COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

APPLICATION OF BIG RIVERS ELECTRIC CORPORATION FOR A DECLARATORY ORDER	)))	**CASE NO. 2019-00269**

POST-HEARING BRIEF OF CITY OF HENDERSON, KENTUCKY, AND HENDERSON UTILITY COMMISSION, d/b/a HENDERSON MUNICIPAL POWER & LIGHT

December 1, 2020

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The City of Henderson, Kentucky, and the Henderson Utility Commission, d/b/a Henderson Municipal Power & Light (jointly "Henderson"), by counsel, and pursuant to the Order of the Kentucky Public Service Commission ("Commission") dated October 22, 2020, for its post-hearing brief states as follows:

Big Rivers Electric Corp. ("Big Rivers") brings this action before the Commission in the semblance of a rate standard and in the form of a sweeping request for relief purported to resolve all remaining financial disputes arising from the parties' 50-year contractual relationship. In so doing, Big Rivers invites the Commission to step beyond the bounds of its statutory authority and into an unprecedented role of environmental oversight in which the Commission ultimately approves every decommissioning expense Big Rivers cares to submit. The Commission is without jurisdiction to grant this relief. Even if Commission review were appropriate, which it is not, Big Rivers deliberately has failed to give the Commission sufficient information to calculate the true cash exchange that would resolve the disputes or to appreciate the impact of the lopsided outcome Big Rivers wants.

Henderson has never shirked its obligations under the Station Two contracts. To the contrary, Henderson has paid or agreed to pay all expenses related to the retired power plant and properly attributed to Henderson. Henderson on multiple occasions has tendered checks to Big Rivers for expenses calculated in accordance with the contracts and on the basis of Henderson's correct capacity reservation and Big Rivers has returned those checks. But Henderson is obligated as a steward of public funds and guardian of ratepayer interests to contest those improperly calculated expenses Big Rivers would wrongfully shift to Henderson, particularly where to do so would produce a windfall for Big Rivers and place an undue burden on Henderson and its 12,000 customers. To the extent the Commission agrees to undertake what Henderson maintains is an impermissible review and accept the supervisory burden Big Rivers would impose, the Commission should reject Big Rivers' calculations, accept Henderson's calculations, and decline to determine those matters properly falling within the purview of the courts.

I. INTRODUCTION

The financial disputes between Henderson and Big Rivers stem from a series of contracts executed in 1970 and providing for the construction and operation of a 350 MW generating plant and including the reservation and allocation of generating capacity, energy, and associated costs. The now-retired plant consists of two generating units known collectively as Station Two. With the exception of a single agreement, the Joint Facilities Agreement, as amended, the Station Two contracts have terminated and the plant ceased to operate effective February 1, 2019. Henderson's attempts to define its liability in accordance with the contracts and to ensure that Big Rivers fulfills its previous commitment to the Commission to assign to Henderson both costs and revenue associated with unwanted energy have been unsuccessful. Consequently, Big Rivers

has submitted a wish-list of disputes it wants the Commission to resolve in its favor, including, among other things, Big Rivers' attempt to extract $10,688,386[1] in unwanted-energy production costs from Henderson without crediting Henderson for corresponding sales revenue in the sum of $10,696,158[2] as an offset to those production costs (this calculation does not take into account an additional $3,500,219[3] in Henderson-owned fuel and reagent which Big Rivers used to generate unwanted energy and which Henderson will be forced to write off at a loss, regardless of which party pays variable costs and receives corresponding revenue associated with the generation of unwanted energy). Big Rivers simultaneously seeks to retain an additional $2,482,079[4] in revenue from the sale of profitable energy Big Rivers cherry-picked and sold during the same time period. This would create a substantial windfall for Big Rivers and deprive Henderson of revenue Henderson is entitled to receive as an offset to any losses Henderson might ultimately be forced to absorb.

Other disputes stem from Big Rivers' improper allocation to Henderson of MISO fees, severance costs improperly characterized as "operating costs" or "labor costs," and Big Rivers' miscalculation of operating expenses on the false premise that Henderson was required to reserve 125MW of capacity from Station Two for fiscal 2018-2019 rather than the 115MW of capacity Henderson actually and appropriately reserved. It is important to note that these expenses were allocated to Henderson in end-of-year statements showing actual expenses incurred by Big Rivers and were not part of any budget Henderson approved in advance in accordance with the contracts. As such, Big Rivers deducted these improper charges from Henderson's capacity

[1] Exhibit A attachment to Exhibit Heimgartner-4.
[2] Id.
[3] Henderson response to BREC DR 1-1.
[4] BREC response to Henderson DR 1-11.

payment made at the start of each fiscal year and is now obligated to credit Henderson in the amount of these overcharges.

Additionally, Big Rivers presents for Commission review: i) the unauthorized registration of the Station Two units in the Midcontinent Independent System Operator (MISO) market and the assignment of related fees to Henderson without corresponding benefit; ii) a unilateral and unauthorized increase in Henderson's capacity reservation for Fiscal Year 2018-2019 and the use of that incorrect capacity reservation to calculate the parties' relative shares of operational expenses; iii) a demand without contractual basis for Henderson to partially fund a vertical expansion of Big Rivers' Green Landfill; iv) a demand that Henderson pay a share of every conceivable expense Big Rivers decides to characterize as a decommissioning cost for as long as Big Rivers decides decommissioning lasts; and v) the surreptitious inclusion of severance packages for Big Rivers employees in the proposed Station Two operating plan for Fiscal Year 2018-2019.

Big Rivers devotes much of its post-hearing brief to issues which are either irrelevant or immaterial to the resolution of the parties' outstanding financial disputes. Additionally and perhaps most importantly, Big Rivers raises no issue at all that would implicate utility rate or service standards so as to invoke Commission jurisdiction. Big Rivers wants the Commission to interpret terminated contracts, supply missing provisions in those contracts, interpret state and federal environmental laws, impose expenses on Henderson and collect those expenses on behalf of Big Rivers, and determine the scope of a Settlement Agreement that resolved a Henderson Circuit Court action and is unrelated to any matters falling within the Commission's scope of authority. And Big Rivers wants the Commission to grant this comprehensive request for relief absent any request for rate relief or a change in service standards.

II. LEGAL CHARACTER OF THE HENDERSON UTILITY COMMISSION d/b/a HENDERSON MUNICIPAL POWER & LIGHT

The City of Henderson, Kentucky, is a city of the Home Rule class, its authority and powers set forth in the Kentucky Constitution and state statutes, said authority and powers including but not being limited to the capacity to enter into legal contracts, and to sue and be sued in its own name. The City of Henderson is not a "utility" as defined in KRS 278.010(3) and is not subject to Commission regulation. On June 1, 1949, the Henderson City Commission adopted an ordinance pursuant to KRS 96.530 establishing a five-member utility commission to operate, manage, and control the city's municipal light and power system. The Henderson Utility Commission later approved a resolution adopting the assumed name of Henderson Municipal Power & Light, or "HMP&L." The Henderson Utility Commission d/b/a HMP&L is a public body politic and corporate, with perpetual succession, which controls the municipally owned electric system, and which may contract and be contracted with, sue and be sued, in and by its corporate name. Pursuant to KRS 96.530, HMP&L controls the system in every respect, including daily operations and fiscal management, except that any decision fixing utility rates is subject to city approval. Pursuant to KRS 96.535, rates are fixed in part so as to provide for the operation and maintenance of the utility and to furnish a fair and reasonable return to the municipality on the fair value of the used and useful property of the utility. The parties to the Station Two contracts are Big Rivers and the City of Henderson. While the Henderson Utility Commission, d/b/a HMP&L, is an autonomous body in many respects, its statutory authority is both derived from and limited by KRS 96.530 et seq. Henderson is not aware of any authority to suggest that a civil judgment against HMP&L would not be binding upon the City of Henderson.

III. JURISDICTION

1. The Terminated Station Two Contracts Are Not a Basis for Jurisdiction

Big Rivers asks the Commission to resolve a number of contractual disputes, some of which are pending and some of which Big Rivers predicts will arise in the future in connection with the decommissioning of the retired Station Two power plant. Much of the relief Big Rivers seeks is based upon a series of now-terminated contracts: the Power Plant Construction & Operation Agreement, Power Sales Contract, and System Reserves Agreement, along with various amendments made in 1993, 1998, and 2005, which were terminated at Big Rivers' request pursuant to a Commission Order dated August 29, 2018, in Case No. 2018-146. Only the Joint Facilities Agreement remains in effect.[5] The parties ceased to be bound under the terms of the remaining Station Two contracts when the plant ceased operation effective February 1, 2019, in accordance with the Commission's order in Case No. 2018-00146. Even if Big Rivers had raised an issue related to a rate or service standard, the relevant contracts have terminated and cannot be the basis for Commission jurisdiction over Henderson pursuant to KRS 278.200.

2. The Issues Are Unrelated to Utility Rates or Service Standards

Big Rivers has not identified any rate or service standard that stands to be affected by the Commission's ruling in this case, a necessary prerequisite to Commission jurisdiction under KRS 278.200. Neither party pays the other a rate or receives or provides utility service from or to the other. No rate or service standard was fixed in any of the Station Two contracts, all but one of which have terminated. The mere fact that the Commission approved the Station Two contracts and their various amendments does not provide the requisite basis for Commission

[5] Big Rivers' Application, Exhibit 10.

jurisdiction in the absence of a current rate or service issue. As such, there is no basis for Commission jurisdiction pursuant to KRS 278.200.

Henderson is not a "utility" as defined in KRS 278.010(3)(a), and thus is generally exempt from Commission regulation. Only where a city contracts with a utility to fix a utility rate or service standard does KRS 278.200 operate to bring a city within the ambit of Commission regulation. The Commission derives its limited jurisdiction over contracts between utilities and municipalities from KRS 278.200, which provides as follows:

> The 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, regulating any such rate or service standard, shall be subject to the jurisdiction and supervision of the commission, but no such rate or service standard shall be changed, nor any contract, franchise or agreement affecting it abrogated or changed, until a hearing has been had before the commission in the manner prescribed in this chapter.[6]

Big Rivers has not asked the Commission to originate, establish, change, promulgate, or enforce any specific rate or service standard. None of the issues relate to any service standard, as the facilities are inoperable and are not providing any service. None of the issues relate to any rate being charged to or being paid by either party. Big Rivers has not even pointed to any specific rate or service standard that would purportedly be affected by the Commission's ruling. When asked to document any rate adjustments related to the Station Two contracts, Big Rivers merely said that failure to recover expenses might result in reduced earnings.[7]

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[6] It should be noted that the narrow jurisdiction authorized under KRS 278.200 is distinct from the exclusive jurisdiction to regulate utility rates and service pursuant to KRS 278.040. In its order dated February 4, 2020, the Commission here availed itself of KRS 278.200 on the grounds the issues "implicate" rates and service under the various Station Two contracts.

[7] Big Rivers' Response to Henderson DR 1-4; Big Rivers' Response to Commission 1-6.

The Kentucky Supreme Court has held that where, as here, the sole issue is a matter of contract interpretation, jurisdiction lies with the courts of the Commonwealth, and not with the Commission. Simpson County Water Dist. v. City of Franklin, 872 S.w.2d 460, 464 (Ky. 1994). See also Carr v. Cincinnati Bell, Inc., 651 S.W.2d 126, 128 (Ky. App. 1983). In the absence of a rate or service issue, the exception contained in KRS 278.200 for the regulation of rates and service standards fixed by contract between a utility and a city does not apply. "The rates and service exception effectively insures, throughout the Commonwealth, that any water district consumer/customer that has contracted and become dependent for its supply of water from a city utility is **not subject to either excessive rates or inadequate service.** Simpson at 465 (Emphasis added). By statute, a rate is compensation for service rendered to a utility customer. KRS 278.010(12). Station Two has ceased operation. Neither party is a customer of the other. Big Rivers has cited no rate that has been or will be imposed, changed, or modified by either party. Henderson has not changed any rate, contract term, or condition of service concerning Big Rivers. Neither the expired Station Two contracts nor the single agreement remaining in force fix a rate or service standard. Neither party is charging the other a rate under the terms of either the expired contracts or the remaining Joint Facilities Agreement. Neither party is using a defunct power plant to provide a service to the other. The issues Big Rivers presents are unrelated to any current rate or service standard. The mere specter of a potential effect on rates is not sufficient to meet the criteria of KRS 278.200. The issues are not generally applicable to Big Rivers' service or customers. Rather, they relate solely to disputed interpretations of terminated contracts among Henderson and Big Rivers. In such a case, as the Kentucky Court of Appeals has noted: "Although the Public Service Commission has jurisdiction over questions concerning rates and services generally, nevertheless, **when a question arises which is peculiar to the individual**

complainant, the courts will assume jurisdiction and hear the matter." Bee's Old Reliable Shows, Inc. v. Kentucky Power Co., 334 S.W.2d 765, 767 (Ky. 1960). (Emphasis added).

For the Commission to exercise jurisdiction over the instant dispute is to invade the province of the courts, infringe upon the contract rights of a municipality exempt from Commission regulation where neither rates nor service standards are implicated, and to exceed the scope of the authority the legislature conferred. Even in the case that gives the Commission broad authority over rates, the Court stated that there are limits to the powers of the Commission: "While we recognize that the PSC has discretion in fulfilling its statutory duty of insuring that rates are fair, just, and reasonable, we do not hold that the PSC has unlimited power to do whatever it wants in regards to ratemaking. Kentucky Public Service Commission v. Commonwealth of Kentucky, ex rel. Jack Conway; and Duke Energy Kentucky, Inc. (f/k/a) The Union Light, Heat, and Power Company), 324 S.W.3d 373, fn 16 (KY 2010).

The Commission itself recognized the limitations on its authority in City of Lawrenceburg, Kentucky v. South Anderson Water District, Order, Case No. 96-256 (June 11, 1998). There, the City of Lawrenceburg filed a formal complaint with the Commission over a water district's plan to relocate two water meters that, according to the city, would lead the utility to extend service to existing city customers. The city alleged the utility's plan constituted an improper practice related to service, thereby invoking the Commission's original jurisdiction under KRS 278.260(1). The Commission rejected the city's argument, stating: "Lawrenceburg's definition of "practice" … is so broadly drawn that it would bring virtually every act, function, and operation remotely involved in the provision of utility service within the Commission's jurisdiction and subsume the statutory limitations upon that jurisdiction." Id. at 5. If Big Rivers succeeds in its effort to similarly broaden the definition of "rate," virtually no facet of a contractual relationship between a city and a utility will go unregulated.

3. A Speculative Impact on Rates is Insufficient to Invoke Commission Jurisdiction

Several of the issues directly impacting Big Rivers' post-termination claims are pending before the courts of the Commonwealth or involve potential decommissioning and environmental costs which have not been incurred and which might never be incurred. Big Rivers acknowledges the indefinite nature of such costs through the testimony of its witness, Jeffrey T. Kopp:

> Even after a full demolition is performed, there still may be potential future costs. These costs could include, but are not limited to, costs to meet new environmental regulations and costs for environmental monitoring. For example, there is a 30-year requirement to perform post-closure groundwater monitoring on the ash pond for Henderson Station Two.[8]

In addition to its request for the Commission to assign liability for costs incapable of verification, Big Rivers presumably expects the Commission to oversee "decommissioning" for the next 30 years. Big Rivers must not be permitted to avail itself of Commission jurisdiction simply by predicting a potential, theoretical downstream effect on rates.[9] The Kentucky Court of Appeals has confirmed that matters of contract enforceability raising nothing more than the mere possibility of future rate increases do not fall within the Commission's exclusive jurisdiction over utility rates and service conferred by KRS 278.040(2). Jessamine-South Elkhorn Water Dist. v. Forest Creek, LLC, 2013 Ky. App. Unpub. LEXIS 577 (Ky. App. July 12, 2013).

KRS 278.030 requires the Commission to determine whether proposed utility rates are "fair, just and reasonable." However, Big Rivers has not proposed any rate adjustment that would permit the Commission to apply that standard. Rather, Big Rivers is asking the Commission to issue a premature finding that unknown, yet-to-be incurred expenses are

[8] Direct Testimony of Jeffrey T. Kopp, p. 13, lines 13-19.
[9] See Big Rivers' Brief, p. 76.

reasonable future ratemaking purposes. The Commission would have to issue such a finding without the benefit of knowing what, if any, expenses will be incurred, when those expenses will be incurred, when or if Big Rivers might propose a rate adjustment, and whether or not Henderson will contest those expenses. Such expenses are unquantifiable and indeed might never materialize.

The issues Big Rivers raises relate to interpretation of contractual terms and assignment of post-contractual environmental responsibilities which are not yet ripe for litigation. Responsibility for such costs depends upon the degree of environmental remediation that might be imposed upon the parties. Until the extent of the decommissioning is known, costs cannot be known. Big Rivers nonetheless wants the Commission to foresee the future and impose liability for costs that do not currently exist. Big Rivers President & CEO Robert W. Berry asserts in his testimony:

> Big Rivers requests that the Commission enter an Order that enforces Section 8 of the 1993 Amendments, which requires Henderson to pay its share of current and **future** Station Two **decommissioning** costs. In order to enforce this provision, the Commission should find that 1) decommissioning consists of the activities described by Mr. [Jeffrey] Kopp to demolish the Station Two facilities and to make the Station Two site suitable for future industrial use; 2) the decommissioning costs that the parties are obligated to share also include any **ongoing environmental monitoring, remediation and permitting costs** relating to Station Two, including the joint use facilities, which includes but is not limited to the Station Two ash pond and the ash pond dredgings in the Big Rivers Green Station landfill; 3) Big Rivers' share of decommissioning costs is 77.24%, and Henderson's share of decommissioning costs is 22.76% per Section 8; and 4) the **ongoing obligation** to share in decommissioning costs applies to both parties, regardless of who incurs the cost or owns the real property upon which the asset is located.
> Additionally, Big Rivers requests that the Commission find that **in the event** Henderson elects not to cooperate in fully decommissioning any portion of Station Two or not to city bid and award contracts necessary for the completion of full decommissioning of Station Two, **any ongoing maintenance costs**

> **or other costs or liabilities that may result from those decisions are solely the responsibility of Henderson, and Big Rivers shall have no obligation to share in those costs or associated liability.**[10]

It is well settled that Kentucky courts will not attempt to decide speculative issues: In Bank One Kentucky NA v. Woodfield Financial Consortium LP, 957 S.W.2d 276, 279 (Ky. App. 1997), the Kentucky Court of Appeals said:

> A justiciable controversy concerning present rights, duties or liabilities does not include questions "which may never arise or which are merely advisory, or are academic, hypothetical, incidental or remote, or which **will not be decisive of any present controversy**." Dravo, supra at 97. Consequently, abstract or speculative propositions simply made to satisfy the curiosity of the parties are not appropriate for declaratory relief. Shearer v. Backer, 207 Ky. 455, 269 S.W. 543, 545 (1925). (emphasis added)

Each of Big Rivers' claims is based upon future actions or inactions of the parties and predicated upon unknown monetary liabilities that are dependent upon speculative, undetermined activities of the parties. Big Rivers' petition does not offer any information about, or seek to change, its rates for any services. Big Rivers admits that no service issue is implicated in this case.[11] Rates relate only to service. KRS 278.010(12). Without any service among the parties, there can be no rate imposed or collected by any party. Big Rivers does not document its overall revenue requirements or how those requirements might have changed since Big Rivers' last general rate case. Big Rivers does not provide the Commission with any of the information required pursuant to 807 KAR 5:001 to analyze revenue needs. Big Rivers apparently seeks to be relieved of the obligation to meet any and all procedural and substantive requirements related to ratemaking. Big Rivers instead would bypass all requirements to follow procedural rules, quantify its overall revenue needs, and determine the best way to recoup any shortfall, and

[10] Direct Testimony of Robert W. Berry, pp. 45-46.
[11] Big Rivers' response to Henderson DR 1-2.

simply obtain a preemptive Commission ruling permitting collection of unspecified amounts from Henderson.

4. The Commission is Not Authorized to Grant the Relief Requested

Not only does Big Rivers insist that the Commission assume the role of court of general jurisdiction, but Big Rivers also wants to impose upon the Commission the obligation of collecting any disputed expenses from Henderson:

> If Henderson fails to timely pay the monthly charge, then the Commission should seek enforcement of its rate order at the Franklin Circuit Court pursuant to KRS 278.390.[12]

In such an event, any dispute between Big Rivers and Henderson concerning decommissioning or other related costs would require the Commission to file an action in the Franklin Circuit Court to collect the disputed funds on Big Rivers' behalf. The Commission would bear the burden of enforcing a terminated contract and collecting disputed expenses, relieving Big Rivers of all related obligations.

Big Rivers demands the Commission order Henderson to immediately pay a specific sum of money to Big Rivers.[13] This request for relief lies squarely outside the scope of the Commission's jurisdiction. Nowhere does KRS Chapter 278 authorize the Commission to impose expenses or otherwise order a municipality to pay money to a utility other than through a rate. An award of direct payments to Big Rivers in the form of liability for disputed expenses is the equivalent of an award of equitable relief, not an award based on limited statutory authority related to rates and services. It is undisputed that the Commission does not have authority to order direct cash payments from a city to a utility. The only authority vested in the Commission is the enforcement of the contract through adjustment of rate (KRS 278.180; 278.270) or service

[12] Big Rivers' Application, p. 17. See also Big Rivers' Post-Hearing Brief, pp. 80-81.
[13] Big Rivers' Application, p. 18.

standards (KRS 278.274), neither of which is implicated in this case. In a reference to regulatory authority to modify a contract because of its alleged uneconomic consequences to the utility, the same claim being made by Big Rivers, the Michigan Supreme Court stated:

> ...[T]he commission argues that its authority to fix and regulate reasonable utility rates, of necessity, encompasses the power to prevent noneconomic management practices which threaten the integrity of the ratemaking process. As this Court asserted in Detroit v. Public Service Comm., 308 Mich. 706, 716, 14 N.W.2d 784 (1944), "[i]t is the duty of the commission, under its statutory power, to fix a just and reasonable rate." See also M.C.L. Sec. 460.6a(1), (2); M.S.A. Sec. 22.13(6a)(1), (2). The commission's argument, though it may be economically supportable, is legally unsound. The commission is a creature of the Legislature and, as such, possesses only those powers conferred upon it by statute. . . The power to fix and regulate rates, however, does not carry with it, either explicitly or by necessary implication, the power to make management decisions. . . Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Comm., 262 U.S. 276, 289, 43 S.Ct. 544, 547, 67 L.Ed. 981 (1923). Union Carbide Corporation, Plaintiff, and Consumers Power Company, Intervening Plaintiff-Appellant v. Public Service Commission, Defendant-Appellee. Docket Nos. 79148, 79150. 428 N.W.2d 322, 328, Supreme Court of Michigan. August 23, 1988.

Kentucky courts have long held that the Commission lacks the legal authority to award monetary damages. See Carr v. Cincinnati Bell Inc., 651 S.W.2d 126, 128 (Ky.App. 1983) ("Nowhere in Chapter 278 do we find a delegation of power to the PSC to adjudicate contract claims for unliquidated damages. Nor would it be reasonable to infer that the Commission is so empowered or equipped to handle such claims consistent with constitutional requirement."). The Commission, too, has recognized this limitation on the scope of its authority. Claims for monetary damages that exceed the "direct costs for retail service" are beyond the scope of the Commission's authority to grant relief. *In the Matter of: Harold Barker, Ann Barker, and Brooks Barker v. East Kentucky Power Cooperative Inc., Case No. 2013-00291, p. 6 (April 7, 2014)* (See also *In the Matter of Dr. Bart MacFarland, DMD v. Kentucky Utilities Co., Case*

No. 97-012, p. 3 (January 21, 1997). The Commission has defined damages to include a request for "just compensation" for loss of ownership of a water line. See *James S. Wayne, Individually and as Trustee for the James S. Wayne Living Trust v. Henry County Water District #2*, Case No. 2009-00264, Order dated August 9, 2010.

The request by Big Rivers for direct compensation for expenses rather than for a rate adjustment is within the prohibition the Commission has consistently followed against awarding payments other than through an adjustment of rates.

5. The Commission Does Not Have Authority to Define Ambiguous Contractual Terms

A key issue in this case is the definition and implementation of the ambiguous term "decommissioning" with respect to Station Two as reflected in the Joint Facilities Agreement, as amended. Section 8 of that agreement provides only that "the parties shall bear decommissioning costs of Station Two in the proportions in which they shared capacity costs during the life of Station Two." The term "decommissioning" is not defined, does not describe the scope of activity related to decommissioning, or the costs to be incurred or shared by the parties. Yet, Big Rivers is asking the Commission to define the term in accordance with Big Rivers' disputed definition by imposing obligations upon Henderson that are not referenced in the contract and cannot reasonably be inferred from the contract. As the Commission noted in its order dated January 5, 2018, in Case No. 2016-00278: "It is well settled law that in the absence of ambiguity, the terms of a contract should be interpreted by assigning language its ordinary meaning and without resort to extrinsic evidence." Board of Trustees of Kentucky School Boards Insurance Trust v. Pope, 528 S.W.3d 901, 906.[14]

[14] Order, Case No. 2016-00278, January 5, 2018, p.12.

Here, the contract is ambiguous because the term "decommissioning" is susceptible to multiple or inconsistent interpretations, as evidenced by the parties' unresolvable disputes. If an ambiguity exists, our task is to "gather, if possible, the intention of the parties from the contract as a whole. Frear v. P.T.A. Industries, Inc., 103 S.W.3d 99, 106 (Ky.2003), quoting Whitlow v. Whitlow, 267 S.W.2d 739, 740 (Ky.1954). In determining the intention of the parties, we "will consider the subject matter of the contract, the situation of the parties and the conditions under which the contract was written...." Whitlow at 740. The task of interpreting contracts and assigning meaning to ambiguous terms lies squarely with the courts of the Commonwealth and not with the Commission.

Big Rivers seeks Commission approval of its calculations regarding accounts payable and receivable related to the post-closure of Station Two and resolution of future financial disputes. Any liability for unknown expenses yet to be incurred would be predicated on the Commission's interpretation of several key terms that are not defined in the contracts. To grant the relief Big Rives requests, the Commission must assign a meaning to the term "decommissioning," which is to accept Big Rivers' unsubstantiated definition of that term. The Commission further must impose future liability for "ongoing environmental monitoring, remediation and permitting" activities, despite the fact that none of those terms has been definitively defined and no activities associated with those terms has been deemed necessary or inevitable.

Big Rivers' application further imposes upon the Commission the duty to interpret state and federal environmental remediation laws to determine whether the parties have incurred legitimate expenses in decommissioning the facilities.[15] Without the requisite scrutiny, the Commission must simply accept Big Rivers' invoices as evidence of legitimate expenses and impose a share of those costs upon Henderson with no oversight. Even if Henderson could

[15] Big Rivers' Application, p. 19.

request Commission review of disputed expenses, such a review necessarily requires review and interpretation of complex environmental regulations, none of which invoke the jurisdictional authority of the Commission. Even if the Commission believes that the expenses associated with decommissioning affect rates, it does not have the jurisdiction to interpret state and federal environmental laws. Before the Commission can find the contested expenses reasonable for ratemaking, a court must first determine that Big Rivers' interpretation of decommissioning requirements under the contracts is correct. For the Commission to interpret the decommissioning standards Big Rivers' has proposed, it must assume the authority of a court of general jurisdiction. Nothing in the Commission's empowering statute permits the Commission to do so.

6. The Commission Does Not Have Jurisdiction to Interpretation the Settlement Agreement Resolving the Henderson Circuit Court "Damages Suit"

Even if the Commission continues to rely upon KRS 278.200 for jurisdiction to interpret the terminated Station Two contracts, the Commission has no basis whatsoever for jurisdiction to interpret the settlement and release that resolved a Henderson Circuit Court civil action. The Settlement Agreement[16] at issue stems from a civil action Big Rivers filed in the Henderson Circuit Court in 2009. In that action, Civil Action No. 09-CI-00693, Big Rivers petitioned the Henderson Circuit Court to refer to arbitration a dispute concerning which party to the Station Two contracts was entitled to take and sell profitable surplus energy which was associated with Henderson's capacity reservation and which was wanted by both parties to the contracts. An agreement to settle legal claims is essentially a contract subject to the rules of contract interpretation. Cantrell Supply Inc. v. Liberty Mut. Ins. Co., 94 S.W.3d 381, 384. Construction

[16] Direct Testimony of Robert W. Berry, Exhibit 2.

and interpretation of a contract, including questions regarding ambiguity, are questions of law to be decided by a Court. Frear v. P.T.A. Indus., 103 S.W.3d 99 (Ky. 2003).

The Henderson Circuit Court had undisputed jurisdiction to adjudicate Big Rivers' petition. The Henderson Circuit Court continued to have undisputed jurisdiction to adjudicate Henderson's related claim for damages (identified in the Settlement Agreement as the "Damages Suit"), which flowed from the arbitration panel's decision and which sought reimbursement for lost sales of profitable surplus energy generated between 2009 and the effective date of the Settlement Agreement (December 15, 2017). The damages suit was filed as a request for further relief pursuant to KRS 418.055 in the same action Big Rivers had initiated. The claim by definition involved only profitable energy. It was the Henderson Circuit Court that entered an Agreed Order dismissing the claim as settled. The Henderson Circuit Court – and only the Henderson Circuit Court – has the authority to resolve a dispute concerning the scope of the release that resolved the claim. Not only is the Commission without jurisdiction to resolve the dispute concerning the Settlement Agreement, but also Big Rivers has failed to supply the Commission with any calculations related to the time period covered in the agreement or any evidence to support Big Rivers' interpretation. To the extent Big Rivers asks the Commission to interpret the Settlement Agreement, the request is not one for meaningful review but rather a request for the Commission to simply accept Big Rivers' contention that the agreement means what Big Rivers thinks it means. A settlement agreement is a contract and is governed by contract law. Ford v. Ratliff, 183 S.W.3d 199, 202 (Ky. Ct. App. 2006). In the absence of ambiguity, a written agreement will be enforced strictly according to its terms, and a court will interpret the contract's terms by assigning language its ordinary meaning and without resort to extrinsic evidence. Frear v. P.T.A. Industries Inc., 103 S.W.3d 99, 106 (Ky. 2003). The scope of

a release, like any contract, depends on ascertaining the intent of the parties at the time of signing the release. Intent is determined by reviewing the language of the entire instrument and all surrounding facts and circumstances under which the parties acted. Toumany Sayon Sako v. Ohio Dept. of Admin. Servs., 278 Fed. Appx. 514 (6th Cir. 2008). A substantive review of the Settlement Agreement necessitates a review of the Court record so that the intent of the parties and the evidence of record can be interpreted. That record is not part of the evidence in this case. Any decision about the Settlement Agreement based on the record in this case would be unsubstantiated and unsupported by any facts.

The impact of a favorable ruling accepting Big Rivers' self-serving interpretation of the Settlement Agreement is illustrated below.

Financial Impact of Commission Ruling Granting Big Rivers' Requested Relief June 1, 2016 - December 31, 2017		
	Big Rivers	**Henderson**
Variable Production Costs of Unwanted Energy		($10,688,386)[1]
Revenue from Sales of Unwanted Energy	$10,696,158[2]	
Profitable Energy Purchased at Contract Price of $1.50MWh	($88,191)[3]	$88,191
Profit from Sales of Profitable Energy	$2,482,079[4]	
E.ON Indemnification Payment for lost profits from sales of Wanted Energy	$4,700,000 +[5]	
Payment in Settlement of "Damages Suit," i.e. Civil Action No. 09-CI-00693		$6,250,000[6]

Write-off of Coal/Lime used to produce Unwanted Energy (June 1, 2016 - January 31, 2019)		($3,500,219)[7]
TOTAL	**$16,840,046 +**	**($7,850,414)**

[1] Exhibit A attachment to Exhibit Heimgartner-4
[2] Id.
[3] Exhibit Moll-2; Attachment to BREC Response to HMPL DR 1-11.
[4] Id.
[5] PSC Hearing testimony of Robert W. Berry, Oct. 22, 2020 at 9:34:33 (confirming E.ON paid Big Rivers "north of $10 million" pursuant to the 2009 Indemnification Agreement between Big Rivers and Western Kentucky Energy (WKE), a subsidiary of E.ON. Of the amount E.ON paid to Big Rivers, Big Rivers forwarded $6,250,000 to Henderson in settlement of Henderson's wanted-energy claim).
[6] Direct Testimony of Christopher Heimgartner, 6:20-7:5.
[7] Henderson response to BREC DR 1-1.

These are material amounts which reflect Big Rivers' flawed interpretation of a 2017 Settlement Agreement that resolved a Henderson Circuit Court civil action for historical sales of profitable surplus energy that both parties claimed a right to take and sell. Big Rivers' post-settlement attempt to redefine "Excess Henderson Energy" in a way that permits the outcome illustrated above is inconsistent with the definition contained in the Commission's order in Case No. 2016-00278, is inconsistent with the definition contained in the Arbitration Award that flowed from the Henderson Circuit Court action, and is inconsistent with the representations Big Rivers made to the Commission in Case No. 2016-00278.

The issue involving unwanted Excess Henderson Energy is before the Commission only by omission in that Big Rivers has not asked the Commission to conduct a meaningful review of the 2017 Settlement Agreement. Rather, Big Rivers asks the Commission to simply accept Big Rivers' assurances that Henderson is due zero revenue for unwanted energy without question and without resort to "relitigating" the unwanted-energy issue.[17]

[17] Rebuttal Testimony of Paul G. Smith, 3:22-4:8.

Assuming for the sake of argument that Henderson accepts or is assigned responsibility for the variable costs of producing unwanted energy between June 1, 2016, and the plant-closure date of January 31, 2019, Henderson must also receive the corresponding sales revenue as an offset to those costs, in keeping with the terms of the contracts and the course of dealing among the parties spanning the past 50 years. In the event the Commission agrees to determine the scope of the Settlement Agreement, the Commission must interpret the agreement in accordance with the definition of "Excess Henderson Energy" reflected in the Commission's order in Case No. 2016-00278 and in accordance with the demonstrated intent of the parties to the agreement . The correct outcome in that event is reflected in the figures prepared by Big Rivers and attached to the April 11, 2019, letter attached to the Direct Testimony of Christopher Heimgartner as Heimgartner Exhibit-6, and results in a credit due to Henderson in the sum of $1,233,583.77:

Summary of Revenue & Costs Associated with Excess Henderson Energy Assuming Use of HMPL Coal When Available June 1, 2016- January 31, 2019		
Revenues		
	MISO Rev for Unwanted EHE	$16,955,597.28
	BREC EHE Utilization	$88,191.00
	Subtotal EHE MISO Revenue	$17,043,788.28
Costs		
	Coal Shortfall	($12,790,320.29)
	Lime Shortfall	($915,742.28)
	Fuel Oil	($1,489,602.65)
	2016 Coal Stockpile Inv. Adj.	($430,182.79)
	2018 Coal Stockpile Inv. Adj.	($124,300.00)
	2019 Coal Stockpile Inv. Adj.	($7,531.50)
Subtotal Costs		($15,810,204.51)
Net due HMPL		**$1,233,583.77**

It is important to note that this figure does not include an additional $2,482,079 in revenue Big Rivers received through the sale of profitable energy during the referenced time

period. As reflected in the table above, Big Rivers paid Henderson only $88,191 for the energy that generated this revenue. Big Rivers' figure further does not reflect the reality that Henderson would be forced to write off $3,500,219 in fuel and reagent which is still reflected on Henderson's books but which would be deemed to have been used to generate unwanted energy. Thus, the consequence of a ruling for Big Rivers on this issue is a net loss of $2,266,635 to Henderson, not including lost revenue for profitable energy Henderson would have called for and sold but for Big Rivers' failure to approve Henderson's proposed protocol for scheduling profitable energy sales.[18]

To resolve this ongoing dispute among Big Rivers and Henderson over the proper enforcement and interpretation of the 2017 Settlement Agreement, on July 29, 2020, Henderson filed a Petition for Declaratory Relief[19] asking the Henderson Circuit Court to confirm that the terms of the Settlement Agreement apply solely to Henderson's claim for damages associated with sales of wanted energy and not to any claim related to the generation of unwanted energy. Big Rivers successfully urged the Court to hold that action in abeyance on the grounds the Commission would determine whether Big Rivers had correctly interpreted the Settlement Agreement by excluding from its calculations the unwanted-energy revenue Big Rivers had told the Commission it intended to pass through to Henderson.

Big Rivers' post-settlement attempt to erase the well-documented distinction between wanted and unwanted energy is disingenuous and is among the key reasons the parties remain at an impasse.

[18] Direct Testimony of Christopher Heimgartner, 6:15-18.
[19] Henderson's Response to Commission DR 5.

IV. THE REDEFINING OF EXCESS HENDERSON ENERGY

1. The History of the Dispute Concerning "Wanted" Energy

In 2009, when Big Rivers emerged from a period of receivership and assorted other legal troubles to regain control of its electrical system and resume its rights and obligations under the Station Two contracts, a dispute arose concerning which party was entitled to take and sell profitable energy which exceeded the amount Henderson needed to serve its inhabitants but which fell within the amount of generating capacity Henderson had reserved and paid for under the terms of the parties' Power Sales Contract, as amended in 1998. The emergence of such a dispute was anticipated at the close of the 2009 unwind transaction and resulted in the execution of an Indemnification Agreement between Big Rivers and E.ON, as guarantor for Western Kentucky Energy (WKE). Under the terms of the Indemnification Agreement, WKE agreed to indemnify Big Rivers for any losses Big Rivers might suffer in the event Big Rivers were deprived of the ability to purchase Excess Henderson Energy from Henderson at the price of $1.50 per MWhr and sell that energy to a third party at a profit.[20] With the parties unable to resolve their dispute, Big Rivers filed an action in the Henderson Circuit Court, Civil Action No. 09-CI-00693, and successfully petitioned the Court to refer the dispute to arbitration. An arbitration panel ultimately concluded that the disputed energy both parties wanted to take and sell belonged to Henderson and that Henderson was entitled to take and schedule its energy for sale to third parties, subject to Big Rivers' first right to match any third-party offer Henderson received.[21] The Henderson Circuit Court confirmed the Arbitration Award and the Kentucky Court of Appeals affirmed the ruling. Big Rivers nonetheless continued to deny Henderson

[20] See Case No. 2016-00278, Big Rivers' response to Item 25 of Henderson DR 2-25 for a copy of the Indemnification Agreement.

[21] Arbitration Award, American Arbitration Association, Case No. 52 198 00173 10, Big Rivers' Application for a Declaratory Order, Case No. 2016-00278, Exhibit 9.

access to the disputed energy and refused to approve the scheduling protocol Henderson proposed. Because Henderson was precluded from taking and scheduling its energy, Big Rivers was able to continue taking energy which belonged to Henderson and which Henderson otherwise would have called for and sold. Big Rivers continued to take Henderson's energy at nominal cost and sell the energy at a substantial profit while Henderson absorbed the cost of the capacity used to generate that energy.

On February 12, 2016, as each party continued to contest the other's right to access and sell the disputed energy on what was then a robust power market, Henderson sought damages against Big Rivers for lost revenue, reimbursement of capacity costs, and other costs as a request for further relief pursuant to KRS 418.055. Henderson filed its Petition for an Award of Damages in the Henderson Circuit Court, Civil Action No. 09-CI-693, which is the same action in which Big Rivers had sought a determination as to which party was entitled to take and sell the profitable energy both parties wanted. This profitable energy was the only energy in dispute in Civil Action No. 09-CI-00693.

2. The "First Right" to Excess Energy

It is undisputed that the 2009 action Big Rivers filed in the Henderson Circuit Court, Civil Action No. 09-CI-00693, concerned which party had the "first right," i.e. the superior right, to take and sell to a third party excess energy which exceeded the amount Henderson needed to serve its native load but which fell within the amount of generating capacity Henderson had reserved and paid for in a given hour.[22] It is undisputed that the arbitration panel assigned to hear the dispute had one task: to interpret a section of the Power Sales Agreement, as amended, which dealt directly with the respective rights of the parties to energy both parties wanted to take and

[22] Big Rivers' Application for a Declaratory Order, Case No. 2016-00278, Post-Hearing Brief, p. 5, lines 8-9.

sell on what was then a robust power market. It is further undisputed that Henderson's subsequent claim for damages based upon the arbitration panel's award was an attempt to quantify lost profits Henderson would have realized but for Big Rivers' refusal to approve a protocol whereby Henderson could schedule its energy. This disputed "first right" to profit from the sale of surplus energy was an issue specifically reserved at the close of the 2009 unwind transaction. This "first right" to profit from the sale of surplus energy was the only issue before the Court in Big Rivers' post-unwind request for declaratory relief and the only issue considered in the resultant arbitration proceeding. The lost profits that stood to result from a ruling adverse to Big Rivers on that issue are precisely the potential losses for which E.ON, as guarantor for Western Kentucky energy (WKE), indemnified Big Rivers.

Big Rivers is aware – and was aware at the time the Commission issued its Order in Case No. 2016-00278 – that the unwanted energy then at issue before the Commission is and was separate and distinct from the wanted energy which was at issue in Civil Action No. 09-CI-00693 and which was pending before the Henderson Circuit Court at the time Big Rivers filed Commission Case No. 2016-00278.

Given that Big Rivers went to great lengths in Case No. 2016-00278 and in the ensuing appeal in the Franklin Circuit Court to articulate the distinction between wanted and unwanted energy, it is baffling for Big Rivers to claim now that the distinction is an artificial distinction created by Henderson. For example, Big Rivers told the Commission in its Post-Hearing Brief in Case No. 2016-00278:

> [T]he only variable costs at issue are those associated with EHE that is not sold by Henderson and that Big Rivers elects not to take. In other words, whether energy that Henderson sells to third parties is considered EHE is not relevant to the issue before the Commission, which is whether the Station Two Contracts require Big Rivers to pay the variable costs of, and to pay Henderson for,

> the ***unwanted*** EHE (i.e., the energy within Henderson's capacity reservation that is not used to meet the needs of Henderson and its inhabitants, not sold by Henderson to third parties, and not taken by Big Rivers pursuant to its contractual option to purchase EHE). Big Rivers' Post-Hearing Brief, Case No. 2016-00278, p. 13, lines 9-16.

Big Rivers continues to complain that Henderson required Big Rivers to generate unwanted energy and apparently concludes that Henderson should therefore suffer the penalty of being forced not only to pay the variable costs of producing unwanted energy, but also to forgo the corresponding sales revenue that would otherwise offset those costs. Nothing in the Station Two contracts or elsewhere supports the notion that one party should bear the cost of producing certain energy while the other reaps the revenue from the sale of that very same energy.

On December 15, 2017, the parties entered into a Settlement Agreement & Release in which Henderson accepted a payment for lost profits associated with the sale of profitable energy and released all past, present, and future claims concerning the "Disputed Energy" as defined in the Settlement Agreement, which included specific reference to the "Arbitration Proceeding" and the "Damages Suit" filed in Civil Action No.09-CI-00693.

3. The Emergence of "Unwanted" Energy

As the parties litigated their rights and obligations with respect to the disputed energy both parties wanted, market forces created a downturn in energy prices and gave rise to a type of energy never contemplated in the Power Sales Contract or in Civil Action No. 09-CI-00693: unprofitable energy which was unwanted by either party to the contracts.

On May 25, 2016, with the Henderson Circuit Court suit still pending, Big Rivers notified Henderson that Big Rivers would cease to take and sell Henderson's surplus energy

unless that energy happened to be profitable.[23] Rather, Big Rivers would implement a new practice in which Big Rivers would sell unprofitable and unwanted energy into the market on Henderson's behalf and assign both variable production costs and any revenue associated with the sale of that energy to Henderson's account. The practice change announced in the May 25, 2016, notice gave rise to a new and distinct dispute concerning responsibility for costs associated with this new and distinct category of unwanted energy. On July 29, 2016, Big Rivers filed an application with the Commission asking the Commission to declare Big Rivers not responsible for the variable costs of producing unwanted energy and to assign those costs and corresponding revenue to Henderson. In accordance with the representation made to Henderson in the May 25, 2016, notice, Big Rivers represented to the Commission throughout the proceeding that Big Rivers intended to sell the unwanted energy on Henderson's behalf, assign the variable production costs to Henderson, and pass the sales revenue through to Henderson. For example:

> "Any EHE that Big Rivers elects not to take still belongs to Henderson and is taken by Henderson. Big Rivers treats the EHE taken by Henderson the same as the energy from Station Two that Henderson takes for its native load. All of that energy is sold into MISO, and Big Rivers allocates both the revenue from that sale and the variable costs associated with the energy taken by Henderson to Henderson." [24]

Big Rivers repeatedly insisted throughout the 2016 filing that unwanted energy was the only energy at issue. For example:

> "There is a dispute in this case over which party should be required to bear the variable costs of the unwanted EHE." [25]

[23] Exhibit Heimgartner-2.
[24] Case No. 2016-00278, Big Rivers' Post-Hearing Reply Brief, 22:1-5.
[25] Case No. 2016-00278, Big Rivers' Post-Hearing Reply Brief, p. 9, lines 14-15.

See also:

> "[T]he only variable costs at issue are those associated with EHE that is not sold by Henderson and that Big Rivers elects not to take."[26]

In Henderson's appeal of the Commission's order issued in the 2016 case, which is currently pending and stayed in the Franklin Circuit Court, Big Rivers argued that the Court should hold the appeal in abeyance on the grounds the Commission ruling in the instant case would address all issues pending before that Court. Again, Big Rivers was specific as to the category of energy which had been before the Commission and which was now awaiting judicial review:

> "Big Rivers' Application has presented to the Commission for resolution of the following disputes between the parties that arise from the Commission-approved Power Sales Contract, as amended, related to unwanted EHE:
>
> - Plaintiffs' ultimate responsibility for the variable costs associated with the production of unwanted EHE and the correct amount of those variable costs;
>
> - The appropriate amount of MISO revenues associated with the sale of unwanted EHE and who should receive those revenues;
>
> - Which party's coal and lime reagent were used to generate unwanted EHE;
>
> - Which party owns the coal and lime currently located at the Station Two coal pile; and
>
> - The appropriate capacity reservation for Plaintiffs for fiscal year 2018-2019, which impacts the amount of unwanted EHE generated during that fiscal year and proper allocation of costs and revenues for that year." Defendant Big Rivers Electric Corporation's Motion to Stay Proceedings on Counterclaims, Franklin Circuit

[26] Case No. 2016-00278, Big Rivers' Post-Hearing Brief, p. 13, lines 9-11.

> Court, Civil Action No.18-CI-00078, p. 2. (Emphasis added).

Nowhere in Case No. 2016-00278 did Big Rivers reference the damages suit concerning profitable energy, which was simultaneously unfolding in the Henderson Circuit Court.

4. Resolution of the "Damages Suit"

On December 15, 2017, with the Commission's ruling on unwanted energy still pending, the parties resolved Henderson's claim for damages associated with the wanted energy at issue in the Henderson Circuit Court, Civil Action No. 09-CI-00693.[27] In exchange for Henderson's release of its claim for lost profits associated with the sale of profitable energy, Big Rivers paid Henderson $6.25 million from an indemnification payment of "a little north of $10 million" Big Rivers had received from E.ON under the terms of the 2009 Indemnification Agreement.[28]In negotiating that settlement, the parties acknowledged both verbally and in writing that the agreement resolved only the claim then pending before the Court in Civil Action No. 09-CI-00693, which was Henderson's claim for damages associated with the profitable energy both parties wanted and which had been generated since Big Rivers' 2009 filing, and that the settlement "would not have any impact on the proceeding still pending before the Commission."[29] Indeed, this profitable and wanted energy is the only energy that could have been at issue in a claim for damages associated with lost profits. For Big Rivers to suggest that the damages claim was in any way related to unprofitable and unwanted energy that could only be sold at a loss is absurd.

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[27] Exhibit Berry-2.
[28] Hearing testimony of Robert W. Berry, Oct. 22, 2020 at 9:34:33.
[29] Exhibit Heimgartner-5.

Shortly after the execution of the Settlement Agreement on December 15, 2017, specific to the pending civil action, the parties filed an Agreed Order with the Henderson Circuit Court dismissing Civil Action No. 09-CI-00693 as settled. Importantly, Big Rivers did not withdraw its application pending before the Commission and did not take any other steps to notify the Commission that any part of the parties' dispute over unwanted energy had been resolved. If Big Rivers believed the language of the Settlement Agreement was so broad as to encompass unwanted energy, then Big Rivers would have been obligated to tell the Commission as much. Also in that event, Big Rivers' remedy would be to enforce the Settlement Agreement in the Henderson Circuit Court.

On January 5, 2018, the Commission entered an Order finding Big Rivers not responsible for the variable costs of producing unwanted energy.[30] Subsequent to the entry of that order, Big Rivers began to take the position that Henderson owed Big Rivers for the variable costs of producing unwanted energy, but that Henderson had waived its right to receive the corresponding revenue as part of the agreement to settle the damages claim. Big Rivers demanded that Henderson pay the variable costs of producing unwanted energy, but said that Big Rivers now intended to retain the revenue.[31] This position is contrary to the position Big Rivers took before the Commission and contradicts the intent of the parties to the Settlement Agreement.

The Settlement Agreement unambiguously resolves only the damages claim then pending before the Henderson Circuit Court in Civil Action No. 09-CI-00693 and reflects the mutual understanding of the parties concerning the limited scope of the agreement.

[30] Exhibit Heimgartner-3.
[31] Exhibit Heimgartner-4.

Henderson has appealed the Commission's order and has not accepted responsibility for the variable costs of producing unwanted energy generated between June 1, 2016 (the date Big Rivers notified Henderson of its practice going forward with respect to unwanted energy) and January 4, 2018 (the date of the settlement payment). That Henderson rejected Big Rivers' checks for unwanted-energy revenue was consistent with Henderson's position contesting liability for the cost of generating unwanted energy. It does not diminish Henderson's right to receive revenue in the event Henderson accepts or is assigned responsibility for the production costs. Any scenario in which Henderson accepts or is assigned such responsibility must provide for Henderson to receive the corresponding revenue as an offset to variable costs. The Station Two contracts and the long course of dealing between the parties mandate that the party who took certain energy also received the revenue from the sale of that energy.

Contrary to the representations Big Rivers made to the Commission is the 2016 proceeding, Big Rivers now takes the position that all Excess Henderson Energy is one and the same and that the distinction between wanted and unwanted energy is an artificial distinction created by Henderson. As previously pointed out, the record in Case No. 2016-00278 demonstrates otherwise. Big Rivers' post-settlement attempt to redefine Excess Henderson Energy as the mere difference between Henderson's native load and the amount of its capacity reservation is inconsistent with the definition contained in the Arbitration Award and is inconsistent with the Commission's order dated January 5, 2018, which defined Excess Henderson Energy as "the difference between Henderson's reserved capacity under the Power Sales Contract … and the amount of capacity needed by Henderson to serve its native load and for sale by Henderson to third-parties." [32] Thus, the energy at issue before the Commission in Case No. 2016-00278 was separate and distinct from that energy at issue in the Henderson

[32] Order, p. 13.

Circuit Court, Civil Action No. 09-CI-00693. By definition, the energy at issue before the Commission was that energy which Henderson did not need to serve its native load and which Henderson did not schedule for sale to third parties and which Big Rivers also declined to take. In other words, the energy at issue before the Commission was precisely what Big Rivers had said it was: unwanted energy.

5. The Settlement Agreement is Unambiguous.

The Settlement Agreement defines "Disputed Energy" by way of reference to two other proceedings: the "Arbitration Proceeding" that flowed from the action Big Rivers filed in the Henderson Circuit Court, Civil Action No. 09-CI-00693, and the "Damages Suit" that Henderson filed in the same action pursuant to KRS 418.055 seeking monetary damages for lost profits associated with excess energy sales an arbitration panel had decided Henderson was entitled to make, but which Big Rivers had made instead.

The Settlement Agreement provides in Paragraph 4 under the heading "Release" as follows:

> 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, judgments, 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 (collectively referred to as the "Released Claims").

The "Arbitration Proceeding," styled Big Rivers Electric Corporation v. City of Henderson, Kentucky, and City of Henderson Utility Commission d/b/a Henderson Municipal Power & Light, American Arbitration Association Case No. 52 198 00173 10, and defined specifically in the Settlement Agreement as the "Arbitration Proceeding," arose directly from Big Rivers' petition seeking a declaration of Big Rivers' rights with respect to profitable excess energy both parties wanted to take and sell. The "Arbitration Proceeding" resulted in an Award[33] that quoted directly from Big Rivers' demand for arbitration in describing the nature of the controversy:

> "There is an actual controversy among Big Rivers and Henderson/HMPL regarding whether (a) Henderson/HMPL can sell Excess Henderson energy directly to a third-party without first offering the energy to Big Rivers and (b) Henderson/HMPL is entitled to offer the Excess Henderson energy to Big Rivers at a price higher than the explicit contractual price of $1.50MWh plus certain variable production costs."

With the issue placed squarely in context, the arbitration panel determined that Henderson had the first right to sell excess energy, subject to Big Rivers' first right to match any third-party offer Henderson received. The "Damages Suit" is defined to refer to Henderson's petition for damages associated with lost profits, which was filed as a request for further relief in

[33] Big Rivers' Application for a Declaratory Order, Case No. 2016-00278, Exhibit 9.

Civil Action No. 09-CI-00693 following the issuance of the Arbitration Award. The arbitration panel's definition of Excess Henderson Energy is consistent with the Commission's definition of Excess Henderson Energy, which was stated in the Commission's Order dated January 5, 2018:

> Excess Henderson Energy is the difference between Henderson's reserved capacity under the Power Sales Contract, or 115 as of 2016, and the amount of capacity needed by Henderson to serve its native load and for sale by third parties. PSC Order, January 5, 2018, p. 13.

Big Rivers has since attempted to truncate the definition of Excess Henderson Energy contained in both the Commission's order and the Arbitration Award to exclude the clause "and for sale by third parties."[34] However, Big Rivers is unable to demonstrate that the definition of Excess Henderson Energy ever changed after the arbitration panel and the Commission defined the term, other than through the unilateral and arbitrary actions of Big Rivers.

After going to great lengths to distinguish this new type of "unwanted" energy from the profitable energy both parties historically had wanted to take and sell, Big Rivers now claims the distinction was an artificial distinction created by Henderson, that all Excess Henderson Energy is one and the same, and that the language of the Settlement Agreement is broad enough to encompass claims for both profitable/wanted and unprofitable/unwanted energy. Big Rivers offers nothing to support its position, apart from an inadmissible account of an eleventh-hour exchange at the negotiating table in which Henderson purportedly agreed to waive its claim for revenue associated with the sale of unwanted energy in addition to its claim for lost profits, even though the latter claim was the only claim before the Court in Civil Action No. 09-CI-00693. This is not the case. Not only does the language of the Settlement Agreement state in clear and unambiguous terms the nature of the claim being released, but the parties confirmed as much in numerous pre-settlement communications.

[34] Hearing testimony of Robert W. Berry, 9:37:27. See also Berry Rebuttal Testimony, 27:16-19

For example, counsel for Big Rivers confirmed in an email dated November 10, 2017[35], that the proposed agreement resolving Civil Action No. 09-CI-00693 was unrelated to the matter then pending before the Commission in Case No. 2016-00278 ("Big Rivers' position is that nothing in this settlement agreement affects or has anything to do with the PSC case.").

Big Rivers is unable to demonstrate that the 2017 release applied to any claim other than the claim specifically before the Court in Civil Action No. 09-CI-00693. To achieve its purpose, then, Big Rivers must change the definition of Excess Henderson Energy contained in the Arbitration Award and in Henderson's damages suit. This Big Rivers cannot do.

Big Rivers apparently would have the Commission believe that Henderson simply waived its claim to unwanted-energy revenue for no additional consideration and at a time when the dispute concerning responsibility for the variable cost of producing unwanted energy was still pending before the Commission. Big Rivers' new and self-serving definition of "Disputed Energy" is contradicted by the Settlement Agreement, the pleadings filed in Civil Action No. 09-CI-00693, the Award issued in the "Arbitration Proceeding," and the Commission's Order issued in PSC Case No. 2016-00278. Indeed, Big Rivers' new definition of "Disputed Energy" is contradicted by Big Rivers' numerous filings in PSC Case No. 2016-00278 and in the appeal currently pending and stayed in the Franklin Circuit Court, a case in which the Commission is a party and of which the Commission can take judicial notice.

For example:

> **Q. Which energy production costs does Big Rivers contend, in this proceeding, that it is not or should not be required to pay?**
> A. Big Rivers seeks a declaratory order in this proceeding that it is not responsible for the variable production costs for Excess Henderson Energy, as described and calculated by Big Rivers in this proceeding, generated by Station Two that neither Big Rivers nor Henderson wants." (Application of Big Rivers Electric Corp. for a Declaratory Order, Case No. 2016-00278, Rebuttal Testimony of Robert W. Berry, p. 5, lines 15-20).

[35] Exhibit Heimgartner-5.

> "Henderson acknowledges that it is responsible for the variable costs of energy it sells to a third party. It is the responsibility for the variable costs of producing the remaining Excess Henderson Energy, which I refer to as the 'unwanted Excess Henderson Energy,' that is the subject of this proceeding." (Application of Big Rivers Electric Corp. for a Declaratory Order, Case No. 2016-00278, Rebuttal Testimony of Robert W. Berry, p.7, lines 15-18).

To accept Big Rivers' argument, the Commission would have to accept a scenario in which the Commission decides responsibility for production costs while a Court adjudicates the right to receive sales revenue from the very same energy. The Commission must further believe each of the parties assumed the untenable risk that it might be held liable for costs in one forum and deprived of the corresponding sales revenue in the other. Costs and revenue are inextricably intertwined. The Commission's order in Case No. 2016-00278 was premised on Big Rivers' testimony that Big Rivers intended to sell unwanted energy on Henderson's behalf and remit to Henderson the corresponding sales revenue.

Nothing in the law permits a Court and an administrative agency to contemporaneously and independently decide opposite sides of the same coin. The only set of facts that comports with law and logic and the evidence of record is that the actions simultaneously unfolding in the Henderson Circuit Court and before the Commission involved two distinct types of energy.

Big Rivers would reap a substantial windfall and Henderson would be forced to sustain the losses associated with the generation of unwanted energy without the benefit of the corresponding revenue as an offset to costs. Henderson would also be forced to write off some $3.5 million in coal and lime which belonged to Henderson and which Big Rivers arbitrarily and without Henderson's consent or knowledge used to generate unwanted energy. The Commission is tasked with ensuring that utility rates are fair, just, and reasonable. KRS 278.030. Nothing in

KRS Chapter 278 or elsewhere authorizes the Commission to shore up utility revenues at the expense of a municipality and its ratepayers.

V. SEVERANCE

Section 14 of the now-terminated Construction and Operation Agreement[36], as amended, described the process by the Station Two operating budget was approved each year. Under Section 14.1, Big Rivers was required to submit to Henderson a proposed operating budget, along with supporting documentation for Henderson's review and evaluation. Section 14.2 rendered the proposed budget subject to Henderson approval, at which time Henderson would adopt the budget. Pursuant to Section 14.3, an operating budget adopted by Henderson and approved by Big Rivers would become the basis for payments from Henderson to Big Rivers during that fiscal year for the operation and maintenance of the plant. It was only through this process that Big Rivers could appropriately charge Henderson for Henderson's share of operating and maintenance expenses. Big Rivers did not include severance costs in the proposed budget for fiscal 2018-2019 presented for Henderson's review. The operating plan approved and adopted by Henderson and approved by Big Rivers made no provision for severance costs, nor was any definition contained the Station Two contracts so broad as to encompass severance packages for employees who, as late as November 2018, do not appear to have expressed any intent to leave Big Rivers' employment prior to the Station Two shutdown date of January 31, 2019.

After Station Two closed, Big Rivers advised Henderson of its decision to offer severance packages to some Big Rivers' employees and asked Henderson to share in the cost. Henderson verbally declined the invitation on numerous occasions. Nevertheless, Big Rivers

[36] Big Rivers' Application, Exhibit 9.

unilaterally added Henderson's purported share of severance costs to the month-end statement of costs for December 2018 as required under Section 16.1 and to the "Annual Settlement," a summary of charges actually incurred during fiscal 2018-2019.[37] Additionally, like many of the other expenses Big Rivers asks the Commission to assign to Henderson, the calculation of Henderson's purported share was based upon a false capacity reservation of 125MW rather than 115MW Henderson actually reserved in accordance with its contractual rights. Big Rivers added severance costs under the "operational costs" umbrella without explanation, without supporting documentation, and without Henderson's knowledge or approval. Section 16.1 provides:

> On or before the twentieth day of each calendar month of the Contract Year Big Rivers will present to City a statement of payment due covering the operation and maintenance of City's Station Two for the Monthly Billing Period just ended, such statement showing in detail the costs and charge included therein, with proper vouchers substantiating such charges. Such statements, when approved by the City, will become the basis for actual charges by Big Rivers to City for the operation and maintenance of City's Station Two for such Monthly Billing Period and shall be the basis for adjustments, if any, as provided in Section 16.6 hereof. (Emphasis added)

The requisite billing statement for December 2018 was not accompanied by any vouchers, proper or otherwise, substantiating the sharp and unexplained increase in operating and maintenance expenses. Henderson did not approve the payment of any severance costs during the contractually prescribed budgeting process and discovered the surreptitious addition of severance costs only upon investigating the discrepancy in budgeted and "actual" operating and maintenance costs. It should be noted that this inquiry came at a cost to Henderson, as Big Rivers charged Henderson for the requisite data. The billing statements provide no basis for payment of these costs to Big Rivers, as only an approved budget can be the basis of payments. Henderson is entitled to a credit in the amount of the severance costs.

[37] Big Rivers' response to Henderson DR 1-22.

Big Rivers asserts that Big Rivers agreed to operate Station Two an additional 13 months for the sole benefit of Henderson. According to Big Rivers, it was Big Rivers' belief that without a severance package it would not be able to operate and maintain Station Two for those additional 13 months.[38] Big Rivers further claims that it was necessary to over a severance plan in order to maintain the safe and reliable operations of Station Two and to ensure that a sufficient number of employees continued working until such time that the units were retired.[39] However, Big Rivers' Board of Directors did not approve the severance benefits until October 31, 2018.[40] And it was not until November 6, 2019 that Big Rivers notified affected employees that severance packages were available.[41] Big Rivers fails to explain how severance benefits could have incentivized employees to stay when those employees did not even know the benefits existed. Big Rivers offers nothing to support the notion that any employees assigned to Station Two resigned or threatened to resign between the date the contracts were deemed terminated on May 1, 2018, and the date Big Rivers notified employees that severance packages would be offered. **Big Rivers has failed to demonstrate that severance costs were reasonable labor costs necessitated by the cessation of operations at Station Two**. As such, Henderson is not obligated to share in these costs.

Big Rivers has sometimes characterized severance costs as "labor costs" subject to Section 13.8 of the Power Sales Contract.[42] Section 13.8(b) addresses the allocation of costs related to "operating labor" and requires that those costs be allocated between Station Two and Big Rivers' now-retired Reid generating station on the basis of each generating station's capacity

[38] It is true that Big Rivers offered to continue operating Station Two through May 31, 2019, conditioned upon Henderson's acceptance of the offer, and obtained Commission approval to do so. Big Rivers ultimately operated Station Two for five months between the date the Commission confirmed the Station Two contracts had terminated (August 29, 2018) and the date the plant ceased operating (February 1, 2019).
[39] Big Rivers' Response to Henderson DR 2-23.
[40] Big Rivers' Response to Commission DR 1-9b.
[41] Big Rivers' Response to Commission DR 2-5.
[42] Direct Testimony of Robert W. Berry, p. 30.

as related to their combined total capacity. First, the term "operating labor" cannot be stretched to include any cost Big Rivers cares to allocate to Henderson, including severance costs. Secondly, there is nothing to indicate that Big Rivers took into account the generating capacity of its Reid plant in calculating severance costs.

All individuals who provided labor for Station Two were employees of Big Rivers, subject to the sole discretion of Big Rivers in establishing compensation, benefits, and all other conditions of employment. Henderson was not involved in establishing any Station Two labor costs. Henderson's involvement was limited to paying its proportionate share of costs in accordance with its obligations under the terms of the Station Two contracts. Big Rivers did not consult Henderson when considering employee compensation and benefits. Rather, Big Rivers submitted the costs to Henderson for approval as part of the annual budget-review process. Henderson has never knowingly approved any Station Two expense related to severance benefits for employees of Big Rivers.

VI. FISCAL 2018-2019 CAPACITY RESERVATION

Section 3.3 of the Power Sales Contract, as amended in 1993[43], provided for Henderson to reserve capacity from Station Two based upon a rolling five-year projection of the city's needs. Station Two capacity surplus to the city's needs was then allocated to Big Rivers, which had the obligation to take and pay for the capacity allocated to Big Rivers. Henderson had the ability under the terms of the contracts to raise or lower its capacity reservation by a maximum 5 MW for any given fiscal year. In accordance with the terms of the contracts, Henderson always provided the requisite written notice to Big Rivers concerning the amount of capacity Henderson intended to reserve for a given fiscal year and the amount that would be

[43] Big Rivers' Application, Exhibit 8.

allocated to Big Rivers. Section 13.8 of the Power Plant Construction & Operation Agreement provided the parties would share operating and maintenance costs in accordance with the capacity split.

On May 10, 2018, Henderson provided written notice to Big Rivers that Henderson's capacity reservation for Fiscal Year 2018-2019 would be 115 MW[44]. Henderson's reservation of 115 MW translates to 36.86 percent of the capacity available from Station Two. Accordingly, Henderson would be responsible for 36.86 percent of operating and maintenance costs incurred during that fiscal year. Without Henderson's approval or acceptance and absent any contractual right to do so, Big Rivers unilaterally calculated the amounts due in settlement of the Fiscal Year 2018-2019 budget on the false assumption that Henderson had reserved 125 MW of capacity rather than the 115 MW Henderson actually reserved.[45] As a result, Big Rivers' calculations have Henderson responsible for 40.06 percent of operating and maintenance expenses incurred that fiscal year as opposed to the 36.86 percent associated with Henderson's actual reservation. Big Rivers applied this flawed calculation to all Station Two expenses for fiscal 2018-2019, including those expenses which remain in dispute and those Henderson previously approved at the correct capacity reservation.[46]

Big Rivers' assertion that Henderson's capacity reservation for fiscal 2018-2019 was deficient for failure to comply with MISO rules is incorrect. Prior to February 1, 2019, Henderson had neither any agreement with MISO, nor any generation, nor load, nor transmission facilities registered in MISO. Henderson therefore was not subject to the MISO Planning Reserve Margin Requirement. Rather, Henderson's obligation was to maintain sufficient operating reserves to meet NERC's default recommendation of fifteen (15) percent applicable to

[44] Direct Testimony of Barbara Moll, p. 7.
[45] Direct Testimony of Barbara Moll, p. 8.
[46] Id.

predominantly thermal systems in the absence of a different requirement imposed by a regional authority such as MISO. As reflected in its 2010 Integrated Resource Plan, Case No. 2010-00443, this is the same methodology Big Rivers used to ensure adequate operating reserves prior to joining MISO.[47]

Henderson reserved 115 MW of capacity from Station Two for fiscal 2018-2019 in accordance with its rights under the Station Two contracts. Big Rivers calculated the relative shares of decommissioning and other expenses on the false premise that Henderson should have reserved 125 MW for the MISO 2018-2019 Planning Year. Pursuant to Section 3.3 of the Power Sales Contract, as amended, Henderson had the sole authority to determine its annual capacity reservation from Station Two. Neither MISO nor Big Rivers had authority to require Henderson to deviate from the NERC reliability guidelines and requirements.

Henderson's reservation of 115MW capacity for fiscal 2018-2019 met the NERC reserve margin, which was the only target reserve margin applicable to Henderson prior to the date Henderson became a member of MISO. It was not until March 21, 2018, that Big Rivers' notified Henderson that Henderson needed to meet MISO capacity requirements. Prior to that date, Big Rivers had not notified Henderson that Henderson was subject to MISO's capacity requirements or that Henderson's election of Station Two capacity reservation was subject to MISO's capacity requirements or resource capacity accreditation process. On May 14, 2018, Big Rivers notified Henderson that Henderson had reserved insufficient capacity from Station Two and that Henderson needed to increase its capacity reservation by the equivalent of eight (8) Zonal Resource Credits (ZRCs) in MISO.[48] While Henderson maintained and continues to maintain that Henderson was not subject to MISO planning reserve requirements, Henderson

[47] 2010 Integrated Resource Plan of Big Rivers, Case No. 2010-00443, Big Rivers' Response to Commission DR 2-3.

[48] Direct Testimony of Brad Bickett, p. 14.

nonetheless purchased eight (8) credits from a third party, as Henderson was entitled to do under MISO rules, assuming MISO rules applied to Henderson, and had the credits transferred to Big Rivers via the MISO capacity tracking tool,[49] but Big Rivers never accepted those ZRC capacity credits.[50] It was known at the time of purchase that no price separation existed between the zone where the capacity credits were purchased and Big Rivers' zone. Therefore, according to MISO's capacity accreditation rules, the ZRC capacity credits were sufficient to satisfy Big Rivers' claim that Henderson's was capacity deficient.[51] Contrary to Big Rivers' assertion,[52] Henderson did not artificially reduce its capacity obligation through market purchases of ZRCs. Henderson simply purchased ZRCs to satisfy what Big Rivers claimed to be a capacity deficiency in accordance with MISO resource adequacy rules. Henderson maintained and continues to maintain that any alleged capacity deficiency and any objection to the purchase of the ZRCs was a product of Big Rivers' desire for Henderson to follow MISO rules for calculation of capacity reserves, but not for acquiring capacity to meet the reserve obligation. As explained in greater detail in our discussion of the MISO fee dispute, if Big Rivers had registered Henderson's share of the generating units, Henderson's load, and/or Henderson's transmission assets, then Henderson would have received revenue for its power sold into the MISO market and some $1.9 million per year for MISO's use of its transmission facilities.[53]

Henderson's purchase of ZRCs from a third party did not result in any additional costs to Big Rivers. Big Rivers' claim that Henderson was capacity deficient and was not entitled to purchase ZRCs in a different zone from Big Rivers' zone is nothing more than evidence of Big

[49] Exhibit Bickett-8.
[50] Direct Testimony of Brad Bickett, p. 14.
[51] Id. at p. 15.
[52] Big Rivers' Post-Hearing Brief, p. 52.
[53] Direct Testimony of Brad Bickett, p. 16.

Rivers' attempt to shift a greater share of Station Two capacity onto Henderson, thereby increasing Henderson's share of decommissioning costs.

Henderson did not consent to the registration of Henderson's assets in MISO.[54] Big Rivers did not act as Henderson's market participant in MISO, as Henderson did not consent for Big Rivers to do so and did not receive any revenue associated with the registration of Henderson's generation or load, or use of Henderson's transmission assets.[55] Nothing in the Station Two contracts or elsewhere renders Henderson subject to MISO planning reserve requirements, whereas Big Rivers is attempting to foist all of the associated MISO capacity obligations onto Henderson while denying Henderson any of the capacity and energy benefits associated with MISO registration. Calculated on the basis of Henderson's true capacity reservation of 115MW, the parties' relative shares of responsibility for any and all legitimate Station Two costs based on the historic capacity split is 77.39 percent and 22.61 percent for Big Rivers and Henderson respectively.

VII. DISPUTED OPERATING EXPENSES

Section 14.1 of the terminated Construction and Operation Agreement required Big Rivers to prepare a proposed operating budget each year for Henderson's review and evaluation. Upon approval and adoption by the Henderson Utility Commission and approval by Big Rivers, the budget would become the basis for payments from Henderson to Big Rivers during that fiscal year for Station Two fixed operational costs, i.e. "capacity costs." At the end of each fiscal year, the parties reconciled the monthly payments Henderson had made to Big Rivers in accordance with the most recently approved budget against the actual fixed costs Big Rivers said it had incurred. If Big Rivers incurred actual charges in excess of the capacity costs Henderson had

[54] Henderson response to BREC DR 1-17; See also Direct Testimony of Brad Bickett, p. 5.
[55] Henderson response to BREC DR 1-17.

paid under the approved budget, then Henderson was obligated to pay Big Rivers the additional sum Big Rivers was entitled to receive. If Henderson's capacity payment exceeded the amount of charges actually incurred, Big Rivers was obligated to either credit the difference against Henderson's next monthly payment or pay the difference directly to Henderson.

It is undisputed that Big Rivers owes Henderson a refund in the sum of $1,649,923 as a result of the 2017-2018 budget settlement process.[56] Under Big Rivers' original calculations, the refund due from Big Rivers to Henderson as a result of the 2018-2019 budget settlement process is $672,056.[57] Otherwise, the parties disagree concerning the sums due to resolve their remaining financial disputes. First, the calculations are fundamentally flawed as a result of Big Rivers' attempt to assign a higher capacity reservation to Henderson than Henderson reserved under the terms of the contracts for fiscal 2018-2019. As explained previously, Henderson reserved 115MW of capacity from Station Two for fiscal 2018-2019 in accordance with its contractual right to do so. Big Rivers arbitrarily raised Henderson's capacity reservation to 125MW without a contractual basis to do so and in an apparent attempt to shift to Henderson a greater share of Station Two capacity and consequently a greater share of those costs which are apportioned according to the Station Two capacity split. Under the terms of the Station Two contracts, the correct capacity reservation renders Henderson liable for 36.86 percent of any expenses which are shared according to the capacity split averaged over the life of the plant. If Big Rivers is permitted to unilaterally assign a higher capacity reservation to Henderson, then Henderson would be responsible for 40.06 percent.

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[56] Exhibit Moll-3; Updated Exhibit Smith-5.

[57] In Big Rivers' Application, Exhibit Smith-4 to the direct testimony of Paul G. Smith, the amount of the 2018-2019 true-up refund is depicted as $649,850. Updated Exhibit Smith-4 attached to Mr. Smith's rebuttal testimony revised that amount to $793,170, reflecting Big Rivers' issuance of a credit to Henderson for the difference between projected and actual severance costs. For calculation purposes, Henderson has used the original $672,056 as the 2018-2019 true-up amount and listed all severance refunds separately.

Additionally, Big Rivers' calculation of the budget-reconciliation figure does not include a refund for certain expenses that were improperly charged to Henderson and deducted from Henderson's annual capacity payment. Specifically, the figure does not include reimbursement due to Henderson for i) a share of severance costs incurred without Henderson's knowledge or approval; ii) MISO fees far exceeding the fees Henderson was obligated to pay and for which Henderson received a benefit; and iii) a vertical expansion of Big Rivers' Green Landfill which was not needed to accommodate Henderson's share of waste from Station Two and the contract for which was awarded without the use of municipal bidding requirements in violation of the Station Two contracts.[58]

Big Rivers also seeks to recover interest on the sums purportedly due from Henderson,[59] even though there is no reasonable basis for doing so. Specifically, Big Rivers seeks to recover interest calculated at the rate of 6 percent on what Big Rivers claims to be past-due sums dating from 2010 through 2019.[60] There is no support in the now-terminated contracts for the argument that interest should accrue at all, much less at the rate Big Rivers suggests. Even if the contracts were not expired, which they are, they contain no provision supporting Big Rivers' argument with respect to interest. Section 16 of the former Construction & Operation Agreement addresses the method and timing for Henderson payments to Big Rivers for operating and maintenance expenses as reflected in properly submitted and documented monthly statements. Section 16.3 provides for the addition of a 1-percent penalty in the event actual operating and maintenance charges are not paid when due. Specifically, Section 16.3 provides:

> If any such payment or portion thereof is not paid when due as herein provided, a penalty in the amount of one per cent (1%) of the unpaid amount may, at the option of Big Rivers, be added

[58] Direct Testimony of Barbara Moll, pp. 7-10.
[59] Big Rivers' Post-Hearing Brief, p. 76; See also Updated Exhibit Smith-1.
[60] Id. at 77.

> thereto at the commencement of each thirty (30) day period thereafter, and due and payable therewith. Provided however that in the case of a bona fide dispute as to the amount of any such monthly payment, then the delayed payment charge will be applicable only to that unpaid portion thereof which is not reasonably in dispute.

To the extent Big Rivers relies on this expired contractual provision as a basis for collecting disputed amounts from Henderson in a multitude of categories[61], that reliance is misplaced. The provision does not provide for interest all, but rather a "penalty" on past-due operating and maintenance expenses. Additionally, the fact that the amounts owed between the parties is reasonably in dispute renders the provision inapplicable. There is no basis for the addition of interest, calculated under any formula, to any sums Henderson is ultimately deemed to owe Big Rivers. The Commission should disregard Big Rivers' request to collect any interest from Henderson.

The Accounting Summary below reflects the true amounts Henderson has already either paid or tendered[62] to Big Rivers to resolve the parties' outstanding financial disputes. Henderson's figures reflect the amounts actually due under a proper calculation using Henderson's capacity reservation of 115MW for fiscal 2018-2019.

[61] Direct Testimony of Paul G. Smith, 18:12-24.

[62] Henderson tendered checks to Big Rivers in the sums listed for Henderson's share of auxiliary power costs incurred at Station Two for the period from June 2018 and January 2019. However, Big Rivers has returned those checks. Big Rivers deducted all other listed amounts from Henderson's annual capacity payment.

HMPL Accounting Summary Amounts Due (To)/From BREC Other Operating Costs Fiscal Years 2018 & 2019		
Annual Settlement		
	Budget True-up 2017-2018	$1,649,923
	Budget True-up 2018-2019	$ 672,056
	Severance Refund	$1,201,510
	Undisputed Refund for Severance Adjustment (Estimated v. Actual Cost Difference)	$ 143,400[1]
	MISO Fees Refund for Fiscal Years 2018 & 2019	$ 478,829
	Vertical Wall Refund 2015-2016 & 2016-2017	$1,081,221
	Vertical Wall Refund 2017-2018 & 2018-2019	$ 674,353
	Refund of overcharges attributable solely to incorrect capacity split	$ 454,090
Auxiliary Power	June-October 2018	($10,334)
	November 2018	($16,455)
	December 2018	($12,711)
	January 2019	($25,066)
MISO Fees	Fees due from HMPL to BREC for LBA services 2010-2016	($38,512)
TOTAL Credit Due HMPL for Amounts Paid/Tendered		**$6,252,304**

[1]Big Rivers' response to Commission DR 1-5.

VIII. MISO FEES

Henderson does not contest responsibility for legitimate MISO fees which were incurred by Big Rivers and for which Henderson received a service or corresponding benefit. For this reason, Henderson is responsible for only a fraction of the $1,422,762 in MISO load and transmission fees Big Rivers wants Henderson to pay dating back to when Big Rivers registered the Station Two units in the MISO market over Henderson's objection and with the knowledge

Henderson was negotiating with another potential market participant to represent Henderson's share of Station Two in MISO. Henderson's review of itemized invoices received from Big Rivers for the time period beginning in December 2010 and ending on May 31, 2016, indicates that the amount for which Henderson is responsible, and which Henderson agrees to pay, is $38,512. This figure represents the costs which were incurred by Big Rivers in its role as a Local Balancing Authority (LBA) during that time period and which Big Rivers is entitled to recover pursuant to the Schedule 24 MISO tariff. Following is a summary of the remaining charges Big Rivers wants Henderson to pay and the reasons these charges are inapplicable to Henderson:[63]

1. $357,908.62 is the amount calculated by Big Rivers for operation reserve costs allocated to Henderson load for regulation, spinning, and supplemental reserves. Henderson disputes these charges because Henderson did not require these operating reserves for its load. Additionally, Henderson never received any MISO revenue for operating reserves provided by Station Two.

2. $753,538.92 is the amount calculated by Big Rivers and allocated to Henderson load for network and/or point-to-point transmission service under the Schedule 23 tariff. Henderson disputes these charges because Henderson did not require transmission service and Henderson was not a customer of Big Rivers. Additionally, Henderson never received any MISO revenue for use of its transmission facilities.

3. $272,801.97 is the amount calculated by Big Rivers and allocated to Henderson load to recover costs from MISO market participants under grandfathered agreements pursuant to the Schedule 17 tariff. The Schedule 17 tariff permits transmission providers to recover certain transmission costs from MISO market participants. These charges are not recoverable from Henderson for two reasons. First, Henderson was not a market

[63] Direct Testimony of Brad Bickett, pp. 18-19.

participant. Secondly, Henderson owned the generation and transmission facilities used to supply power to its load. Big Rivers' integration into MISO did not affect Henderson's independent ability to supply power to its load just as it had done prior to the integration. Henderson did not require or benefit from any Schedule 17 services and Big Rivers is not entitled to recover those costs from Henderson.

Big Rivers registered Henderson's generation and load in MISO without Henderson's authorization and in Big Rivers' name without Henderson's approval. Big Rivers did not register Henderson's transmission facilities in MISO[64] by including them in either the BREC Transmission Facilities List in MISO or in the Appendix G or H in the MISO Tariff.

Big Rivers is incorrect in stating the only feasible way for Henderson to satisfy the NERC reliability standards in 2010 was to join MISO.[65] There was no NERC requirement that required the registration of Henderson's load and/or generation in MISO.

BAL-005-0 is a NERC Reliability Standard. Compliance with BAL-005-0 is unrelated to and is not met through MISO registration. BAL-005-0 provides simply that generation, transmission, and load operating within an Interconnection must be included within the metered boundaries of a Balancing Authority Area. Henderson's generation, transmission, and load were located within Big Rivers' Balancing Authority Area. For this reason, Henderson always remained in compliance with BAL-005-0. Big Rivers' decision to join MISO did not impact Henderson's compliance with BAL-005-0, as demonstrated by the fact that Big Rivers registered Henderson's load and generation – and not Henderson's transmission – in MISO.

Big Rivers is also incorrect in stating that all MISO fees invoiced to Henderson represent a "direct pass through" of fees Big Rivers incurred on Henderson's behalf and attributed to

[64] Hearing Tr. 1:27:50.
[65] Big Rivers' Post-Hearing Brief, p. 54.

Henderson's native load and generation.[66] Big Rivers acknowledges that the MISO fees for which Big Rivers is seeking recovery are load related, are not based on generation, and would have been incurred regardless of whether the Station Two units were registered in MISO.[67] What Big Rivers neglects to say is that Henderson did not register Henderson's load into a Henderson-owned Commercial Model until 2019.

Henderson would never have chosen to register its load in MISO without contemporaneously registering its generation and transmission assets. This is because in MISO RTO the registered load results in costs which might be offset by registered generation and transmission revenue. Since Henderson independently joined MISO on February 1, 2019, for example, Henderson has received approximately $160,000 per month in transmission revenue.

Big Rivers argues that the amount Henderson currently pays for third-party LBA services is significantly more than the MISO fees Big Rivers wants Henderson to pay.[68] First, the two types of cost are unrelated. Secondly, it should be noted that Henderson would not have been required to secure third-party LBA services at all after joining MISO but for Big Rivers' decision to install new metering equipment and create a new Local Balancing Authority (LBA) embedded within Big Rivers' system for the apparent purpose of excluding Henderson from the LBA and gaining leverage against Henderson in the parties' other financial disputes. The action produced no benefit to Big Rivers' member cooperatives and resulted in added LBA obligations for both parties.

As stated previously, a portion of the MISO fees Big Rivers seeks to recover from Henderson is for operational reserve costs which Henderson had already paid from its Station

[66] Big Rivers' Post-Hearing Brief, p. 57.
[67] Big Rivers' response to Henderson DR 1-48.
[68] Big Rivers' Post-Hearing Brief, p. 61.

Two capacity and energy. Big Rivers is now asking Henderson customers to pay twice for the same operating reserves.[69]

Additionally, prior to February 1, 2019, Henderson was not a MISO Transmission Customer, was not a MISO market participant and was not represented by a MISO market participant. Also, prior to February 1, 2019, Henderson had not authorized any grandfathered agreement (GFA) in MISO. Additionally, the referenced GFAs were not eligible for carved-out treatment and could not be the source of any proper charges to Henderson. As a result, Henderson is not responsible for any MISO-related fees prior to February 1, 2019, and is not responsible to pay MISO market participant fees under the terms of a grandfathered agreement (GFA) that Henderson did not authorize.[70]

IX. ASH POND

The Reid-HMPL Ash Pond is identified in the Joint Facilities Agreement as a joint-use facility subject to shared closure costs. The dispute regarding the ash pond involves the parties' relative shares of those costs.

The ash pond historically served as a repository for coal combustion residuals both from Station Two and from Big Rivers' Reid generating plant. Section 5.1 of the Joint Facilities Agreement, as amended, provides that costs related to joint-use facilities, including the ash pond, were apportioned between Reid and Station Two in accordance with Section 13 of the Construction and Operation Agreement. Under Section 13.8(b), costs associated with joint-use facilities were allocated between Reid (65MW capacity) and Station Two (312MW capacity) on the basis of each station's capacity as related to the combined capacity of both generating

[69] Direct Testimony of Seth W. Brown, pp. 8-9.
[70] Id. at p. 6.

stations. Station Two expenses were allocated between Henderson and Big Rivers on the basis of the parties' capacity split over the life of the plant.[71] Big Rivers' calculations regarding Henderson's share of ash-pond closure expenses are flawed in two (2) ways. First, Big Rivers' position that Henderson is responsible for 22.76 percent of closure costs is based partially upon an incorrect capacity reservation Big Rivers arbitrarily assigned to Henderson for fiscal 2018-2019. As explained elsewhere herein, Henderson appropriately reserved 115MW of capacity for that year and any expenses calculated on the basis of the capacity split should reflect the correct reservation. Secondly, Big Rivers' calculations disregard the portion of coal combustion residuals attributable to the Reid plant prior to the date Reid ceased to operate in 2015. Using Henderson's correct reservation and taking into account the percentage of waste attributable to the Reid plant, Henderson's share of reasonable expenses associated with the compliance, closure, and post-closure care of the ash pond is 18.87 percent.[72]

On March 9, 2020, Henderson tendered a check to Big Rivers in the amount of Henderson's 18.87 percent share of ash-pond closure expenses incurred through October 2019, but Big Rivers has returned those checks.

As explained in greater detail in the section regarding Henderson's purported liability to decommissioning the ash-pond dredgings, Big Rivers has further excluded the percentage of waste attributable to the Reid plant in its calculation of Henderson's share of dredgings in relation to the total waste contained in the Green Landfill.

[71] Section 3.3, Power Sales Contract, as amended.
[72] See Attachment 2 to Big Rivers' response to PSC DR 2-1 (mislabeled in record as Response to HMPL 2-1).

X. GREEN LANDFILL OPERATING & MAINTENANCE

The Green Landfill is a facility owned solely by Big Rivers and located entirely on Big Rivers' property. Henderson has no responsibility to operate, maintain, or decommission the Green Landfill. Henderson's sole responsibility with respect to the landfill stems from its contractual obligations regarding joint-use facilities, which are defined to include Station Two ash-pond dredgings. Henderson has already fulfilled those obligations. Henderson has already paid Big Rivers for disposal costs and landfill "usage" fees related to the dredgings. Additionally, Henderson no longer has a contractual obligation to operate or maintain the dredgings, as that obligation ceased when the dredgings ceased to serve a generating plant. Section 6.1 of the Joint Facilities Agreement obligates Henderson to share in the costs of operating and maintaining joint-use facilities, including the Station Two ash-pond dredgings, "so as to assure the continuous operation of the parties' respective generating station or stations served thereby." Section 8.1 of the agreement states that this obligation remains in effect "so long as either party continues to operate or maintain a generating station which is served by any such joint-use facility." Neither party is currently operating or maintaining a generating station which is "served by" the Station Two ash-pond dredgings. Big Rivers' assertion that the deposit of Henderson's waste into the Green Landfill saved Henderson some $3 million is unsupported and speculative.

The lion's share of continued operational and maintenance costs Big Rivers wants Henderson to pay with respect to the landfill are related to a vertical expansion which Big Rivers initiated in 2015 and which Big Rivers contends was needed to accommodate the waste being deposited into the landfill, including the ash-pond dredgings. When Big Rivers submitted a proposed Station Two operating plan for fiscal 2015-2016, Henderson discovered that Big Rivers

had increased the projected per-ton disposal rate for Station Two ash-pond waste from $1.78 the previous year to $5.61. Projected disposal costs for the next three fiscal years also were dramatically higher than the price the Henderson Utility Commission had approved. Big Rivers confirms that the increase was largely attributable to a vertical expansion designed to add some 20 years to the life of the landfill.[73] There is nothing to indicate that Big Rivers used competitive-bidding procedures to secure bids for the project, as Big Rivers would have to have done if Henderson were obligated to commit public funds to the project. Additionally, Big Rivers now indicates that that it intends to shutter its Green generating plant in 2022. Even if an expansion were needed to extend the life of the landfill, which Big Rivers now acknowledges it is not, Henderson is not responsible for sharing in the cost of that expansion. Costs related to a vertical expansion of the landfill are not reasonable and should not be assigned to Henderson.

XI. DECOMMISSIONING

1. Station Two Generating Plant

Section 8 of the parties' Joint Facilities Agreement provides for the parties to share decommissioning costs in the proportion in which they shared capacity during the life of Station Two. The Station Two contracts did not define decommissioning and Henderson is not aware of a single, industrywide definition that prescribes a specific list of activities to be applied in every case before decommissioning is deemed complete. Here, for example, Big Rivers lists three options, all of which constitute decommissioning: mothballing, retiring in place, and full demolition.[74] Henderson's position is that the Station Two plant has been decommissioned since the plant was retired and removed from service, i.e. brought to "safe, dark, and dry" status, in April 2019. Big Rivers has not cited any legal

[73] Big Rivers' response to Henderson DR 1-66.
[74] Direct Testimony of Jeffrey T. Kopp, 5:16-17.

requirement or authoritative justification for the plant to be decommissioned in the manner or to the extent Big Rivers recommends, nor is there a requirement that activities associated with decommissioning be completed on a particular timeline. Additionally, Big Rivers has cited no basis for its contention that decommissioning also entails environmental monitoring, remediation, and permitting.[75] Of the three decommissioning options set forth in Big Rivers' application, full demolition is the option Big Rivers witness Jeffrey T. Kopp recommends. According to Mr. Kopp, full demolition includes remediation of the site to a condition suitable for industrial use.[76] Big Rivers asserts that demolition and site remediation, which involves removal of above-grade structures and equipment as well as removal of foundations, rough grading and seeding, are desirable because they allow flexibility regarding the future use of the site.[77] For example, Big Rivers could elect to use the site for another power plant, could redevelop the site for industrial use, or could sell the property for similar use.[78] Once the plant is demolished and the site restored, the site can remain in this condition in perpetuity.[79]

The Webster Circuit Court on July 2, 2020, upheld the validity of a deed provision calling for title to the Station Two property to revert to Big Rivers when plant operations cease and when bonds related to the completion of the plant are retired. Further proceedings are needed to confirm the date on which the conditions precedent are met and the reversion occurred by operation of law. Big Rivers either is or unquestionably will be deemed the owner of the former Station Two property. As such, any determination concerning the future use of the property and any additional activities necessary to achieve that objective belong to Big Rivers. The plant ceased to operate effective February 1, 2019, and has since been brought to "safe, dark, and dry" status. Henderson's position is that Henderson thus has fulfilled its obligations under Section 8 of the Joint Facilities Agreement regarding decommissioning.

To the extent Henderson is indebted to Big Rivers for any further decommissioning expenses, Henderson's should be responsible on the basis of Henderson's actual capacity reservation for fiscal

[75] Direct Testimony of Robert W. Berry, 45:20-21.
[76] Id. at 10:14-17.
[77] Id. at 10:19-11: 9.
[78] Id.
[79] Id.

2018-2019 (115MW) and not the artificially inflated capacity reservation (125MW) Big Rivers unilaterally and arbitrarily assigned to Henderson. Calculated appropriately and in accordance with the historical capacity split (including Henderson's actual capacity reservation of 115MW for fiscal 2018-2019 and assuming a particular expense is unaffected by activities associated with Big Rivers' retired Reid plant), Henderson is responsible for 22.61 percent of costs apportioned on the capacity split and Big Rivers is responsible for 77.39 percent.[80]

2. Decommissioning Joint-Use Facilities

As stated throughout this proceeding, Henderson does not object to Big Rivers' continued use of those facilities designed in the Station Two contracts as joint-use facilities, so long as Big Rivers remains responsible for all expenses related to the operation and maintenance of those facilities for as long as Big Rivers continues to use them. However, to the extent Henderson is obligated to share in the cost of decommissioning those facilities, the parties' relative shares of decommissioning responsibility should be calculated in proportion to the use by either party over the life of the facility, to be determined by the time-weighted capacity of the units supported by that facility.

3. Decommissioning the Green Landfill

In a letter dated May 5, 1995,[81] Big Rivers proposed Henderson pay $1.74 per ton for disposal of Henderson's portion of the scrubber sludge waste generated from Station Two and a Green Landfill "usage fee" of $1.077 per ton of waste. Big Rivers acknowledges that Henderson paid its share of disposal costs both for dredgings from the ash pond and for scrubber sludge waste from Station Two in accordance with the 1993 amendments to the Station Two contracts.[82] Henderson's position is that the payment of the appropriate disposal fees fulfills its obligation with respect to the ash-pond dredgings. To the extent Henderson is deemed responsible for

[80] See Attachment 2 to Big Rivers' response to PSC DR 2-1 (mislabeled in record as Response to HMPL 2-1).

[81] Direct Testimony of Barbara Moll, Exhibit Moll-5.

[82] Big Rivers' responses to Henderson DR 1-60 and 1-61.

sharing in the cost of decommissioning the ash-pond dredgings, Henderson's share should be calculated in accordance with the formula set forth in Big Rivers' Post-Hearing Brief,[83] with one important adjustment: Henderson's share should be calculated on the historical capacity split, which includes Henderson's correct capacity reservation of 115MW for fiscal 2018-2019. The appropriate calculation under the capacity split renders Henderson responsible for 22.61 percent of all expenses calculated according to the capacity split. Henderson's share of 22.61 percent would then be multiplied by the percentage of the Station Two ash-pond dredgings in proportion to the total amount of waste contained in the landfill at the time of decommissioning. As of the October 22, 2020, hearing date, Big Rivers attributed 9.88 percent of total landfill waste to Henderson.[84]

XII. CONCLUSION

WHEREFORE, for the reasons set forth herein, Henderson respectfully requests that the Commission decline to exercise jurisdiction over the issues Big Rivers presents. In the alternative, Henderson requests the Commission reject Big Rivers' calculations, accept Henderson's calculations, and decline to determine those matters properly falling within the purview of the courts. Henderson provides the following summary of all financial disputes as submitted by both parties for the Commission's reference.

[83] Big Rivers' Post-Hearing Brief, p. 45.
[84] Hearing testimony of Michael T. Pullen, 11:01:45.

Net Effect of Finding Based on Henderson/Big Rivers Positions June 1, 2016 - January 31, 2019				
Per Henderson			**Per Big Rivers**	
Description	**Amount**		**Description**	**Amount**
Other Operating Costs (June 2016 - January 2019)	$6,252,304[1]		Total Amount Due From HMP&L	$2,266,896[6]
Big Rivers Calculation For Unwanted Energy Net Revenue & Costs Associated with Energy Production (June 2016 - January 2019)	$1,233,584[2]			
Total Amount Due to HMP&L	**$7,485,888**		**Total Amount Due from HMP&L** **(Exclusive of UEHE June 2016- December 2017)**	**$2,266,896**
HMP&L Coal Write-off	($2,149,084)[3]			
HMP&L Lime Write-off	($1,351,135)[4]			
Total Inventory Write-Off	**($3,500,219)**			
Henderson's Liability for Variable Costs of UEHE from June 2016 through December 2017 without Corresponding Revenue for UEHE for June 2016 through December 2017	($10,688,386)[5]		Big Rivers to Retain Revenue from Sales of Unwanted Energy (June 2016 - December 2017)	$10,696,158[7]

[1]Moll Amended Direct Testimony: Amended Exhibit Moll-3
[2]Heimgartner Direct Testimony: Exhibit Heimgartner-6
[3]Henderson response to BREC DR 1-1
[4]Henderson response to BREC DR 1-1
[5]Heimgartner Direct Testimony: Exhibit Heimgartner-4
[6]Revised Exhibit Smith-1 (Excluding Unwanted Excess Henderson Energy June 2016 - December 2017)
[7]Heimgartner Direct Testimony: Exhibit Heimgartner-4

Respectfully submitted,

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Jessamine-South Elkhorn Water Dist. v. Forest Creek, LLC

Court of Appeals of Kentucky

July 12, 2013, Rendered

NO. 2011-CA-001714-MR

Reporter
2013 Ky. App. Unpub. LEXIS 577 *; 2013 WL 3480344

JESSAMINE-SOUTH ELKHORN WATER DISTRICT, APPELLANT v. FOREST CREEK, LLC AND PUBLIC SERVICE COMMISSION OF KENTUCKY, APPELLEES

Prior History: **[*1]** APPEAL FROM JESSAMINE CIRCUIT COURT. HONORABLE C. HUNTER DAUGHERTY, JUDGE. ACTION NO. 10-CI-01394.

Core Terms

rates, regulation, circuit court, exclusive jurisdiction, elect, subject matter jurisdiction

Counsel: BRIEF FOR APPELLANT: Bruce E. Smith, Esq., Nicholasville, Kentucky.

BRIEF FOR APPELLEE: Helen C.

Helton, Gerald E. Wuetcher, Counsel for Public Service, Commission of Kentucky, Frankfort, Kentucky.

Judges: BEFORE: MOORE, NICKELL, AND TAYLOR, JUDGES. ALL CONCUR.

Opinion by: MOORE

Opinion

REVERSING

MOORE, JUDGE: The Jessamine-South Elkhorn Water District (JSEWD) petitioned the Jessamine Circuit Court for a declaration of rights regarding an agreement it had entered into with Forest Creek, LLC.[1] The Public Service Commission of Kentucky (the Commission) filed a motion to intervene and to dismiss arguing that because it had exclusive statutory jurisdiction over utility rates and services, the circuit court therefore did not have subject matter jurisdiction. The circuit court granted the Commission's motion to intervention and dismiss based on lack of subject matter jurisdiction. JSEWD filed a timely notice of appeal. Upon review, we reverse.

[1] Forest Creek has not participated in this appeal.

I. FACTUAL AND PROCEDURAL BACKGROUND

Forest Creek, a developer, filed a request for an extension of water service with JSEWD. Extension **[*2]** of service is governed by JSEWD Rule 26,[2] which provides:

> Any person desiring an extension to the District's system shall request in writing, in a form approved by the District, for such extension. Any requested extension may be provided under one of the following options.
>
> Option I — District shall construct such extension under authority and procedure as stipulated in Public Service Commission Regulation 807 KAR[3] [5:066 Section 11]. Any extension made under this option shall be subject to refund as outlined in said regulation.
>
> Option II — Applicant may construct and donate to District, the extension, as a contribution in aid of construction, meeting all District's specifications and approval. District reserves right to stipulate applicable engineering, legal and administrative factors. Applicant shall pay all cost of district as a contribution in aid of construction. Any extension made under this option shall not be eligible for refund.

[2] Neither party contests **[*3]** that JSEWD Rule 26 has been approved by the commission prior to Forest Creek's request for an extension of service.

[3] Kentucky Administrative Regulation.

> The applicant or group of applicants shall have the right to elect the option by which said extension shall be made. In either case applicant must execute a contract and agreement for line extensions of form approved by District.

Forest Creek elected to proceed under Option II and entered into an Interim Water Service Agreement with JSEWD on May 2, 2007. On or about August 11, 2010, Forest Creek requested that JSEWD permit it to proceed under extension Option I, rather than under its original election of Option II. JSEWD rejected Forest Creek's request. On December 17, 2010, JSEWD filed a petition for declaration of rights seeking a judgment that the agreement entered into by JSEWD and Forest Creek was an enforceable contract and compelling Forest Creek to proceed under Option II. Forest Creek filed an answer citing the affirmative defenses of contributory negligence, estoppel, failure of consideration, fraud, illegality, latches, waiver, failure to exhaust administrative remedies, and failure to state a claim upon which relief can be granted. Forest Creek also filed a counterclaim seeking judgment against JSEWD for improper assessment of legal and engineering fees, requesting to be permitted to proceed under Option I, requesting that review of any remaining **[*4]** plans to be conducted by a third-party engineer, and requesting various additional damages.

The Commission filed a motion to intervene and motion to dismiss arguing that because it had exclusive statutory jurisdiction over utility rates and services, the circuit court therefore did not have subject matter jurisdiction over this action. Specifically, the Commission stated that the claims made by JSEWD and Forest Creek require "a review and interpretation of the provisions of [JSEWD]'s filed tariff, the Commission's regulations, and the provisions of KRS[4] Chapter 278. . . . Moreover, as the agency that promulgated and enforces *807 KAR 5:066* — the Commission's water extension regulation, the Commission is uniquely suited to determine whether Rule 26 and the Agreement's provisions are consistent with that regulation and thus enforceable." The Commission also argued that it possessed exclusive jurisdiction because it may "compel **reasonable** extensions of service. *KRS 278.280(3)*." The circuit court granted the Commission's motion to intervene and dismissed the action for lack of subject matter jurisdiction.

II. STANDARD OF REVIEW

We conduct a *de novo* review of a circuit **[*5]** court's determination that it lacks subject matter jurisdiction. *Harrison v. Park Hills Bd. of Adjustment, 330 S.W.3d 89, 93 (Ky. App. 2011)* (quoting *Appalachian Regional Healthcare v. Coleman, 239 S.W.3d 49, 53-54 (Ky. 2007))*.

[4] Kentucky Revised Statute.

III. ANALYSIS

The sole question on appeal is whether the circuit court correctly determined that the issues raised in JSEWD's petition and Forest Creek's counter-claim fall within the Commission's exclusive jurisdiction.

Kentucky Revised Statute 278.040(2) provides:

> The jurisdiction of the commission shall extend to all utilities in this state. The commission shall have exclusive jurisdiction over the regulation of rates and service of utilities, but with that exception nothing in this chapter is intended to limit or restrict the police jurisdiction, contract rights or powers of cities or political subdivisions.

Thus, the Commission's exclusive jurisdiction is applicable only to the "regulation of rates and services." *KRS 278.040(2)*. "Unless exclusive power is given to the commission, the authority conferred upon it does not deprive the courts of jurisdiction over the same matters, and an application to the commission is not a prerequisite to an action before the **[*6]** court to obtain relief with respect thereto." *Louisville Gas & Electric Co. v. Dulworth, 279 Ky. 309, 130 S.W.2d 753, 755 (1939)* (internal quotations omitted).

Likewise, the Commission does not possess the power to limit the contract rights of a political subdivision, such as a water district, regarding matters unrelated to rates or services. *KRS 278.040(2)*; *see also Louisville Extension Water Dist. v. Diehl Pump & Supply, 246 S.W.2d 585, 586 (Ky. 1952)* (Water district is a political subdivision). And, where issues of rates or services are not implicated, matters of contract interpretation and enforceability are more appropriately addressed by the court. *See Carr v. Cincinnati Bell, Inc., 651 S.W.2d 126, 128 (Ky. App. 1983)* (no authority that commission possesses power to adjudicate contract claims for unliquidated damages); *Simpson County Water Dist. v. City of Franklin, 872 S.W.2d 460, 464 (Ky. 1994)* (Issue of contract interpretation, not involving changes in rates, are "well within the court's expertise and not that of utility regulatory agencies").

To determine whether the Commission's jurisdiction over this case is exclusive, we must evaluate whether the claims asserted fall within **[*7]** the definition of "rates" or "services."

> Rate means any individual or joint fare, toll, charge, rental, or other compensation for service rendered or to be rendered by any utility, and any rule, regulation, practice, act, requirement, or privilege in any relating to such fare, toll, charge, rental, or other compensation, and any schedule or tariff or part of a schedule or tariff thereof.

KRS 278.010(12).

The Commission asserts that the issue of rates is implicated because, as JSEWD represents, JSWED could be forced to raise rates in order to absorb the cost if required to proceed with the extension under Option I. However, the mere possibility of raising rates in the future does not bring this matter within the exclusive jurisdiction of the Commission. Rather, the question posed is solely one of contract enforceability, *i.e.*, whether Forest Creek can now elect to proceed under Option I after having entered into an agreement to proceed under Option II. Moreover, a rate change would only be at issue if it is determined that the Interim Agreement is unenforceable, thus permitting Forest Creek to elect under Option I. Thus, the possibility that JSEWD may seek approval for an increase in rates **[*8]** due to additional expenditures under Option I is purely speculative. A court, or other adjudicative body, is not required to address the collateral effect of the terms of an agreement for which it has only been asked to determine the enforceability thereof. Therefore, the questions presented do not invoke the Commission's exclusive jurisdiction.

The Commission also argues that the JSEWD's practices concerning the extension of service fall within the broad definition of "service."

> Service includes any practice or requirement in any way relating to the service of any utility, including the voltage of electricity, the heat units and pressure of gas, the purity, pressure, and quantity of water, and in general the quality, quantity, and pressure of any commodity or product used or to be used for or in connection with the business of any utility . . . .

KRS 278.010 (13).

The Commission argues that the question of the enforceability of the Interim Agreement involves issues regarding services because 1) the alleged irrevocability of the agreement imposes an additional condition of service not previously approved by the Commission and 2) the agreement was not filed with the Commission pursuant **[*9]** to *807 KAR 5:011* Section 13.

Regarding the Commission's first contention, pursuant to *807 KAR 5:066* Section 11, a party seeking extension of service must be reimbursed under the procedures delineated therein. In addition, the water district is permitted to make extensions under "different arrangements if such arrangements have receive[d] the prior approval of the commission." *807 KAR 5:066* Section 11(4). As previously discussed, JSEWD implemented Option I, pursuant to *807 KAR 5:066* Section 11, and Option II appears to have been implemented under the "different arrangements" provision. There is no allegation that Option II was not approved by the Commission. Although the Commission asserts that it is necessary to review Option II to ensure consistency with its

regulations, the Commission fails to present any argument that persuades us that Option II was incompatible with its regulations regarding rates and services.

More importantly, the validity of JSEWD Rule 26 which outlines both Option I and Option II is also uncontested. Rule 26 clearly requires that after exercising the right to elect under the aforementioned options, the "applicant must execute a contract and agreement for line **[*10]** extensions of form approved by District." The Commission's argument that irrevocability would constitute an additional condition of service not previously approved by the Commission is incongruous with this requirement. Rule 26 (as previously approved by the Commission) clearly denotes that both parties would enter into a contract for an extension of service. By definition, a contract is a "**binding** agreement between two or more persons." *See Black's Law Dictionary* 271 (Eleventh Ed. 2005) (emphasis added).

That is not to say, however, that the enforceability of the Interim Agreement can be resolved in such a perfunctory manner. Forest Creek raised a number of defenses and in its answer which must be evaluated by the circuit court to determine whether the contract is valid and enforceable; namely, the affirmative defenses of contributory negligence, estoppel, failure of consideration, fraud, illegality, latches, waiver, failure to exhaust administrative remedies, and failure to state a claim upon which relief can be granted. However, these defenses do not require interpretation of any statute or regulation under the Commission's purview but instead involve only basic issues of contract **[*11]** law which are more appropriately addressed by the circuit court. *See Carr, 651 S.W.2d at 128*; *see also Simpson County Water Dist., 872 S.W.2d at 464*.

The Commission also argues that this matter falls within its exclusive jurisdiction because *KRS 278.280(3)* permits it to compel a district to make any reasonable extension of service. However, *KRS 278.280(3)* further indicates that the Commission may do so only after a person has petitioned the Commission for such relief. Although Forest Creek has filed a petition with the Commission seeking a reasonable extension of service after the commencement of this action, it did not seek the same relief before the circuit court. Our review is limited to whether the claims brought before the circuit court invoke the exclusive jurisdiction of the Commission. Therefore, this provision cannot serve a jurisdictional basis where no such relief was requested.

We therefore conclude that the issues presented *sub judice* do not involve the regulation of rates or services so as to bring this action under the exclusive jurisdiction of the Commission and sole issue presented is a question of the enforceability of the Interim Agreement.

This clearly falls within **[*12]** the circuit court's realm of expertise, rather than that of the Commission. Accordingly, we reverse.

ALL CONCUR.

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