

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AN INVESTIGATION OF BIG RIVERS)
CORPORATION'S WHOLESALE POWER CONTRACT) CASE NO.
WITH HOOSIER ENERGY RURAL ELECTRIC) 93-163
COOPERATIVE, INC.)

O R D E R

On September 28, 1993, Big Rivers Electric Corporation ("Big Rivers") filed a motion to dismiss this investigation on the basis that the Commission lacks subject matter jurisdiction over the pending contract for the sale of wholesale power by Big Rivers to Hoosier Energy Rural Electric Cooperative, Inc. ("Hoosier Energy"). Specifically, Big Rivers argues that any attempt by the Commission to regulate the wholesale power contract with Hoosier Energy imposes a direct burden on interstate commerce and, therefore, it is prohibited by the commerce clause of the United States Constitution.

The Attorney General's office, Utility and Rate Intervention Division, and Kentucky Industrial Utility Customers filed responses opposing the motion and asserting that the Commission does have jurisdiction to review the pending contract particularly because of its nexus to Big Rivers' financial workout plan and restructuring agreement that was previously approved by the Commission. Big Rivers also filed a reply to the responses.

Based on the pleadings and being otherwise sufficiently advised, the Commission hereby finds that our review of the pending

wholesale power contract with Hoosier Energy imposes, at most, an indirect burden on interstate commerce and is not unconstitutional.

The United States Supreme Court has definitively ruled that in determining whether state regulation of an interstate wholesale power sale violates the Commerce Clause, the test to be applied is not a mechanical bright line but a balancing of interest. Arkansas Electric Cooperative Corp. v. Arkansas Public Service Com'n, 461 U.S. 375 (1983).

In upholding the Arkansas Commission's authority to regulate the wholesale power sales of a generating cooperative, the court abandoned the bright line test adopted long ago in Public Utilities Commission of Rhode Island v. Attleboro Electric Company, 273 U.S. 88 (1927). Simply stated, the bright line test allowed states to regulate the retail sale of gas and electricity but not the wholesale sale on the theory that retail sales occur after the interstate transportation ends whereas wholesale sales involve interstate transportation. In discussing the evolution of the factors to be applied in reviewing challenges under the Commerce Clause, the Court in Arkansas Electric, quoting from Illinois Gas Company v. Public Service Company, 314 U.S. 498, 505 (1942), stated that over time the Court became "less concerned to find a point in time and space where the interstate commerce . . . ends and intrastate commerce begins, and . . . looked [instead] to the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce." Arkansas Electric, 461 U.S. 379.

In abandoning the bright line test, the Court in Arkansas Electric quoted from its decision in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970), for the proposition that:

Where [a] statute regulates evenhandedly to effectuate a legitimate local public interest, and its affects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree and the extent of the burden that will be tolerated will, of course, depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Arkansas Electric, 461 U.S. at 393-394.

The statute at issue here, KRS 279.210(1) provides that:

Every corporation formed under KRS 279.010 to 279.220 [rural electric and rural telephone cooperative corporations] shall be subject to the general supervision of the Energy Regulatory Commission, and shall be subject to all the provisions of KRS 278.010 to 278.450 inclusive, and KRS 278.990.

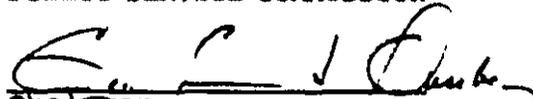
Pursuant to KRS 278.040(1) the Commission is obligated to regulate utilities and enforce the provisions of KRS Chapter 278, including KRS 278.030(1) which requires utility rates to be fair, just, and reasonable. Clearly, the statute in question regulates in an evenhanded manner. There has been no attempt to single out or impose special treatment to wholesale sales. Unlike the statute at issue in New England Power Company v. New Hampshire, 455 U.S. 331 (1982), there is no statutory prohibition to the export of low cost power, nor, as was struck down in Middle South Energy, Inc. v. Arkansas Public Service Commission, 772 F.2d. 404 (8th Cir. 1985)

is there any attempt to void a wholesale power contract approved by the Federal Energy Regulatory Commission. As the Court found in reviewing the Arkansas Commission's assertion of jurisdiction over wholesale power rates, such activity "is well within the scope of legitimate local public interests." Arkansas Electric at 394. We have a legitimate interest in reviewing the pending sale to Hoosier Energy to determine whether Big Rivers can satisfy the terms of the previously approved financial workout plan.

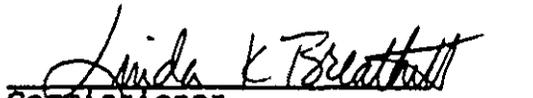
IT IS THEREFORE ORDERED that the motion to dismiss be and it hereby is denied.

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

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director