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Via Overnight Mail

July 20, 2011

Mr. Jeff Derouen, Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, Kentucky 40602

RECEIVED

JUL 21 2011

PUBLIC SERVICE
COMMISSION


Re: Case No. 2011-00036

Dear Mr. Derouen:

Please find enclosed the original and ten (10) copies of KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC.'s (KIUC) RESPONSE TO BIG RIVERS ELECTRIC CORPORATION'S MOTION TO COMPEL to be filed in the above-referenced matter.

By copy of this letter, all parties listed on the Certificate of Service have been served. Please place these documents of file.

Very Truly Yours,



Michael L. Kurtz, Esq.
Kurt J. Boehm, Esq.
BOEHM, KURTZ & LOWRY

MLKkew
Attachment

cc: Certificate of Service
David C. Brown, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by electronic mail (when available) or by mailing a true and correct copy by overnight mail, unless other noted, this 20th day of July, 2011 to the following



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**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

In The Matter Of: The Application Of Big Rivers Corporation For General Adjustment of Rates : Case No. 2011-00036

**KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC.'S (KIUC) RESPONSE TO
BIG RIVERS ELECTRIC CORPORATION'S MOTION TO COMPEL**

KIUC submits this Response to Big Rivers Electric Corporation's July 11, 2011 Motion to Compel.

A. Response to Big Rivers' Information Request, Item 1.

Counsel for Big Rivers and KIUC agreed that KIUC would provide certain information to Big Rivers in response to BREC-1. On July 13, 2011, KIUC filed Supplemental Responses to BREC-1 in compliance with this agreement. Counsel for Big Rivers has advised KIUC that the issue addressed in Part A of Big Rivers' July 11, 2011 Motion to Compel has been sufficiently addressed by KIUC's Supplemental Responses. KIUC believes that this matter is no longer in dispute.

B. Response to Big Rivers' Information Request, Item 41.

BREC-41 states:

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

In its Response to Big Rivers' First Data Requests, KIUC objected to BREC-41 on the grounds that *“the information requested is not relevant to the issues presented in this docket and is confidential and proprietary to each Smelter,”* and that *“E.ON payments to the Smelters at closing were disclosed to the Staff and the Attorney General in Case No. 2007-00445 under a petition of confidentiality.”* For the reasons set out below, KIUC strongly opposes Big Rivers' Motion to Compel with respect to BREC-41.

1. The Information Requested In BREC-41 Is Not Relevant Nor Reasonably Calculated To Lead To The Discovery Of Admissible Evidence.

The information sought in BREC-41 is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Any attempt by Big Rivers to link the E.ON unwind payments to the Smelters' position in this rate application and the determination of fair, just and reasonable rates two years later is far-fetched. It is a long-recognized principle, that discovery must be kept within reasonable bounds and restricted to questions having substantial and material relevancy. Carpenter v. Wells, Ky., 358 S.W.2d 524 (1962). Any payments received by the Smelters from the former E.ON U.S. LLC were payments made from one unregulated business to another unregulated business. The finances of these businesses are not at issue in this proceeding.

Further, the payments made to the Smelters from E.ON U.S., LLC were finalized in mid-2009. Even if the finances of the Smelters were at issue in this case, the payments would not be as they pre-date Big Rivers' test period.

The payments made to the Smelters from E.ON were intended in large part to compensate the Smelters for relinquishing the remaining period of their favorable retail contracts with E.ON's unregulated subsidiary. Those payments were totally disconnected, in amount and rationale, from monies paid by E.ON to or on behalf of either Big Rivers or the Members. Each party – the Smelters, Big Rivers, and indirectly the Members - received compensation from E.ON in separate negotiations and for entirely different reasons. For the Smelters, this was not a windfall, but compensation for real loss. Nor were the E.ON payments received by the Smelters in any way connected to their negotiations with Big Rivers or the Members. The Smelters' agreement to the TIER Adjustment Charge, the Surcharges and the \$0.25/MWh differential over the Large Industrial rate, which they will continue to pay at the conclusion of this rate case, have no relation, in amount or theory, to the compensation paid to the Smelters by E.ON. Any disclosure in this proceeding of E.ON's compensation to the Smelters in the Unwind transaction, to be meaningful to the Commission, would require delving back into the complex Unwind negotiations between E.ON and the Smelters. This is well beyond the scope of the present proceeding. Big Rivers was not a party to those negotiations and had no right to the information then or now.

Finally, the originally contemplated cash and escrow payments to Century did not take place, but rather were incorporated into an entirely different and complex financial arrangement among Century and E.ON.

For these reasons, the details of any payments made by the unregulated E.ON U.S. LLC to the Smelters beginning two years ago are irrelevant to this case and are not reasonably calculated to lead to admissible evidence.

2. Big Rivers Is Collaterally Estopped, Or In The Alternative Barred By Res Judicata From Discovering Information That It Was Unable To Discover During The 2007 “Unwind Transaction.”

The issue of the discoverability of the payments received by each Smelter by the former E.ON U.S., LLC arising out of the Big Rivers “unwind transaction” (Case No. 2007-00455) has been decided by the Commission. In that proceeding, the Commission sustained the Motion for Confidential Protection to preclude Big Rivers and the Attorney General from having the information, although the payment amounts were disclosed to the Commission. If Big Rivers and the other parties to Case 2007-00455 were not permitted the information then, they cannot be permitted to discover the same information now, particularly now that E.ON and its successor are absent. (See Case No. 2007-00455, Order dated March 6, 2009, page 41; see also Commission letter dated April 28, 2008 referenced therein.)

Big Rivers is collaterally estopped, or in the alternative barred by the related principle of res judicata, from obtaining the information sought in BREC-41 as the same issue was decided by this Commission in the unwind proceeding regarding the identical data request. Under collateral estoppel, “once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.” Montana v. United States, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed.2d 210. Under res judicata, “a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that

action.” Cromwell v. County of Sac, 94 U.S. 351, 352, 24 L.Ed. 195. In Case No. 2007-00455 the Commission determined that Big Rivers and HMPL should not be privy to the financial arrangements made by and between the Smelters and E.ON. Big Rivers should not be permitted to relitigate that issue now.

For the foregoing reasons, the Commission should deny Big Rivers’ July 11, 2011 Motion to Compel.

Respectfully submitted,



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July 19, 2011