

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

IN THE MATTER OF THE:

**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)**

CASE NO. 2012-00063

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**PUBLIC SERVICE
COMMISSION**

**ATTORNEY GENERAL’S MOTION TO DISMISS AND RESPONSE TO
OTHER INTERVENORS’ MOTIONS TO DISMISS**

In an August 21, 2012 decision, the D.C. Circuit Court of Appeals vacated the U.S. Environmental Protection Agency’s Cross-State Air Pollution Rule (“CSAPR”). *See EME Homer City Generation, L.P. v. Environmental Protection Agency et al.*, No. 11-1302 (D.C. Cir. Aug. 21, 2012). The Attorney General has reviewed the motions by its fellow intervenors in this matter, the Kentucky Industrial Utility Cutomers, Inc. (“KIUC”) and the Sierra Club, and concurs with the reasoning presented, except as otherwise outlined herein. In short, the Attorney General cannot support the Application as filed.

The Attorney General, by and through his Office Rate Intervention, (“AG”) moves the Kentucky Public Service Commission (“Commission”) to enter an Order dismissing without prejudice Big Rivers application. A Memorandum in Support of the AG’s Motion is attached and incorporated herewith.

MEMORANDUM IN SUPPORT

As detailed by KIUC and the Sierra Club, Big Rivers filed its Application to amend its environmental recovery surcharge under KRS 278.183 and for a certificate of public necessity (“CPCN”) under KRS 278.020 to build the projects outlined within the Application. KRS 278.183(1) provides in relevant part that:

[A] utility shall be entitled to the current recovery of its costs of ***complying with the Federal Clean Air Act as amended and those federal, state, or local environmental requirements which apply*** to coal combustion wastes and by-products from facilities utilized for production of energy from coal in accordance with the utility's compliance plan as designated in subsection (2) of this section. These costs shall include a reasonable return on construction and other capital expenditures and reasonable operating expenses for any plant, equipment, property, facility, or other action to be used to ***comply with applicable environmental requirements*** set forth in this section.

Emphasis supplied. Moreover, under KRS 278.020, it is axiomatic that a utility applying for a CPCN carries the burden to demonstrate the requisite need for the construction.

After staying the effective date of the Cross-State Air Pollution Rule (“CSAPR”) pending appeal, the United State Court of Appeals for the District of Columbia Circuit issued an Opinion yesterday, August, 21, 2012, vacating the CSAPR. *See EME Homer City Generation, L.P. v. Environmental Protection Agency et al.*, No. 11-1302 (D.C. Cir. Aug. 21, 2012). In summarizing its decision to vacate the rule, the Court stated:

Various States, local governments, industry groups, and labor organizations have petitioned for review of the Transport Rule. Although the facts here are complicated, the legal principles that govern this case are straightforward:

Absent a claim of constitutional authority (and there is none here), executive agencies may exercise only the authority conferred by statute, and agencies may not transgress statutory limits on that authority.

Here, EPA’s Transport Rule exceeds the agency’s statutory authority in two independent respects. *First*, the statutory text grants EPA authority to require upwind States to reduce only their own significant contributions to a downwind State’s nonattainment. But under the Transport Rule, upwind States may be required to reduce emissions by more than their own significant contributions to a downwind State’s nonattainment. EPA has used the good neighbor provision to impose massive emissions reduction requirements on

upwind States without regard to the limits imposed by the statutory text. Whatever its merits as a policy matter, EPA's Transport Rule violates the statute. *Second*, the Clean Air Act affords States the initial opportunity to implement reductions required by EPA under the good neighbor provision. But here, when EPA quantified States' good neighbor obligations, it did not allow the States the initial opportunity to implement the required reductions with respect to sources within their borders. Instead, EPA quantified States' good neighbor obligations and *simultaneously* set forth EPA-designed Federal Implementation Plans, or FIPs, to implement those obligations at the State level. By doing so, EPA departed from its consistent prior approach to implementing the good neighbor provision and violated the Act.

For each of those two independent reasons, EPA's Transport Rule violates federal law. Therefore, the Rule must be vacated.

In addition to vacating CSAPR in its entirety, the D.C. Court of Appeals also explicitly held that the prior rule, the Clean Air Interstate Rule ("CAIR") was reinstated: EPA must continue administering CAIR pending the promulgation of a valid replacement."

Therefore, consistent with KIUC's motion, the portions of Big Rivers' Application seeking to amend its environmental surcharge to recover the costs of projects and pollution control equipment to comply with CSAPR should be dismissed without prejudice. Based on the Opinion of the D.C. Court of Appeals, the CSAPR is not consistent with the Federal Clean Air Act and is therefore not applicable within the meaning of KRS 278.183. Further, since dismissing the portion of Big Rivers' Application directly relating to the CSAPR will save electric ratepayers at least \$227.5 million in capital costs, as well as related financing and operation and maintenance costs, it follows that Big Rivers' has failed to meet its burden to show that these projects meet the need required under KRS 278.020 at this time.

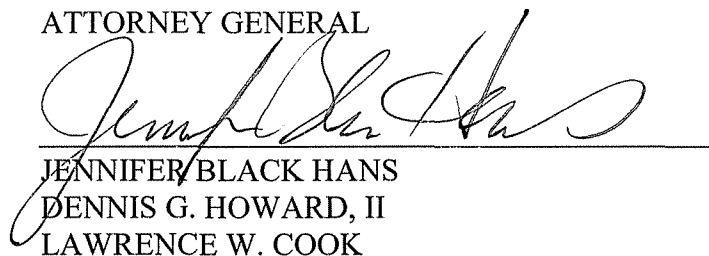
The Attorney General also understands the Sierra' Club's motion with respect to the other portions of Big Rivers' Application relating more specifically to the Mercury and Air Toxic Standards ("MATS") rule. While the Attorney General is the only party to this matter that

has filed a federal challenge to MATS¹, the AG nonetheless recognizes that as of today, MATS is a current regulation in full force and effect. Therefore, the Attorney General has no objection to the Commission proceeding with a hearing regarding Big Rivers' application as it relates to MATS.

WHEREFORE, the Attorney General, by and through its Office of Rate Intervention, respectfully requests that the Commission enter an Order dismissing without prejudice the portion of Big Rivers' Application that seeks Commission approval of environmental projects and equipment intended to comply with the former CSAPR rule and any other projects within the Application that may be deemed so intertwined with CSAPR that going forward would be unnecessary at this time.

Respectfully submitted,

JACK CONWAY
ATTORNEY GENERAL

A handwritten signature in cursive script, appearing to read "Jennifer Black Hans", is written over a horizontal line.

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¹ See generally, *White Stallion Energy Center, LLC v. EPA*, No. 12-1100 and consolidated cases, pending before the U.S. Court of Appeals for the D.C. Circuit; see also States Attorneys General Comments filed to the MATS rule, 76 Fed. Reg. 24976 (May 3, 2011), Docket ID No. EPA-HQ-OAR-2009-0234.

Certificate of Service and Filing

Counsel certifies that an original and ten photocopies of the foregoing were served and filed by hand delivery to Jeff Derouen, Executive Director, Public Service Commission, 211 Sower Boulevard, Frankfort, Kentucky 40601; counsel further states that true and accurate copies of the foregoing were hand-delivered, to:

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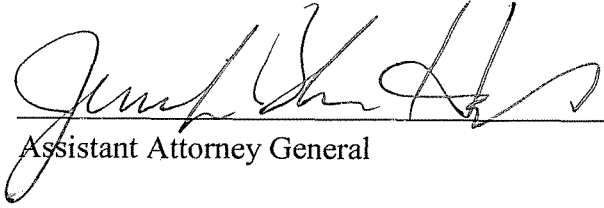
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