

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

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PUBLIC SERVICE  
COMMISSION

In the Matter of:

Application of Big Rivers Electric Cooperative for Approval of )  
its 2012 Environmental Compliance Plan, Approval of its ) CASE NO. 2012-00063  
Amended Environmental Cost Recovery Surcharge Tariffs, )  
and for the Certificates of Public Convenience and Necessity, )  
and the Authority to Establish a Regulatory Account )

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PETITION OF BEN TAYLOR AND  
SIERRA CLUB FOR FULL INTERVENTION

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Pursuant to K.R.S. §278.310 and 807 K.A.R. 5:001 § 3(8), Ben Taylor and Sierra Club (collectively “Movants”), petition the Commission for full intervention in this case. The Movants have a wealth of knowledge and experience in a wide variety of the complex and rapidly changing issues which impact Big Rivers Electric Cooperative’s (“Big Rivers”) application for Certificates of Public Convenience and Necessity (“CPCN”), and interests in this proceeding that are not adequately represented by any other party to the proceeding. The Movants seek full intervention to help to ensure that any CPCNs are approved only if they represent the best option to satisfy their members’ interest in low cost energy service.

On April 2, 2012, Big Rivers filed an application for CPCNs for the installation of pollution control equipment on the Wilson plant, Green unit 2, and Reid unit 1 pursuant to the Public Service Commission’s authority under the Kentucky Revised Statutes and Kentucky Administrative Code to regulate the electric utilities in the state. KRS § 278.020(1), and 807 KAR 5:001, Sections 8, 9, and 11. Big Rivers seeks approval for the retrofit work so that it can recover the full costs of installing this pollution control equipment, which it estimates at \$285

million.<sup>1</sup> Big Rivers needs to install this equipment because the power plants do not comply with existing and expected federal Clean Air Act requirements to control emissions of nitrogen oxide (“NO<sub>x</sub>”), sulfur dioxide (“SO<sub>2</sub>”), and hazardous air pollutants (“HAPs”).<sup>2</sup>

The proposed environmental controls projects (“Projects”) would involve extensive work to retrofit the plant. For NO<sub>x</sub> and SO<sub>2</sub> abatement, Big Rivers proposes to install a new flue gas desulfurization (“FGD”) technology on the Wilson plant, selective catalytic reduction (“SCR”) equipment on Green Unit 2, modifying the FGD on HMP&L Station Two Units 1 and 2 (this project does not require a CPCN according to Big Rivers because it is a municipally owned facility);<sup>3</sup> and converting the Reid unit to burn natural gas instead of coal.<sup>4</sup> To comply with the new MATS regulation, Big Rivers plans to install activated carbon injection equipment for mercury removal, dry sorbent injection equipment for acid gas removal, and continuous emission compliance monitors on the Wilson, Green, and Coleman Units. Finally, Big Rivers plans to install continuous emission monitors on the HMP&L Station to demonstrate MATS compliance.

The alternative compliance path for Big Rivers is to retire some or all of these units and replace the capacity, to the extent such capacity is actually needed, or to significantly curtail its operation.<sup>5</sup> Big Rivers purports to have evaluated the revenue requirements of these options and determined that retrofitting the Wilson, Green, HMP&L and Coleman units is the most cost-effective means of complying with existing law.<sup>6</sup> The Company considered in its modeling two alternatives to the proposed projects (the proposed projects are referred to as the “Build Case”) (a) a “Partial Build Case,” which includes all of the projects proposed by Big Rivers in its

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<sup>1</sup> See Direct Testimony of Robert W. Berry, Tables 6-1, 6-2, 6-3, and 6-5; see also Direct Testimony of Mark A. Hite at 5.

<sup>2</sup> See Direct Testimony of Robert W. Berry at 9.

<sup>3</sup> See Direct Testimony of Robert W. Berry at 6.

<sup>4</sup> See Direct Testimony of Robert W. Berry at 9.

<sup>5</sup> See, e.g., Environmental Compliance Plan at 3-20.

<sup>6</sup> Direct Testimony of Robert W. Berry at 33.

application except the SCR on Green Unit 2 is not included; and (2) a “Buy Case,” which consisted of installing technology to comply with MATS and reducing generation and buying power on the wholesale market to comply with CSAPR.<sup>7</sup> Other alternatives, such as gas conversion and DSM, were not fully considered as alternatives as they were never modeled for cost effectiveness.<sup>8</sup>

This proceeding comes at a critical juncture for Big Rivers. Existing or expected federal Clean Air Act and Clean Water Act regulations will require Big Rivers to either install pollution controls on coal units or to retire such units. Technological advances and changes in market conditions have made a larger suite of both supply- and demand-side options available for Big Rivers to provide service to their customers through the distribution cooperatives. Moreover, growing awareness of the public health, environmental, and economic impacts of energy production have increased the importance of the pursuit of energy efficiency and renewable energy resources from both a cost and environmental perspective. For the Commission, energy efficiency and conservation are paramount considerations for determining the rates and services of utilities and their importance will continue to grow “as more constraints are . . . placed on utilities that rely significantly on coal-fired generation.”<sup>9</sup> In short, Big Rivers faces a new reality involving a growing set of costs to its existing generation fleet, an expanding set of options for how to service its customers, and an increasingly complex set of factors relevant to identifying the lowest cost mix of supply- and demand-side resources for meeting its customers’ needs.

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<sup>7</sup> See Direct Testimony of Mark A. Hite at 6.

<sup>8</sup> See Direct Testimony of Mark A. Hite at 6.

<sup>9</sup> *In the Matter of: Joint Application of PPL Corporation, E.ON AG, E.ON US Investments Corp., E.ON U.S. LLC, Louisville Gas and Electric Company, and Kentucky Utilities Company for Approval of an Acquisition of Ownership and Control of Utilities* (Case No. 2010-00204) Order, Sept. 30, 2010 at 20 (noting that the Commission stated its support for energy-efficiency programs in a report “to the Kentucky General Assembly in July 2008 pursuant to Section 50 of the 2007 Energy Act”).

The organizational Movant, on behalf of its members, has gained significant expertise on these issues in proceedings throughout the country, and seek to bring such expertise to this proceeding.

## **I. THE MOVANTS**

Movants seek full intervention in order to ensure that their interests in lower cost and cleaner energy options are fully represented, and to bring to this proceeding their expertise in developing plans for providing a lower cost and cleaner energy future. Movant Ben Taylor is a customer of Kenergy Corporation, which is a Big Rivers' distribution cooperative, and a long-time Sierra Club member, and has a deep interest in seeing Big Rivers transform to meet the new reality in a way that is both low cost and cleaner. His address is as follows:

Ben Taylor  
419 Yelvington Grandview Road  
Maceo, KY 42355-9749

Sierra Club is one of the oldest conservation groups in the country with over 625,000 members nationally in sixty-four chapters in all fifty states including the District of Columbia and Puerto Rico. Sierra Club has almost 5,000 members in Kentucky, which are part of the Cumberland Chapter. The Cumberland Chapter's address is:

Sierra Club  
Cumberland Chapter  
P.O. Box 1368  
Lexington, KY40588-1368

## **II. LEGAL BACKGROUND**

The Commission's regulations regarding intervention provide that a person may seek leave to intervene in a Commission proceeding and, upon timely motion:

If the commission determines that a person has a special interest in the proceeding which is not otherwise adequately represented or that full intervention by [the] party is likely to present issues or to develop facts that assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings, such person shall be granted full intervention.

807 K.A.R. 5:001 § 3(8)(emphasis added). In other words, the Commission must grant full intervention if Movants either have interests in this proceeding that are not adequately represented or they offer expertise that would assist in evaluation of the CPCN application. As explained below, Movants satisfy both standards for intervention.

Movants are seeking intervention in a CPCN proceeding that is governed by KRS § 278.020(1).<sup>10</sup> Pursuant to that statute, Big Rivers cannot install equipment until it receives a certificate that “public convenience and necessity require the service or construction.” KRS § 278.020(1). The Commission has the right to “issue or refuse to issue the certificate, or issue it in part and refuse it in part.” *Id.* Big Rivers is also seeking to recover approximately \$285 million from the ratepayers for this project pursuant to KRS § 278.183.<sup>11</sup> This proceeding is intended to evaluate the reasonableness of Big Rivers’ submission and to identify possible improvements or less costly alternatives.

### **III. THE COMMISSION SHOULD GRANT MOVANTS FULL INTERVENTION**

#### **A. This Petition to Intervene is Timely Filed**

This request to intervene is timely. Big Rivers filed its CPCN application for the installation of pollution control equipment detailed in its application on April 2, 2012. On April 30, 2012, the Commission issued a scheduling order in this proceeding, which requires the filing of all requests for intervention by May 7, 2012. Movants have submitted this Petition for intervention on May 7, 2012. As such, this Petition is timely.

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<sup>10</sup> See Big Rivers Application at 1.

<sup>11</sup> See Big Rivers Application at 1; see also Direct Testimony of Mark A. Hite at 5.

**B. Movants Will Present Issues and Develop Facts That Will Assist the Commission in Fully Considering the Matter Without Unduly Complicating or Disrupting the Proceedings.**

The Commission should grant Movants full intervention as they are “likely to present issues or to develop facts that assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings.” 807 K.A.R. 5:001 § 3(8). This proceeding involves complex questions regarding whether installing pollution control equipment on existing coal-fired power plant units is a public convenience or necessity. According to Big Rivers, retrofitting these plants is the most cost effective option of the alternatives it evaluated.<sup>12</sup> However, Big Rivers’ application and supporting testimony makes clear that there was no other technology considered, such as a natural gas-fired combined cycle plant or demand side management, in its full cost-effective modeling of alternatives.<sup>13</sup> As parties to this proceeding, the Movants will ensure that the appropriate suites of alternatives were examined, such as replacing the capacity with natural gas, renewable energy sources, and/or efficiency.<sup>14</sup> Movants bring to this docket their unique perspective and experience in advancing technical and regulatory solutions to increasing renewable and demand side energy sources.

Movants Sierra Club has developed expertise that encompasses a broad range of environmental and energy concerns that fully complement the myriad of technical and policy issues parties will face in this proceeding. In particular, Sierra Club’s staff and consultants have extensive experience in resource planning, analyzing the potential for cost effective energy efficiency, and in the laws and regulations regulating energy production. Sierra Club has jointly

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<sup>12</sup> See Direct Testimony of Mark A. Hite at 5.

<sup>13</sup> See Direct Testimony of Mark A. Hite at 5.

<sup>14</sup> “[A]s more constraints are . . . placed on utilities that rely significantly on coal-fired generation,” this is an important issue for the Commission to consider. See, e.g., *In the Matter of: Joint Application of PPL Corporation, E.ON AG, E.ON US Investments Corp., E.ON U.S. LLC, Louisville Gas and Electric Company, and Kentucky Utilities Company for Approval of an Acquisition of Ownership and Control of Utilities* (Case No. 2010-00204) Order, Sept. 30, 2010 at 20 (noting that the Commission stated its support for energy-efficiency programs in a report “to the Kentucky General Assembly in July 2008 pursuant to Section 50 of the 2007 Energy Act”).

or individually intervened and/or provided testimony on these issues in a multitude of similar proceedings in a number of states including Arkansas, Arizona, California, Colorado, Florida, Illinois, Iowa, Louisiana, Kentucky, Michigan, Mississippi, Missouri, New York, New Jersey, Nevada, Ohio, Oklahoma, Oregon, South Carolina, Utah, Wisconsin, and Wyoming. Moreover, Sierra Club recently intervened and provided testimony on these issues in four other dockets before this Commission.<sup>15</sup> Sierra Club has also regularly presented testimony before the U.S. Congress and various state legislatures on issues related to the electric utility industry, including energy efficiency, renewable energy, and coal generation.

Movants are aware of past holdings by the Commission that it does not make decisions about environmental regulations.<sup>16</sup> But the Movants are not seeking intervention to opine about the environmental impacts of Big Rivers' coal plants and its environmental compliance plans. Instead, Movants are seeking to present testimony regarding whether the compliance plan proposed by Big Rivers is the least cost option in light of the full range of regulatory, capital, operating, and fuel costs that the Big Rivers plants face, whatever need exists, and the increasing availability of low cost energy efficiency and renewable energy alternatives. The Commission cannot reach a logical determination on the reasonableness of Big Rivers' request to recoup \$285 million from its ratepayers to pay for environmental controls without evaluating each of those issues. As such, Movants are seeking intervention to address topics that are directly at issue in this proceeding.

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<sup>15</sup>See, Application of Louisville Gas & Electric for Certificates of Public Convenience and Necessity and Approval of Its 2011 Compliance Plan for Recovery by Environmental Surcharge (Docket No. 2011-00162), Application of Kentucky Utilities for Certificates of Public Convenience and Necessity and Approval of Its 2011 Compliance Plan for Recovery by Environmental Surcharge (Docket No. 2011-00161); Joint Application of Louisville Gas & Electric and Kentucky Utilities for Certificates of Public Convenience and Necessity to Construct Combined Cycle Natural Gas Plant (Docket No. 2011-00375); Application of Kentucky Power Company for Approval of its 2011 Environmental Compliance Plan and Certificates of Public Convenience and Necessity (Docket No. 2011-00401).

<sup>16</sup> In the Matter of The 2008 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company (Case No. 2008-148) Order, July 18, 2008 at 5-6.

The Commission must examine the entire suite of emerging federal regulations in order to accurately determine what is the least cost option. In its application, Big Rivers insists that it must address certain federal regulations now. However, it has completely failed to consider a number of emerging federal requirements that will require additional expenditures on control technology (emerging retrofits) or may lead to plants being repowered or retired. In this way, Big Rivers is asking ratepayers to fund piecemeal work that it could do more efficiently or not at all once Big Rivers has a better understanding of the full suite of federal requirements. Big Rivers has stated that retrofitting these plants is the most cost effective compliance option.<sup>17</sup> However, since Big Rivers has only analyzed a subset of the expected regulatory obligations, the accuracy of that conclusion is doubtful. Movants want to ensure that the Commission evaluates the full regulatory and capital costs facing the Wilson, Green, and Coleman plants, including the expected Clean Water Act effluent limitation guidelines and capital costs associated with keeping these old plants running for another 30 years, so it can accurately determine the least cost option for moving forward. Movants are not advocating any particular resource mix or alternative at this time, and instead simply endorse a robust examination of the comparative costs and benefits of viable options once the full suite of emerging federal requirements are considered and the full costs of each alternative assessed.

Through full intervention, Sierra Club, on behalf of their members including the individual Movant, will use their expertise and consultants to provide current data and analysis to investigate the adequacy of Big Rivers' proposed compliance plan, explore additional alternatives for replacing capacity, investigate the adequacy of Big Rivers' limited cost analyses, and present evidence and argument in support of energy efficiency, renewable energy resources,

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<sup>17</sup> Direct Testimony of Mark A. Hite at 5.



and other low carbon generation technologies such as purchasing an existing gas plant if they represent reasonable and prudent alternatives for Big Rivers to pursue.

Big Rivers' application deals with complicated topics. However, the Movants helping the Commission to explore many of the assumptions and inputs will not unduly complicate the matter. Rather, it will allow for a more robust examination to ensure that the Commission approves the least cost alternative for Big Rivers. Finally, the Movants are represented by experienced counsel and will comply with all deadlines in the proceeding established by the Commission. As such, Movants' participation will not disrupt this proceeding.

**C. Movants Have Special Interests in This Proceeding Which Are Not Adequately Represented.**

As noted above, 807 K.A.R. 5:001 §3(8) provides two alternative bases for granting full intervention. Parties either need to have a special interest not adequately represented or present issues and facts that will help the Commission fully consider the matter. As explained in Section III.B., above, the Movants will present issues and facts that will help the Commission fully consider the matter. Therefore, the Commission can grant full intervention on that basis alone and need not consider the Movants' special interest. Nevertheless, as explained below, the Movants also have special interests that are not adequately represented.

The individual Movant is a customer and rate payer of Kenergy Corporation, which is one of Big Rivers' distribution cooperative members. As such, he helps fund Big Rivers' operations, and the Commission's decision about whether to grant the CPCNs for installation of pollution control equipment and subsequent surcharges for \$285 million will directly impact his bills. In addition, the individual Movant lives within the Big Rivers distribution cooperatives' service territory and, therefore, is impacted by the economic, public health, and environmental effects of the resource decisions that Big Rivers makes. Organizational Movant Sierra Club has

member(s) who are customers and ratepayers of a distribution cooperative of Big Rivers and, therefore, have the same interests as the individual Movant. In addition, Movants' desire to promote energy efficiency, peak demand reduction, renewable energy, and cost-effective low carbon energy sources in Kentucky is directly related to the issues of this proceeding, in which Big Rivers has proposed and the parties are evaluating whether to install pollution control equipment on existing plants or pursue different options.

Movants' interests are not adequately represented by any of the parties in the proceeding, as none of the other parties can adequately represent the organizational Movants' interests as a national organization that seeks to promote energy efficiency, renewable energy, and other low carbon generation sources as the most reasonable and cost effective way for Big Rivers to maintain essential electric services and meet new and emerging federal regulatory requirements.

The Attorney General cannot adequately represent the Movants' interest. The Attorney General has the unenviable task of representing all consumers and all of their diverse interests, even if some of the interests are diametrically opposed to each other. In fact, courts have "repeatedly held that private companies can intervene on the side of the government, even if some of their interests converge." *See, e.g., Hardin v. Jackson*, 600 F. Supp. 2d 13, 16 (D.D.C. 2009). That is because "government entities are usually charged with representing the interests of the American people, whereas aspiring intervenors, like the [Movants] here, are dedicated to representing their personal interests or the interests of their members or members' businesses." *County of San Miguel, Colo. v. MacDonald*, 244 F.R.D. 36, 48 (D.D.C.2007); *Purnell v. Akron*, 925 F.2d 941, 949 (6th Cir. 1991) (granting intervention in a wrongful death suit when intervenors' interests were personal and narrower than the current defendants); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 737 (D.C. Cir. 2003) (movant satisfied its burden where it

sought to protect interests that were “more narrow and parochial” than the government’s interests); *Am. Horse Prot. Ass’n v. Veneman*, 200 F.R.D. 153, 159 (D.D.C. 2001) (granting intervention of right where intervenors had “more narrow interests and concerns” than the government entity); *Jansen v. Cincinnati*, 904 F.2d 336, 343 (6th Cir. 1990) (granting intervention when intervenors agreed with the government’s conclusion but differed in their rationale); *Southern Utah Wilderness v. Norton*, 2002 WL 32617198, at \*5 (D.D.C. June 28, 2002) (concluding that government entity may not adequately represent specific interests of private entity). While the Attorney General is tasked with representing the overall, and sometimes conflicting, public interest(s) in this proceeding, the Movants have a more narrow interest and concern in ensuring that compliance with emerging federal regulations is not piecemealed, complete costs associated with each alternative are adequately presented to the Commission, and that the full range of alternatives are thoroughly and objectively evaluated.

The Attorney General may not be able to represent the Movants’ interest, or at least not as forcefully, because of the Attorney General’s obligation to represent all consumers. The Attorney General has previously encouraged the Commission to allow public interest groups to intervene when the “Attorney General is not capable of providing the same perspective and representation” as a public interest group.<sup>18</sup> Moreover, the Commission cannot interpret its regulations to provide that the mere fact that the Attorney General intervened in this case to mean that the Movants’ interests are adequately represented, for that is the situation in every case. Such an interpretation would render the intervention provision for parties other than the Attorney General superfluous, which would run contrary to the rules of statutory and regulatory

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<sup>18</sup>See *In the Matter of: Application of Columbia Gas of Kentucky, Inc. for an Adjustment of Rates for Gas Service* (Case No. 2009-00141), Attorney General’s Comments Regarding the Motion of Stand Energy Corporation Customer Group to Intervene, June 17, 2009 at 1 (arguing that the Commission should grant the SEC Customer Group’s motion to intervene).

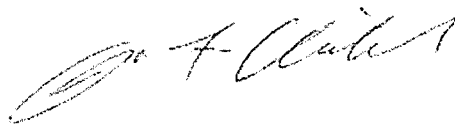
interpretation. See *Lexington-Fayette Urban County Government v. Johnson*, 280 S.W.3d 31, 34 (Ky. 2009), *University of Cumberlands v. Pennybacker*, 308 S.W.3d 668, 683-84 (Ky. 2010).

Finally, neither the Commission staff nor the Attorney General's office will marshal the same level of environmental expertise as Movants with regard to emerging federal regulatory requirements and what pollution control upgrades utilities will need to make to meet those obligations. Movants are uniquely positioned to share their expertise with the Commission to ensure that it does not authorize the proposed Certificates of Convenience and Necessity and accompanying \$285 million in surcharges only to discover that another investment is required to meet additional environmental compliance obligations. Finally, allowing Movants to intervene will serve the public interest because no other party to this proceeding has the capacity or the incentive to assure that Movants' concerns are addressed.

#### IV. CONCLUSION

For the foregoing reasons, the Movants respectfully request full intervention in this matter.

Respectfully submitted,



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Dated: May 7, 2012

## CERTIFICATE OF SERVICE

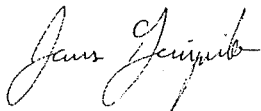
I certify that I mailed a copy of this Petition for Full Intervention by first class mail on May 7, 2012 to the following:

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