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November 26, 2013

Via Federal Express

Jeff Derouen
Executive Director
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211 Sower Boulevard, P.O. Box 615
Frankfort, Kentucky 40602-0615

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PUBLIC SERVICE
COMMISSION

Re: *In the Matter of: The Application of
Big Rivers Electric Corporation for a General
Adjustment in Rates, PSC Case No. 2012-00535*

Dear Mr. Derouen:

Enclosed are an original and ten copies of the Response of Big Rivers Electric Corporation to the Petition for Rehearing of Kentucky Industrial Utility Customers, Inc., Attorney General, Ben Taylor, and Sierra Club in the above referenced matter. I certify that on this date, a copy of this letter and a copy of the response were served on the persons listed on the attached service list by first class mail, postage prepaid.

Sincerely,



Tyson Kamuf

TAK/ej
Enclosures

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1 COMMONWEALTH OF KENTUCKY
2 BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY
3
4

5 In the Matter of:

6
7 Application of Big Rivers Electric)
8 Corporation for a General) Case No. 2012-00535
9 Adjustment In Rates)
10
11

12 **RESPONSE OF BIG RIVERS ELECTRIC CORPORATION TO THE PETITION FOR**
13 **REHEARING OF KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC.,**
14 **ATTORNEY GENERAL, BEN TAYLOR, AND SIERRA CLUB**
15

16 Comes now Big Rivers Electric Corporation (“Big Rivers”), through counsel, and hereby
17 submits this response to Petition for Rehearing (“Petition”) jointly filed by Kentucky Industrial
18 Utility Customers, Inc. (“KIUC”), the Office of the Attorney General (“Attorney General”), and
19 Ben Taylor and Sierra Club (collectively, the “Opposing Intervenors”).

20 **A. Introduction**

21 The Petition seeks a rehearing on three matters that the Opposing Intervenors contend
22 were erroneously determined by the Kentucky Public Service Commission (“Commission”) in
23 the October 29, 2013, order in this proceeding (the “October 29 Order”). For the following
24 reasons, the Commission should deny the Opposing Intervenors’ Petition for a rehearing on any
25 of those issues.

26 **B. The Commission should not grant rehearing based on the Opposing Intervenors’**
27 **claim that the October 29 Order fails to achieve a balance of interests between Big**
28 **Rivers and customers**

29 For their first assignment of error, the Opposing Intervenors complain that the October 29
30 Order “fails to achieve a balance of interests between [Big Rivers] and customers...because
31 under generally accepted accounting principles, a deferral of depreciation expense on excess
32 capacity is only allowed if the Commission provides ‘reasonable assurance’ that future recovery

1 from customers is ‘*probable.*’” (Petition for Rehearing at ¶ 1 (emphasis in original).) The
2 Opposing Intervenor continue: “Instead of providing Big Rivers a regulatory promise of future
3 recovery through a deferral, the Commission should not allow depreciation expense on excess
4 capacity in the revenue requirement and not allow the utility to recover any disallowed
5 depreciation expense in the future.” (*Id.*) Extrapolating their own characterizations of the
6 October 29 Order, the Opposing Intervenor conclude that “[t]he Commission thereby virtually
7 guarantees that Big Rivers will recover the Coleman depreciation expense from customers in the
8 future.” (Memorandum in Support of Petition for Rehearing at p. 6.)

9 If the Opposing Intervenor instead rely on the actual language in the October 29 Order,
10 the underpinnings of their position collapse. Rather than “virtually guarantee” that Big Rivers
11 will recover Coleman depreciation expenses in the future, the Commission said that the deferred
12 Coleman depreciation expense may be considered for recovery in the future under certain
13 circumstances (October 29 Order at p. 33):

14 It is the Commission’s intent that the amount recorded as a deferred asset will be
15 considered for amortization at some future point in time if and when the facility is
16 needed to serve customers, is sold, or is permanently closed.

17
18 The Commission cannot have made an error by allowing Big Rivers to recover depreciation
19 expense on Coleman in its rates because the Commission has not made that decision.

20 Interestingly, the Opposing Intervenor do not claim, or cite any authority holding, that
21 the Commission lacks the authority to grant utilities the authority to establish regulatory
22 accounts, and any such claim would be contrary to Commission practice and precedent. (*See,*
23 *e.g.,* Order dated Dec. 23, 2008 in *In the Matter of East Ky. Power Coop., Inc. for an Order*
24 *Approving Accounting Practices to Establish a Regulatory Asset Related to Certain Replacement*
25 *Power Costs Resulting from Generation Forced Outages*, Case No. 2008-00436 at pp. 3-4

1 (discussing Commission practice for establishing regulatory assets.) Instead, the Opposing
2 Intervenors claim that under generally accepted accounting principles (“GAAP”), “Big Rivers
3 cannot defer and record the excluded Coleman depreciation expense as a regulatory asset unless
4 this Commission gives ‘*reasonable assurance*’ that it is ‘*probable*’ that Big Rivers will recover
5 that expense from customers in the future.” (Memorandum in Support of Petition for Rehearing
6 at p. 5 (emphasis in original).) Big Rivers does not agree that deferring depreciation expense in
7 accordance with the October 29 Order would violate GAAP, but even if the Opposing
8 Intervenors were correct that Big Rivers cannot defer Coleman depreciation expense under
9 GAAP, the Opposing Intervenors have not shown that it follows that GAAP somehow commits
10 the Commission to grant rate recovery in contravention of the plain language of the October 29
11 Order. The Commission expressly stated in the October 29 Order that it is the only agency with
12 ratemaking authority over Big Rivers. As such, the Commission should deny rehearing on this
13 issue.

14 Additionally, Opposing Intervenor KIUC proposed in its brief “as an alternative to
15 suspending, or ceasing, depreciation on the idled plants, that the depreciation expense could be
16 deferred and recorded in a regulatory asset account for recovery at a later time.” (October 29
17 Order, at pp. 31-32; KIUC Post-Hearing Brief at pp. 40-47.) So, KIUC supported an alternative
18 that involved deferring and recording depreciation expense on idled plants in a regulatory
19 account, and no other Opposing Intervenor opposed that alternative. The Commission should
20 deny rehearing on this issue because the Opposing Intervenors had many opportunities to raise
21 this argument during the case in chief but chose not to do so. The Commission has denied
22 rehearing in previous cases where a party voluntarily declined to present the argument or
23 evidence during the case only to try to raise the issue for the first time on rehearing. (*See, e.g.,*

1 Order dated October 17, 2005, in *In the Matter of: Application of Kentucky Power Company for*
2 *Approval of an Amended Compliance Plan for Purposes of Recovering Additional Costs of*
3 *Pollution Control Facilities and to Amend its Environmental Cost Recovery Surcharge Tariff,*
4 PSC Case No. 2005-00068 (“Kentucky Power had a full and fair opportunity in this proceeding
5 to propose an alternative means of reflecting income taxes in the rate of return calculation for the
6 environmental surcharge...Kentucky Power had full knowledge of the tax issue raised by KIUC
7 and Kentucky Power's rebuttal testimony could have included the evidence it now seeks to
8 present on rehearing. Based on a review of all of Kentucky Power's rehearing arguments, the
9 Commission finds that rehearing should be denied”); Order dated January 29, 1991, in *In the*
10 *Matter of: An Adjustment of Gas and Electric Rates of Louisville Gas and Electric Company,*
11 PSC Case No. 90-158 (“LG&E did not propose to recover the costs of this rate case through
12 rates. To raise such costs for the first time on rehearing is improper”).) Because the Opposing
13 Intervenors seek rehearing based on an argument that they chose not to pursue during the case in
14 chief, the Commission should deny rehearing on this issue.

15 The remainder of the Opposing Intervenors’ arguments in support of their first
16 assignment of error is simply a rehashing of arguments they made in their direct testimonies and
17 briefs that the Commission should not allow depreciation expense on Coleman. A party cannot
18 support a request for rehearing with a mere “recitation of the arguments that it presented in its
19 complaint, in filed testimony, at oral argument and in its post-hearing briefs.” (Order dated
20 March 2, 2012, in *In the Matter of DIP Teleconnect, LLC v. BellSouth Telecomm., Inc.,* Case No.
21 2009-00127; *see also* Order dated December 15, 2009, in *In the Matter of Complaint of Sprint*
22 *Comms. Co. LP Against Brandenburg Tele. Co. and Request for Expedited Relief,* Case No.
23 2008-00135 (denying motion for rehearing after finding that the moving party's arguments for

1 rehearing were “merely a rehash of its old arguments”); Order dated January 18, 2008, in *In the*
2 *Matter of: Petition of Bellsouth Telecommunications, Inc. to Establish Generic Docket to*
3 *Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, Case No.
4 2004-00427 (denying motion for rehearing because it presented no “new evidence or arguments
5 which were not previously considered by the Commission”); Order dated August 21, 2006, in *In*
6 *the Matter of: Joint Application for Approval of the Indirect Transfer of Control Relating to the*
7 *Merger of AT&T Inc. and Bellsouth Corp.*, Case No. 2006-00136 (“Intervenors have raised no
8 evidence or arguments not previously considered by the Commission. Thus, the Commission
9 will not grant rehearing”).) Thus, the Commission should not grant rehearing based on a rehash
10 of arguments the Commission previously considered.

11 **C. The Commission should not grant rehearing based on the Opposing Intervenors’**
12 **claim that the October 29 Order fails to account for recent MISO filings with FERC**

13 For their second assignment of error, the Opposing Intervenors allege that the October 29
14 Order “fails to account for recent Midcontinent Independent System Operator (‘MISO’) filings
15 with the Federal Energy Regulatory Commission (‘FERC’) indicating that Big Rivers will likely
16 receive \$12.313 million more in compensation for the Coleman units as a result of its System
17 Support Resource (‘SSR’) Agreement than was reflected in the Commission-approved revenue
18 requirement.” (Petition for Rehearing ¶ 2.)

19 The Opposing Intervenors attempt to support this argument with MISO filings dated
20 November 1, 2013. (*See* Opposing Intervenors’ Memorandum in Support of Petition for
21 Rehearing at p. 6.) These documents did not exist at the time of the hearing in this matter in
22 early July 2013, or even at the time the Commission issued its order in this proceeding on
23 October 29, 2013, and therefore, they cannot be relied upon or presented on rehearing.

1 In order for the Commission to grant a motion for rehearing pursuant to KRS 278.400,
2 the moving party must present new arguments or “newly-discovered evidence” that “could not
3 with reasonable diligence have been offered on the former hearing.” (KRS 278.400.) Citing the
4 Kentucky Supreme Court, the Commission has held that “on rehearing, a party may present
5 ‘newly discovered evidence’ which has been judicially defined to be limited to evidence that
6 existed at the time of the former hearing, not ‘new evidence’ which did not exist at the time of the
7 former hearing. (Order dated November 15, 2013, in *In the Matter of Application of Ky. Power*
8 *Co.*, Case No. 2012-00578 (citing *Stephens v. Kentucky Utilities Co.*, 569 S.W.2d 155, 158 (Ky.
9 1978)).) The MISO documents relied upon by the Opposing Intervenors are “‘new evidence’
10 which did not exist at the time of the former hearing” and therefore may not be presented on
11 rehearing. Thus, rehearing based upon those documents is not proper under KRS 278.400, and
12 the Commission should deny rehearing on this issue.

13 **D. The Commission should not grant rehearing based on the Opposing Intervenors’**
14 **claim that the October 29 Order fails to provide specific parameters regarding the**
15 **implementation of Big Rivers’ load mitigation plan**
16

17 For their third assignment of error, the Opposing Intervenors allege that the October 29
18 Order “fails to provide specific parameters regarding the implementation of Big Rivers’ load
19 mitigation plan.” (Petition for Rehearing ¶ 3.) In support of this argument, the Opposing
20 Intervenors claim, “Unless the Commission sets forth specific parameters that Big Rivers must
21 adhere to in implementing its mitigation plan, then its customers will be left on the hook
22 indefinitely to continue to pay for rate increases that may never be alleviated.” (Memorandum in
23 Support of Petition for Rehearing at p. 15.)

24 The Opposing Intervenors fail to explain how the Commission’s October 29 Order could
25 possibly terminate the authority the Commission has over utilities and rates under KRS Chapter

Respectfully submitted,



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Certificate of Service

I certify that a true and accurate copy of the foregoing was served by Federal Express or by regular mail upon the persons listed on the service list accompanying this response, on or before the date this petition is filed with the Kentucky Public Service Commission.

On this the 26th day of November, 2013,



Counsel for Big Rivers Electric Corporation