

**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.)	
)	

**BIG RIVERS ELECTRIC CORPORATION’S
RESPONSE TO CITY OF HENDERSON, KENTUCKY AND
CITY OF HENDERSON UTILITY COMMISSION d/b/a
HENDERSON MUNICIPAL POWER & LIGHT’S POSITION STATEMENT**

Pursuant to the Kentucky Public Service Commission’s (“Commission”) August 1, 2023 Order, Big Rivers Electric Corporation (“Big Rivers”) provides its Response to the Position Statement of the City of Henderson, Kentucky and City of Henderson Utility Commission, d/b/a Henderson Municipal Power & Light (collectively, "Henderson" or “City”) filed on August 22, 2023.

1. Henderson’s Argument That The City Need Not Obey The Commission’s 2021 Order While Its Appeals Are Pending Violates Kentucky Law.

On August 2, 2021, the Commission issued its Order in Case No. 2019-00269 (“the 2021 Order”) finding that Henderson is required to pay a specific share of operating and decommissioning costs pursuant to the Station Two Contracts.¹ In its Position Statement, Henderson argues that the Commission should not enforce its 2021 Order pursuant to KRS 278.390 while its appeal is pending at the Franklin Circuit Court so that the City can continue to avoid paying its share of Station Two costs. Henderson claims that it “*would be an unnecessary waste of Commission resources to review Big Rivers’ claims, which are*

¹ Order, Case No. 2019-00269 (August 2, 2021) at 38. The 2021 Order requires Henderson “*to share in the costs of decommissioning Station Two and joint-use facilities...*”

entirely dependent upon the assumption that the Commission has jurisdiction over the contracts.”²

Henderson’s position ignores Kentucky law which states that Commission orders continue in force until they are revoked by the Commission or vacated by a court of competent jurisdiction pursuant to KRS 278.390. That statute also empowers the Commission to enforce its lawful orders by filing a mandamus, injunction, or other pleading at the Franklin Circuit Court.³ Without KRS 278.390, a party could ignore the orders of the Commission for years simply by exercising its appellate options. Henderson has already disobeyed the 2021 Order for more than two years under the unsupported theory that its appeals stay the effectiveness of the Commission’s Order. By the City’s logic, if the Franklin Circuit Court ultimately affirms the Commission’s Order, Henderson could appeal to the Kentucky Court of Appeals and continue to disobey the 2021 Order while *that* appeal is pending. And if Henderson is unsuccessful at the Court of Appeals, the City could further avoid its financial responsibilities by appealing to the Kentucky Supreme Court. This is the very situation that KRS 278.390 was enacted to prevent.

2. The Commission Should Use Its Discretionary Authority Granted Under KRS 278.390 To Enforce Its 2021 Order Through An Application To Franklin Circuit Court.

While the appellate process does not always move quickly, the decommissioning of Station Two must be completed in a timely manner. In its 2021 Order the Commission

² Henderson Position Statement, at 2.

³ KRS 278.390 states: *“The commission may compel obedience to its lawful orders by mandamus, injunction or other proper proceedings in the Franklin Circuit Court or any other court of competent jurisdiction, and such proceedings shall have priority over all pending cases. Every order entered by the commission shall continue in force until the expiration of the time, if any, named by the commission in the order, or until revoked or modified by the commission, unless the order is suspended, or vacated in whole or in part, by order or decree of a court of competent jurisdiction.”*

found that the decommissioning of Station Two includes “*the entire process associated with taking the plant out of service, demolishing the plant, and restoring the site to a state that is suitable for future industrial use;*” *‘ongoing environmental monitoring and any environmental remediation that may be required in the future’* and *all maintenance activities necessary to maintain the plant and the site in a safe, secure and legally compliant condition before demolition.*”⁴ Big Rivers’ decommissioning plan (subject to a few modifications) was approved in the 2021 Order and includes actions that are mandatory pursuant to federal laws and regulations.⁵ The failure to take these actions within prescribed time periods can result in civil and criminal penalties.

During the life of Station Two, Big Rivers and Henderson each shared in its costs and benefits pursuant to the Station Two Contracts. But now that Station Two is no longer producing power, Henderson is attempting to wash its hands of the retired unit and stick Big Rivers with the lion’s share of the City’s outstanding Station Two costs in direct defiance

⁴ 2021 Order at 33.

⁵ As noted in Big Rivers’ Application, there are several federal laws and regulations that govern the decommissioning of Station Two:

- *40 CFR 257 and 261, Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals (“CCR”)*
 - Required Compliance Activities at Station Two: Closure of the Station Two ash pond no later than April 2024 and ongoing groundwater monitoring for thirty years following closure.⁵
- *40 CFR 112.5, Spill Prevention Control and Countermeasure Plan*
 - Required Compliance Activities at Station Two: Removal and/or maintenance of hazardous waste (solvents, paints, etc.) on site.
- *40 CFR 122, National Pollutant Discharge Elimination System*
 - Required Compliance Activities at Station Two: Limiting runoff and discharge from Station Two ash pond and coal pile.
- *40 CFR Part 61 Subpart M, Notification required per National Emission Standard for Asbestos*
 - Required Compliance Activities at Station Two: Ongoing containment of any asbestos exposure.
- *Surface Mining Control Reclamation Act*
 - Required Compliance Activities at Station Two: Cleanup of Station Two coal pile and removal of any residual.
- *Resource Conservation and Recovery Act*

of the Commission's Order. Big Rivers is currently paying 100% of its own cost and 86% of the Station Two decommissioning and operating cost that Henderson is required to pay pursuant to the 2021 Order.⁶ Big Rivers should not have to pay Henderson's share of these costs while the City exhausts its appellate rights.

The Commission has discretionary authority under KRS 278.390 to enforce its 2021 Order through an application to Franklin Circuit Court. Given Big Rivers' significant investment in the decommissioning of the Station Two facilities and Henderson's persistent unwillingness to pay its own share of these costs, it is appropriate for the Commission to lift the stay and exercise its power to enforce its Order pursuant to KRS 278.390. If Henderson successfully challenges the Order and a refund of costs paid by the City is required at the conclusion of Henderson's appeal, then Big Rivers would comply with that decision. Because of this refund safeguard, Henderson will be fully protected from complying with the Commission's decision while an appeal is pending. But in the absence of any Court ruling vacating the Commission's Order, that Order is effective, and Henderson should pay what is owed to Big Rivers during the pendency of any appeal.

⁶ Henderson has paid only 14% of its Commission-mandated share of Station Two decommissioning and operating costs (\$363,735 of the total \$2,604,635 due) as of June 30, 2023.

CONCLUSION

Big Rivers respectfully requests that the Commission lift the abeyance and take all appropriate action to compel obedience to its 2021 Order, including compelling Henderson to obey the 2021 Order by mandamus, injunction, or other proper proceedings in the Franklin Circuit Court or other court of competent jurisdiction pursuant to KRS 278.390.

Respectfully submitted,

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September 5, 2023