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April 10, 2009

Mr. Jeff Derouen
Executive Director
Public Service Commission
211 Sower Boulevard, P.O. Box 615
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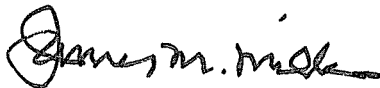
Re: Notice and Application of Big Rivers Electric Corporation
for a General Adjustment in Rates P.S.C. Case No. 2009-00040

Motion to Strike Brief of Kentucky Industrial Utility Customers, Inc.

Dear Mr. Derouen:

Enclosed are an original and ten copies of Big Rivers Electric Corporation's Motion to Strike Brief of Kentucky Industrial Utility Customers, Inc. I certify that a copy of this letter and attachment has been served on the parties of record.

Sincerely yours,



James M. Miller
Counsel for Big Rivers Electric Corporation

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PSC CASE NO. 2009-00040

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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COMMISSION

In the Matter of:

Notice and Application of Big Rivers Electric)
Corporation for a General Adjustment in Rates) Case No. 2009-00040

MOTION TO STRIKE BRIEF OF
KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC.

Big Rivers Electric Corporation ("Big Rivers") moves to strike the brief of the party Kentucky Industrial Utility Customers, Inc. ("KIUC") on the grounds that it offers and relies upon information from documents that are not evidence in the record of this case.

The Public Service Commission ("Commission") held a hearing in this case on March 26, 2009, on the application of Big Rivers for emergency interim rate relief. At the close of the hearing the Commission ordered simultaneous briefs filed on April 8, 2009, with no reply briefs.

The KIUC brief has two attachments. Attachment A is composed of one page from the Big Rivers Rural Utilities Service ("RUS") Form 12 for January of each year from 2002 through 2009. Information from these documents is incorporated into an argument found on pages 6 and 7 of the KIUC brief in support of a conclusion that in those months Big Rivers was operating under conditions where it had no more access to cash or credit than it would have in the period that is the subject of this proceeding. With the exception of the page for January of 2008, none of these documents was introduced as evidence at the hearing, or is otherwise filed in the record of this proceeding. The conclusion reached using these documents is not part of any testimony in the record from

the KIUC witness or any other witness, and is not otherwise part of the record. Had these documents been in the record, Big Rivers would have offered a materially different picture of the significance of the information contained in them based upon the impact of pre-payments on RUS debt that were available to meet Big Rivers' cash requirements.

Attachment B to the KIUC brief is the Moody's Investors Service March Credit Opinion on Big Rivers, granting Big Rivers an investment grade rating on its pollution control debt based on the assumption that the unwind of Big Rivers' current transaction with certain E.ON U. S., LLC subsidiaries is consummated. This document is referenced on page 9 of the KIUC brief. This document is not in the record in this case. The document was filed by Big Rivers in Case No. 2007-00455¹ on April 7, 2009, in response to a Commission staff data request.

It is fundamental that the evidence considered by the Commission on Big Rivers' application for emergency interim rate relief should be limited to the evidence in the record to which Big Rivers has had the opportunity to respond.² Information should be "introduced in evidence and properly identified so that the

¹ *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.

² *U.S. v. Abilene & S. Ry. Co.*, 265 U.S. 274, 286-90, 44 S.Ct. 565, 569-70 (U.S. 1924) ("The plaintiffs contend that the order is void because it rests upon evidence not legally before the Commission. It is conceded that the finding rests, in part, upon data taken from the annual reports filed with the Commission by the plaintiff carriers pursuant to law; that these reports were not formally put in evidence; that the parts containing the data relied upon were not put in evidence through excerpts; that attention was not otherwise specifically called to them; and that objection to the use of the reports, under these circumstances, was seasonably made by the carriers and was insisted upon... Nothing can be treated as evidence which is not introduced as such... The matter improperly treated as evidence may have been an important factor in the conclusions reached by the Commission. The order must, therefore, be held void")

parties to the proceedings may know with what evidence they are confronted in order that they may refute or rebut such evidence.”³

All hearings before the Commission are governed by rules adopted by the Commission. KRS 278.310. The Commission’s rule, found in 807 KAR 5:001 Section 5(4), is that it will not receive in evidence or consider as a part of the record any document provided after the close of evidence:

Except as may be expressly permitted in particular instances, the commission will not receive in evidence or consider as a part of the record any book, paper or other document for consideration in connection with the proceeding after the close of the testimony.

KIUC has improperly filed and incorporated into its brief documents and information from those documents that are not in the record, and that are not evidence in this case. The KIUC brief must accordingly be stricken from the record, and information from the inappropriately tendered documents should not be considered by the Commission in ruling on the Big Rivers application for emergency interim relief.

WHEREFORE, Big Rivers requests that the Commission enter its order striking the KIUC brief from the record in this case, that the information contained in the attachments to the KIUC brief not be considered by the Commission in its deliberations on Big Rivers’ motion for emergency interim relief, and for all other relief to which it may appear entitled.

On this the 10th day of April, 2009.

³ *Louisville & N. R. Co. v. Com. ex rel. Kentucky R. R. Commission*, 300 S.W.2d 777 (Ky. 1957)(citations omitted).

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