

**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of:

ELECTRONIC APPLICATION OF BIG RIVERS)
ELECTRIC CORPORATION FOR) Case No. 2021-00378
ENFORCEMENT OF ORDER)

**MOTION OF BIG RIVERS ELECTRIC CORPORATION
TO LIFT ABEYANCE**

Big Rivers Electric Corporation (“Big Rivers”) hereby notifies the Kentucky Public Service Commission (“Commission”) that it has withdrawn with prejudice its Counterclaim in Franklin Circuit Court Civil Action Nos. 18-CI-00078 and 21-CI-00667,¹ and therefore moves the Commission to lift the abeyance that was established by the Commission’s October 11, 2021 Order in this proceeding.

MEMORANDUM IN SUPPORT

On July 31, 2019, Big Rivers filed an Application with the Commission in Case No. 2019-00269 requesting an order enforcing the rates and service standards contained in the Station Two Contracts.² Throughout that proceeding, Big Rivers expressly anticipated that the City of Henderson, Kentucky, and the Henderson Utility Commission, d/b/a Henderson Municipal Power & Light (jointly referenced hereinafter as “Henderson” or “City”) would refuse to comply with any Commission order finding that the City is required to pay for its share of Station Two costs. Consequently, Big Rivers repeatedly advised the Commission

¹ See Attachment 1.

² The Station Two Contracts are a series of contracts that Henderson entered with Big Rivers related to the Station Two generating units.

that it may eventually need to “*compel obedience*” to its order at the Franklin Circuit Court pursuant to KRS 278.390. For example, Big Rivers’ Application urged that:

In the event that the Commission grants Big Rivers’ requested relief, but Henderson refuses to comply with the Commission’s rate order, then Big Rivers respectfully requests that the Commission exercise its enforcement authority pursuant to KRS 278.390...³

Additionally, in his Direct Testimony, Big Rivers witness Paul Smith proposed a process in which Big Rivers would file monthly with the Commission amounts due under the Station Two Contracts before submitting the monthly charge to the City. Mr. Smith recommended that:

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 278.390.⁴

Mr. Smith again addressed the Commission’s enforcement authority under KRS 278.390 in his Rebuttal Testimony, stating that:

If Henderson refuses to comply with the Commission’s lawful Order by not paying its invoice for its share of Station Two costs, then the Commission should seek to ‘compel obedience’ to its rate order at the Franklin Circuit Court pursuant to KRS 278.390.⁵

In its initial Brief, Big Rivers repeated this warning, writing that:

Big Rivers will comply with whatever Order the Commission issues. But the City has demonstrated a distinct unwillingness to do the same. If the Commission approves Big Rivers’ Application in full or in part, it is probable that the Commission will need to ‘compel obedience’ to its lawful order in the Franklin Circuit Court under KRS 278.390. That may be the only way to resolve the issues raised in this case in an orderly manner.⁶

³ Application (July 31, 2019) at 8.

⁴ Direct Testimony of Paul Smith (July 31, 2019) at 19.

⁵ Rebuttal Testimony of Paul Smith (August 25, 2020) at 29.

⁶ Brief of Big Rivers (November 17, 2020) at 9.

And Big Rivers provided one last word of caution in its Reply Brief, stating that:

Since Big Rivers filed this case in July 2019 as a last resort, Big Rivers has believed that Henderson is likely to resist compliance with a lawful Commission Order and that the Commission will need to ‘compel obedience’ to its rate order at the Franklin Circuit Court pursuant to KRS 278.390.⁷

On August 2, 2021, the Commission issued its Order in Case No. 2019-00269 finding that Henderson is required to pay for its share of uncollected operating and decommissioning costs pursuant to the Station Two Contracts.⁸ Henderson appealed the Commission’s Order to the Franklin Circuit Court in Civil Action No. 21-CI-00667 (consolidated with Civil Action No. 18-CI-00078) on August 27, 2021.

As Big Rivers long anticipated, Henderson has not paid any of the amounts due to Big Rivers in accordance with the Commission’s August 2, 2021 Order. However, Commission orders continue in force until they are revoked by the Commission or vacated by a court of competent jurisdiction per KRS 278.390. Henderson’s appeal therefore does not relieve the City of its current legal responsibility to pay the amounts due to Big Rivers pursuant to the Order. If a mere appeal stayed the effectiveness of a Commission order, then rate case, environmental surcharge, certificate of public convenience and necessity, and other important decisions could be put on hold for years while the appellate process plays out. The system of rate regulation established by the Kentucky Legislature cannot function if non-compliance with a Commission order is condoned merely by filing an appeal.

Accordingly, in order to address Henderson’s continued non-compliance with the August 2, 2021 Order, Big Rivers initiated this case, requesting that the Commission expeditiously take all appropriate action to compel obedience to its Order, including

⁷ Reply Brief of Big Rivers (December 8, 2020) at 17.

⁸ Order, Case No. 2019-00269 (August 2, 2021) at 38.

compelling Henderson to obey the Order by mandamus, injunction, or other proper proceedings in the Franklin Circuit Court pursuant to KRS 278.390.

Big Rivers also submitted an Answer and Counterclaim at the Franklin Circuit Court on September 17, 2021. Big Rivers raised the September 17, 2021 Counterclaim only in an abundance of caution based upon its reading of Civil Rule 13.01, which mandates that Big Rivers file any claim arising out of the subject matter of Henderson's claim.

Shortly thereafter, Henderson moved to dismiss Big Rivers Counterclaim, alleging that "*only the Commission is authorized to seek enforcement of its Orders...*" and that "[t]he plain language of KRS 278.390 makes clear that the Commission – and not Big Rivers – is the proper party to seek enforcement of a Commission Order through the filing of a proper proceeding in the Franklin Circuit Court." Big Rivers agrees with the City that the Commission is the proper party to seek enforcement of the August 2, 2021 Order in the Franklin Circuit Court.

However, because Big Rivers' Counterclaim was still pending at the Court, the Commission issued an October 11, 2021 Order in this case holding the proceeding in abeyance "*pending more clarity from the Franklin Circuit Court on the claims and motions asserted in that forum.*"⁹ In light of the possibility of substantial delay resulting from the Commission's abeyance Order, Big Rivers chose to clarify the issue by filing a Notice withdrawing its Counterclaim with prejudice at the Franklin Circuit Court. By withdrawing its Counterclaim with prejudice, Big Rivers eliminated any uncertainty over the Counterclaim.

⁹ Order (October 11, 2021) at 2.

Consequently, there is no longer any valid reason for the Commission to avoid issuing its decision in this matter. As Big Rivers has already explained, time is of the essence given the need to decommission Station Two in accordance with federal environmental laws and regulations, as well as asbestos-related public safety issues. Therefore, Commission should lift the abeyance and establish an expedited procedural schedule in this matter.

CONCLUSION

WHEREFORE, Big Rivers respectfully moves the Commission to lift the abeyance that was established in the Commission's October 11, 2021 Order in this proceeding.

Respectfully submitted,

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ATTACHMENT 1

**COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
CIVIL ACTION NO 18-CI-00078
CIVIL ACTION NO. 21-CI-00667**

ELECTRONICALLY FILED

**CITY OF HENDERSON, KENTUCKY, AND
HENDERSON UTILITY COMMISSION, d/b/a
HENDERSON MUNICIPAL POWER & LIGHT**

PLAINTIFFS

v.

KENTUCKY PUBLIC SERVICE COMMISSION OF KENTUCKY, *et. al.*

DEFENDANTS

**NOTICE OF WITHDRAWAL OF COUNTERCLAIM
BY BIG RIVERS ELECTRIC CORPORATION**

Defendant Big Rivers Electric Corporation (“Big Rivers”) hereby submits notice of withdrawal with prejudice of its Counterclaim filed September 17, 2021 in the above-captioned matter.

On this 12th day of October, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically on October 12, 2021 and served via electronic mail (when available) and via U.S. Mail postage prepaid to all parties listed below.

/s/ Michael L. Kurtz

Michael L. Kurtz

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