



EARTHJUSTICE

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NORTHWEST ROCKY MOUNTAIN WASHINGTON, DC INTERNATIONAL

July 15, 2013

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

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JUL 15 2013

PUBLIC SERVICE  
COMMISSION

*Via Courier*

**Re: CASE NO. 2013-00221, Joint Application of Kenergy Corp. and Big Rivers Electric Corporation for Approval of Contracts and for a Declaratory Order**

Dear Mr. Derouen:

Enclosed are an original and ten copies of *Ben Taylor and Sierra Club's Reply in Support of Petition for Full Intervention* and a certificate of service in docket 2012-00535 before the Kentucky Public Service Commission. This filing contains no confidential information.

Sincerely,

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JUL 15 2013

PUBLIC SERVICE  
COMMISSION

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

JOINT APPLICATION OF KENERGY )  
CORP. AND BIG RIVERS ELECTRIC )  
CORPORATION FOR APPROVAL OF )  
CONTRACTS AND FOR A )  
DECLARATORY ORDER )

CASE NO. 2013-00221

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BEN TAYLOR AND SIERRA CLUB'S REPLY IN SUPPORT OF  
PETITION FOR FULL INTERVENTION

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INTRODUCTION

Mr. Ben Taylor and Sierra Club (collectively, "Movants") petitioned the Commission for full intervention in this proceeding in which Big Rivers Electric Corporation and Kenergy Corp. (collectively, the "Applicants") filed an application for a declaratory order and approval of certain contracts executed between the Applicants and Century Aluminum of Kentucky General Partnership ("Century"). Big Rivers filed a response<sup>1</sup> that recycles flawed arguments the company used to oppose the Movants' motion to intervene in the pending Big Rivers rate increase proceeding, Case No. 2012-00535. The Commission rejected Big Rivers' arguments in that proceeding and should reject them here, too. *See In re Application of Big Rivers Electric Corp. for an Adjustment of Rates*, Case No. 2012-00535, Order dated April 17, 2013 (granting Ben Taylor and Sierra Club full intervention).

In their Motion to Intervene, the Movants demonstrated that they possess expertise in the evaluation of supply- and demand-side alternatives, analysis of the impact of contracts on rates,

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<sup>1</sup> In a July 11, 2013 filing, Kenergy Corp. adopted in full Big Rivers' response to Movants' intervention motion.

and analysis of the impact of System Support Resources (“SSR”) agreements on the allocation of costs to ratepayers and the use of generating resources. The Movants’ expertise will assist the Commission in reviewing these issues, which have been raised in the direct testimony of the Applicants’ witnesses. Moreover, the Movants have special interests in this case that are not adequately represented by the existing parties, namely, interests in a robust analysis of supply- and demand-side alternatives, and in the use of energy efficiency, demand-side management, and other clean energy resources.

Although Big Rivers asserts that Movants’ interests and expertise pertain to issues that are outside the scope of this proceeding and the Commission’s jurisdiction, this argument is contradicted by the direct testimony of the Applicants’ own witnesses. Kenergy CEO Gregory Starheim and Big Rivers COO Robert Berry each devote several pages of testimony to discussing the costs and risks that Kenergy and Big Rivers will assume under these contracts, whether the contracts will impact rates, and whether the contracts will change the current plans to idle Coleman. Having submitted testimony that explicitly raises these issues, Big Rivers cannot now deny their relevance to this proceeding. Movants will develop facts and present issues that will assist the Commission in reviewing this case without undue complications or disruptions. As such, the Commission should grant full intervention to the Movants.

I. MOVANTS WILL PRESENT ISSUES AND FACTS THAT ARE RELEVANT TO THE ISSUES RAISED BY THE APPLICANTS IN THEIR DIRECT TESTIMONY.

A. It is uncontested that the Sierra Club has expertise on the issues raised by Big Rivers and Kenergy’s direct testimony.

In their Petition to Intervene, the Movants put forth evidence that they possess expertise in the evaluation of supply- and demand-side alternatives, evaluation of the impact of contracts on rates, analysis of the potential use of SSR agreements and the allocation of costs in SSR

agreements to ratepayers, and analysis of the impact of contracts and SSR agreements on the continued use of generation resources. Motion to Intervene, pp. 7-8.

Witness Starheim spends portions of six pages discussing whether the costs and risks that Kenergy and Big Rivers will incur under the contracts will adversely affect ratepayers, including through impacting rates. Testimony of Gregory Starheim, pp. 11, 16, 19-21, 24. Witness Berry spends portions of three pages of his testimony discussing the same issues. Testimony of Robert W. Berry, pp. 43-45. These two witnesses have raised the issue of whether the contracts are fair to ratepayers, whether the contracts will adversely affect rates, and whether the contracts ask ratepayers to bear unreasonable risks. As demonstrated in the Motion to Intervene, the Movants have expertise analyzing these issues, Motion to Intervene, pp. 7-8, and the Movants will develop facts and present issues that will assist the Commission's review of this case.

Additionally, witness Starheim submitted testimony concerning the possibility that the contracts will lead to an SSR agreement that will require operation of Coleman, despite current plans to idle the facility. Testimony of Gregory Starheim, pp. 10-11. Witness Berry discussed the same issues. Testimony of Robert W. Berry, pp. 10-11, 31-33, 43-44. The Motion to Intervene explained that the Movants have participated in Federal Energy Regulatory Commission ("FERC") proceedings to develop the general rules governing SSR agreements in MISO and also participated in the FERC proceeding concerning the first use of an SSR agreement in MISO in Escanaba, Michigan. Motion to Intervene, pp. 7-8. As a result, the Movants have experience that will assist the Commission in reviewing the possibility that approval of the proposed contracts will lead to an SSR agreement requiring the operation of Coleman and the impact that any such SSR agreement could have on Big Rivers and its customers.

Big Rivers has not attempted to rebut this showing that the Movants possess expertise in supply- and demand-side alternatives, the impact of contracts on rates, and the impact of SSR agreements on rates and the continued operation of facilities. Instead the company argues that such expertise is outside the scope of this proceeding. *See* Big Rivers Resp., pp. 9-12. Big Rivers made a similar argument in its failed opposition to the Movants' intervention in a pending Big Rivers rate case, No. 2012-00535. *Compare* Big Rivers Electric Corporations Response And Objection, p. 6, Case No. 2013-00221 ("its intervention would turn a special contract proceeding into an environmental policy proceeding") *with* Big Rivers Electric Corporations Response, p. 10, Case No. 2012-00535 (arguing that the Movants will raise "generalized environmental grievances that are beyond the scope of this rate application proceeding"). In Case No. 2012-00535, the Commission rejected Big Rivers' argument and found that the Movants "possess sufficient expertise on issues that are within the scope of this base rate proceeding, such as whether Big Rivers' proposed rate increase is reasonable in light of all available alternatives to mitigating the loss of a significant load." *In re Application of Big Rivers Electric Corporation for an Adjustment of Rates*, Case No. 2012-00535, Order dated April 17, 2013. The Commission should reach a similar result here and find that the Movants have expertise on issues raised by the Applicants in their direct testimony.

Big Rivers also cites to the Commission's September 7, 2012 Order in Case 2012-002222 in an attempt to dismiss the relevance of the Movants' expertise. Big Rivers Resp., p.7. Big Rivers cited this same order in its opposition to the Movants' motion to intervene in the pending rate case, No. 2012-00535. Big Rivers Resp., p. 10, *In re Application of Big Rivers Electric Corporation, Inc. for An Adjustment of Rates*, Case No. 2012-00 535. In their reply in that proceeding, the Movants pointed out that "the language that the Company relies on does not

appear anywhere in the September 7 Order that Big Rivers cites to, which actually found a proposed intervenor's 'knowledge and experience of rail logistical services' insufficient to demonstrate the requisite knowledge about ratemaking issues." Ben Taylor and Sierra Club's Reply, p. 3, *In re Application of Big Rivers Electric Corporation, Inc. for An Adjustment of Rates*, Case No. 2012-00535. Despite the Movants having already pointed out Big Rivers' mistaken citation, Big Rivers continues to rely on a case that simply does not contain the language that Big Rivers claims it contains.

Big Rivers' argument that the Movants' expertise is irrelevant to matters at issue in this case, Big Rivers Resp., pp. 9-12, is fatally undermined by its own direct testimony. As noted above, the Applicants have submitted direct testimony in this proceeding discussing whether the contracts are fair and reasonable, whether they will adversely impact rates, and whether they will affect current plans to idle Coleman. Having submitted direct testimony on these topics, the Applicants placed them at issue in this proceeding. The Applicants cannot now credibly claim that they are outside of the scope of this proceeding simply because they prefer that the Movants not be granted intervention.

B. Intervention will not unduly complicate or disrupt the proceeding.

Big Rivers' argument that the Movants would unduly complicate the proceeding incorrectly assumes that Movants will raise issues beyond the scope of this case. Big Rivers Resp., pp. 10-12. As explained above, the issues on which the Movants have expertise were placed squarely within the scope of the proceeding by the direct testimony of Big Rivers and Kenergy witnesses. As a result, developing facts and analysis regarding issues directly relevant to this case will not unduly complicate the proceeding.

Moreover, Big Rivers ignores that the Movants filed their motion to intervene in compliance with the accelerated schedule in this case. The Movants have acknowledged the

accelerated schedule and have stated that they “will comply with all deadlines in this proceeding established by the Commission.” Motion to Intervene, p. 9. Moreover, due to the accelerated schedule for this case, the Movants chose not to submit any discovery requests, while several other parties have done so. The only remaining deadlines in the accelerated schedule for this proceeding are for the intervenors to submit testimony or comments by Friday, July 19, for the hearing to commence on Tuesday, July 30, and for post-hearing briefs to be filed by Tuesday, August 6. If granted intervention, the Movants intend to comply with each of these deadlines. Accordingly, Big Rivers cannot point to any way in which permitting the Movants’ intervention would interfere with resolving this case on an accelerated basis.

II. THE MOVANTS POSSESS SPECIAL INTERESTS NOT ADEQUATELY REPRESENTED BY EXISTING PARTIES.

A. The Movants’ interests are not adequately represented by the existing parties.

In the Motion to Intervene, Movants established that they have special interests in a robust analysis of supply- and demand-side alternatives, and in the use of energy efficiency, demand-side management, and other clean energy resources. Motion to Intervene, p. 9. These interests are narrower than the general customer interests that the Attorney General is charged with representing and are different from the industrial and governmental interests of other intervenors. As a result, none of the existing parties adequately represents the Movants’ interests.

Big Rivers’ response is based on the faulty assumption that the Movants have interests only as customers. Big Rivers Resp., pp. 4, 8-9. Big Rivers cites several Commission Orders for the proposition that being a customer is insufficient to support intervention, *id.*, pp. 4-5, but each of the cited cases is inapposite. The Commission denied intervention in Case 2009-00174 because the proposed intervenor filed a one-page letter which contained a single sentence

requesting intervention and presented no factual support whatsoever. *In re Application of Kentucky Utilities Company for an Order Approving the Establishment of a Regulatory Asset*, Case No. 2009-0014, Order dated June 26, 2009. By contrast, the Movants submitted a thorough motion explaining the applicable legal standards and putting forth facts demonstrating how the Movants satisfy the standards.

Big Rivers cites the denial of intervention in Case 2009-00198, in which a proposed intervenor filed a one-page letter requesting intervention. The letter consisted of a single paragraph explaining views on the proposed rate increase but failed to provide any facts about specific interests or expertise relating to the case. *In re Application of Louisville Gas and Electric Company for a Certificate of Public Convenience and Necessity and Approval of Its 2009 Compliance Plan for Recovery by Environmental Surcharge*, Case No. 2009-00198, Order dated August 28, 2009. To compare the proposed intervenor in Case 2009-00198 to the Movants is to ignore the detailed showing in the Movants' Motion to Intervene.

These two cases cited by Big Rivers demonstrate what cursory intervention motions look like. The intervention motion filed by the Movants is just the opposite. The Movants' motion contains a detailed description of this case, the interests and experience of the Movants, and how the special interests and expertise of the Movants relate to this case and satisfy the governing legal standards. The thoroughness of the Motion contradicts Big Rivers' erroneous assertion that the Movants "take for granted that, because they intervened in other Big Rivers [cases], they should be given leave to intervene in this proceeding as a matter of course." Big Rivers Resp., p. 10.

Big Rivers also cites a Commission order in Case 2007-00337 denying intervention to a proposed intervenor who had had his limited intervention in a prior proceeding revoked for



failure to comply with Commission Orders and because the intervenor filed numerous, frivolous data request to non-applicant parties. *In re Joint Application of Louisville Gas and Electric Company, Association of Community Ministries, Inc., People Organized and Working for Energy Reform, and Kentucky Association for Community Action, Inc. for the Establishment of a Home Energy Assistance Program*, Case No. 2007-00337, Order dated September 14, 2007. The Commission denied intervention in large part because the proposed intervenor had proven to be a nuisance who failed to obey Commission orders and procedural rules. Such is not the case here, where the Movants have participated in several cases before the Commission and have complied with all applicable rules and Orders. Ultimately, Big Rivers has not rebutted the showing in the Motion to Intervene that the Movants' interests are not adequately represented by the existing parties.

- B. The Sierra Club's interests are within the scope of the Commission's jurisdiction and within the scope of this case.

Big Rivers mistakenly asserts that the Movants' interests are "environmental concerns" outside the scope of both this case and the Commission's jurisdiction. Big Rivers Resp., pp. 6-7. This argument ignores the Movants' statement that "Movants are not seeking intervention to opine about the environmental impacts of Big Rivers' coal plants and its environmental compliance plans." Motion to Intervene, p. 8. Instead, the Movants articulated specific interests that fall squarely within the Commission's jurisdiction: interests in a robust analysis of alternatives; and interests in the use of energy efficiency, demand-side management, and other clean energy resources in order to meet demand in a least-cost way. *Id.* at 9. The Commission has jurisdiction over these issues. *See, e.g.*, KRS 278.040(2) ("The Commission shall have exclusive jurisdiction over the regulation of rates and service of utilities"); *In re Application of Kentucky Utilities Company for an Adjustment of its Electric Rates*, Case No. 2012-00221, Order

dated December 20, 2012 at pp. 7, 8, 11 (noting the importance of energy efficiency and DSM in ratemaking). Simply labeling an issue that is within the scope of the Commission's jurisdiction as an "environmental concern" does not deprive the Commission of jurisdiction over that issue.

Big Rivers analogizes to cases in which the Commission denied motions to intervene in which the proposed intervenor sought to raise concerns about the environmental effects of a proposed action. *See* Big Rivers Resp., pp. 6-7 (citing Case No. 2008-00148, Order dated July 18, 2008). But in Case 2008-00148, the proposed intervenors Geoffrey Young and CDH/Cunningham/Bennett sought to address the impact of air emissions on human health and the environment and to advocate on general environmental issues. *In re 2008 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company*, Case No. 2008-00148, Order dated July 18, 2008, pp. 6, 11. As the Movants explained in their motion to intervene, "Movants are not seeking intervention to opine about the environmental impacts of Big Rivers' coal plants and its environmental compliance plans." Motion to Intervene, p. 8. As a result, it is no surprise that Big Rivers did not cite any passage from the Motion to Intervene in which the Movants claimed an interest in environmental quality or the environmental impacts of this case. Unlike the proposed intervenors in the cases cited by Big Rivers, the Movants seek intervention in order to protect their interests in advancing specific utility practices – consideration of a full range of alternatives, and the use of DSM, energy efficiency, and other clean energy resources – that are within the scope of the Commission's jurisdiction.

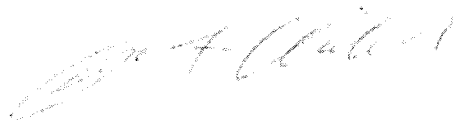
The direct testimony of the Applicants' own witnesses contradicts Big Rivers' claim that the interests of the Movants are outside the scope of this proceeding. The Movants have special interests in a robust analysis of supply-demand-side alternatives, and in the use of energy efficiency, demand-side management, and other clean energy resources in order to meet demand

in a least-cost way. Motion to Intervene, p. 9. As explained above, direct testimony from Big Rivers and Kenergy witnesses addresses the impact of the proposed contracts on rates and the continued operation of the Coleman facility. *See supra* pages 3-4. The Movants' interests in least-cost rates based on consideration of a full range of alternatives are thus potentially affected by this case. Similarly, the Movants' interests in the use of clean energy resources is potentially affected by this case, given that the proposed contracts may lead to increased operation of the coal-fired Coleman facility. As a result, the Movants possess special interests which are at issue in this proceeding and are not adequately represented by existing parties.

#### CONCLUSION

For the foregoing reasons, the Movants respectfully request full intervention in this matter.

Respectfully submitted,



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Dated: July 15, 2013

## CERTIFICATE OF SERVICE

I certify that I mailed a copy of this Petition for Full Intervention by FedEx mail on July 15, 2013 to the following:

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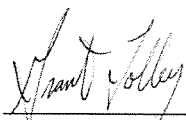
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