COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

APPLICATION OF BIG RIVERS ELECTRIC CORPORATION FOR ENFORCEMENT OF RATE AND SERVICE STANDARDS	))))	**CASE NO. 2019-00269**

MOTION OF CITY OF HENDERSON, KENTUCKY, AND HENDERSON UTILITY COMMISSION, d/b/a HENDERSON MUNICIPAL POWER & LIGHT, TO DISMISS OR ALTERNATIVELY TO HOLD IN ABEYANCE

The City of Henderson, Kentucky, and the Henderson Utility Commission, d/b/a Henderson Municipal Power & Light (jointly referenced hereinafter as "Henderson"), by counsel, hereby move for an Order dismissing the Application filed herein on grounds that the Kentucky Public Service Commission ("Commission") lacks jurisdiction to determine the issues presented and that Big Rivers Electric Corp. ("Big Rivers") has failed to state a claim upon which relief may be granted. In the alternative and without waiving the foregoing, Henderson hereby moves for an Order directing that Big Rivers' Application be held in abeyance pending adjudication of duplicative issues currently pending before the courts. In support of said Motions, Henderson states as follows:

THE COMMISSION LACKS JURISDICTION TO RESOLVE FINANCIAL DISPUTES UNRELATED TO RATES OR SERVICE

The pleading Big Rivers filed on July 31, 2019, asks the Commission to resolve a number of financial disputes associated with the past operation and maintenance of Henderson's now-shuttered Station Two power plant. Some of the relief Big Rivers is requesting is the same relief Big Rivers is seeking in an identical claim pending before the Franklin Circuit Court. Much of

the rest is based upon speculative costs which are currently incapable of being quantified and which indeed might never be assessed. All of the requested action lies outside the scope of the Commission's jurisdiction.

Big Rivers' request is based partially upon purported rate and service standards contained in a series of now-terminated contracts and a single agreement which remains in force,[1] none of which refer to rates or service as defined in KRS 278.010. With the exception of the Joint Facilities Agreement, as amended, the Station Two contracts terminated when the Station Two plant ceased operation on February 1, 2019.[2] The issues Big Rivers now raises relate solely to post-termination matters, the majority of which are either pending before the courts of the Commonwealth or involve potential environmental costs which have not been quantified and which might never be assessed. In the absence of a contract either setting or regulating a utility rate or service standard, there exists no basis for Commission jurisdiction.

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 or regulate utility rates or service does KRS Chapter 278 operate to bring a city within the ambit of Commission regulation. While the Commission is vested with exclusive jurisdiction to regulate utility rates and service pursuant to KRS 278.040(2), the legislature took care in crafting the statute to preserve the contract rights of municipalities. KRS 278.040(2) provides in pertinent part:

> The commission shall have exclusive jurisdiction over the regulation of rates and service of utilities, but with that exception

[1] The Power Plant Construction & Operation Agreement, Power Sales Contract, and System Reserves Agreement, along with various amendments made in 1993, 1998, and 2005, terminated at Big Rivers' request pursuant to a Commission Order dated August 29, 2018, in Case No. 2018-146. A Joint Facilities Agreement remains in effect.
[2] The Commission's August 29, 2018, Order in Case No. 2018-146 provided for the parties to continue operating under the terms of the contracts for a period of time sufficient to allow Henderson to obtain an alternate power source. The parties subsequently agreed to cease plant operations effective February 1, 2019.

> nothing in this chapter is intended to limit or restrict the police jurisdiction, contract rights or powers of cities or political subdivisions.

If the terms "rate" and "service" are construed so broadly as to include every account payable and receivable and every conceivable future expense no matter how remote the possible impact on ratepayers, then infringement on municipal contract rights is inevitable. To the contrary, the legislative intent expressed in KRS 278.040(2) "clearly and unmistakably" limits Commission jurisdiction to matters of rates and service, while preserving the contract rights of cities with respect to all other matters. Benzinger v. Union Light, Heat & Power Co., 170 S.W.2d 38, 41 (Ky. App. 1943).

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.

None of the issues raised in Big Rivers' application relate to any rate being charged to or being paid by either party. None of the issues relate to any service standard, as the facilities are inoperable and no utility service is being provided. As such, KRS 278.200 is not applicable. "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

County Water Dist. v. City of Franklin, 872 S.W.2d 460, 465 (Ky. 1994) (Emphasis added). By statute, a rate is compensation for service rendered to a utility customer. KRS 278.010(12). Big Rivers is not a customer of Henderson and Big Rivers has cited no rate that is or has been imposed, changed, or modified by Henderson. 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 either set or regulated a rate or service standard as the statute requires. Neither party is currently charging the other a rate under the terms of any contract. Neither party is using a defunct power plant to provide a service to the other. The issues Big Rivers presents are unrelated to any rate or service standard. Big Rivers cannot will such issues into existence simply by invoking the specter of a potential downstream effect on rates.

THE COMMISSION IS NOT AUTHORIZED TO ENGAGE IN CONTRACTUAL INTERPRETATION

The Commission cannot grant the relief Big Rivers requests without engaging in contractual interpretation to resolve financial disputes unrelated to rates or service standards. For the Commission to do so would require an exercise of power simply not authorized under the Commission's enabling statute.

KRS 278.200, as interpreted and applied in Simpson, *supra*, grants the Commission authority over contracts between cities and regulated utilities, but only to the extent that those contracts relate to the origination, establishment, change, promulgation, or enforcement of utility rates or service standards. 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. Id. See also Carr v. Cincinnati Bell, Inc., 651 S.W.2 126, 128 (Ky.

App. 1983) (Where issues of rates or services are not implicated, matters of contract interpretation and enforceability are more appropriately addressed by the court).

Here, Big Rivers asks the Commission to interpret the former Station Two contracts so as to find Henderson obligated to 1) pay Big Rivers an amount which includes costs associated with the production of unwanted Excess Henderson Energy; 2) share in the cost of decommissioning Station Two; 3) share in the cost of maintaining Station Two waste in Big Rivers' Green Station landfill; and 4) allow Big Rivers to continue using city-owned facilities located on Big Rivers property and designated as joint-use facilities. To support the first prong of its request, Big Rivers submits an "Interim Accounting Summary" purporting to reflect the cash exchanges that would resolve the parties' remaining financial disputes, including a dispute regarding responsibility for variable costs associated with the production of unwanted Excess Henderson Energy.

Big Rivers asks, inter alia, for the Commission to approve the calculations contained in the summary, to order that Henderson "immediately pay" Big Rivers the amount Big Rivers claims is owed, and to find that, with the exception of 481 tons of lime, all coal and lime remaining at Station Two on February 1, 2019, belongs to Big Rivers.[3] Even if the Commission were authorized to award monetary damages, which it clearly is not (see *infra*), Big Rivers has previously sought Commission relief with respect to unwanted Excess Henderson Energy, associated production costs, and ownership of fuel and lime reagent. Those issues were brought before the Commission as part of Case No. 2016-00278 and remain on appeal before the Franklin Circuit Court. The Commission cannot properly assert jurisdiction over an issue which not only has been presented in a prior case, but which also has given rise to a pending challenge to the Commission's exercise of jurisdiction in the same case.

[3] Big Rivers' Application, p. 33.

Big Rivers not only would have the Commission engage in contractual interpretation, but also asks the Commission to supply missing contractual terms. This the Commission simply cannot do. Big Rivers CEO Robert W. Berry asserts in his testimony:

> Big Rivers requests that the Commission enter an Order that enforces 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.**[4]

Any monetary award by the Commission will be damages predicated on the Commission's interpretation of several key terms that are not defined in the contracts. Hence, to grant the relief requested, the Commission must assign a meaning to the term "decommissioning," which is not defined in the contracts. The Commission must accept Big Rivers' unsubstantiated definition of that term. The Commission must impose future liability for "ongoing environmental monitoring, remediation and permitting" activities, despite the fact that

[4] Berry Testimony, pp. 45-46.

none of those terms has been 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. 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 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.

Additionally, the Commission would have to accept Big Rivers' assertion that all costs associated with the closure of the facilities are to be allocated on the percentages asserted by Big Rivers. Each of these claims for relief by Big Rivers depends upon the Commission's interpretation of the two terminated contracts.

Big Rivers further would impose upon the Commission the obligation of collecting any unpaid costs from Henderson:[5]

> 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.

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,

[5] Big Rivers' Application, p. 17.

relieving Big Rivers of any and all related obligations. The Commission's authority cannot and should not be stretched to such a degree.

A SPECULATIVE IMPACT ON RATES OR SERVICE IS INSUFFICIENT TO INVOKE COMMISSION JURISDICTION

The action required to grant the relief requested by Big Rivers necessitates a determination by the Commission that Henderson is responsible for future costs that have not been incurred, might not be incurred, and which are unknown. The indefinite nature of these expenses is highlighted in Mr. Kopp's testimony:[6]

> 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.

In addition to its request for the Commission to assign liability for costs incapable of verification, then, 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 downstream effect on rates. Big Rivers President & CEO Robert W. Berry asserts in his direct testimony that Big Rivers' inability to recover costs purportedly owed under the Station Two contracts would result in an increase in member rates.[7] Every expense incurred by Big Rivers eventually results in increased rates, but unless the expense is incurred as a result of a contract for utility services among Big Rivers and Henderson, the Commission has no jurisdiction to address the issue. The Kentucky Court of Appeals has confirmed that matters of contract enforceability raising nothing more than the mere possibility of future rates increases do

[6] Direct Testimony of Jeffrey T. Kopp, p. 13, lines 13-19.
[7] Direct Testimony of Robert W. Berry, p. 17, lines 4-6.

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).[8] In that case, which appears to be the only Kentucky opinion squarely addressing contract enforceability and the speculative nature of purported rate increases, the Court reversed a lower court's determination upholding the Commission's exercise of jurisdiction, holding that the mere possibility of raising rates in the future did not bring the matter within the Commission's exclusive jurisdiction. Id. at 7.

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. The costs Big Rivers seeks are currently unquantifiable and indeed might never materialize. Responsibility for such costs depends upon the degree of environmental remediation that might be imposed upon the parties. Until the extent of the remediation 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 based on the presumed liability of Henderson for some or all of the costs. However, the issue is premature and not ripe for adjudication and any finding of liability would be speculative. 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).

[8] Copy of full opinion attached in accordance with Ky. CR 76.28.

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.

THE COMMISSION IS NOT AUTHORIZED TO AWARD MONETARY DAMAGES

Big Rivers seeks Commission approval of its calculations regarding accounts payable and receivable related to the closure of Station Two and resolution of remaining financial disputes. Big Rivers next demands the Commission order Henderson to immediately pay a specific sum of money to Big Rivers. This request for relief lies squarely outside the scope of the Commission's jurisdiction. Nowhere does KRS Chapter 278 authorize the Commission to award monetary damages or otherwise order a municipality to pay money to a utility, let alone on the basis of a one-side calculation of disputed financial accounts.

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 expenses Big Rivers seeks are not related to retail service or to any utility service provided to or by Big Rivers.

The payment of damages will not and cannot be made through an adjustment of rates. Such a payment can be made only in the form of a lump--sum award. KRS 278.270 authorizes the Commission to "prescribe a rate to be charged in the future" should it find any rate or service issue to be unreasonable. The relief Big Rivers seeks is not a change in a rate, but rather a lump-sum award of expenses associated with events unrelated to any regulatory activity.

As referenced elsewhere herein, Big Rivers previously filed an Application for a Declaratory Order[9] asking the Commission to interpret the parties' then-unexpired Power Sales Contract, as amended, so as to find Big Rivers not responsible for variable costs associated with the production of Excess Henderson Energy unwanted by either party, and to find Henderson responsible for those costs. On January 5, 2018, the Commission issued an Order finding that it had jurisdiction pursuant to KRS 278.200 and partially granting the relief Big Rivers requested. Henderson appealed the Commission's exercise of jurisdiction in that case by filing a Complaint in the Franklin Circuit Court[10] in accordance with KRS 278.410. Big Rivers subsequently sought and obtained leave to file a Counterclaim for damages based upon the Commission's Order, arguing that Henderson's refusal to pay the variable production costs of generating unwanted energy constituted a breach of the Station Two contracts and characterizing its claim as a compulsory counterclaim under Kentucky CR 13.01.[11] Both the appeal of the Commission's Order and Big Rivers' Counterclaim remain pending. Also pending is Henderson's Motion for Leave to File an Amended Answer & Counterclaim in the Franklin Circuit Court action. In the event discovery proceeds on the competing claims underlying the jurisdictional challenge, the evidence is expected to show that the revenue Big Rivers collected from market sales of unwanted energy exceeded the variable costs of producing that energy and that Henderson is not

[9] Case No. 2016-00278.
[10] Civil Action No. 18-CI-00078.
[11] Motion of Defendant Big Rivers Electric Corp. for Leave to File Counterclaim, Paragraph 4 (filed July 2, 2018).

indebted to Big Rivers. The expected outcome notwithstanding, if Big Rivers had believed the Commission possessed authority to issue a monetary award, then it would have included such a request in its 2016 application for a declaratory order regarding responsibility for variable production costs. Big Rivers did not do so. Rather, Big Rivers characterized its claim as an issue involving rates and services for purposes of obtaining a declaratory order from the Commission and a breach-of-contract claim appropriate for an award of monetary damages for purposes of securing monetary relief from the Court. Big Rivers cannot have it both ways and must not be permitted to engage in forum shopping in an attempt to obtain piecemeal relief.

ALTERNATIVE MOTION TO HOLD IN ABEYANCE

In the alternative and without waiving its Motion to Dismiss, Henderson requests that Big Rivers' application be held in abeyance pending adjudication of duplicative issues pending before the courts.

Big Rivers' application requests, inter alia, an Order directing Henderson to pay money to Big Rivers on the basis of Big Rivers' calculations regarding the production of unwanted Excess Henderson Energy and variable production costs purportedly incurred between June 1, 2016, and February 1, 2019, the date the plant ceased operation. The request is identical to a claim for damages Big Rivers filed in the Franklin Circuit Court in response to Henderson's appeal of the Commission's exercise of jurisdiction in Case No. 2016-00278. The appeal and the damages claim, as well as Henderson's proposed Counterclaim, remain pending.

Once an Order has been appealed, the Commission generally has followed judicial decisions holding that jurisdiction is transferred to the appellate court. "Generally, a lower tribunal loses jurisdiction to amend or modify a decision once that decision is appealed." Johnson Bonding Co. v. Ashcroft, 483 S.W.2d 118 (Ky. 1972). "[T]he general rule, with certain

exceptions, is that the trial court loses jurisdiction over matters that have been appealed until mandate has issued." City of Devondale v. Stallings, 795 S.W.2d 954 (Ky. 1990). In this case, the underlying legal basis for Commission jurisdiction over the contracts is under review in the Franklin Circuit Court. Pending a ruling by the Court, any jurisdiction the Commission might have over the Station Two contracts is stayed. Even assuming the contracts provide a basis for Big Rivers' claims, the appeal of the Commission's exercise of jurisdiction over the contracts forecloses any further action on the issue of Commission jurisdiction over the contracts until a final decision by the Court. It would be an unnecessary waste of Commission resources to review Big Rivers' claims, which are entirely dependent upon the assumption that the Commission has jurisdiction over the contracts, should the Franklin Circuit Court find the Commission's exercise of jurisdiction in Case No. 2016-00278 was improper.

For reasons which are unclear, Big Rivers also attempts to argue the merits of a pending Webster Circuit Court action regarding title to the former Station Two site. Big Rivers does not seek any relief related to that action and indeed would have no basis for doing so, as the action relates purely to a real-estate transaction which falls outside the ambit of Commission jurisdiction. Big Rivers acknowledged the Court's jurisdiction over that issue in its Answer to Henderson's Complaint for Declaratory Relief.[12] The pendency of that action also precludes any action by the Commission. The issue related to this matter is exclusively one of ownership of real estate. "KRS Chapter 278 provides the Commission with exclusive jurisdiction over the rates and services of utilities. However, matters concerning property law are within the exclusive jurisdiction of the courts of the Commonwealth." *Robert J. & Nicole R. Arnold v. Blue Grass R.E.C.C.*, Case No. 94-528 (January 6, 1995).

[12] Defendant Big Rivers Electric Corporation's Answer to Complaint for Declaratory Relief, Fourth Defense, Paragraphs 3-4, p. 2 (filed December 21, 2018).

Big Rivers also claims in error that it cannot acquire the facility without a Certificate of Public Convenience and Necessity ("CPCN"). However, the real property at issue is not a utility within the meaning of KRS 278.010(3)(a), which defines a utility as "any person ... who owns, controls, operates, or manages any facilities used or to be used for or in connection with: (a) the generation, production, transmission or distribution of electricity to or for the pubic for compensation. . . ." The Station Two units are not generating, producing or transmitting electricity. Additionally, because the Station Two facilities are owned by Henderson, an unregulated municipality, Commission approval is not necessary for the acquisition. See *Application of South Kentucky RECC for Approval to Purchase the Fixed Assets of the Monticello Electric Plant Board,* Case No. 2007-00374, pp. 1-2, (Order dated December 18, 2007): "KRS 278.020(5) and KRS 278.020(6) require prior Commission approval of the transfer of control or ownership of any "utility." The MEPB, as a city-owned facility, is not a "utility" subject to the Commission's jurisdiction as that term is defined in KRS 278.010(3)."

There can be no doubt that the issue concerning title to the Webster County property is beyond the Commission's jurisdiction and cannot serve as a basis for any relief.

CONCLUSION

The Commission is without jurisdiction to determine the issues raised or grant the relief requested in Big Rivers' application. Big Rivers cannot prevail in the action pending before the Commission and, as such, Big Rivers' application should be dismissed. In the alternative, the matters addressed in the application should be held in abeyance pending resolution of Henderson's challenge to the Commission's exercise of jurisdiction over the Station Two contracts in Case No. 2016-00278 and pending adjudication of issues under review in the courts.

Respectfully submitted,

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