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April 22, 2009

Via Federal Express

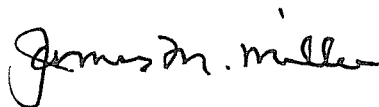
Jeff DeRouen
Executive Director
Public Service Commission
211 Sower Boulevard, P.O. Box 615
Frankfort, Kentucky 40602-0615

Re: In the Matter of: Notice and Application of
Big Rivers Electric Corporation for a General
Rate Adjustment in Rates, P.S.C. Case No. 2009-00040

Dear Mr. DeRouen:

Enclosed are an original and ten copies of the reply of Big Rivers Electric Corporation ("Big Rivers") to the KIUC Response to Motion to Strike Brief and the Response of Big Rivers to KIUC Motion to Incorporate by Reference. I certify that a copy of this letter and attachments have been served on each party of record.

Sincerely yours,



James M. Miller

JMM/ej
Enclosures

cc: Mark A. Bailey
David Spainhoward
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APR 23 2009

**PUBLIC SERVICE
COMMISSION**

SERVICE LIST
BIG RIVERS ELECTRIC CORPORATION
PSC CASE NO. 2009-00040

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

REPLY OF BIG RIVERS ELECTRIC CORPORATION
TO KIUC RESPONSE TO MOTION TO STRIKE BRIEF

Big Rivers Electric Corporation ("Big Rivers") makes this reply to the Kentucky Industrial Utility Customers, Inc. ("KIUC") response to Big Rivers' motion to strike the KIUC post-hearing brief on the emergency interim relief sought by Big Rivers. KIUC's response does not dispute the material elements that justify striking its brief: (i) the documents attached to its brief as Attachments A and B are not in the record, and (ii) Big Rivers did not have an opportunity to respond to those documents or the incorrect interpretation KIUC put on the information in those documents in its brief. At a minimum, the documents attached to the KIUC brief, and all references to those documents and the information in them should be stricken from the KIUC brief.

KIUC incorrectly analogizes Big Rivers introducing Big Rivers Redirect Exhibit 1 at the public hearing on the emergency interim relief, with KIUC introducing two sets of exhibits with the brief it filed simultaneously with Big Rivers' filing of its brief. Big Rivers' Redirect Exhibit 1 was nothing more than a summary of evidence already in the record¹, while the KIUC brief Attachments A and B were not in the record almost two weeks after the close of the evidentiary

¹ Transcript of March 26, 2009, hearing, redirect testimony of C. William Blackburn, page 80. The information contained in Big Rivers' Redirect Exhibit 1 was contained in Big Rivers' March 24, 2009, response to Item 6 of the Commission Staff's Second Data Request.

hearing. KIUC heard the use Big Rivers made of its Redirect Exhibit 1, and had an opportunity to respond at the hearing to that exhibit and the interpretation Big Rivers' witness put on the information in that exhibit. Big Rivers has had no opportunity to respond to KIUC's erroneous conclusions reached regarding the information in its brief Attachment A.

KIUC had from March 2, 2009 (the date the Big Rivers Notice and Application were filed) until March 26, 2009 (the date of the hearing) to assemble and file the information in Attachment A, but did not do so until it filed its brief on April 8, 2009. In its response to Big Rivers' Motion to Strike, KIUC takes the inconsistent positions that Big Rivers should not have been permitted to summarize at the hearing evidence that was in the record prior to the hearing, but KIUC should be permitted to introduce and construe in its brief information that is not in the record.

The orders of the Public Service Commission ("Commission") in this case require that evidence on Big Rivers' application for emergency interim relief be presented at the March 26, 2009 hearing. The Commission has specifically told KIUC that its March 16, 2009 procedural order set the hearing on March 26 for the purpose, among others, of allowing KIUC the opportunity "to provide direct testimony . . . to address any concerns the Intervenors may have regarding Big Rivers' proposed interim rate relief."² And that is the procedural schedule the Commission has required "shall be followed for investigating the requests for interim relief."³

² Order dated March 20, 2009, denying KIUC Motion to Amend Procedural Schedule, at page 2.

³ Order dated March 16, 2009, page 3.

KIUC's attempt to present additional evidence after the close of the March 26 hearing is in contravention of the Commission's own rules and procedural order, and would improperly⁴ deny Big Rivers the right to respond to that evidence. The KIUC positions should not be sanctioned by the Commission. The Commission should strike the KIUC brief from the record in this case. In the alternative, the Commission should at least strike from the KIUC brief the documents attached to the KIUC brief, along with all references to the contents of those documents, and the information stricken from the KIUC brief should not be considered by the Commission in its deliberations on Big Rivers' motion for emergency interim relief.

On this the 22d day of April, 2009.

SULLIVAN, MOUNTJOY, STAINBACK
& MILLER, P.S.C.



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Counsel for Big Rivers Electric
Corporation

⁴ See Big Rivers' Motion to Strike, pages 2 and 3.

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

RESPONSE OF BIG RIVERS ELECTRIC CORPORATION
TO KIUC MOTION TO INCORPORATE BY REFERENCE

Big Rivers Electric Corporation ("Big Rivers") makes this response to the Kentucky Industrial Utility Customers, Inc. ("KIUC") Motion to Incorporate by Reference. *With certain reservations*, Big Rivers does not oppose the KIUC motion.

Big Rivers does not object to KIUC introducing into the record through any appropriate means the documents appended to its brief as Attachments A and B. Attachment B, the Moody's Investment Service ("Moody's") credit opinion, is of questionable relevance to this case since it gives a financial rating for Big Rivers in a scenario where the Unwind Transaction closes, and this case is premised on the assumption that the Unwind Transaction does not close. But Big Rivers does not object to its introduction in this case.

KIUC's motion is obviously not about simply introducing two sets of documents into the record. KIUC wants the Public Service Commission to consider the contents of those documents, and the conclusions KIUC makes about the contents of those documents when the Commission decides the Big Rivers application for emergency interim rate relief.

KIUC should not be permitted through its motion and its reference to administrative notice to bootstrap its brief Attachments A and B into the record

of the proceedings on Big Rivers' application for emergency interim relief. The hearing for taking evidence on that application concluded, in accordance with the Commission's March 16, 2009 procedural order, on March 26, 2009. By its own rules, the Commission does not accept evidence after that date. 807 KAR 5:001 Section 5(4).

The Commission's rule is consistent with the well-settled rule in administrative law that a party must have the opportunity to respond to evidence which is considered in making a decision. *U.S. v. Abilene & S. Ry. Co.*, 265 U.S. 274, 286-90, 44 S.Ct. 565, 569-70 (U.S. 1924). Information should be "introduced in evidence and properly identified so that the parties to the proceedings may know with what evidence they are confronted in order that they may refute or rebut such evidence."¹ In *U.S. v. Abilene & S. Ry. Co.*, which involved an issue that is factually similar to the present issue, the U.S. Supreme Court expressly held that information taken from annual reports filed by a carrier with the Interstate Commerce Commission but not introduced as evidence in a proceeding involving the carrier could not be used as the basis for an order:

The objection to the use of the data contained in the annual reports is not lack of authenticity or untrustworthiness. It is that the carriers were left without notice of the evidence with which they were, in fact, confronted, as later disclosed by the finding made. The requirement that in an adversary proceeding specific reference be made, is essential to the preservation of the substantial rights of the parties.

U.S. v. Abilene & S. Ry. Co., 265 U.S. at 286-90, 44 S.Ct. at 569-70.

¹ *Louisville & N. R. Co. v. Com. ex rel. Kentucky R. R. Commission*, 300 S.W.2d 777 (Ky. 1957)(citations omitted).

The Commission should note that KIUC's purported quest for "the most accurate and relevant information available"² has never included a suggestion that Big Rivers should be permitted to respond to the new evidence that KIUC seeks to introduce and utilize. As stated in Big Rivers' Motion to Strike, if given the opportunity to respond to those documents Big Rivers would provide other relevant information about Big Rivers' financial circumstances on the dates of the documents in KIUC's brief Attachment A that would thoroughly discredit the KIUC conclusion about the significance of those documents. To get into more detail here, though, would involve presenting evidence not in the record, compounding the KIUC error.

Nor should the Commission consider revising its procedural schedule to reopen taking of evidence. The very nature of the Big Rivers application for emergency interim rate relief requires expediency, as was recognized in the Commission's order of March 20, 2009, denying KIUC's objections to the procedural schedule. It is not appropriate to reopen the evidentiary investigation into the emergency interim rate relief and further delay a decision in this matter. The application for emergency interim relief stands submitted and briefed.

Finally, Big Rivers is forced to respond to the incorrect accusation by KIUC that Big Rivers failed to make a required production of the Moody's credit opinion in response to the KIUC First Set of Data Requests. KIUC has appended the Moody's credit opinion as Attachment B to its brief. Those KIUC data

² Motion of Kentucky Industrial Utility Customers, Inc. to Incorporate by Reference Documents on File with the Commission at page 2.

requests, served and received by Big Rivers on March 17, 2009, included the following request as Item 1-10:

Please provide all documents, memos, presentations or e-mails provided to or received from Moody's in the past twelve months.

KIUC misrepresents in its motion that Big Rivers and KIUC agreed that the documents produced pursuant to this data request would be limited to "Moody's information relevant to the rate case, not the Unwind." In fact, the agreement between Big Rivers and KIUC was that the request would be limited to those documents "regarding financing in a scenario where there is no unwind transaction." See e-mail correspondence attached to letter dated March 24, 2009, transmitting Big Rivers' responses to data requests from the Commission and KIUC, a copy of which is attached to this response. The Moody's credit opinion KIUC appended as Attachment B to its brief deals solely with financing by Big Rivers where there has been an Unwind Transaction, and thus falls outside the agreed parameters of the data request.

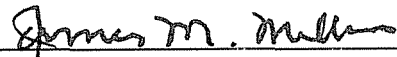
In addition, Big Rivers did not receive the credit opinion from Moody's until March 19, 2009, placing it outside the chronological scope of the data request, which sought communications during the twelve months prior to the date of the data requests, March 17, 2009. For whatever reason, KIUC has leveled unfounded criticisms at Big Rivers.

The KIUC motion purports to be for incorporation by reference of the Moody's credit opinion and the pages from the RUS Form 12s appended as Attachment A to the KIUC brief. Big Rivers has no objection to that relief, but

those documents should not be considered or relied upon in connection with the decision on Big Rivers' application for emergency interim rate relief.

On this the 22d day of April, 2009.

SULLIVAN, MOUNTJOY, STAINBACK
& MILLER, P.S.C.



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Counsel for Big Rivers Electric Corporation

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March 24, 2009

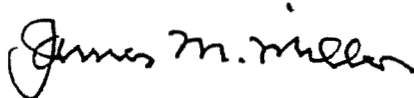
Jeff Derouen
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Frankfort, Kentucky 406-0615

Re: In the Matter of: Notice and Application of
Big Rivers Electric Corporation for a General
Rate Adjustment in Rates, P.S.C. Case No. 2009-00040

Dear Mr. Derouen:

Enclosed for filing on behalf on Big Rivers Electric Corporation ("Big Rivers") are an original and seven (7) copies of Big Rivers' response to the Commission Staff's March 18, 2009, data request and Big Rivers' response to KIUC's First Set of Data Requests. Also attached to this letter is an email dated March 20, 2009, reflecting an agreement between Big Rivers and KIUC with regard to a discovery dispute concerning the KIUC data requests. I certify that a copy of each of the responses has been served on the attached service list.

Sincerely yours,



James M. Miller

Cc: Mark A. Bailey
David Spainhoward
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PSC CASE NO. 2009-00040

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Paula Mitchell

From: Jim Miller [jmiller@smsmlaw.com]
Sent: Monday, March 23, 2009 8:02 AM
To: Paula Mitchell
Subject: FW: Big Rivers PSC Case No. 2009-00040

From: Michael Kurtz [mailto:MKurtz@bkllawfirm.com]
Sent: Fri 3/20/2009 3:17 PM
To: Jim Miller
Subject: RE: Big Rivers PSC Case No. 2009-00040

Jim,

Your email is generally accurate. I would add that the CFC correspondence relates to the \$15 million line of credit, the \$2.5 million line of credit and the \$3 million CFC borrowing option.

Michael L. Kurtz, Esq.
Boehm, Kurtz & Lowry
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Cincinnati, Ohio 45202
ph: 513.421.2255 fax: 513.421.2764

From: Jim Miller [mailto:jmiller@smsmlaw.com]
Sent: Friday, March 20, 2009 4:02 PM
To: Michael Kurtz
Subject: Big Rivers PSC Case No. 2009-00040

Mike,

Regarding the objections Big Rivers Electric Corporation has raised to KIUC's data requests dated March 17, 2009, in our telephone conversation this afternoon I understood us to reach the following agreements or conclusions on the indicated items of your data request:

Item 8 is limited to information related to the \$2.5 million CFC line of credit, or the \$15 million CFC line of credit.

Items 9, 10 and 11 are limited to information regarding financing in a scenario where there is no unwind transaction.

Item 12. We discussed Big Rivers' objections and reached no agreement. Big Rivers will generally file information that is non-privileged, and that may be relevant to or may lead to the discovery of information relevant to the subject matter of this proceeding. KIUC will review the information produced, and take whatever additional action it deems appropriate.

Please let me know whether you believe I have accurately stated the substance of our conversation.

Jim Miller

3/23/2009

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