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DEC 14 2011

PUBLIC SERVICE
COMMISSION

Via Overnight Mail

December 12, 2011

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

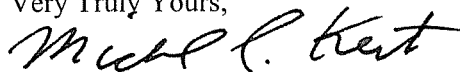
Re: Case No. 2011-00036

Dear Mr. Derouen:

Please find enclosed the original and ten (10) copies of KIUC'S MOTION TO DISMISS REHEARING AND TO VACATE ORDER OF DECEMBER 8, 2011 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

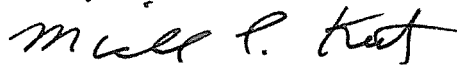
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Attachment

cc: Certificate of Service
Richard Raff, Esq.
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 12th day of December, 2011 to the following



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Kurt J. Boehm, Esq.

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

APPLICATION OF BIG RIVERS)	
ELECTRIC CORPORATION FOR A)	CASE NO. 2011-00036
GENERAL ADJUSTMENT IN RATES)	

MOTION TO DISMISS REHEARING AND TO VACATE

ORDER OF DECEMBER 8, 2011

Kentucky Industrial Utility Customers, Inc. (“KIUC”) by counsel, moves the Kentucky Public Service Commission (“Commission”) to enter an Order dismissing Big Rivers Electric Corporation’s (“Big Rivers”) Petition for Rehearing filed on December 6, 2011 and vacating the Commission’s December 8, 2011 Order granting rehearing.

MEMORANDUM IN SUPPORT

1. Procedural History

On November 17, 2011, the Commission issued its Order in Case No. 2011-00036 approving new rates for service rendered by Big Rivers. On December 1, 2011, KIUC filed a Complaint and original Petition for Review with the Franklin Circuit Court, (Appendix 1) of the November 17, 2011 Order pursuant to KRS 278.410.¹ On December 6, 2011, five days after

¹ The Franklin Circuit Court assigned Civil Action No. 11-CI-1700 to KIUC’s Appeal. Notice of Appeal is attached.

jurisdiction vested in the Franklin Circuit Court, Big Rivers filed a Petition for Rehearing of the November 17, 2011 Order with the Commission pursuant to KRS 278.400.

On December 8, 2011, the Commission issued an Order granting Big Rivers' Petition for Rehearing and established a procedural schedule to receive evidence and testimony on the issues addressed in Big Rivers' Petition. The Commission's Order did not reference the fact that this matter is currently on appeal at the Franklin Circuit Court. The Commission may have been unaware at the time of the December 8, 2011 Order that an appeal was filed with the Franklin Circuit Court 7 days prior to the issuance of the Order.

2. Argument

Big Rivers' Petition should be dismissed because the Commission lacks jurisdiction over the subject matter of the Petition. The Commission and Kentucky courts have held that the Commission loses jurisdiction over a matter once the matter is appealed to a higher court. Since Case No. 2011-00036 is on appeal to the Franklin Circuit Court, the Commission no longer has jurisdiction over this matter.

In *Union Light, Heat and Power Company's Motion for Extension of Filing Date and Continuation of Its Current Rider AMRP Rates*, Case No. 2004-00403, Union Light Heat and Power Company ("ULH&P") argued that the Commission retains jurisdiction to modify its orders even after the Order is appealed to the Franklin Circuit Court. It further argued that granting its requested relief would constitute a ministerial act and that the Commission has "*inherent ability to issue ministerial type Orders modifying its previous Orders even when an appeal has been taken.*" (December 7, 2005 Order, at 4).

The Commission rejected this argument holding that, “[g]enerally a lower tribunal loses jurisdiction to amend or modify a decision once that decision is appealed.”² The Commission cited Johnson Bonding Co. v. Ashcroft, Ky., 483 S.W.2d 118 (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.”); and City of Devondale v. Stallings, Ky., 795 S.W.2d 954 (1990) (“[a] notice of appeal, when filed, transfers jurisdiction of the case from the circuit court to the appellate court”).

The Commission has adhered to this principle even when there is a separate proceeding addressing the same subject matter, as it did when conducting a six-month review of Kentucky Utilities Company’s (“KU”) environmental surcharge mechanism (“ESM”) in Case No. 1995-00445. In that proceeding, an intervenor sought a refund of certain amounts on the ground that the Franklin Circuit Court had overturned a Commission Order in Case No. 1993-00465 granting KU authority to collect those amounts through its ESM.³ The Commission refused to grant the requested refund because the subject matter of Case No. 1993-00465 was still on appeal: “*The Commission finds that it cannot implement the Court’s judgment until Case No. 93-465 is actually remanded... sound public policy requires the Commission to recognize the uncertainties present during the appeal and wait until all appeals are exhausted.*”⁴

These decisions are consistent with the Commission’s recent holding in *Schimmoeller v. Kentucky-American Water Company*, Case No. 2009-00096. In *Schimmoeller*, the Commission issued a Certificate of Public Convenience and Necessity (“Certificate”) to construct certain utility facilities. A party to that proceeding filed an appeal with the Franklin Circuit Court. Two

² December 7, 2005 Order, at 5.

³ *In the Matter of an Examination by the Public Service Commission of the Environmental Surcharge Mechanism of Kentucky Utilities Company as Billed from February 1, 1995 to July 31, 1995*, Case No. 1995-00445, Order at 3 (Mar. 6, 1996).

⁴ *Id.*

individuals subsequently filed complaints with the Commission requesting that the Commission reexamine the need for the construction of new facilities.⁵ The Commission dismissed the complaints stating that it had “*previously held that the Commission lacks jurisdiction to amend or modify any Order that is currently pending judicial review... To the extent that the Complainants seek to reopen [the Certificate case], we are without jurisdiction to act.*”⁶

The one notable exception to the rule that a court or administrative body loses jurisdiction over a matter once it is appealed to a higher court relates to the lower tribunal’s ability to correct “ministerial” errors relating to the appealed decision. This exception is discussed in *Frankfort Kentucky Natural Gas Co. v. City of Frankfort*; 276 Ky. 199, 123 S.W.2d 270. Ky.App. 1938. (December 06, 1938). In that case, a group of Kentucky cities appealed two Commission orders to the Franklin Circuit Court. It was subsequently discovered that the Commissioners had mistakenly neglected to sign the orders that were on appeal. The Commission signed the order nunc pro tunc and took the position that the orders were effective on the day that they were intended to be issued and not effective on the later date. The Kentucky Court of Appeals agreed with the position of the Commission finding that when it can be seen by reference to a record what was intended to be entered but by inadvertence or mistake on the part of the judge or clerk it had not been, the same may be put to record as of the date it should have been done by a nunc pro tunc order. The Court, citing Helle v. Public Utilities Commission of Ohio, 118 Ohio St. 434, 161 N.E. 282 stated:

“It is not the province of a nunc pro tunc order to correct a mistake in judgment, its sole function being that of correcting a clerical error in the execution of a ministerial act. Where an order has actually been rendered, but not entered on the record in consequence of mistake, neglect, omission or inadvertence of the clerk or other ministerial officer, the court or other tribunal has power to order that the judgment or order be entered nunc pro tunc. Even so, the

⁵ November 24, 2009 Order at 2.

⁶ Id. At 4.

fact of its rendition must be satisfactorily established, and it must further appear that no intervening rights will be prejudiced.” (at 272.)

The narrow application of this exception was emphasized in *Re ULH&P*, Case No. 2004-00403 cited above. The Commission acknowledged the “ministerial acts” exception, but defined “ministerial acts” as acts that involve “*obedience to instructions or laws instead of discretion, judgment, or skill;*”⁷ and a “ministerial duty” as “*one in respect to which nothing is left to discretion.*”⁸ In that case, the Commission determined that ULH&P’s request for an extension of a certain Rider beyond the time period previously found reasonable and the argument that the Commission change its directive regarding the filing of its next rate case, “[c]early... *involve judgment and discretion.*”⁹

Big Rivers’ Petition for Rehearing which seeks to increase rates on consumers by \$2,734,907 contains requests that involve judgment and discretion. Big Rivers raises the following four issues on rehearing:

1. The disallowance of Big Rivers’ adjustment to recover rate case expenses, allegedly worth \$640,753.
2. A miscalculation of Big Rivers’ depreciation adjustment related to construction work in progress, allegedly worth \$450,000.
3. The exclusion of construction work in progress from Big Rivers’ depreciation adjustment, allegedly worth \$1,644,154.
4. The finding that the financial model relied upon by Big Rivers during the Unwind Transaction did not include any Smelter TIER revenues, and any other findings that the Commission deems appropriate to change if this finding relating to the financial model is eliminated.

⁷ Case No. 2004-00403; Order of January 27, 2005, p. 5; Citing Black’s Law Dictionary 1011 (7th ed. 1999). 2 Am.Jur.

2d Administrative Law § 64 (1994),

⁸ Case No. 2004-00403; Order of January 27, 2005, p. 5; Citing 2 Am.Jur. 2d Administrative Law § 60 (May, 2004)

⁹ January 27, 2005 Order at. 5, Case No. 2004-00403

Big Rivers is not petitioning the Commission to correct an uncontested, clerical error. KIUC would oppose Big Rivers' Petition and the resolution of these issues, if the Commission had jurisdiction. Proceeding with the Rehearing would require the taking of new evidence and for the Commission to exercise judgment and discretion in resetting the rates. The Commission's November 17, 2011 underscores this fact by directing Big Rivers to file testimony in support of its rehearing issues. Ratemaking is not a ministerial act.

In sum, the principle is well-established that the Commission lacks jurisdiction once a case is appealed to the Franklin Circuit Court. Applying this principle to this proceeding, the Commission lacks jurisdiction over the subject matter of its November 17, 2011 Order in Case No. 2011-00036, because it is on appeal in the Franklin Circuit Court. The issues identified in Big Rivers' Petition for Rehearing would increase rates on consumers by \$2,734,907 and involve judgment and discretion on the part of the Commission. The Kentucky Court of Appeals and the Commission have held that, once appealed to a higher court, the Commission cannot modify its own order on issues involving judgment and discretion. For these reasons, the Commission should enter an Order dismissing the Petition for Rehearing of Big Rivers filed on December 6, 2011 and vacating its Order of December 8, 2011 granting Big Rivers' Petition for Rehearing.

WHEREFORE, Kentucky Industrial Utility Customers, Inc. respectfully requests that the Commission enter an Order dismissing Big Rivers Electric Corporation's Petition for Rehearing and vacating its Order of December 8, 2011 granting Big Rivers' Petition for Rehearing.

Respectfully submitted,



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Kurt J. Boehm, Esq.

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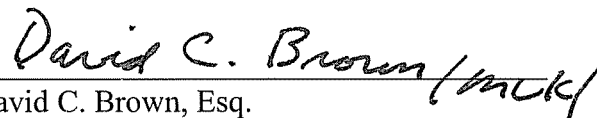
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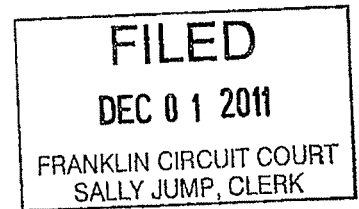
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**CO-COUNSEL FOR ALCAN PRIMARY
PRODUCTS CORPORATION**

December 12, 2011

APPENDIX 1

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
CIVIL ACTION NO 11-CI- 1700
DIVISION F



KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC.

PLAINTIFF

vs.

KENTUCKY PUBLIC SERVICE COMMISSION

Serve: Jack Conway or any Assistant Attorney General
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700 Capitol Avenue
Suite 118
Frankfort, Kentucky 40601

Richard Raff
Public Service Commission
Post Office Box 615
Frankfort, Kentucky 40602

BIG RIVERS ELECTRIC CORPORATION

Serve: Paula L. Mitchell
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Henderson, Kentucky 42420

**ATTORNEY GENERAL OF THE COMMONWEALTH OF KENTUCKY
BY AND THROUGH HIS OFFICE FOR RATE INTERVENTION**

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KENERGY CORP.

Serve: Sanford Novick
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Henderson, Kentucky 42420

JACKSON PURCHASE ENERGY CORPORATION

Serve: Kelly Nuckols
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Paducah, Kentucky 42001

DEFENDANTS

COMPLAINT AND ORIGINAL ACTION FOR REVIEW

Kentucky Industrial Utility Customers, Inc. ("KIUC") for its complaint states as follows:

INTRODUCTION

This is an action by KIUC pursuant to KRS 278.410 to vacate and set aside portions of the November 17, 2011, Order of the Public Service Commission of Kentucky ("Commission") in Case No. 2011-00036, In the Matter of Application of Big Rivers Electric Corporation For A General Adjustment In Rates, and for declaratory and other relief pursuant to Section 2 of the Kentucky Constitution..

PARTIES

1. KIUC is a Kentucky non-profit corporation and trade organization comprised of large industrial electric users with manufacturing operations located in Kentucky. KIUC members represented in this proceeding are Alcan Primary Products Corporation and Century

Aluminum of Kentucky General Partnership (collectively “the Smelters”), and Domtar Paper Co., LLC, Kimberly-Clark Corporation and Aleris International, Inc . (collectively, the “Large Industrials”)

2. The Commission is a body corporate with the power to sue and be sued in its corporate name. The Commission has jurisdiction to regulate utilities within the Commonwealth and is charged with enforcing the provisions of Chapter 278 and 279 of the Kentucky Revised Statutes.

3. Big Rivers Electric Corporation (“Big Rivers”) is a Kentucky corporation and a generating and transmission utility regulated by the Commission pursuant to KRS 278 and 279. Big Rivers sells its energy to its three cooperative members, Kenergy Corp., Jackson Purchase Energy Corporation and Meade County Rural Electric Cooperative Corporation.

4. Kenergy Corp. (“Kenergy”) is a Kentucky corporation regulated by the Commission pursuant to KRS 278 and 279 and a cooperative member of Big Rivers. Kenergy purchases 100% of its energy from Big Rivers and resells such energy to its members including 100% of the energy requirements of the Smelters and Large Industrials.

5. Jackson Purchase Energy Corporation (“Jackson Purchase”) is a Kentucky corporation regulated by the Commission pursuant to KRS 278 and 279. Jackson Purchase is a cooperative member of Big Rivers and purchases 100% of its energy requirements from Big Rivers.

6. Jack Conway is the Attorney General of the Commonwealth of Kentucky (“Attorney General.”). The Attorney General, acting by and through his Utility Rate Intervention Division, was granted to leave in the rate proceeding giving rise to this action.

THE PROCEEDINGS

7. On January 31, 2011, Big Rivers filed with the Public Service Commission (“Commission”) a Notice of Intent to file an application for a general adjustment of rates pursuant to KRS 278 and 807 KAR 5:011, section 10(2). The proposed application was assigned Case No. 2011-00036. On March 1, 2011, Big Rivers filed its Application for a General Adjustment In Rates.

8. By order dated February 28, 2011, the Commission granted KIUC full intervention in Case No. 2011-00036. Other parties intervening in the proceeding were the Attorney General; Kenergy Corp. and Jackson Purchase Energy Corporation.

9. The Commission held a public hearing in Case No. 2011-00036 on July 26, 27 and 28, 2011 during which all witnesses filing direct testimony were subject to cross-examination.

10. On November 17, 2011, the Commission entered an Order in Case No. 2011-00036 (the “Order”) adjusting the rates and tariffs of Big Rivers. By the Order, the Commission granted Big Rivers’ application in part. A true and correct copy of the Order is attached hereto as EXHIBIT 1 and is incorporated herein by reference.

ASSIGNMENTS OF ERROR

I. UNLAWFUL SUBSIDY

The Commission's November 17, 2011 Order approving a revenue allocation containing a significant subsidy to be paid by the Large Industrial and Smelter rate classes to the Rural rate class is arbitrary, unreasonable and unlawful.

11. As set forth on page 29 of the Order, the Commission found that under Big Rivers' existing rates, based on the approved cost of service study, the Large Industrials and Smelters subsidize the rates of the Rural class (residential and commercial customers) by \$13.5 million per year. The Commission then found that the Rural subsidy should be reduced by \$2.4 million per year, thus approving a continuing subsidy of \$11.1 million per year to be paid by the Large Industrials and Smelters.

12. The Commission's specific finding of a significant interclass subsidy contained in current and proposed rates and its refusal to eliminate the subsidy is unreasonable and unlawful in violation of KRS 278.170(1) which provides:

"No utility shall, as to rates or service, give any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage, or establish or maintain any unreasonable difference between localities or between classes of service for doing a like and contemporaneous service under the same or substantially the same conditions."

13. The Commission's Order approving the continuing subsidy of the Rural Class by the Large Industrials and Smelters is arbitrary in violation of Section 2 of the Kentucky Constitution and lacks any rationale justifying the subsidy or for granting an unreasonable advantage to the Rural class and imposing an unreasonable disadvantage to the Large Industrials and Smelters.

14. The Commission's Order approving the continuing subsidy of the Rural Class by the Large Industrials and Smelters lacks substantial evidence, and is contrary to the clear and satisfactory evidence in the proceeding.

II. DSM EXPENSE

The Commission's November 17, 2011 Order exempting the Smelter customers from paying any of the approved demand side management ("DSM") costs, but failing to implement that directive in its Order, is arbitrary, unreasonable and unlawful.

15. On page 22 of its Order, the Commission approved Big River's recommendation to allow Big Rivers to recover \$1 million in proposed demand side management ("DSM") expenses but on the specific condition that the \$1 million should be recovered from the customers that benefit from DSM programs and exempted the Smelters and Large Industrials from paying any DSM costs. The Commission stated:

"[W]hile we agree in theory with Big Rivers' argument that all customers can benefit from deferring new generation, we are mindful that the cost of DSM programs should be allocated to the classes of customers that are eligible to participate in those programs. For that reason, in allocating the revenue increase granted herein, we will incorporate an adjustment to ensure that none of the \$1 million will be recovered from the Smelters."

16. On page 29 of the Order the Commission again addressed its decision to exempt the Smelters and Large Industrials from paying any part of the approved \$1 million DSM expense:

[F]or purposes of revenue allocation, it has been our practice to allow the costs of programs to be assigned only to the customer classes that are eligible to participate in the programs. Here, Big Rivers has not shown a sufficient basis to allocate the costs of these DSM programs to customer classes not eligible to participate in the programs. Therefore, the Commission will make an adjustment

to reflect the assignment of the full \$1 million cost for Big Rivers' energy efficiency programs to the Rural rate class.

17. Despite the Commission's assurance that "none of the \$1 million will be recovered from the Smelters," the Commission's Order does in fact provide for the recovery of DSM costs from the Large Industrials and Smelters.

18. The Commission attempted to accomplish its stated objective of exempting the Smelters and Large Industrials from paying DSM costs by allocating 100% of the DSM expenses to the Rural rate class in the approved cost of service study. However, at page 30 of the Order, the Commission acknowledged that the Rural rate class is not paying its full cost of service. By definition, if the Rurals are not paying full cost of service then the Rurals are not paying the full level of each cost assigned to them in base rates, including DSM. Because the Rural class, at Commission approved rates, are paying less than the system average rate of return, the "shortfall" is proportionate for all allocated costs including DSM costs. This means, by definition, that the Rural customers are not paying all of the \$1 million in DSM expenses and that a significant portion of the \$1 million DSM cost will be borne by the Large Industrial and Smelter customers contrary to the Commission's intention. The Commission's Order requiring the Large Industrials and Smelters to bear any portion of the \$1 million DSM cost is, in light of the Commission expressed intention to exempt the Large Industrials and Smelters from the DSM expense, unreasonable and unlawful and should be reversed, and this matter remanded to the Commission for the entry of an order that implements rates that comply with the directives of the Commission regarding the allocation of DSM expenses to the customer classes.

III. DEPRECIATION

The Commission's November 17, 2011 Order adopting Big Rivers' proposed depreciation rates is arbitrary, unreasonable and unlawful.

19. On page 20 of its Order the Commission approved increased depreciation rates proposed by Big Rivers' consultants Burns & McDonnell ("B&M"). The evidence in the record shows that the depreciation rates proposed by Big Rivers are arbitrary, unreasonable and unlawful in two respects.

20. First, Big Rivers' proposed depreciation rates are based on shorter facility service lives (resulting in higher depreciation rates) than the management of Big Rivers believes to be correct and shorter than Big Rivers represented to its primary creditor, Rural Utility Service ("RUS").

21. Second, this increase in depreciation rates should not have caused an increase in Big Rivers' depreciation expense because there should have been a corresponding reduction in the depreciable plant balance (based on an additional year and one half of accumulated depreciation). However, B&M erred by increasing the depreciation rate based on shorter remaining lives, but failed to factor in the offsetting increase in accumulated depreciation. As a result, the Big Rivers' depreciation expense using the B&M study was \$6.2 million higher than warranted

22. KIUC witness Charles King submitted a depreciation study that used Big Rivers' own estimates concerning facility service lives along with standard best depreciation practices all as of the same time period, April 2010. The Commission found that the depreciation study

presented by KIUC was also “credible evidence” in support of KIUC’s proposed depreciation rates, but established Big Rivers’ rates for electrical service using the B&M depreciation study instead. The Commission erred in so doing. Its decision is arbitrary, unlawful and unreasonable, lacks substantial evidence and is contrary to the clear and satisfactory evidence, and the resulting rates established by the Commission in the Order are not fair, just and reasonable.

WHEREFORE, Kentucky Industrial Utility Customers, Inc. respectfully demands that:

1. The November 17, 2011 Order of the Commission in Case No. 2011-00036 be reversed in part and this matter remanded to the Commission for the entry of an order eliminating the interclass subsidies in Big Rivers’ rates, and that establishes new rates which reflect the subsidy reduction.

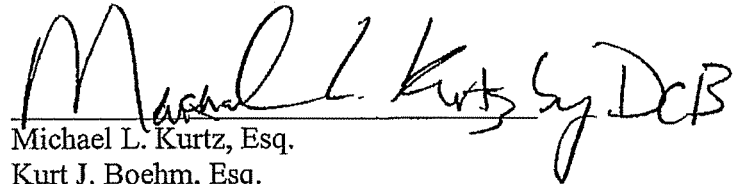
2. The November 17, 2011 Order of the Commission in Case No. 2011-00036 be reversed in part and this matter remanded to the Commission for the entry of an order that exempts all non-Rural customers from payment of any DSM-related expenses, and that establishes new rates that reflect the exemption.

3. The November 17, 2011 Order of the Commission in Case No. 2011-00036 be reversed in part and this matter remanded to the Commission for the entry of an order that rejects the depreciation rates proposed by Big Rivers, accepts the depreciation rates proposed by KIUC, and reduces Big Rivers’ rates by \$6.2 million.

4. All other relief which it may be entitled.

Respectfully submitted

**KENTUCKY INDUSTRIAL UTILITY
CUSTOMERS, INC**



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COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
CIVIL ACTION NO 11-CI- 1700
DIVISION I

FILED
DEC 01 2011
FRANKLIN CIRCUIT COURT
SALLY JUMP, CLERK

KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC.

PLAINTIFF

vs.

**KENTUCKY PUBLIC SERVICE COMMISSION,
BIG RIVERS ELECTRIC CORPORATION,
ATTORNEY GENERAL OF THE COMMONWEALTH OF KENTUCKY,
BY AND THROUGH HIS OFFICE FOR RATE INTERVENTION
KENERGY CORP., and
JACKSON PURCHASE ENERGY CORPORATION**

DEFENDANTS

DESIGNATION OF THE RECORD

Plaintiff, Kentucky Industrial Utility Customers, Inc. ("KIUC") in accordance with KRS 278.420, designates the following record of the proceedings before the Public Service Commission of Kentucky to be filed with Franklin Circuit Court in this action.

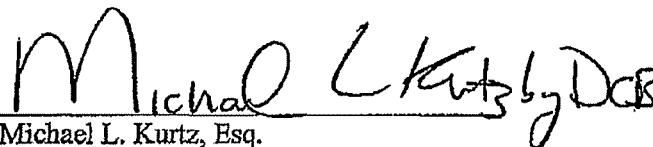
1. Plaintiff designates for inclusion in the record of this action the entire case file and record of Public Service Commission Case Number 2011-00036, In the Matter of Application of Big Rivers Electric Corporation For A General Adjustment In Rates.

2. The designation includes, but is not limited to, all pleadings, motions, exhibits, orders, memoranda, and the video recordings of the hearing in Case No. 2011-00036.

3. KIUC reserves the right to supplement and amend this designation in accordance with the provisions of KRS 278.420(2)

Respectfully submitted

**KENTUCKY INDUSTRIAL UTILITY
CUSTOMERS, INC**



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing DESIGNATION OF THE RECORD was served by United States First Class Mail, postage prepaid, on this 1st day of December, 2011 upon:

Jack Conway or any Assistant
Attorney General
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700 Capitol Avenue Suite 118
Frankfort, KY 40601

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