

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE JOINT APPLICATION OF BIG RIVERS)
ELECTRIC CORPORATION, GREEN RIVER)
ELECTRIC CORPORATION, HENDERSON UNION)
ELECTRIC COOPERATIVE, JACKSON PURCHASE)
ENERGY CORPORATION, AND MEADE COUNTY) CASE NO. 98-427
RURAL ELECTRIC COOPERATIVE FOR AUTHORITY)
TO REFUND CERTAIN AMOUNTS RECEIVED AS)
RESTITUTION BY BIG RIVERS ELECTRIC)
CORPORATION)

ORDER

Big Rivers Electric Corporation (Big Rivers) and its member cooperatives¹ (collectively the Applicants) have jointly applied for authority to refund approximately \$1.2 million² received as restitution for damages related to the improper conduct of a former Big Rivers employee. At issue is whether the proposed refund plans are reasonable and equitable to all ratepayer classes. Finding in the affirmative, we

¹ Big Rivers has 4 member cooperatives: Green River Electric Corporation, Henderson Union Electric Cooperative, Jackson Purchase Energy Corporation, and Meade County Rural Electric Cooperative.

² Big Rivers Electric Corp. v. William H. Thorpe et al., No. 93-0110-0(CS) (W.D. Ky.); Big Rivers Electric Corp. v. Green River Coal Co., Inc., No. 95-CV-107-0(C) (W.D. Ky.); Big Rivers Electric Corp. v. Costain Coal, Inc. et al., No. 94-CI-00012 (Union Cir. Ct. Ky.); Big Rivers Electric Corp. v. Jim Smith Contracting Co., Inc., No. 94-CI-00173 (Union Cir. Ct. Ky.); Big Rivers Electric Corp. v. Costain Coal, Inc. et al., No. 94-CV-0226-0(C) (W.D.Ky.). In addition to these actions, Big Rivers applied for and received payment from Reliance Insurance Company under the terms of a fidelity bond issued for William Thorpe.

approve the proposed refund plans, but deny Jackson Purchase Electric Cooperative Corporation s (Jackson Purchase) request to retain a portion of the proposed refund.

BACKGROUND

In the early 1980s, Big Rivers entered into a long-term coal contract with Green River Coal Company and several coal contracts with E&M Coal Company and Jim Smith Coal Company. Big Rivers later discovered that its General Manager William Thorpe had received improper payments in connection with these contracts and initiated legal action to recover these payments and compensation for Thorpe's breach of his fiduciary duty. Additionally, the United States District Court ordered Thorpe and one of his accomplices to pay restitution to Big Rivers as part of their sentence for federal criminal offenses.³ As a result of these actions, Big Rivers has recovered in excess of \$2.5 million.⁴

The Commission has previously considered and rejected the mandatory refund of these proceeds. In Case No. 90-360-C,⁵ we directed Big Rivers on our own motion to develop a rate mechanism to refund any proceeds recovered in judicial proceedings

³ United States v. William H. Thorpe, 166 F.3d 1216 (6th Cir. 1998); United States v. Shirley Bethel Pritchett, Criminal Nos. 93-00022-01-O and 93-00023-01-O (W.D.Ky. April 12, 1994).

⁴ In their application, the Applicants state that the amount of the refund is approximately \$1,218,432.94, plus interest. Big Rivers placed the proposed refund amount into an interest bearing account on July 17, 1998. See Application at 2. Since filing this action, Big Rivers and three of its industrial customers entered a settlement agreement with the Estate of Jim Smith and Jim Smith Contracting Co., Inc. to resolve litigation concerning certain fuel procurement contracts. The terms of this agreement, including the amount of any settlement that might be paid to Big Rivers, have been accorded confidential treatment. See Letter from Helen C. Helton to James Miller of 2/10/99. Suffice it to say, the total amount of the refund will exceed \$1,218,432.94.

⁵ Case No. 90-360-C, An Examination by the Public Service Commission of the Application of the Fuel Adjustment Clause of Big Rivers Electric Corporation From November 1, 1991 to April 30, 1992 (July 21, 1994).

involving its fuel procurement contracts.⁶ After establishing a separate proceeding to consider Big Rivers proposal and considering Big Rivers objections to such a mechanism, however, we determined that the recoveries in question were not fuel costs and therefore were not subject to refund under Administrative Regulation 807 KAR 5:056.⁷ We further held that mandatory refund of such non-fuel recoveries outside a general rate adjustment proceeding would constitute retroactive rate-making and violate the rule against single-issue rate-making.⁸ The Commission directed that Big Rivers proposed mechanism not be placed into effect and closed the proceeding.

As part of its approved First Amended Plan of Reorganization, Big Rivers has voluntarily agreed to refund one-half of all recoveries. Big Rivers Electric Corporation, No. 96-41168 (Bankr. W.D.Ky. June 1, 1998). This refund is to be made to Alcan Aluminum Corporation and Southwire Company (the Smelters) and other ratepayers using a methodology that takes into account historic energy usage by the Smelters and other retail customers consistent with the time period in which the revenues were

⁶ Contending that the Commission lacked the legal authority to direct the mandatory refund of these proceeds, Big Rivers brought an action for review of the Commission's Order. Since the Commission had not yet established any refund mechanism or addressed Big Rivers arguments in opposition to such mechanism in any formal proceeding, Franklin Circuit Court deferred Big Rivers action as premature. See Big Rivers Electric Corporation v. Pub. Serv. Comm'n, No. 94-CI-001184 (Franklin Circuit Court October 20, 1995).

⁷ Case No. 94-453, Big Rivers Electric Corporation's Proposed Mechanism to Credit Customers Amounts Recovered in Judicial Proceedings Involving Fuel Procurement Contracts at 4-6 (Feb. 21, 1997).

⁸ Id. at 11-12.

collected.⁹ Big Rivers and the Smelters legal expenses would be deducted before any refund. The Commission has approved the transactions outlined in the Plan of Reorganization in principle without directing any modification to these refund provisions.¹⁰

Refund Plan

Big Rivers proposes to base its refunds upon each member-cooperative's share of Big Rivers total native system sales between July 31, 1989 and July 31, 1994. This period encompasses the five years immediately prior to the Commission's Order in Case No. 90-360-C in which the Commission directed Big Rivers to refund fuel charges related to imprudent fuel procurement practices. The member-cooperatives proposed to refund by billing credit to those customers directly served by Big Rivers transmission system an amount equal to the portion of the refund attributable to their customers usage during this period. Refunds would be made only to directly served customers still in existence. The remainder, including refunds attributable to retail directly served customers who have ceased operations, would be refunded by a billing credit to rural customers (small commercial and residential customers) based upon their prior month's usage.

⁹ Big Rivers Electric Corporation's First Amended Plan of Reorganization, Schedule 5.4(a), Paragraph 20.

¹⁰ Case No. 97-204, The Application of Big Rivers Electric Corporation, Louisville Gas and Electric Company, Western Kentucky Energy Corp., Western Kentucky Leasing Corp., and LG&E Station Two Inc. For Approval of Wholesale Rate Adjustment For Big Rivers Electric Corporation and For Approval of Transaction (April 30, 1998).

The Commission has considered possible modifications to the proposed refund plan and finds such modifications are unlikely to produce a more equitable plan. Big Rivers concedes that the activities which gave rise to its restitution efforts occurred between 1981 and 1992. Basing refunds upon customer usage from this period results in only minor changes in the refund distribution. Basing refunds upon all customers current usage will result in some industrial customers who were not on Big Rivers system when the misconduct occurred benefiting from the restitution. Clearly, restitution should be made only to customers adversely affected by the misconduct.

The Commission recognizes that the proposed plan treats rural customers differently from directly served industrial and commercial customers. While directly served customer refunds are based upon historical usage, individual rural customer refunds are based upon current usage. A reasonable basis for this difference in treatment, however, exists. Use of historic usage for all customers would be administratively burdensome and expensive. The amount that rural customers receive as a customer class, moreover, is based upon historical usage.

Having carefully considered the proposed refund plan, the Commission finds that the plan is reasonable, does not unduly discriminate against any customer class, and should be approved. We note, however, that the circumstances that led to the payment of restitution and Big Rivers agreement to return this restitution to its ratepayers are unique. The proposed refund plan, therefore, should not be regarded as a model for future refund plans.

JACKSON PURCHASE S REQUEST

Jackson Purchase Electric Cooperative Corporation requests authority to retain approximately \$111,039 of the refunds to compensate the utility for excessive refunds made in October 1998 as part of a rate adjustment proceeding.¹¹ Retention of \$111,039 of the proposed refunds, Jackson Purchase argues, would avoid a separate application for a surcharge to recover these excessive refunds and customer confusion resulting from successive billing credits and surcharges.

The Commission finds that Jackson Purchase s request should be denied. Any request for recovery of excessive refunds should be made by separate application. The restitution refund and the excessive refunding are unrelated. We believe that Jackson Purchase s proposal would not reduce customer confusion but would likely create additional confusion when customers fail to receive refunds while other Big Rivers customers do.

CONCLUSION

Having considered the application and being otherwise sufficiently advised, the Commission finds that:

1. Jackson Purchase s request for authority to retain \$111,039 of the proposed refund should be denied.

¹¹ Case No. 97-224, Notice and Application of Jackson Purchase Electric Cooperative Corporation for Permission to Flow Through a Portion of the General Rate Decrease Filed Before the Kentucky Public Service Commission by Big Rivers Electric Corporation, Case No. 97-204.

2. The Applicants proposed refund plans, except as noted in Finding Paragraph 1, are reasonable, do not unduly discriminate against any customer class, and should be approved.

3. The proposed rate schedules that will implement the proposed refund plans are approved.¹²

IT IS THEREFORE ORDERED that:

1. Jackson Purchase s request for authority to retain \$111,039 of the proposed refunds is denied.

2. Except as noted in Ordering Paragraph 1, the proposed refund plans are approved.

3. The proposed rate schedules implementing the refund plans are approved and made effective as of the date of this Order.

4. Within 30 days of the date of this Order, the Applicants shall file revised tariff sheets reflecting the rate schedules approved herein.

Done at Frankfort, Kentucky, this 24th day of May, 1999.

By the Commission

ATTEST:

Executive Director

¹² Although Jackson Purchase proposed retaining \$111,039 of the proposed refund, its proposed rate schedule is silent on this issue. No change in the proposed rate schedule, therefore, is required by the Commission s rejection of Jackson Purchase s proposal.