

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF BIG RIVERS ELECTRIC )  
CORPORATION TO ASSESS A SURCHARGE )  
UNDER KRS 278.183 TO RECOVER COSTS ) CASE NO. 94-032  
OF COMPLIANCE WITH ENVIRONMENTAL )  
REQUIREMENTS OF THE CLEAN AIR ACT )

O R D E R

The Attorney General ("AG"), through his Utility and Rate Intervention Division, has moved to dismiss Big Rivers Electric Corporation's ("Big Rivers") application to assess a surcharge to recover its costs of complying with the Federal Clean Air Act and certain other environmental requirements. Having considered the motion and Big Rivers' response thereto, the Commission denies the motion.

The AG first argues that, because Station Two is municipally-owned and therefore not subject to Commission jurisdiction, the Commission has no authority to grant an environmental surcharge for costs associated with the installation of flue gas desulfurization facilities ("scrubbers") at that plant.<sup>1</sup>

This argument ignores the literal language of KRS 278.183(1) which provides for recovery of the costs associated with "any

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<sup>1</sup> In his motion, the AG incorporates the arguments raised in his May 17, 1993 motion to dismiss in Case No. 93-065. See Case No. 93-065, 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.

plant, equipment, property, facility or other action to be used to comply with applicable environmental requirements . . . ." The statute does not distinguish between jurisdictional and non-jurisdictional facilities. Instead, it focuses on the use of the facilities in question and the utility which incurs the cost of their construction and operation.

The AG next argues that, as KRS 278.183 permits a utility to recover only its cost of compliance with the Clean Air Act Amendments of 1990 ("CAAA") and as Big Rivers' has no responsibility for Station Two's compliance with that law, KRS 278.183 does not permit recovery of any costs associated with the installation of scrubbers.

The factual premise of this argument is incorrect. Under the terms of its present agreement with the City of Henderson,<sup>2</sup> Big Rivers is the plant operator of Station Two. As the operator of Station Two, it is responsible for the plant's compliance with CAAA's emission limitations and is fully liable for any failure to comply. See 42 U.S.C. §§ 7651c(a)(1) and 7651d(a)(1); 58 Fed. Reg. 3599 (1993).

Moreover, some of the costs which Big Rivers seeks to recover through the proposed environmental surcharge are unrelated to the Station Two scrubbers. Assuming arguendo that Big Rivers had no

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<sup>2</sup> Power Plant construction and Operation Agreement between the City of Henderson, Kentucky and Big Rivers Rural Electric Cooperative Corporation (Aug. 1, 1970) at §13. The Commission reviewed this agreement and 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.

responsibility for Station Two's compliance with the CAAA, KRS 278.183 permits Big Rivers to seek recovery of these unrelated costs through an environmental surcharge.

The AG next argues that dismissal is required because Big Rivers' compliance with the CAAA is not dependent upon the installation of scrubbers at Station Two. The installation of scrubbers is one of a wide array of options available to Big Rivers to comply with the CAAA. KRS 278.183 does not mandate the selection of any particular compliance option. It, however, permits the costs of compliance to be recovered through an environmental surcharge only if the plan of compliance is reasonable and cost-effective. Whether Big Rivers' compliance plan is cost effective and reasonable is an issue which cannot be determined until all of the evidence has been heard.

The AG's final argument centers on the alleged absence of regulations to implement KRS 278.183. He argues that the absence of a regulation to implement KRS 278.183 precludes Big Rivers from invoking the statute. The Commission's existing regulations, the AG opines, neither establish nor govern the process for adjudicating an environmental surcharge application. Citing KRS Chapter 13A, the AG claims that a regulation is necessary to establish the requirements for processing Big Rivers' surcharge application. He also cites Commonwealth of Kentucky, ex rel Cowan v. Kentucky Public Service Commission, No. 90-CI-798 (Franklin Cir. Ct. July 10, 1991), to support his argument.

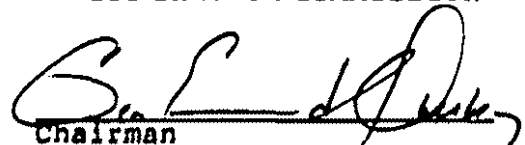
Big Rivers maintains that "the environmental surcharge statute contains comprehensive procedural instructions to utilities and to the Commission, and it does not require the Commission to promulgate implementing regulations in any subject area." Big Rivers' Response at 5. Big Rivers further states that the procedures to be followed in this instance are contained in either the statute or existing regulations.


The Commission finds that its existing regulations set forth the general requirements for processing applications. KRS Chapter 13A specifically exempts agency regulations when the governing statute prescribes the specific process for an application. Here, KRS 278.183 specifies the exact process. The promulgation of implementing regulations is not required.

IT IS THEREFORE ORDERED that the AG's motion to dismiss is denied.

Done at Frankfort, Kentucky, this 2nd day of June, 1994.

PUBLIC SERVICE COMMISSION

  
Chairman

  
Vice Chairman

  
Commissioner

ATTEST:

  
Executive Director