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APR 23 2012

**PUBLIC SERVICE
COMMISSION**

Via Overnight Mail

April 20, 2012

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

Re: Case No. 2012-00063

Dear Mr. Derouen:

Please find enclosed the original and ten (10) copies each of the MOTION TO DISMISS OF THE KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC. for filing 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
Quang Nyugen, Esq.
David C. Brown, Esq.

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

IN THE MATTER OF: THE APPLICATION OF BIG RIVERS :
ELECTRIC CORPORATION FOR APPROVAL OF ITS 2012 :
ENVIRONMENTAL COMPLIANCE PLAN., FOR APPROVAL : Case No. 2012-00063
OF ITS AMENDED ENVIRONMENTAL COST RECOVERY :
SURCHARGE TARIFF, FOR CERTIFICATES OF PUBLIC :
CONVENIENCE AND NECESSITY, AND FOR AUTHORITY :
TO ESTABLISH A REGULATORY ACCOUNT :

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**PUBLIC SERVICE
COMMISSION**

MOTION TO DISMISS

Kentucky Industrial Utility Customers, Inc. (“KIUC”) moves the Kentucky Public Service Commission (“Commission”) to enter an Order dismissing the instant action initiated by Big Rivers Electric Corporation (“Big Rivers”). The Application filed by Big Rivers on April 2, 2012 (“Application”) fails to provide sufficient evidence with which the Commission can make the determinations required under KRS 278.183 and KRS 278.020. Consequently, Big Rivers has not made a *prime facie* showing and has failed to meet its burden of proof with substantial evidence.¹ The Commission should dismiss the instant action without prejudice. Big Rivers should then refile its Application with the requisite evidence.

¹ This Commission and Kentucky courts have repeatedly stated that “[a]pplicants before an administrative agency have the burden of proof.” Order, Case No. 2005-00220 (May 19, 2006); Order, Case No. 2005-00057 (Feb. 9, 2007); *Energy Regulatory Commission v. Kentucky Power Company*, Ky. App., 605 S.W. 2d 46, 50 (1980); Order, Case No. 2001-00265 (May 13, 2002). Further administrative findings must be based on substantial evidence. *Kentucky Board of Nursing v. Ward*, Ky. App., 890 S.W.2d 641, 642 (1994).

MEMORANDUM IN SUPPORT

Big Rivers failed to provide the requisite evidence with which the Commission can make a determination as to whether its Application satisfies the requirements of KRS 278.183 or KRS 278.020. KRS 278.183 requires the Commission to determine whether an environmental compliance plan and rate surcharge are “reasonable and cost-effective” for compliance with certain environmental requirements. Additionally KRS 278.020 requires the Commission to determine whether “public convenience and necessity require” the projects proposed in Big Rivers’ Application. But the Application fails to provide the requisite evidence with which the Commission can make such determinations. Consequently, Big Rivers failed to meet its burden of proof and failed to provide substantial evidence to support its Application. Therefore, the Commission should dismiss the instant action without prejudice.

As described by Big Rivers witness Mark A. Hite, Big Rivers hired Sargent & Lundy, LLC (“S&L”) to conduct an analysis of the cost-effectiveness of various compliance strategies.² Based on S&L’s analysis, Big Rivers chose three alternatives to evaluate from a cost-effectiveness standpoint, which Big Rivers has labeled the “Build Case,” “Partial Build Case,” and “Buy Case.”³ Big Rivers acquired forward pricing data from PACE Global and hired ACES Power Marketing (“ACES”) to run production cost models.⁴ Big Rivers compiled this data to develop four financial models used to evaluate the Build Case, Partial Build Case, Buy Case, and the *status quo* “Base Case.”⁵ Big Rivers also performed two sensitivity studies to assess whether the compliance strategy would change if the Smelter load was eliminated after 2013.⁶ The Smelter annual load of 7,300,000 mWh represents approximately

² Direct Testimony of Mark A. Hite (“Hite Testimony”)(April 2, 2012) at 5:3-7.

³ Hite Testimony at 6:1-17.

⁴ Hite Testimony at 7:18-8:5.

⁵ Hite Testimony at 7:5-10.

⁶ Hite Testimony at 9:19-10:18.

70% of Big Rivers' native load energy sales. The sensitivity studies were performed only against the Build Case and Buy Case compliance alternatives.

Big Rivers' Application provides only a cursory explanation of the entire analysis conducted and omits information and testimony critical to determining whether its compliance plan and rate surcharge are reasonable and cost-effective, or whether the projects proposed by it are required by public convenience and necessity. Critical information and testimony missing from the Application includes, but is not limited to:

- Sargent & Lundy models and electronic spreadsheets used to assess compliance options.
- PACE Global information provided to ACES Power Marketing, which includes forward hourly energy prices, monthly coal prices, monthly natural gas prices, and monthly allowance prices.
- Big Rivers' plant specific data provided to ACES Power Marketing.
- The ACES Power Marketing production cost models used.
- The Big Rivers' corporate financial model used and studies of compliance alternatives.
- Testimony from a PACE Global witness to support their projections of forward hourly energy prices, monthly coal prices, monthly natural gas prices and monthly allowance prices.
- Testimony from an ACES witness to support the production cost model runs.
- The assumptions under the sensitivity studies which assume the loss of the 7,300,000 mWh Smelter load at the end of 2013 (70% of native load sales) were not provided. So the Commission and Intervenors are left to guess whether Big Rivers assumed it would sell 7,300,000 mWh into the wholesale market as a merchant generator (for how much?), would close power plants (at what cost?), would sell power plants (at what price?), would merge with another G&T cooperative or would be acquired by an investor-owned electric utility.

The Company provided only a one page summary of the results of its review of the compliance alternatives and the two sensitivity studies attached as an Exhibit to Mr. Hite's testimony. This one page summary is insufficient evidence for the utility to establish a *prime facie* case and meet its burden of proof.

Big Rivers' Application is deficient, especially when compared to the level of detail provided in the recent environmental compliance filings of Kentucky Power Company, Kentucky Utilities Company, and Louisville Gas & Electric Company.

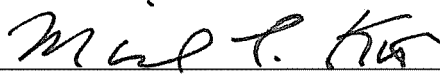
Big Rivers failed to provide critical information which the Commission would need to consider in making the determinations required under KRS 278.183 and KRS 278.020. The glaring deficiencies in the Application prevent Big Rivers from establishing a *prime facie* case that its environmental compliance plan is reasonable or cost-effective in light of other alternatives. Further, these deficiencies do not give this Commission even the minimal amount of evidence necessary to determine whether the public convenience and necessity require the \$286.14 million of compliance projects proposed by Big Rivers.

It is no answer to say that intervenors can obtain the missing evidence through discovery. KRS 278.183 provides that a hearing must be conducted within six months after an application is filed. Neither the Commission nor Intervenors should have to spend half of that six month period conducting discovery to ferret out information that should have been filed in Big Rivers' Application. Further, the missing information, once obtained, will surely lead to the need for additional discovery of information and assumptions referred to in those documents.

The Commission cannot and should not proceed to consider approving approximately \$286.14 million in capital expenditures and \$13.23 million in annual operating & maintenance expenses based merely upon the inadequate Application submitted by Big Rivers in this case. Instead, the Commission should dismiss the instant proceeding without prejudice and permit Big Rivers to file a proper Application.

WHEREFORE, Kentucky Industrial Utility Customers, Inc. respectfully requests that the Commission enter an Order dismissing this action without prejudice.

Respectfully submitted,



Michael L. Kurtz, Esq.

Kurt J. Boehm, Esq.

BOEHM, KURTZ & LOWRY

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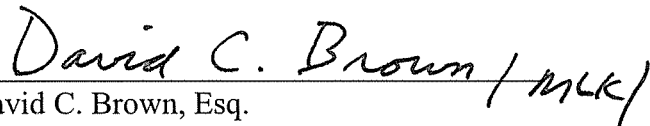
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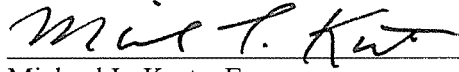
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**CO-COUNSEL FOR ALCAN PRIMARY PRODUCTS
CORPORATION**

April 20, 2012

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 April, 2012 to the following



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