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July 20, 2018

RECEIVED

JUL 20 2018

PUBLIC SERVICE  
COMMISSION

**VIA HAND DELIVERY**

Ms. Gwen R. Pinson  
Executive Director  
Public Service Commission  
211 Sower Boulevard, P.O. Box 615  
Frankfort, Kentucky 40602-0615

Re: *In the Matter of: Notice of Termination of Contracts and Application of Big Rivers Electric Corporation for a Declaratory Order and for Authority to Establish a Regulatory Asset—Case No. 2018-00146*

Dear Ms. Pinson:

Enclosed for filing in the above-referenced matter are an original and ten (10) copies of Big Rivers' Memorandum Brief pursuant the Public Service Commission's July 11, 2018, order

I certify that, on this date, copies of this letter and all attachments were served on each of the persons listed on the attached service list by electronic mail.

Sincerely,

A handwritten signature in blue ink, appearing to read "TK" or similar initials.

Tyson Kamuf  
Corporate Attorney,  
Big Rivers Electric Corporation

**BIG RIVERS ELECTRIC CORPORATION**

**NOTICE OF TERMINATION OF CONTRACTS AND APPLICATION OF BIG RIVERS ELECTRIC CORPORATION FOR A DECLARATORY ORDER AND FOR AUTHORITY TO ESTABLISH A REGULATORY ASSET**

**CASE NO. 2018-00146**

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1 COMMONWEALTH OF KENTUCKY  
2 BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

JUL 20 2018

3 In the matter of:

NOTICE OF TERMINATION OF CONTRACTS )  
AND APPLICATION OF BIG RIVERS )  
ELECTRIC CORPORATION FOR A ) Case No.  
DECLARATORY ORDER AND FOR ) 2018-00146  
AUTHORITY TO ESTABLISH A )  
REGULATORY ASSET )

PUBLIC SERVICE  
COMMISSION

4 **MEMORANDUM BRIEF OF BIG RIVERS ELECTRIC CORPORATION IN**  
5 **RESPONSE AND OPPOSITION TO KENTUCKY INDUSTRIAL UTILITY**  
6 **CUSTOMERS, INC.'S MOTION TO COMPEL DISCOVERY RESPONSES, TO**  
7 **STAY PROCEDURAL SCHEDULE, AND TO SCHEDULE AN INFORMAL**  
8 **CONFERENCE**

9 Big Rivers Electric Corporation ("Big Rivers") respectfully submits to the  
10 Kentucky Public Service Commission ("Commission") this Memorandum Brief in  
11 opposition to Kentucky Industrial Utility Customers, Inc.'s ("KIUC") consolidated  
12 Motion to Compel Discovery Responses, To Stay Procedural Schedule, and To  
13 Schedule An Informal Conference ("Consolidated Motion").

14 The disputed First Data Requests which the Motion to Compel addresses will  
15 inject extraneous and improper issues into this proceeding. The Motion to Compel  
16 is without merit and should be denied.

17 The Motion to Stay was addressed by the Commission's July 11 and July 13  
18 Orders, in which the Commission held the Consolidated Motion in abeyance and  
19 ruled that, if necessary, the Commission would amend the scheduling order based  
20 on its resolution of the discovery dispute after the July 25 oral argument. Big  
21 Rivers would note that the dispute over the confidentiality agreement that Big

1 Rivers proposed has been resolved as KIUC signed the agreement, with the  
2 disputed provision, on July 15.

3 The Motion to Schedule an Informal Conference was rendered moot by the  
4 Commission's July 11 Order scheduling oral argument.

5

6 **The First Data Requests To Which Big Rivers Has Objected Improperly**  
7 **Seek the Discovery of Rate Information Beyond the Issues in This**  
8 **Proceeding**

9  
10 The First Data Requests to which Big Rivers has objected and which are the  
11 subject of the Motion to Compel improperly seek discovery on rate issues which are  
12 not part of this proceeding. It is axiomatic that the Motion to Compel must be  
13 considered in the context of the issues the Commission will be deciding in this  
14 proceeding. The issues are framed in the Notice and Application ("Application")  
15 filed by Big Rivers with the Commission on May 1, 2018. The Application presents  
16 three issues for the Commission to decide. First, the Commission is to decide  
17 whether the Station Two units are no longer capable of normal, continuous, reliable  
18 operation for the economically competitive production of electricity, and that, as a  
19 result, whether the relevant contracts between Big Rivers and the City of  
20 Henderson have terminated pursuant to the terms contained in the contracts.  
21 Second, the Commission is to decide whether Big Rivers has the authority to  
22 continue to operate Station Two under the terms of the relevant contracts until May  
23 31, 2019, in order to allow the City adequate time to make alternative  
24 arrangements for the operation of Station Two or otherwise to arrange for the City's

1 power supply needs. Third, the Commission is to decide whether Big Rivers is  
2 authorized to establish a regulatory asset to enable Big Rivers to defer the costs it  
3 will incur related to the termination of the Station Two contracts, including  
4 approximately \$89.6 million associated with the undepreciated value of Big Rivers'  
5 capital investment in the Station Two over its historical useful life for the benefit of  
6 Big Rivers' members. These are the issues which the Application presents for the  
7 Commission to decide in this proceeding. The only other issue raised in this  
8 proceeding is KIUC's claim that if Big Rivers is permitted to defer the \$89.6 million,  
9 that Big Rivers also be required to defer all of Station Two's fixed costs.<sup>1</sup>

10 This is not, therefore, a rate case and Big Rivers is not requesting authority  
11 from the Commission to adjust its rates in this proceeding, either because of the  
12 termination of the Station Two contracts, the continued operation of Station Two for  
13 the finite period ending May 31, 2019, or the establishment of a regulatory asset.  
14 While the Commission's June 21, 2018 Order states that "Big Rivers' request for  
15 authority to establish a regulatory asset for the costs associated with the Station  
16 Two facilities would *ultimately* have an impact on the rates of KIUC's members"  
17 (emphasis supplied), future rates ultimately to be charged to such customers are not  
18 an issue in *this* proceeding, are not known at this time, and discovery concerning  
19 such future rates therefore is clearly not appropriate. Likewise, Big Rivers'  
20 Application explains that the expenses which Big Rivers will incur as a result of the  
21 termination of the Station Two contracts will be recoverable not in this proceeding,

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<sup>1</sup> KIUC's Reply filed June 5, 2018.

1 but "*through rates in the future.*"<sup>2</sup> Only "*after*" the Commission authorizes Big  
2 Rivers to establish the regulatory asset that is requested in this proceeding will Big  
3 Rivers seek an appropriate adjustment in its rates and charges. The Application  
4 further explains that "Big Rivers would *then* seek recovery of the amount recorded  
5 in the regulatory asset *in its next base rate case*, amortized over an appropriate  
6 period of time."<sup>3</sup> The Application therefore makes clear that rates may become an  
7 issue in Big Rivers' next rate case, but that they are not an issue raised in the  
8 Application which is now before the Commission to decide in this proceeding.

9 As detailed in the next section of this brief, the information requests to which  
10 Big Rivers objected seek information that KIUC can use to argue about the impact  
11 of Big Rivers' proposed deferral on Big Rivers' rates. Big Rivers' Objections are  
12 appropriate since although KIUC is trying to make this a rate case, this is not a  
13 rate case and should not be a rate case. KIUC will have the opportunity to argue in  
14 Big Rivers' next base rate case whether and the extent to which Big Rivers should  
15 be allowed rate recovery for the amounts deferred in this proceeding, as well as Big  
16 Rivers' other deferred accounts. For example, in its next rate case, Big Rivers will  
17 request recovery of the deferred depreciation from its Wilson station, which is  
18 currently operating for the benefit of the Members even though the depreciation on  
19 Wilson and the fixed costs to operate Wilson are not being recovered in rates. The  
20 Commission will determine then the extent to which Big Rivers will be allowed to  
21 recover the deferred depreciation on Wilson. As such, the Commission should not

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<sup>2</sup> May 1, 2018, Application, Paragraph 20.

<sup>3</sup> *Id.*, Paragraph 25.

1 base its decision in this case on the speculative impact that the Wilson deferred  
2 depreciation will have on rates in the future.

3 Likewise, the Commission should not base its decision in this case on the  
4 speculative impact that Big Rivers' proposed deferral of the undepreciated value of  
5 Big Rivers' capital investment in Station Two would have on rates. How that  
6 deferral will impact rates will not be known until the Commission determines in the  
7 next rate case the extent to which Big Rivers is permitted to recover the deferred  
8 amount. In fact, even the amount that will be in the deferred account at the time of  
9 the next rate case will not be known until the next rate case because, while the  
10 undepreciated value of Big Rivers' capital investment in Station Two is currently  
11 about \$89.6 million, that amount is being reduced by about \$3.4 million per year.

12 KIUC is attempting to turn this case into a rate case but only on a single  
13 issue so that KIUC can prevent Big Rivers from even having the chance to recover  
14 the undepreciated value of its capital investment in Station Two in the next rate  
15 case. By trying to make this a single issue rate case, KIUC takes a narrowly  
16 slanted view of Big Rivers' rates and attempts to prevent the Commission from  
17 considering the impact of the additional effects that the contract exit will have on  
18 Big Rivers' rates. Rate issues should instead be left to Big Rivers' rate case, where  
19 the Commission can establish fair, just and reasonable rates based on all  
20 circumstances at the time. Rates are not an issue in this proceeding, the impact of  
21 any deferrals on Big Rivers' rates is mere speculation at this time, and discovery  
22 concerning rates and impacts on rates is therefore not appropriate.



1                    **KIUC's First Data Requests To Big Rivers Improperly Seek**  
2                    **Discovery Unrelated To The Issues In This Proceeding**  
3

4                    On June 15, 2018, KIUC served its First Set of Data Requests upon Big  
5 Rivers. On July 6, 2018, Big Rivers timely filed its Response and produced the  
6 information which Big Rivers determined was discoverable based upon the actual  
7 issues in this proceeding. Appropriately, Big Rivers objected to those Data Request  
8 paragraphs which sought discovery beyond the actual issues in this proceeding.  
9 The Data Requests which are at issue, including Big Rivers' Objections, are as  
10 follows:

11                    Q1-18. Provide the deferred depreciation regulatory asset for Coleman plant  
12 at the end of each month from December 2016 through the most recent month for  
13 which actual information is available. <sup>4</sup>  
14

15                    RESPONSE: Big Rivers objects to this request on the ground that it is not  
16 reasonably calculated to lead to the discovery of admissible evidence.  
17

18                    Q1-19. Provide the deferred depreciation regulatory asset for Wilson plant at  
19 the end of such month from December 2016 through the most recent month for  
20 which actual information is available.<sup>5</sup>  
21

22                    RESPONSE: See the Objection to Q1-18.  
23

24                    Q1-20. Provide the gross plant and accumulated depreciation for Coleman  
25 plant at the end of each month from December 2016 through the most recent month  
26 for which actual information is available.  
27

28                    RESPONSE: See the Objection to Q1-18.  
29

30                    Q1-21. Provide the gross plant and accumulated depreciation for Wilson  
31 plant at the end of each month from December 2016 through the most recent month  
32 for which actual information is available.  
33

34                    RESPONSE: See the Objection to Q1-18.  
35

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<sup>4</sup> The Coleman plant is not the Station Two plant at issue in this proceeding.

<sup>5</sup> The Wilson plant is not the Station Two plant at issue in this proceeding.



1 Q1-22. Provide the monthly Coleman plant depreciation expense from  
2 January 2016 through the most recent month for which actual information is  
3 available.

4  
5 RESPONSE: See the Objection to Q1-18.

6  
7 Q1-23. Provide the monthly Wilson plant depreciation expense from January  
8 2016 through the most recent month for which actual information is available.

9  
10 RESPONSE: See the Objection to Q1-18.

11  
12 Q1-24. Provide the gross plant and accumulated depreciation for each of Big  
13 Rivers' generating plants, including Station Two, but excluding Coleman and  
14 Wilson, at the end of each month from December 2016 through the most recent  
15 month for which actual information is available.

16  
17 RESPONSE: Big Rivers objects to this Request on the ground that it is not  
18 reasonably calculated to lead to the discovery of admissible evidence.  
19 Notwithstanding this objection, and without waiving it, please see the attached  
20 document for Station Two gross plant and accumulated depreciation.

21  
22 Q1-26. For each of the last ten years, provide the average price of power in  
23 total and by component (e.g. energy, demand, FAC, environmental surcharge and  
24 all other riders) for service to the Rural Class and Large Industrial Class.

25  
26 RESPONSE: Big Rivers objects to this Request on the grounds that it is  
27 overly broad, unduly burdensome, and not reasonably calculated to lead to the  
28 discovery of admissible evidence.

29  
30 Q1-27. Provide the number of Rural customers and the number of Large  
31 Industrial customers at December 31, 2017. List each of the Large Industrial  
32 customers.

33  
34 RESPONSE: See the Objection to Q1-26.

35  
36 Q1-28. Provide the annual actual and projected revenues that Big Rivers  
37 received on projects that it will receive from the Missouri Municipal transaction, the  
38 Nebraska Public Power transaction and the sale to KMEA for the years 2017  
39 through 2026.

40  
41 RESPONSE: See the Objection to Q1-18.

42  
43 Q1-29. Provide the patronage capital account balances at Big Rivers at  
44 December 31, 2107 (sic) for Domtar and Kimberley (sic) Clark.

1  
2 RESPONSE: See the Objection to Q1-18.

3  
4 Big Rivers' Objections to the foregoing Data Requests were entirely  
5 appropriate and should be affirmed by the Commission. Except for Q1-24, the  
6 contested Requests have nothing whatsoever to do with the Station Two contracts  
7 or the economics of the Station Two units. Nor do they have anything to do with the  
8 issue of whether Big Rivers should be permitted to establish a regulatory asset for  
9 the expenses it incurs relating to the termination of the Station Two contracts. The  
10 test for whether Big Rivers should be authorized to establish a regulatory asset is  
11 whether the expenses related to the termination of the Station Two contracts are  
12 extraordinary or non-recurring expenses that over time will result in a saving that  
13 fully offsets the cost.<sup>6</sup>

14 KIUC has made clear that it wants to use the information it has requested to  
15 argue that “a write-off . . . is more reasonable than a deferral *with later recovery in*  
16 *member rates;*” that “adding another \$89.6 million . . . would result in *unjust and*  
17 *unreasonable rates;*” that “depreciation expense is included in several relevant  
18 credit metrics *used for ratemaking purposes;*” and that “requiring customers to  
19 ultimately pay down that asset *would result in rate shock.*”<sup>7</sup> KIUC even  
20 acknowledges that the information it seeks in Items 26 and 27 “relate to the  
21 potential impact . . . *on customer rates.*”<sup>8</sup> Thus, the disputed First Data Requests  
22 are an inappropriate fishing expedition by KIUC to obtain information that KIUC

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<sup>6</sup> See May 1, 2018, Application, Paragraph 24.

<sup>7</sup> Consolidated Brief at p. 3 (emphasis supplied).

<sup>8</sup> *Id.* (emphasis supplied).

1 can use to argue about rate impacts that are unrelated to the issues before the  
2 Commission in this proceeding.

3 Big Rivers' Objections to the First Data Requests are consistent with the  
4 scope of discovery permitted by the applicable Kentucky Rules of Civil Procedure.  
5 Rule 26.01(1) states, in pertinent part:

6 Parties may obtain discovery regarding any matter, not privileged,  
7 which is relevant *to the subject matter involved in the pending*  
8 *action*, whether it relates to the claim or defense of the party  
9 seeking discovery or to the claim or defense of any other party.... It  
10 is not ground for objection that the information sought will be  
11 inadmissible at trial if the information sought appears reasonably  
12 calculated to lead to the discovery of admissible evidence.  
13 (Emphasis supplied.)  
14

15 To be discoverable, information therefore must be relevant "to the subject  
16 matter involved in the pending action." The First Data Requests to which Big  
17 Rivers has objected do not seek information *which is relevant to the subject matter*  
18 *involved* in this proceeding. The disputed Requests instead seek to expand the  
19 issues which Big Rivers has set forth in its Application and improperly seek  
20 discovery concerning rate issues which simply are not part of this proceeding. The  
21 disputed discovery is entirely unrelated to the termination of the Station Two  
22 contracts, continued operation of Station Two for a finite period ending May 31,  
23 2019, and establishing a regulatory asset involving termination of the Station Two  
24 contracts.

25 The disputed First Data Requests also do not seek "relevant evidence" as that  
26 term is used in Rule 26.02(1) of the Kentucky Rules of Civil Procedure. Relevant  
27 evidence is defined to mean that evidence "which has the tendency to make the

1 existence of any fact *that is of consequence to the determination of the action* more  
2 probable or less probable than it would be without the evidence." Kentucky Rule of  
3 Evidence, Rule 401. As explained hereinabove, the disputed First Data Requests  
4 seek information on issues which are not part of this proceeding. The information  
5 requested is not "of consequence to the determination of the action," and therefore is  
6 irrelevant and non-discoverable.

7 Moreover, even if such information were relevant, such evidence "may be  
8 excluded if its probative value is substantially outweighed by the danger of undue  
9 prejudice, *confusion of the issues*, or misleading the jury, or by consideration of  
10 undue delay, or needless presentation of cumulative evidence." KRE 403. The  
11 requested discovery to which Big Rivers has objected has already confused and  
12 expanded the issues in this proceeding, and will create more delay in the orderly  
13 progress of this proceeding. Such discovery should not be permitted.

#### 14 CONCLUSION

15 For the foregoing reasons, Big Rivers respectfully requests that the  
16 Commission deny KIUC's Consolidated Motion.

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On this the 20th day of July, 2018.

Respectfully submitted,



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