in KRS 278.010, except retail electric suppliers for service connections to electric-consuming facilities located within its certified territory and ordinary extensions of existing systems in the usual course of business, until such person has obtained from the Public Service Commission a certificate that public convenience and necessity require such construction.

Municipalities are not subject to Commission jurisdiction or regulation. KRS 278.010(3); McClellan v. Louisville Water Co., Ky., 351 S.W.2d 197 (1961). Notwithstanding the literal language of KRS 278.020(1), that statute confers upon the Commission no additional powers over municipally-owned utilities nor does it require such utilities to obtain a Certificate of Public Convenience and Necessity before commencing construction of utility related facilities. City of Georgetown v. Pub. Serv. Comm'n, Ky., 516 S.W.2d 842 (1974).

KIUC's application, therefore, poses the following issue: Does Big Rivers possess an ownership interest in Station Two, thus subjecting the construction of the scrubbers to Commission jurisdiction and triggering the requirements of KRS 278.020(1)?

Although conceding that "legal title to Station Two rests solely with the city of Henderson and not Big Rivers,"[4] KIUC argues that Big Rivers is a "constructive owner" of Station Two. It suggests that the power sales contract between Big Rivers and Henderson confers an ownership interest in Station Two on Big

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[4] KIUC's Response to AG's Reply at 3.

Rivers. Under the provisions of that contract, Big Rivers must pay its designated share of the generating plant's fixed costs regardless of Station Two's operational status. Big Rivers must also pay a proportionate share of all expenses, including principal and interest payments of the bonds issued to finance Station Two's construction. In return, Big Rivers is entitled to receive a proportionate share of Station Two's electrical output. Big Rivers has recorded the power sales agreement on its accounting books as an asset and the capacity payments as a liability.

KIUC also contends that the CAAA confers certain ownership attributes upon Big Rivers. Because Big Rivers purchases Station Two capacity under a "life-of-the unit, firm power contractual arrangement," KIUC asserts that the CAAA deems Station Two to have multiple owners and entitles Big Rivers to a share of Station Two SO_2 emission allowances. It also notes that Henderson has designated Gregory F. Black, Big Rivers' Manager of Environmental Affairs, as Station Two's designated representative for the Acid Rain Program established by the CAAA. Because a designated representative has the "authority to legally bind each owner and operator of the plant in all matters pertaining to the Acid Rain Program," 40 C.F.R. §72.20(b), KIUC asserts that Big Rivers, through Mr. Black, has full legal authority and control over Station Two for purposes of CAAA compliance.

Our examination of the power sales agreement and the power plant construction and operation agreement does not support KIUC's contention. Neither confers upon Big Rivers any incident of

ownership in Station Two. To the contrary, they vest Henderson with all incidents of ownership and provide Big Rivers with only a limited contractual interest in Station Two.

The power plant construction and operation agreement provides that Henderson has "full ownership, management, operation and control" of Station Two.[5] It gives Henderson final approval authority over construction plans and specifications and over all operational and management decisions.[6] Henderson, furthermore, has final approval authority over the plant's annual budgets.[7]

In contrast, the agreement identifies Big Rivers merely as an independent contractor.[8] While Big Rivers is entitled to reimbursement of its monthly expenses for operating Station Two, these expenses are subject to Henderson's review.[9] Henderson, furthermore, has the right to remove Big Rivers as plant operator should Big Rivers fail to perform properly its duties as plant operator.[10] The agreement also requires Big Rivers to indemnify Henderson for any damages resulting from its operation of Station Two.

The power sales contract confers few, if any, additional rights to Big Rivers. It provides that Station Two's total

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[5] Construction and Operation Agreement at §13.1.

[6] Id. at §§4.1 and 11.3.

[7] Id. at §§13.3, 14.1, and 14.3.

[8] Id. at §13.2.

[9] Id. at §§13.3 and 13.6.

[10] Id. at §13.9.

capacity and output is intended to serve the needs of Henderson. Big Rivers is entitled only to excess capacity.[11] Moreover, the capacity to which Big Rivers is entitled may be reduced upon five years notice.[12] Should Henderson's demand upon Station Two's capacity equal Station Two's capacity, the contract will terminate.[13] In the event of an outage at either Station Two unit, Henderson has priority on the plant's remaining capacity.[14]

The Commission attaches little import to the method which Big Rivers has used to record the power sales contract. The accounting method used is not determinative of any ownership interest in this situation and is similar to that normally used to record power sale contracts.

Notwithstanding KIUC's assertion to the contrary, the CAAA confers no ownership interest in Station Two to Big Rivers nor does it deem Big Rivers to be an owner of Station Two. Station Two is an "affected unit" under the CAAA and is allocated a specific number of allowances. 42 USC 7651c(e). An allowance is a limited authorization to emit sulfur dioxide and, although not a property right, may be held or traded. 42 USC 7651b(f). The CAAA further provides that, unless otherwise agreed, a utility taking power from an affected unit pursuant to a 30 year contract is entitled to

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[11] Power Sales Contract Between the City of Henderson, Kentucky and Big Rivers Rural Electric Cooperative Corporation ("Power Sales Contract") (Aug. 1, 1970), at §3.1.

[12] Id. at §3.3.

[13] Id. at §21.3.

[14] Id. at §5.1.

share in that unit's allowances to the extent of its share of the unit's output. 42 USC 7651a(27); 42 USC 7651g(i). It does not confer upon such utility an ownership interest in the affected unit. Moreover, the Commission's reading of the CAAA finds no such intent on Congress' part.

We see no significance in the designation of Big Rivers' Manager of Environmental Affairs as Station Two's "designated representative." It is Mr. Black, not Big Rivers, as KIUC suggests, who is the designated representative for Station Two.[15] Nothing in the record indicates that Henderson, by its designation of Mr. Black, has surrendered any control or authority over Station Two to Big Rivers.

KIUC offers two other grounds for requiring a certificate for the Station Two scrubbers. First, it argues that Big Rivers and Henderson have invoked Commission jurisdiction over the scrubbers' installation with the filing of their joint notice of intent. Having invoked the Commission's jurisdiction, they should not now be permitted to deny that jurisdiction.

Second, KIUC argues that the Commission's failure to assert jurisdiction will result in irreparable harm to Big Rivers' customers. It contends that other, more cost-effective methods exist for Big Rivers to achieve compliance with the CAAA. Once the scrubber is built, it warns, the Commission will be "faced with the draconian choice of either allowing cost recovery or forcing a non-

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[15] Big Rivers could not be a designated representative for the Acid Rain Program. Such representative must be a natural person. 41 CFR 72.2.

solvent government cooperative with an existing negative net worth exceeding $150 million to default on its payment obligation."[16]

The Commission finds both of these arguments without merit. As to the former, the Commission's powers are purely statutory. "[L]ike other administrative agencies, it has only such powers as are conferred expressly or by implication." Croke v. Pub. Serv. Comm'n, Ky.App., 573 S.W.2d 927, 929 (1978). Additional powers cannot be conferred on an administrative agency by the actions of the parties. The actions of Big Rivers and Henderson, therefore, cannot confer to the Commission jurisdiction over a municipal utility facility.

As to the latter, while we share KIUC's concerns about the installation of scrubbers, they do not provide a legal basis for KIUC's requested relief. While a Certificate of Public Convenience and Necessity is not required in this instance, Commission approval of any amendments to the existing power sales contract is. This Commission intends to closely review any amendments to ensure that Big Rivers' ratepayers are protected from unreasonable and imprudent management decisions.

Accordingly, we find that KIUC has failed to establish a *prima facie* case in support of its application for a show cause order and that its application should be denied.

We next turn to the AG's motion to dismiss. Accepting Big Rivers' position that the Commission lacks jurisdiction over Station Two, the AG argues that this lack of jurisdiction also

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[16] KIUC's Application at 12-13.

prevents the Commission from considering an environmental surcharge for the scrubber's cost. The AG contends that Station Two's compliance with the CAAA is solely Henderson's responsibility. Big Rivers' compliance with the CAAA, he further contends, is not dependent on whether Station Two is scrubbed. As KRS 278.183(1) permits a utility to assess an environmental surcharge only for the recovery of its costs of complying with the CAAA, Big Rivers cannot assess an environmental surcharge to recover any of the costs associated with the Station Two scrubbers. Therefore, the AG argues, this proceeding should be dismissed.

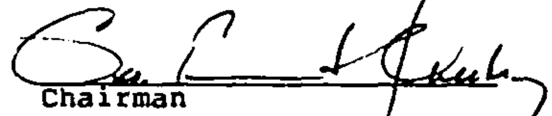
Without considering its merits, the Commission finds that the AG's motion is premature and should be denied. Big Rivers has yet to request authority for imposition of an environmental surcharge.

IT IS THEREFORE ORDERED that:

1. KIUC's application for a show cause order is denied.
2. The AG's motion to dismiss is denied.

Done at Frankfort, Kentucky, this 19th day of July, 1993.

PUBLIC SERVICE COMMISSION



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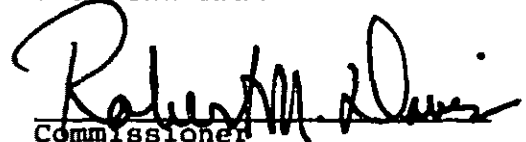

Commissioner

ATTEST:

Executive Director