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July 11, 2011

Via Federal Express

Jeff DeRouen
Executive Director
Public Service Commission
211 Sower Boulevard, P.O. Box 615
Frankfort, Kentucky 40602-0615

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JUL 12 2011

PUBLIC SERVICE
COMMISSION

Re: In the Matter of: Notice and Application of Big Rivers
Electric Corporation for a General Adjustment in Rates,
PSC Case No. 2011-00036

Dear Mr. DeRouen:

Enclosed for filing on behalf of Big Rivers Electric Corporation ("Big Rivers") are an original and ten copies of Big Rivers' Motion to Compel and Big Rivers' Response to Kenergy Corp.'s Motion to Submit Rebuttal Testimony. I certify that a copy of this letter, a copy of the motion and a copy of the response have been served on each party of record.

Sincerely,



Tyson Kamuf

TAK/mh
Enclosures

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PSC CASE NO. 2011-00036

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1 COMMONWEALTH OF KENTUCKY

2
3 BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY

4
5
6 In the Matter of:

7
8 Notice and Application of Big Rivers Electric)
9 Corporation for a General Adjustment in Rates) Case No. 2011-00036

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12 **BIG RIVERS ELECTRIC CORPORATION'S**
13 **MOTION TO COMPEL**
14

15 Big Rivers Electric Corporation ("Big Rivers") moves the Kentucky Public Service
16 Commission ("Commission") for an order compelling Kentucky Industrial Utility Customers,
17 Inc. ("KIUC") to fully respond to Items 1 and 41 of Big Rivers' First Request for Information to
18 Kentucky Industrial Utility Customers, Inc. dated June 8, 2011 ("Big Rivers' Information
19 Request"). Counsel for Big Rivers has spoken with counsel for KIUC and Alcan Primary
20 Products Corporation ("Alcan") in an attempt to resolve this discovery dispute. As of the date of
21 this motion, no agreement has been reached, but KIUC informed Big Rivers today that it is
22 providing some information in response to Item 1. In support of this motion, Big Rivers states as
23 follows.

24 **A. Big Rivers' Information Request, Item 1**

25 Item 1 of Big Rivers' Information Request asks:

26 Please provide an electronic copy - with searchable electronic formats and all
27 formulas intact - of all exchanges of information among Dr. Morey, Dr. Coomes,
28 Mr. King, the Smelters, any person representing a Smelter, the Smelters'
29 respective Corporate parents, and/or Mr. Strong. This includes, but is not limited
30 to, e-mails, letters, charts, graphs, tables, reports, *etc.*

31
32 KIUC objects to the information request on the grounds that the information was
33 privileged and that the request was vague and ambiguous:

1 KIUC objects to this Request on the grounds that it seeks information
2 which is protected from discovery by the attorney-client privilege, the
3 work product rule and the common interest rule. KIUC further objects to
4 this Request on the grounds that it is vague and ambiguous in that it fails
5 to identify a time period for which discovery is sought.
6

7 KIUC Response dated June 22, 2011, to Big Rivers' Information Request, Item 1.

8 As to the first KIUC objection, Big Rivers agrees that any information responsive to Item
9 1 that is covered by the attorney-client or attorney work product privileges¹ need not be
10 provided. Information exchanged between or among the parties listed on the subject of the
11 "long-term solution" discussed in Mr. Fayne's testimony is unlikely to fall within the attorney-
12 client or work product privileges. Moreover, the Instructions section of Big Rivers' Information
13 Request states:

- 14 1. If any document called for by any of these data requests is withheld
15 based upon a claim of privilege or work product, please produce so much
16 of the document as to which you do not claim privilege or protection, and
17 for each document or part of a document for which you claim privilege or
18 protection, describe or identify:
- 19 a. The nature, subject matter and substance of the document or part
 - 20 of the document withheld;
 - 21 b. The nature of the privilege or protection claimed;
 - 22 c. The date, author or authors, addressee or addressees, and
 - 23 distribution of the document;
 - 24 d. Each person in whose possession, custody or control any copy
 - 25 of the document is or has been; and
 - 26 e. Paragraph number of the schedule of documents to which the
 - 27 document or part of the document is responsive.
 - 28

¹ The common interest rule KIUC references simply applies the attorney-client and attorney work product privileges to the situation where "two or more clients share a common legal or commercial interest." *Broessel v. Triad Guar. Ins. Corp.*, 238 F.R.D. 215, 219-20 (W.D.Ky. 2006). As the common interest rule is just an extension of the attorney-client and attorney work product privileges, Big Rivers also agrees that information covered by this rule need not be provided. However, the common interest rule only applies in three situations: (1) "a single attorney representing multiple clients in the same matter," (2) "when parties share a common defense," and (3) "when two or more clients share a common legal or commercial interest and, therefore, share legal advice with respect to that common interest." *Id.* So, it is not clear how it would apply in this situation. Nevertheless, if KIUC produces a privilege list as requested in the Instructions of Big Rivers' Information Request, Big Rivers and this Commission would have a better opportunity to determine whether KIUC's claims of privilege are legitimate.

1 Big Rivers' Information Request at 4. This request for a privilege log is the best way for Big
2 Rivers and the Commission to have an opportunity to determine whether KIUC's claims of
3 privilege are legitimate, especially in the case of the attorney work product privilege since it is
4 not an absolute privilege.² Therefore, if KIUC continues to claim that documents responsive to
5 Big Rivers' Information Request, Item 1 are privileged, KIUC should be required to comply with
6 the above instruction.

7 In response to KIUC's objection that the request "is vague and ambiguous in that it fails
8 to identify a time period," Big Rivers agreed in an e-mail message to counsel to voluntarily limit
9 the scope of its request under Item 1 to information exchanged by the listed persons or parties in
10 connection with the rate case, and information exchanged by the listed persons or parties during
11 the last twenty-four months related to or concerning the "long-term solution" referred to in the
12 Direct Testimony of Henry W. Fayne filed in this proceeding. With that voluntary limitation, the
13 request is no longer vague and ambiguous.

14 **B. Big Rivers' Information Request, Item 41**

15 Item 41 of Big Rivers' Information Request asked:

16 Please identify and provide, by Smelter and by month, a list of the cash
17 payments received by each Smelter from Big Rivers, Kenergy Corp., or a
18 subsidiary or affiliate of the former E.ON U.S., LLC arising out of, related
19 to, or in connection with the Big Rivers unwind transaction as referred to
20 by Mr. Fayne on page 21 of his testimony.

21
22 KIUC objected on relevancy grounds, on the grounds that the information is confidential
23 and proprietary, and on the ground that Big Rivers has such information:

24 KIUC respectfully objects to this Item 41 on the ground that the
25 information requested is not relevant to the issues presented in this docket

² See, e.g., Kentucky Rules of Civil Procedure, Rule 26.02(3)(a) (allowing discovery of documents otherwise covered by the attorney work product privilege if the party seeking the documents can show a substantial need for the documents and the inability "without undue hardship to obtain the substantial equivalent" of the documents by other means).

1 and is confidential and proprietary to each Smelter. KIUC further objects
2 to that portion of the request asking for payments from Big Rivers and for
3 payments to the Smelters from the escrow account held by PNC Bank on
4 the ground that Big Rivers has such information in its possession.
5 Without waiving the foregoing objections, KIUC states the following:

6
7 (1) The Smelters received no payments from Kenergy;

8
9 (2) E.ON payments to the smelters at closing were disclosed to the Staff
10 and the Attorney General in Case No. 2007-00445 under a petition of
11 confidentiality. Please refer to the confidential response of E.ON to Item
12 83 of the Attorney General's Supplemental Request for Information in that
13 docket.

14
15 KIUC Response dated June 22, 2011, to Big Rivers' Information Request, Item 41.

16 First, confidentiality is not an appropriate ground for objecting to a request for
17 information. The Commission's regulations provide, in pertinent part:

18 No party to any proceeding before the commission shall fail to respond to
19 discovery by the commission or its staff or any other party to the proceeding
20 on grounds of confidentiality. If any party responding to discovery requests
21 seeks to have a portion or all of the response held confidential by the
22 commission, it shall follow the procedures for petitioning for confidentiality
23 contained in this administrative regulation. Any party's response to
24 discovery requests shall be served upon all parties, with only those portions
25 for which confidential treatment is sought obscured.

26
27 807 KAR 5:001 Section (5)(a).

28 Second, whether Big Rivers already has the information is not relevant to whether KIUC
29 should provide a response to Big Rivers' Information Request so that the information becomes part
30 of the record in this case, available to other parties who have signed an confidentiality agreement in
31 this case. Third, KIUC states that Big Rivers has the information sought, and refers Big Rivers to
32 the confidential response of E.ON to Item 83 of the Attorney General's Supplemental Request
33 for Information. But Big Rivers was not given access to the E.ON parties' confidential response
34 to Item 83 of the Attorney General's Supplemental Request for Information in Case No. 2007-
35 00455. After receiving the KIUC response to Big Rivers' Item 41, Big Rivers requested that

1 E.ON's successor, LG&E and KU Energy, provide Big Rivers that confidential response, but the
2 aluminum smelter members of KIUC refused to permit LG&E and KU Energy to honor that
3 request.

4 Finally, the payments the Smelters received for agreeing to the Unwind Transaction are
5 relevant to this proceeding. The Smelters, through the KIUC witnesses, propose a plan that would
6 take away from Big Rivers and its members the economic benefit of certain of the contractual and
7 other concessions Big Rivers and its members received at the closing of the unwind transaction,
8 including the value of certain of the benefits received by them under the terms of the various
9 agreements related to electric service to the Smelters. Big Rivers argues in this proceeding that
10 KIUC's proposal should be rejected, in part, because the Smelters are attempting to relieve
11 themselves of many of the burdens of the agreements they made in the Unwind Transaction while
12 keeping the benefits. For that reason, the payments the Smelters received in the Unwind
13 Transaction are relevant.

14 WHEREFORE, Big Rivers respectfully requests that the Commission enter an order
15 compelling KIUC to provide a full response to Big Rivers' Information Request, Items 1 and 41,
16 with the limitations described herein.

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On this the 11th day of July, 2011.

TSK

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY

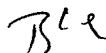
In the Matter of:

Notice and Application of Big Rivers Electric)
Corporation for a General Adjustment in Rates) Case No. 2011-00036

BIG RIVERS ELECTRIC CORPORATION'S
RESPONSE TO THE MOTION OF KENERGY CORP. TO SUBMIT REBUTTAL
TESTIMONY

On July 6, 2011, Kenergy Corp. ("Kenergy") filed a motion to submit rebuttal testimony. Big Rivers Electric Corporation has no objection to Kenergy filing the rebuttal testimony. Kenergy has an interest in the cost of service position taken by KIUC, and its input on this issue could be helpful to the Public Service Commission's deliberations.

On this the 11th day of July, 2011.



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