ORIGINAL

Big Rivers
ELECTRIC CORPORATION

Your Touchstone Energy® Cooperative

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

Reply Brief of
Big Rivers Electric Corporation

FILED: December 8, 2020

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REPLY BRIEF OF BIG RIVERS ELECTRIC CORPORATION

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REPLY BRIEF OF BIG RIVERS ELECTRIC CORPORATION

Big Rivers Electric Corporation ("Big Rivers") submits this Reply Brief in response to the Post-Hearing Brief of City of Henderson, Kentucky, and Henderson Utility Commission, d/b/a Henderson Municipal Power & Light ("Henderson" or "City") filed December 1, 2020 at the Kentucky Public Service Commission ("Commission"). Big Rivers will respond to each of the City's arguments in the order presented in the City's Post-Hearing Brief.

I. COMMISSION JURISDICTION

Henderson continues to recite its now-familiar refrain that the Commission does not have jurisdiction over the issues raised in this case. Indeed, the majority of the City's jurisdictional arguments (including that the issues involved herein do not relate to rates or service, that the Commission may not engage in contractual interpretation, that "speculative impacts" on rates do not invoke Commission jurisdiction, and that the Commission may not award monetary damages) were already raised by Henderson

(sometimes verbatim),[1] rebutted by Big Rivers,[2] and rejected by the Commission early on in this proceeding.[3] The arguably "new" arguments raised in Henderson's Brief are insufficient to justify any change to the Commission's previous jurisdictional finding.[4]

For instance, Henderson's claim that the Commission cannot exercise jurisdiction over the Station Two Contracts because the Power Plant Construction and Operation Agreement, Power Sales Contract, and System Reserves Agreement ended ignores the plain language of KRS 278.200. That statute gives the Commission jurisdiction to "enforce any rate or service standard" in any contract between a utility and a city, as well as enforcement

[1] Henderson Motion to Dismiss or Alternatively Hold in Abeyance (September 5, 2019) at 1-4 (arguing that the Commission lacks jurisdiction to resolve financial disputes unrelated to rates or service), 4-8 (arguing that the Commission is not authorized to engage in contractual interpretation), 8-10 (arguing that a speculative impact on rates or service is insufficient to invoke Commission jurisdiction), 10-12 (arguing that the Commission is not authorized to award monetary damages).

[2] Big Rivers Response to Henderson Motion to Dismiss (September 12, 2019) at 3-8 (explaining that the Commission has exclusive jurisdiction to address the issues in this matter under KRS 278.200 and that KRS 278.010(12) and KRS 278.010(13) define the terms *"rate"* and "*service*" very broadly), 8-10 (explaining that the Commission is authorized to interpret contracts relating to rates or service), 10-12 (explaining that enforcement of the Station Two Contracts will directly impact member rates. For example, both the Environmental Surcharge and the Member Rate Stability Mechanism would be immediately impacted), and 12-13 (explaining that Big Rivers is not requesting monetary damages from the Commission). Although Henderson alleges that some of Big Rivers' claims are speculative, Henderson has similarly asked the Webster Circuit Court to determine each party's share of the post-closure costs for the maintenance costs and any environmental-related costs associated with the Station Two ash pond. *See* Henderson's Complaint provided in Big Rivers' Response to Item 2 of the Commission Staff's Post-Hearing Requests for Information.

[3] Order (February 4, 2020) at 7 (finding that the issues raised by Big Rivers *"implicate the service and rates under the various Station Two Contracts, and such issues are clearly within the scope of the Commission's jurisdiction under KRS 278.200."* Id at 6 (noting that the Commission has repeatedly exercised jurisdiction over the Station Two 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, including Case 5406, Order (October 22, 1970) (approving Power Sales Contract, Power Plant Construction and Operation Agreement and Joint Facilities Agreement); 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)).

[4] The *Lawrenceburg* case cited by Henderson is also inapplicable since it centered on a service territory dispute rather than rate or service standards set forth in a municipal contract. *City of Lawrenceburg, Kentucky v. South Anderson Water District*, Case No. 96-256, Order (June 11, 1998) at 3 ("Lawrenceburg's pleadings make readily apparent that the principal issue in this proceeding is <u>not</u> utility rates or service, but the parties' right to serve certain portions of Anderson County.").

authority over "all rights, privileges, and obligations arising out of any such contract."[5] The outstanding amounts due to Big Rivers are financial obligations arising out of the Station Two Contracts that continue to persist even after the expiration of the contracts. Henderson cannot evade its obligations arising out of the Contracts simply because it failed to satisfy those obligations during the term of the Contracts.

And, critically, the Joint Facilities Agreement as amended in 1993, has not ended as a result of the Commission's Order in Case No. 2018-00146. That contract continues in effect. The Joint Facilities Agreement as amended in 1993 authorized the construction of a scrubber on Station Two, designated the Station Two ash pond and ash pond dredgings stored in the Green Landfill as part of Station Two, set forth the City's obligations for storing and maintaining its scrubber sludge and ash pond dredgings in the Green Landfill, and established the Station Two decommissioning cost sharing formula based upon each party's capacity utilization of the plant over its 47 years of operation.[6] These contractual obligations remain in effect and are at the heart of this case.

Henderson also claims that the Commission does not have jurisdiction over this case because, in the City's view, the term "decommissioning" is ambiguous.[7] But the meaning of "decommissioning" is not ambiguous, particularly for this Commission, which routinely addresses power plant decommissioning activities of Kentucky Power (Big Sandy 2), Louisville Gas & Electric (Cane Run and Paddy's Run) and East Kentucky Power Cooperative (Dale).[8] While the total scope of Station Two decommissioning to be completed

[5] *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 exercises exclusive jurisdiction over utility rates and service.").
[6] 1993 Amendments at 11-14 and Exhibit 1.
[7] Henderson Brief at 18-19.
[8] Big Rivers Initial Brief at 25-26.

is uncertain given that some decommissioning activities are mandatory and some are discretionary, it is clear that fully decommissioning Station Two would entail demolition, remediation and restoring the site to a condition suitable for future industrial use.[9] That Henderson itself has begun to question the meaning of "decommissioning" now that its contractual responsibility for paying decommissioning costs has commenced in no way deprives this Commission of jurisdiction over decommissioning costs.

II. EXCESS HENDERSON ENERGY AND HENDERSON NATIVE LOAD

Excess Henderson Energy ("EHE") represents the hourly difference between the amount of capacity that Henderson reserved through the Power Sales Contract and the amount of capacity needed by Henderson to serve its native load and for sale to third parties.[10] Big Rivers' request with respect to EHE is simply to apply the calculation of the total amount due to or from Henderson according to the methodology approved by the Commission in Case No. 2016-00278.

Big Rivers' calculation of EHE costs begins on January 6, 2018 in order to comply with the terms of the December 15, 2017 Settlement Agreement and Release ("2017 Settlement") agreed to by Henderson and Big Rivers. The 2017 Settlement is only relevant to this proceeding because it establishes the starting date for when the calculation of EHE begins. That Settlement resolved all of Henderson's claims relating to EHE prior to January 5, 2018, stating that Henderson: "*releases, acquits, and forever discharges…BREC…of and from any and all manner of actions, causes of action, suits…liabilities, claims and demands of any nature or kind whatsoever, whether or not in contract, in equity, in tort or otherwise,*

[9] Big Rivers Initial Brief at 24.
[10] Order, Case No. 2016-00278 (January 5, 2018) at 12-13.

which Henderson ever had, now has, may now have or may hereafter have against [Big Rivers] … *resulting from, arising out of or in any manner relating to : (1) the generation, production, use, sale or resale of "Disputed Excess Energy…*"[11] The English language does not contain words more definitive. Henderson is forever barred from ever pursuing additional consideration from Big Rivers related to EHE for the period of time prior to January 5, 2018. Accordingly, Big Rivers' calculation of EHE-related costs and revenues begins on January 6, 2018.

Henderson claims that the "Commission does not have jurisdiction to interpret" the terms of the 2017 Settlement.[12] The City alleges that the "Henderson Circuit Court – and only the Henderson Circuit Court – has the authority to resolve a dispute concerning the scope of the release that the resolved the claim."[13] In Henderson's view, a settlement agreement filed with a Kentucky court is somehow only effective when it is the subject of a dispute before that same Kentucky court.

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[11] Section V., Paragraph 4 of the Settlement Agreement and Release provides:

> In consideration of the mutual promises, covenants and agreements contained in this Agreement, the resolution and settlement of disputed claims and controversies, and other good and valuable consideration, the receipt and sufficiency of which are conclusively acknowledged, Henderson hereby releases, acquits, and forever discharges, individually and collectively, BREC and WKEC, along with their affiliates, parents, members, officers, directors, employees, agents, representatives, advisors, successors, predecessors, boards and assigns (collectively, the "Released Parties") of and from any and all manner of actions, causes of action, suits, sums of money, accountings, reckonings, covenants, controversies, agreements, promises, remedies, amounts paid in settlement, compromises, losses, rights of contribution, damages, judgements, executions, debts, obligations, liabilities, claims and demands of any nature or kind whatsoever, whether or not in contract, in equity, in tort or otherwise, which Henderson ever had, now has, may now have or may hereafter have against the Released Parties (or any of them) resulting from, arising out of or in any manner relating to: (1); the generation, production, use, sale or resale of "Disputed Excess Energy" as defined herein, or the capacity, fixed, or variable costs associated with such energy, including but not limited to those asserted or that could have been asserted in, or that were or could have been in any way connected with, the "Damages Suit" or the "Arbitration Proceeding;" and (2) any obligations, past or future, of BREC to Henderson under the Power Sales Contract or the Arbitration Proceeding related to, arising out of , or concerning "Disputed Excess Energy" as defined herein, whether known or unknown, accrued or unaccrued, asserted or unasserted, direct or indirect, fixed, contingent or otherwise…

A copy of the 2017 Settlement Agreement is included with Mr. Berry's Direct Testimony as Exhibit Berry-2.

[12] Henderson Brief at 19.

[13] Henderson Brief at 20.

Henderson's argument ignores the law. The Commission's enforcement of the terms of the 2017 Settlement is specifically permitted by KRS 278.200. KRS 278.200 provides that "[t]he commission may, under the provisions of this chapter, 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…" The Legislature has expressly given the Commission jurisdiction to enforce the terms of contracts and agreements between a utility and a city when they relate to utility rates or service standards. That is plainly the case here.

The sad irony of the EHE saga is that it was completely avoidable. Henderson demanded that its power plant be operated out of economic dispatch order. Henderson demanded that its power plant produce energy that could only be sold into the MISO market at a loss. The City's economic loss is self-inflicted.[14]

Big Rivers' calculation presented in Exhibit Smith-2 is accurate. It applies the methodology approved by the Commission in Case No. 2016-00278 for the time period after January 5, 2018 in recognition of the 2017 Settlement. Henderson has not disputed the mechanics of Mr. Smith's EHE calculation, only the starting point of the calculation. Therefore, the Commission should approve Big Rivers' calculation of the total amount due to or from Henderson related to EHE shown in revised Exhibit Smith-2.

III. SEVERANCE COSTS

[14] Big Rivers Initial Brief at 65-66.

Big Rivers and Henderson each agreed to share in the costs of operating Station Two. One of the major costs of this operation was the obligation to pay and retain power plant employees. Henderson attempts to avoid paying its share of Station Two severance costs because, in Henderson's view, "Big Rivers did not consult Henderson when considering employee compensation and benefits…," but rather "submitted the costs to Henderson for approval as part of the annual budget review process." Henderson concludes that it "has never knowingly approved any Station Two expense related to severance benefits for employees of Big Rivers."[15]

Henderson's substantive argument is essentially that since it withheld express permission to approve severance costs it should be allowed to avoid paying its share of these costs.[16] But the Station Two Contracts do not give the City such veto power. The City's approval of severance/retention costs payments through the annual budget review process is not required in order for it to be responsible for paying its share of these costs. If such approval were required, then Henderson would be able to avoid paying for any or all costs, no matter how reasonable, simply by withholding consent. The Power Plant Construction and Operation Agreement holds Big Rivers to a "best efforts" standard in the efficient and economical operation of the plant as an independent contractor and applies a reasonableness standard to costs payable by the City.[17] The City presented no evidence that the payment of severance was inefficient, uneconomic, or unreasonable.

The outcome sought by the City would be particularly unreasonable because severance costs (amounting to approximately $50,000 per employee for 6 months of

[15] Henderson Post-Hearing Brief at 42.
[16] Henderson Brief at 42.
[17] Power Plant Construction and Operation Agreement at Sections 13.4 and 13.6.

compensation) were incurred solely to retain skilled employees that may otherwise have left during the additional period in which Henderson requested, and Big Rivers agreed, to continue operating Station Two so that Henderson would have sufficient time to secure an alternative supplier.[18] In other words, severance costs were incurred for the benefit of the City, not for Big Rivers.

This issue comes down to the reasonableness of Big Rivers' business judgment. Big Rivers had no incentive to incur unnecessary severance expenses because it paid 77.24% of them. Big Rivers recommends that the Commission require Henderson to pay its contractually mandated share of severance/retention costs. Henderson's recommendation is clearly unreasonable because it would allow them to pay none of costs that were incurred solely for its benefit.

IV. 2018/2019 CAPACITY RESERVATION

Henderson claims that it was not subject to MISO capacity reservation requirements until February 1, 2019 and was only subject to NERC capacity requirements prior to that date.[19] Consequently, Henderson alleges that its capacity reservation obligation was only 115 MW rather than 125 MW and that, in the event its obligation was higher, the City should have been permitted to purchase wholesale market Zonal Resource Credits ("ZRCs") to make up its deficiency.[20]

Big Rivers already addressed these claims thoroughly in its Initial Brief, explaining that once Big Rivers joined MISO in 2010, the MISO rules applied to both Big Rivers and

[18] As documented in Case No. 2018-00146, Henderson requested that Station Two continue to generate electricity past the point at which the Station was no longer economical to operate. *See* Berry Rebuttal at 22; Tr. (October 22, 2020) at 1:11:43.
[19] Henderson Brief at 43-44.
[20] Henderson Brief at 45-46.

Henderson. Section 5 of the 1998 Amendments to the Station Two Contracts required Henderson to "comply with any system capacity requirements now required or imposed at a future date" by "NERC, ECAR… **and any regional transmission authority**, reliability council or like organization, in each case having any system reserve capacity requirements applicable to it…" and that the City agreed to "comply with **any requirements** validly imposed by any of [the listed] entities upon Big Rivers based on Big Rivers' role as control area operator, but only if and to the extent that such requirements imposed on Big Rivers are on account of or due to the generation or load of the City."[21] This contractual obligation therefore extended to any capacity reservation requirement set forth by MISO brought about as a result of the inclusion of the City's load or generation in MISO.

Big Rivers also explained that Henderson was not contractually permitted to purchase wholesale market ZRCs to offset the City's capacity deficiency under the 1998 Amendments to the System Reserves Agreement. If Henderson were permitted to simply purchase lower-cost wholesale market capacity credits to satisfy its MISO capacity reservation requirements, then it could have shifted all of the Station Two fixed capacity costs to Big Rivers and its 118,000 consumers/retail members. With respect to the power plant it owns, the City is not contractually entitled to the lower of cost or market for capacity. Additionally, Big Rivers pointed out multiple mathematical errors imbedded in Henderson's calculation of its alleged 115 MW capacity reservation requirement.[22] Consequently, the Commission should confirm that in compliance with the MISO rules Henderson's Fiscal Year 2018/2019 capacity reservation requirement was 125 MW.

[21] Big Rivers Initial Brief at 49 (emphasis added).
[22] Big Rivers Initial Brief at 49-52.

V. OPERATING EXPENSES

The Accounting Summary contained on page 50 of Henderson's Brief is incorrect. While Henderson filed an amended version of Ms. Moll's Testimony and Exhibits on October 15, 2020 in order to correct a duplication of Henderson's severance cost adjustment within its capacity split adjustment, Henderson never corrected the same duplication error with regard to MISO fees and the Green Landfill vertical wall refund. There errors persist in the Accounting Summary in Henderson's Brief.

Henderson also disputes Big Rivers' request for interest on the amounts due calculated at 6%, claiming that there is no reasonable basis for the request.[23] But Big Rivers explained that its requested interest component reflects the additional charge to keep Big Rivers financially whole during the near-decade long period in which Henderson refused to meet its financial obligations under the Station Two Contracts. From 2010-2019, Big Rivers' average cost of debt was 5.16%, and its weighted average cost of capital was 7.39%. A 6% interest rate is therefore reasonable to compensate Big Rivers for the loss of the use of its money for more than a decade as well as the extended delay and burdensome effort required to enforce collection of the amounts due from Henderson. Without interest, the City would be rewarded for its vexatious litigation strategy.[24]

VI. MISO FEES

Henderson seeks to avoid paying its share of MISO fees incurred from December 2010 to February 2019 based upon an unfounded allegation that it could have complied with

[23] Henderson Brief at 48-49.
[24] Big Rivers Initial Brief at 77.

NERC's reliability standards for power plant owners without joining MISO.[25] However, while Henderson could have chosen to rely upon a different Balancing Authority to satisfy NERC Standard BAL-005-0 during that period, it did not. Instead, in full knowledge that Big Rivers joined MISO at the end of 2010 as part of a Commission approved least cost compliance plan, Henderson remained reliant upon Big Rivers, necessitating the registration of the City's load and generation in MISO.[26] Once Big Rivers joined MISO, MISO became the pertinent Balancing Authority for NERC compliance purposes.

As Big Rivers previously explained, during the nine years that Henderson reaped the benefits of participating in MISO via Big Rivers, the City never attempted to move to a different Balancing Authority, which it could have done at any time. Consequently, Big Rivers incurred several types of MISO fees (Schedule 17 fees, Schedule 23 fees, Schedule 24 fees, and operating reserve fees) on Henderson's behalf. But when Big Rivers attempted to invoice Henderson for its share of the fees, the City largely refused to pay.[27] The Commission must now step in and require the City to pay its share of MISO costs.

VII. STATION TWO ASH POND

With respect to its contractual obligation to pay Station Two ash pond decommissioning costs, Henderson claims that: 1) Big Rivers incorrectly relies upon a 125 MW capacity reservation for Fiscal Year 2018/2019; and 2) Big Rivers improperly disregarded the portion of coal combustion residuals attributable to the Reid plant.

[25] Henderson Brief at 50-54.
[26] Big Rivers Initial Brief at 54.
[27] Big Rivers Initial Brief at 56-61.

Henderson therefore claims that its share of Station Two ash pond decommissioning costs is 18.87%.[28]

As discussed above, Big Rivers' calculation of the City's Fiscal Year 2018/2019 125 MW capacity reservation was correct and in compliance with the MISO rules.

Further, the City's 18.87% decommissioning cost sharing calculation is fundamentally flawed since it relies on the general provisions of the 1970 Power Plant Construction and Operation Agreement, which with respect to decommissioning was superseded and replaced by the 1993 Amendments.

The City treats the Station Two ash pond decommissioning costs as operations and maintenance ("O&M") expenses shared pursuant to Section 13.8(b) of the 1970 Power Plant Construction and Operation Agreement. This is factually wrong. The vast majority of the Station Two ash pond decommissioning costs are capital expenditures, not O&M expenses. The capital cost is estimated to be over $13 million, while the associated O&M expenses are estimated to be less than $25,000 annually.[29]

But more fundamentally, rather than using the general 1970 O&M cost sharing provision (between the Reid and Station Two plants) as the basis for assessing Henderson's responsibility for decommissioning its ash pond, the City's cost responsibility is required to be based upon the 22.76%/77.24% sharing specifically set forth in Section 8 of the more recent 1993 Amendments. The 1993 Amendments directly address decommissioning cost

[28] Henderson Brief at 55.
[29] Rebuttal Testimony of Michael T. Pullen at 10-11.

sharing of Station Two (including Station Two Joint Use Facilities such as the ash pond) and those more recent Amendments control.[30]

VIII. GREEN LANDFILL OPERATING, MAINTENANCE AND DECOMMISSIONING

Henderson disputes $1.75 million of Station Two scrubber sludge and ash pond dredgings disposal, storage, and maintenance costs actually incurred at the Green Landfill for the period 2015 through 2019.[31] The City makes its calculation by arbitrarily locking in the 2014/2015 low point of the landfill cost curve, instead of paying the actual cost for each year over the five year period in question. Big Rivers charged the City the same landfill disposal cost that it charged itself, and those cost-based rates were reasonable. The City cannot "cherry pick" which costs to pay by excluding the cost of the vertical wall expansion. "But for" the accumulation of the City's Station Two waste and Henderson's stated expectation at the time that Station Two would continue to operate for many years to come, the costs of the vertical wall expansion that Henderson now contests would not have been incurred.[32] It is therefore both reasonable and consistent with principles of cost causation for Henderson to pay its share of those costs.

Henderson also asserts that its sole responsibility with respect to the Green Landfill was to pay haulage fees from Station Two to the Landfill.[33] The City disclaims any further cost responsibility for storing and maintaining its ash pond dredgings and scrubber sludge in the Green Landfill, or for sharing any Landfill decommissioning costs once Green is

[30] Rebuttal Testimony of Michael T. Pullen at 10:12-11:8.
[31] Henderson Brief at 56-57.
[32] Big Rivers Initial Brief at 39-41.
[33] Henderson Brief at 56-57.

retired (which could occur as early as 2022). Henderson's attempt to absolve itself from all future environmental liability is flatly contradicted by the 1993 Amendments.

The 1993 Amendments authorized the construction of a scrubber on Station Two. Thirty-two separate components of Big Rivers' Green scrubber with an installed cost of $42.3 million (depreciated value of $21.6 million) were utilized by the City's Station Two scrubber. Also, the use of Big Rivers' existing landfill at Green avoided the need for the City to construct a separate landfill for Station Two. All of this had the effect of "greatly reducing the cost of the Station Two FGD system."[34]

The 1993 Amendments expanded the definition of Station Two to include the Station Two ash pond, as well as Station Two ash pond dredgings stored in the Green Landfill. This is why the Station Two ash pond and Station Two scrubber waste stored in the Green Landfill are both subject to the 77.24%/22.76% decommissioning cost sharing formula.[35]

The 1993 Amendments also addressed operating and maintenance costs of the Station Two scrubber, including scrubber sludge "stackout," "disposal," and "storage" in the Green Landfill.[36] The City is required to pay these Green Landfill costs in proportion to its use of the Station Two scrubber.

Big Rivers did not "buy" or take title to the City's scrubber waste or ash pond dredgings by charging the City the same cost-based haulage rate as it charged itself. In fact, Big Rivers is legally prohibited from doing business as a commercial landfill operator given the nature of our landfill permit.[37] Big Rivers has incurred and continues to incur

[34] Big Rivers Initial Brief at 14-16.
[35] Id. at 15, 44-46.
[36] Id. at 41-44.
[37] Rebuttal Testimony of Robert W. Berry at 24.

real costs to remain in compliance with numerous environmental regulations in order to safely store the City's scrubber sludge and ash pond dredgings in our Green Landfill. The City is responsible for those costs.

Owning a coal-fired power plant is expensive. The environmental obligations are significant. The Station Two Contracts do not allow the City to simply walk away and shift these costs to Big Rivers' 118,000 consumers/retail members. The City is obligated to pay its ongoing share of landfill costs, and once the Green Landfill is decommissioned the City will be responsible for its proportional share.[38] That is what the 1993 Amendments to the Station Two Contracts require.

IX. DECOMMISSIONING OF STATION TWO

Henderson continues to insist that Station Two has already been decommissioned and its contractual decommissioning cost sharing obligations under Section 8 of the 1993 Amendments have already been met (despite the express acknowledgement of the City's financial auditors that decommissioning and environmental obligations related to Station Two remain).[39] This record is replete with evidence demonstrating the error of this position, including expert testimony, industry-wide definitions of decommissioning, and Commission precedent with respect to decommissioning costs.[40] It is also particularly disingenuous for Henderson to take such a position when the City itself has engaged in the decommissioning (including full demolition and dismantling) of its own Station One. Accordingly, the City's position has no engineering merit and should be flatly rejected.

[38] Id. at 22-26.
[39] Henderson Brief at 57; Big Rivers Initial Brief at 26-27.
[40] Big Rivers Initial Brief at 22-35.

Henderson also claims that in light of the Webster Circuit Court Order on July 2, 2020 regarding the potential for some parcels of land upon which only part of Station Two is built to revert to Big Rivers, "Big Rivers either is or unquestionably will be deemed the owner of the former Station Two property."[41] The City's predictive capabilities are admirable, but irrelevant. Whatever the judge in Webster County ultimately decides (assuming it is upheld on appeal) cannot infringe on the Commission's exclusive jurisdiction. The City's and Big Rivers' contractual obligations to share in the cost of decommissioning Station Two do not hinge in any manner on property ownership. Section 8 of the 1993 Amendments allocates decommissioning cost sharing responsibility based upon each party's capacity utilization of Station Two during its 47-year operating history.

Station Two is currently being maintained in a retirement in place state, which differs from decommissioning. Retirement in place is temporary. Decommissioning requires demolition and is final. Big Rivers cannot demolish the City's property without its permission. If the City imprudently elects retirement in place for its power plant, then the decommissioning cost sharing formula would not apply and the City would have full cost responsibility.[42] Since April 2019, Henderson has not paid one dollar of the retirement in place costs associated with Station Two, including the costs incurred by Big Rivers to protect public safety (e.g. costs of mitigating asbestos exposure, of conducting ongoing groundwater monitoring, and of lighting necessary to comply with Federal Aviation Administration requirements).

[41] Henderson Brief at 58.
[42] Big Rivers Initial Brief at 35-38.

Big Rivers cannot continue to do business with a counterparty that refuses to live up to its contractual obligations. Since Big Rivers filed this case in July 2019 as a last resort, Big Rivers has believed that Henderson is likely to resist compliance with a lawful Commission Order, just as it has done in response to the Commission's Order in Case No. 2016-00278, and that the Commission will need to "compel obedience" to its rate order at the Franklin Circuit Court pursuant to KRS 278.390. Given recent events, that belief has only strengthened.

X. CONCLUSION

WHEREFORE, for the reasons set forth herein, Big Rivers respectfully requests that the Commission grant the requests in this Application and any other relief that the Commission deems appropriate.

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