

SULLIVAN, MOUNTJOY, STAINBACK & MILLER PSC

ATTORNEYS AT LAW

Ronald M. Sullivan
Jesse T. Mountjoy
Frank Stainback
James M. Miller
Michael A. Fiorella
Allen W. Holbrook
R. Michael Sullivan
Bryan R. Reynolds
Tyson A. Kamuf
Mark W. Starnes
C. Ellsworth Mountjoy
Mary L. Moorhouse

April 25, 2012

Via Federal Express

Jeff DeRouen
Executive Director
Public Service Commission
211 Sower Boulevard, P.O. Box 615
Frankfort, Kentucky 40602-0615

RECEIVED

APR 26 2012

PUBLIC SERVICE
COMMISSION

Re: *In the Matter of: Application of Big Rivers Electric Corporation for Approval of its 2012 Environmental Compliance Plan, for Approval of its Amended Environmental Cost Recovery Surcharge Tariff, for Certificates of Public Convenience and Necessity, and for Authority to Establish a Regulatory Account, P.S.C. Case No. 2012-00063*

Dear Mr. DeRouen:

Enclosed for filing are an original and ten copies of Big Rivers Electric Corporation's (i) response to Kentucky Industrial Utility Customers, Inc.'s Motion to Dismiss and (ii) Petition for Confidential Treatment for certain documents being filed with the response. The response will also serve as Big Rivers' response to the Attorney General's motion to dismiss. A copy of this letter, a copy of the response, and a copy of the petition have been served on each of the persons listed on the enclosed service list.

Sincerely,



Tyson Kamuf

TAK/ej
Enclosures

cc: Mark A. Bailey
Albert Yockey

Telephone (270) 926-4000
Telecopier (270) 683-6694

100 St. Ann Building
PO Box 727
Owensboro, Kentucky
42302-0727

Service List
PSC Case No. 2012-00063

Jennifer Black Hans, Esq.
Dennis G. Howard, II, Esq.
Lawrence W. Cook, Esq.
Assistant Attorneys General
1024 Capitol Center Drive
Suite 200
Frankfort, KY 40601-8204

Michael L. Kurtz, Esq.
Kurt J. Boehm, Esq.
Boehm, Kurtz and Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202

David C. Brown, Esq.
Stites & Harbison PLLC
1800 Providian Center
400 West Market Street
Louisville, KY 40202

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

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5 APR 26 2012

6 In the Matter of:

PUBLIC SERVICE
COMMISSION

7 Application of Big Rivers Electric Corporation)
8 for Approval of its 2012 Environmental)
9 Compliance Plan, for Approval of its Amended)
10 Environmental Cost Recovery Surcharge Tariff,)
11 for Certificates of Public Convenience and)
12 Necessity, and for Authority to Establish a)
13 Regulatory Account)

Case No. 2012-00063

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16 **PETITION OF BIG RIVERS ELECTRIC CORPORATION FOR CONFIDENTIAL**
17 **PROTECTION**
18

19 1. Big Rivers Electric Corporation ("Big Rivers") hereby petitions the Kentucky
20 Public Service Commission ("Commission"), pursuant to 807 KAR 5:001 Section 7 and KRS
21 61.878, to grant confidential protection to documents Big Rivers is filing with its response to the
22 Motion to Dismiss filed by Kentucky Industrial Utility Customers, Inc. (the "Response to Motion
23 to Dismiss").

24 2. One (1) copy of the documents that Big Rivers seeks to protect as confidential
25 (hereinafter, the "Confidential Information") is being filed electronically on a CD marked
26 confidential, which is attached to this petition. Big Rivers is also filing with this petition an
27 original and ten (10) copies of the Response to Motion to Dismiss, with the Confidential
28 Information redacted (*i.e.*, without the CD). 807 KAR 5:001 Sections 7(2)(a)(2), 7(2)(b).

29 3. A copy of this petition and a copy of the Response to Motion to Dismiss with the
30 Confidential Information redacted have been served on all parties to this proceeding. 807 KAR
31 5:001 Section 7(2)(c). Big Rivers will provide a copy of the Confidential Information to any
32 party who signs a confidentiality agreement.

1 affects Big Rivers' margins will adversely affect its financial results and potentially impact the
2 price it pays for credit. As was described in the proceeding before this Commission in the Big
3 Rivers unwind transaction case, Big Rivers expects to be in the credit markets on a regular basis
4 in the future.¹

5 **II. The Confidential Information is Generally Recognized as Confidential or**
6 **Proprietary**
7

8 9. The Confidential Information for which Big Rivers seeks confidential treatment
9 under KRS 61.878(1)(c)(1) is generally recognized as confidential or proprietary under Kentucky
10 law.

11 10. The Confidential Information consists of financial forecast models and
12 projections that Big Rivers has used in the models relating to fuel prices, power market prices,
13 and allowance prices.

14 11. Public disclosure of the models and projections would reveal Big Rivers'
15 forecasted rates, variable production costs, off-system sales prices, and related information.
16 Knowledge of such projected data would give Big Rivers' suppliers and competitors an unfair
17 competitive advantage. Public disclosure of this information would give Big Rivers' suppliers,
18 buyers, and competitors insight into Big Rivers' cost of producing power and into Big Rivers'
19 view of future prices for fuel prices, market power prices, and allowance prices, which would
20 indicate the prices at which Big Rivers is willing to buy or sell such items.

21 12. The Commission has previously granted confidential treatment to similar
22 information. *See, e.g.,* letters from the Commission dated July 28, 2011, and December 20,
23 2011, in *In the Matter of: Application of Big Rivers Electric Corporation for a General*

¹ See Order dated March 6, 2009, *In the Matter of: Joint Application of Big Rivers, E.ON, LG&E Energy Marketing, Inc., and Western Kentucky Energy Corporation for Approval to Unwind Lease and Power Purchase Transactions*, PSC Case No. 2007-00455, pages 27-30 and 37-39.

1 *Adjustment in Rates*, PSC Case No. 2011-00036 (granting confidential treatment to multi-year
2 financial forecast); letter from the Commission dated December 21, 2010, in *In the Matter of:*
3 *The 2010 Integrated Resource Plan of Big Rivers Electric Corporation*, PSC Case No. 2010-
4 00443 (granting confidential treatment to fuel cost projections, revenue projections, market price
5 projections, financial model outputs, etc.).

6 **III. Disclosure of the Confidential Information Would Permit an Unfair Commercial**
7 **Advantage to Big Rivers' Competitors**
8

9 13. Disclosure of the Confidential Information would permit an unfair commercial
10 advantage to Big Rivers' competitors. As discussed above, Big Rivers faces actual competition
11 in the wholesale power market and in the credit market. It is likely that Big Rivers would suffer
12 competitive injury if that Confidential Information was publicly disclosed.

13 14. The Confidential Information includes material such as Big Rivers' projections of
14 fuel costs and power prices. If that information is publicly disclosed, potential fuel and power
15 suppliers would have insight into the prices Big Rivers is willing to pay and could manipulate the
16 bidding process, leading to higher prices for Big Rivers and impairing its ability to compete in
17 the wholesale power and credit markets. In PSC Case No. 2003-00054, the Commission granted
18 confidential protection to bids submitted to ULH&P. ULH&P argued, and the Commission
19 implicitly accepted, that if the bids it received were publicly disclosed, contractors on future
20 work could use the bids as a benchmark, which would likely lead to the submission of higher
21 bids. Order dated August 4, 2003, in *In the Matter of: Application of the Union Light, Heat and*
22 *Power Company for Confidential Treatment*, PSC Case No. 2003-00054. The Commission also
23 implicitly accepted ULH&P's further argument that the higher bids would lessen ULH&P's
24 ability to compete with other gas suppliers. *Id.* Similarly, potential fuel and power suppliers

1 manipulating Big Rivers' bidding process would lead to higher costs to Big Rivers and would
2 place it at an unfair competitive disadvantage in the wholesale power market and credit markets.

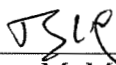
3 15. Additionally, public disclosure of the Confidential Information would give the
4 power producers and marketers with which Big Rivers competes in the wholesale power market
5 insight into Big Rivers' cost of producing power, which would give them an unfair competitive
6 advantage because they could use that information to potentially underbid Big Rivers in
7 wholesale transactions.

8 **IV. Conclusion**

9 16. Based on the foregoing, the Confidential Information is entitled to confidential
10 protection. If the Commission disagrees that Big Rivers is entitled to confidential protection, due
11 process requires the Commission to hold an evidentiary hearing. *Utility Regulatory Com'n v.*
12 *Kentucky Water Service Co., Inc.*, 642 S.W.2d 591 (Ky. App. 1982).

13 WHEREFORE, Big Rivers respectfully requests that the Commission classify and protect
14 as confidential the Confidential Information.

15 On this the 25th day of April, 2012.

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17 
18 _____
19 James M. Miller
20 Tyson Kamuf
21 SULLIVAN, MOUNTJOY, STAINBACK
22 & MILLER, P.S.C.
23 100 St. Ann Street
24 P. O. Box 727
25 Owensboro, Kentucky 42302-0727
26 (270) 926-4000

27 Counsel for Big Rivers Electric Corporation

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Case No. 2012-00063

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15
16 **Big Rivers Electric Corporation's Response to Kentucky Industrial Utility Customers,**
17 **Inc.'s Motion to Dismiss**
18

19 Comes Big Rivers Electric Corporation ("Big Rivers"), by counsel, and for its response
20 to the Motion to Dismiss filed by Kentucky Industrial Utility Customers, Inc. ("KIUC"), states as
21 follows:

22 KIUC argues in its Motion to Dismiss that this case should be dismissed because "Big
23 Rivers failed to provide the Commission with requisite evidence with which the Commission can
24 make a determination as to whether its Application satisfies the requirements of KRS 278.183 or
25 KRS 278.020." Motion to Dismiss at 2. KIUC's argument is wrong for a number of reasons.

26 First, KRS 278.183 requires the Public Service Commission ("Commission") to conduct
27 a hearing to, among other things, consider whether the 2012 Plan is "reasonable and cost-
28 effective for compliance with the applicable environmental requirements...." KRS
29 278.183(2)(a). KRS 278.020 provides, in pertinent part:

30 Upon the filing of an application for a certificate [of public convenience and
31 necessity], and after any public hearing which the commission may in its
32 discretion conduct for all interested parties, the commission may issue or refuse to
33 issue the certificate, or issue it in part and refuse it in part, except that the
34 commission shall not refuse or modify an application submitted under KRS
35 278.023 without consent by the parties to the agreement.

1
2 KRS 278.020(1). Both statutes require the Commission to rule on the merits of an application,
3 and neither statute grants the Commission authority to dismiss an application that meets all
4 applicable filing requirements because the application does not contain all the information an
5 intervenor might request. The Commission has determined that the application Big Rivers' filed
6 in this matter meets the minimum filing requirements. *See* letter from Linda Faulkner to James
7 M. Miller dated April 10, 2012. Thus, Big Rivers is entitled to a ruling on the merits of its
8 application.

9 Second, the Commission has explained that “[a] complaint establishes a *prima facie* case
10 when, on its face, it states sufficient allegations that, if uncontradicted by other evidence, would
11 entitle the complainant to the requested relief.” Order dated October 28, 2004, in *In the Matter*
12 *of: Kanawha Hall v. Equitable Production Company*, PSC Case No. 2004-00307, at 2-3; *see also*
13 Order dated July 15, 2011, in *In the Matter of: Brenda Joyce Clayton v. Louisville Gas and*
14 *Electric Company*, PSC Case No. 2011-00211, at 2-3 (“A complaint establishes a *prima facie*
15 case when, on its face, it states sufficient allegations that, if uncontradicted by other evidence,
16 would entitle the complainant to the requested relief”). Big Rivers' application in this matter
17 provides substantial evidence showing why it needs to construct the projects contained in its
18 2012 environmental compliance plan, explaining how it arrived at that decision, and
19 demonstrating why the Commission should grant the relief Big Rivers is seeking. Big Rivers'
20 application certainly establishes a *prima facie* case.

21 Third, since Big Rivers has provided substantial evidence supporting in its application,
22 dismissal is not the appropriate method of judging whether Big Rivers has met its burden of
23 proof. Instead, the Commission's determination of whether Big Rivers has met its burden of
24 proof should be made after the hearing in this matter. *See* Order dated June 8, 2010, in *In the*

1 *Matter of: Application of Kentucky Utilities Company for an Adjustment of Base Rates*, PSC
2 Case No. 2009-00548, at 4 (“The Commission agrees with the AG’s claim that the issue of
3 whether the test periods utilized in these rate cases are reasonable is a [burden]-of-proof
4 question, and only the Commission, as the trier of fact, can answer that question. Until all
5 parties have had a full opportunity to present evidence, it would be premature to rule on whether
6 the applicants have met their burden of proof”).

7 Finally, KIUC’s real complaint seems to be that it has insufficient time to conduct
8 discovery. KIUC lists several items of information it would like. *See* Motion to Dismiss at 3.
9 However, despite KIUC’s claims to the contrary, these items are more appropriately the subject
10 of a discovery request than the subject of a motion to dismiss. In the Order dated June 8, 2010,
11 in *In the Matter of: Application of Kentucky Utilities Company for an Adjustment of Base Rates*,
12 PSC Case No. 2009-00548, at 3-4, the Commission denied the Attorney General’s motion to
13 dismiss, which included an argument that the Attorney General had not been able to conduct
14 discovery. The Commission explained, “The AG states in his reply that, due to the time
15 limitations for processing rate cases as set forth in KRS 278.190, he has not been able to conduct
16 discovery on the actual financial impacts of the PPL acquisition on KU and LG&E. However,
17 the PPL press release and presentation to financial analysts appended to the AG’s motion to
18 dismiss are dated April 28, 2010 and April 29, 2010, respectively, while the motion was filed on
19 June 2, 2010. No explanation is offered as to why discovery could not have been conducted, or
20 at least requested, during that four-and-a-half-week period.” In addition, KIUC’s alleged
21 inability to conduct sufficient discovery does not take away from the fact that Big Rivers’
22 application states a *prima facie* case. Nevertheless, Big Rivers does recognize the time
23 constraints placed on the Commission and the parties. As such, and given that KIUC’s Motion

1 to Dismiss indicates certain information that KIUC may later ask for in discovery, Big Rivers
2 provides the following information mentioned in the Motion to Dismiss in lieu of waiting for
3 KIUC's discovery requests:

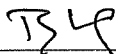
- 4 1. Electronic copies of the spreadsheet models used in the cost effectiveness
5 evaluation; and
6
- 7 2. PACE Global price curve data for energy prices, fuel prices, and
8 allowance prices.
9

10 This information is being provided on a CD, which is being filed under a petition for confidential
11 treatment with this response.

12 WHEREFORE, KIUC's Motion to Dismiss should be denied.

13 On this the 25th day of April, 2012.

SULLIVAN, MOUNTJOY, STAINBACK
& MILLER, P.S.C.

17
18 
19 _____
20 James M. Miller
21 Tyson Kamuf
22 100 St. Ann Street
23 P. O. Box 727
24 Owensboro, Kentucky 42302-0727
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26 Counsel for Big Rivers Electric Corporation