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Via Overnight Mail

August 21, 2012

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

RECEIVED

AUG 22 2012

PUBLIC SERVICE
COMMISSION

Re: Case No. 2012-00063

Dear Mr. Derouen:

Please find enclosed the original and ten (10) copies of KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC.'s MOTION TO DISMISS 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.

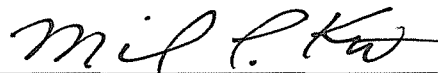
BOEHM, KURTZ & LOWRY

MLKkew
Attachment

cc: Certificate of Service
Quang Nyugen, Esq.
Faith Burns, Esq.
David C. Brown, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by electronic mail (when available) and by mailing a true and correct copy by regular, U.S. Mail, unless other noted, this 21st day of August, 2012 to the following



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Kurt J. Boehm, Esq.

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NEW YORK, NEW YORK 10038

**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	:	Case No. 2012-00063
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	:	

MOTION TO DISMISS OF

KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC.

Kentucky Industrial Utility Customers, Inc. (“KIUC”) moves the Kentucky Public Service Commission (“Commission”) to enter an Order dismissing without prejudice the portion of Big Rivers Electric Corporation’s (“Big Rivers”) Application that seeks Commission approval of environmental projects intended to comply with the former Cross-State Air Pollution Rule (“CSAPR”). A Memorandum in Support of KIUC’s Motion is attached.

MEMORANDUM IN SUPPORT

On April 2, 2012 Big Rivers filed its Application to amend its environmental cost recovery surcharge under KRS 278.183. KRS 278.183(1) provides for the recovery of costs required by existing and effective environmental laws. KRS 278.183(1) states in part:

“[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.”

Big Rivers' Application seeks authority to recover, through the environmental surcharge, the cost of constructing four pollution control projects (at Wilson Unit 1, Green Unit 2, Reid Unit 1, and HMP&L Units 1&2) totaling \$227.5 million in capital costs in order to comply with CSAPR. (See Exhibit Berry-2).

On August 21, 2012, the United States Court of Appeals for the District of Columbia Circuit issued an Opinion in *EME Homer City Generation, L.P. v. Environmental Protection Agency et al.*, No. 11-1302 (D.C. Cir. 2012) vacating the EPA's CSAPR rule. The Court stated on page 7:

“[CSAPR] 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 [CSAPR], 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, [CSAPR] violates federal law. Therefore, the Rule must be vacated."

In other words, CSAPR is null and void.¹

Accordingly, the portion of Big Rivers' Application that seeks to amend its environmental surcharge in order to recover the costs of pollution control equipment to comply with CSAPR should be dismissed. As stated above, KRS 278.183 allows a utility to recover its costs of complying with the Federal Clean Air Act and those federal, state, or local environmental requirements which apply to coal combustion wastes. Per the D.C. Circuit Opinion, there is no longer a CSAPR rule. Therefore, KRS 278.183 does not allow Big Rivers to recover the costs of pollution control projects that are intended to comply with CSAPR because CSAPR no longer exists. If CSAPR is reinstated, then Big Rivers may refile its Application based on current information.

Dismissing this portion of Big Rivers' Application will save consumers at least \$227.5 million in capital costs, approximately \$10 million of capitalized financing cost and another \$30.5 in operation and maintenance costs between 2015 through 2023.²

¹ "To 'vacate' ... means 'to annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority or validity; to set aside.'" *Action on Smoking & Health v. Civil Aeronautics Board*, 713 F.2d 795, 797 (D.C.Cir.1983). (Citations omitted).

² See Exhibit Berry-2.

WHEREFORE, Kentucky Industrial Utility Customers, Inc. respectfully requests that the Commission enter an Order dismissing without prejudice the portion of Big Rivers' Application that seeks Commission approval of environmental projects intended to comply with the former CSAPR rule.

Respectfully submitted,



Michael L. Kurtz, Esq.

Kurt J. Boehm, Esq.

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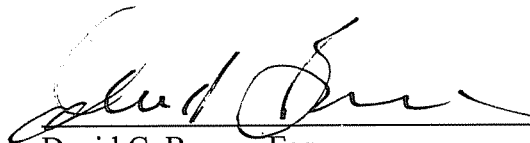
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August 21, 2012