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December 28, 2011


Mr. 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 Adjustment in Rates,
PSC Case No. 2011-00036*

Dear Mr. DeRouen:

Enclosed for filing on behalf of Big Rivers Electric Corporation ("Big Rivers") are an original and ten (10) copies of Big Rivers' response to Kentucky Industrial Utility Customer, Inc.'s Motion to Dismiss Rehearing and to Vacate Order of December 8, 2011. A copy of this letter and a copy of the response have been served to each person on the attached service list.

Sincerely,



Tyson Kamuf

Enclosures

cc: Mark A. Bailey
Albert Yockey
Douglas Beresford, Esq.
Service List

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PSC CASE NO. 2011-00036

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1 COMMONWEALTH OF KENTUCKY
2 BEFORE THE PUBLIC SERVICE COMMISSION

3
4 In the Matter of:

5
6 APPLICATION OF BIG RIVERS)
7 ELECTRIC CORPORATION FOR A) Case No. 2011-00036
8 GENERAL ADJUSTMENT IN RATES)
9

10
11 **BIG RIVERS ELECTRIC CORPORATION'S RESPONSE TO**
12 **KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC.'S**
13 **MOTION TO DISMISS REHEARING AND**
14 **TO VACATE ORDER OF DECEMBER 8, 2011**
15

16 Big Rivers Electric Corporation ("*Big Rivers*"), through counsel,
17 responds as follows to the December 12, 2011, Kentucky Industrial Utility
18 Customers, Inc. ("*KIUC*") Motion to Dismiss Rehearing and to Vacate Order
19 of December 8, 2011 ("*Motion to Dismiss*");

20 *Procedural Background*

21 By order dated November 17, 2011 (the "*November 17 Order*") in this
22 matter, the Public Service Commission ("*Commission*" or "*PSC*") approved
23 new rates for Big Rivers. On December 1, 2011, KIUC filed an action in
24 Franklin Circuit Court seeking to reverse the November 17 Order, in part
25 (the "*KIUC Appeal*"). Big Rivers then filed a petition for rehearing of the
26 November 17 Order with the Commission on December 6, 2011, which the
27 Commission granted by order dated December 8, 2011 (the "*Rehearing*
28 *Order*"). As a consequence of KIUC questioning the jurisdiction of the
29 Commission to conduct a rehearing, on December 15, 2011, Big Rivers filed in

1 Franklin Circuit Court a “protective” appeal of the November 17 Order,
2 raising the same issues it raises in its petition for rehearing.¹

3 *Big Rivers has a right to seek a rehearing, and the Commission*
4 *has the statutory authority to grant a rehearing.*

5
6 Big Rivers filed its petition for rehearing pursuant to KRS 278.400,
7 which is part of the statutory scheme enacted by the General Assembly for
8 the conduct of utility rate cases.² Under the express provisions of that
9 statute, Big Rivers was entitled to apply to the Commission within 20 days
10 after service of the November 17 Order “for a hearing with respect to any of
11 the matters determined.” That is what Big Rivers did, asking for rehearing
12 on four matters.

13 Neither the statutory right of a party to seek rehearing of matters in a
14 Commission order, nor the authority of the Commission to grant or deny that
15 application is conditioned by statute upon the absence of an appeal by
16 another party. The only statutory interaction between the rehearing
17 procedure and the procedures for appeal is in KRS 278.410(1), which provides
18 for postponement of the deadline for filing an appeal until 20 days after a
19 final order on rehearing. And it is significant that the statutory scheme for
20 appeal of a Commission order in KRS Chapter 278 is comprehensive, from the
21 filing of the complaint (KRS 278.410), and the practice of the appeal in
22 Franklin Circuit Court (KRS 278.420 - .440), through appeal of the Franklin

¹*Big Rivers Electric Corporation v. Public Service Commission, et al*, Franklin Circuit Court Civil Action No. 11-CI-1757.

² The Commission's powers are purely statutory. *City of Olive Hill v. Public Service Commission*, Ky., 305 Ky. 249, 203 S.W.2d 68 (1947).

1 Circuit Court judgment to the Kentucky Court of Appeals. The Kentucky
2 Rules of Civil Procedure defer to the procedural requirements of the “special
3 statutory proceedings” in KRS Chapter 278. CR 1(2); *Arlinghaus Builders,*
4 *Inc. v. Kentucky Public Service Commission*, Ky. App., 142 S.W.3d 693, 695-
5 696 (2003).

6 *Appeal of a Commission order does not extinguish*
7 *the right to seek a rehearing under KRS 278.400.*
8

9 The right of the Commission to grant rehearing on Big Rivers’
10 application after the KIUC Appeal was filed is analogous to the right of a trial
11 court in the Commonwealth of Kentucky to rule on certain post-trial motions
12 in the face of an appeal. For example, a trial court retains control over its
13 judgment for purposes of receiving and ruling on a motion to alter or amend a
14 judgment, or to vacate a judgment and enter a new one that is filed not later
15 than 10 days after entry of the final judgment. *Johnson v. Smith*, Ky., 885
16 S.W.2d 944, 947 (1994) (“Under CR 59.04 and 59.05 the court has control over
17 its judgment with a right to order a new trial, or alter, amend or vacate the
18 judgment, either on motion or *sua sponte*, for ten days after entry of
19 judgment, but not thereafter.”); *see also James v. James*, Ky., 313 S.W.3d 17,
20 21 (2010).

21 It is KRS 278.400 that provides a party affected by an order of the
22 Commission the analogous right to apply for an order of the Commission that
23 “may change, modify, vacate or affirm” the order affecting the party. The
24 Commission likewise must retain control over its November 17 Order for the

1 limited period in which KRS 278.400 allows a rehearing to be sought (20 days
2 after service of the order). The Commission must continue to retain control
3 over its November 17 Order during the 20-day period in which KRS 278.400
4 required that the Commission either grant or deny the application. And now
5 that the application for rehearing has been granted, the Commission
6 obviously needs time to conduct that rehearing.

7 KIUC's position is that exercise by a party of the right to appeal a
8 Commission order provided for in KRS 278.410 is intended by the General
9 Assembly to extinguish the right of a party to seek rehearing within 20 days
10 after the service of that order. In other words, a party to a proceeding in
11 which an order is entered does not have 20 days in which to seek a rehearing;
12 it only has the indiscernible number of days (up to 20 after service of the
13 order) between the date on which the order is entered, and the date on which
14 another party files an appeal.

15 The KIUC "race to the courthouse" theory is wholly inconsistent with
16 the well-established rule that statutes *in pari materia* should be construed in
17 reference to each other to give effect to all of the provisions of each. *Milner v.*
18 *Gibson*, Ky, 61 S.W.2d 273, 277-78 (1933). Statues *in pari materia* have a
19 common purpose. *Id.* As put by the Kentucky Supreme Court:

20 We presume, of course, that the General Assembly intended for the
21 statute to be construed as a whole, for all of its parts to have meaning,
22 and for it to harmonize with related statutes. *Hall v. Hospitality*
23 *Resources, Inc.*, 276 S.W.3d 775 (Ky.2008); *Lewis v. Jackson Energy*
24 *Cooperative Corporation*, 189 S.W.3d 87 (Ky.2005). We also presume

1 that the General Assembly did not intend an absurd statute or an
2 unconstitutional one. *Layne v. Newberg*, 841 S.W.2d 181 (Ky.1992).

3
4 *Spencer v. Estate of Spencer*, Ky., 313 S.W.3d 534, 541 (2010). The Kentucky

5 Supreme Court also held:

6 When there appears to be a conflict between two statutes, as here, a
7 general rule of statutory construction mandates that the specific
8 provision take precedence over the general. Moreover, it is the Court's
9 duty to harmonize the law so as to give effect to both statutes. Finally,
10 statutes should be construed in such a way that they do not become
11 meaningless or ineffectual. [footnotes omitted]

12
13 *Commonwealth of Kentucky v. Phon*, Ky., 17 S.W.3d 106, 107-108 (2000); *see*

14 *also Smither v. Commonwealth of Kentucky*, Ky., 342 S.W.2d 521, 522 (1960);

15 *Lewis v. Jackson Energy Cooperative Corporation*, Ky., 189 S.W.3d 87, 91

16 (2005).

17 KRS 278.400 and KRS 278.410 are both part of the post-order relief
18 procedures provided by the General Assembly for parties to a Commission
19 proceeding. The rehearing procedure of KRS 278.400 gives the Commission
20 the right to grant rehearing, and the broad discretion to correct its orders, if
21 appropriate: "Upon the rehearing, the commission may change, modify,
22 vacate or affirm its order as it deems necessary." As the Supreme Court has
23 noted with respect to certain civil rules providing for post-trial relief from a
24 trial court, KRS 278.400 can be characterized as a "mistake correcting"
25 procedure. *Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*,
26 Ky., 90 S.W.3d 454, 456 (2002).

1 Big Rivers' application for rehearing essentially asks the Commission
2 whether, in a complex case with scores of issues and a voluminous record, its
3 November 17 Order contains four mistakes that the Commission would be
4 willing to correct: (1) did the Commission overlook Big Rivers' request to
5 recover its rate case expenses; (2) did the Commission make a mistake in
6 math; (3) did the Commission overlook evidence that would entitle Big Rivers
7 to depreciation on CWIP under the Commission's own rulings in this case and
8 others; and (4) did the Commission incorrectly assume that the unwind
9 financial model is part of the record in this case. None of these issues is the
10 subject of the KIUC Appeal, and none of these issues would be resolved by the
11 KIUC Appeal, even if KIUC obtains all the relief it seeks.

12 KIUC contends that KRS 278.410 operates to cut off Big Rivers' right
13 to seek rehearing under KRS 278.400 during the 20 days after the November
14 17 Order was served, and requires Big Rivers to appeal to the Franklin
15 Circuit Court to seek correction of the mistakes it believes it has identified in
16 the Commission's November 17 Order. And what relief can be granted by the
17 court to correct those mistakes? In all likelihood, the Commission's
18 November 17 Order would be remanded to the Commission for the exact kind
19 of review Big Rivers has been granted in the Rehearing Order.

20 As shown above, the rules of statutory construction require that KRS
21 278.400 be construed together with the other provisions of KRS Chapter 278,
22 including KRS 278.410, to give meaning to the right to seek rehearing. KIUC

1 argues the existence of a post-order relief scheme that presumes the exercise
2 of a right under one statute is intended to cut off a right granted in another
3 statute. This position is inconsistent with established rules of statutory
4 construction, the plain language of KRS Chapter 278, and a rational approach
5 to reconciling a perceived conflict between procedural rights.³ The rational
6 approach is to allow an application for rehearing and action by the
7 Commission on the application for rehearing to occur precisely as
8 contemplated by KRS 278.400, within the narrow time strictures provided.
9 The right of a party to appeal to the Franklin Circuit Court following entry by
10 the Commission of an order after rehearing is expressly preserved. KRS
11 278.410(1).

12 *KIUC's position is unsupported by the authorities it cites.*

13 KIUC mistakenly relies on the Commission's order dated January 27,
14 2005 in *In the Matter of: The Union Light, Heat and Power Company's Motion*
15 *for Extension of Filing Date and Continuation of its Current Rider AMRP*
16 *Rates*, PSC Case No. 2004-00403 (the "ULH&P Order"), to support its
17 allegation that the Commission lost jurisdiction over this matter when KIUC
18 filed the KIUC Appeal. *See* Motion to Dismiss at 1-3. In that case, the
19 Commission ruled that it did not have jurisdiction over a motion filed by The

³ By analogy with reference to the Kentucky Rules of Civil Procedure, the Kentucky Supreme Court held in *James v. James*, 313 S.W.3d at 22, that "our rules of procedure should not be interpreted in a manner as to render them inconsistent with one another," and quoted from its decision in *Kurtsinger*, 90 S.W.3d at 456, that "[w]e should not apply one rule in a manner that destroys another and eliminates its essential purpose."

1 Union Light, Heat and Power Company to modify a previous order that had
2 been entered more than two years earlier on the grounds that an appeal of
3 the previous order was pending. *See ULH&P Order* at 5. Neither that case,
4 nor the two court cases the Commission relied upon in that case cited by
5 KIUC in its Motion to Dismiss,⁴ involve the question of whether the
6 Commission retains jurisdiction to order a rehearing after an appeal is filed.
7 And the motion to modify was not filed within 20 days after the order was
8 served as required by KRS 278.400.

9 KIUC also erroneously contends that the Commission's order dated
10 March 6, 1996, in *In the Matter of: An Examination by the Public Service*
11 *Commission of the Environmental Surcharge Mechanism of Kentucky Utilities*
12 *Company as Billed from February 1, 1995 to July 31, 1995*, PSC Case No. 95-
13 445, supports the proposition that the Commission loses jurisdiction over a
14 case when an appeal is filed. *See Motion to Dismiss* at 3-4. That case
15 involved a request by KIUC that the Commission implement a judgment of
16 the Franklin Circuit Court that was on appeal to the Kentucky Court of
17 Appeals; it did not involve the question of whether the Commission retains
18 jurisdiction to order a rehearing after an appeal is filed. The Commission
19 refused to take up the order not because of lack of jurisdiction, but because of

⁴ Those two cases are *Johnson Bonding Co. v. Ashcraft*, Ky., 483 S.W.2d 118 (1972) and *City of Devondale v. Stallings*, Ky., 795 S.W.2d 954 (1990). While neither case addresses the issue of whether the Commission retains jurisdiction to order a rehearing after an appeal is filed, the *Stallings* case is entirely inapposite in that the only question there was "whether CR 73.02(2), the so-called 'substantial compliance' rule, applies when a notice of appeal is timely filed, but omits the names of indispensable parties." *Stallings*, 795 S.W.2d at 955.

1 the uncertainty caused by the pending appeal to the Court of Appeals of the
2 Franklin Circuit Court judgment that would remand the Commission's order
3 for further proceedings.

4 KIUC then cites *Frankfort Kentucky Natural Gas Co. v. City of*
5 *Frankfort, Ky.*, 276 Ky. 199, 123 S.W.2d 270, 271 (1938)⁵ in support of its
6 proposition that the Commission does retain jurisdiction to correct ministerial
7 errors even after an appeal is filed, but argues that those circumstances are
8 not present in this case. However, the jurisdiction of the Commission was not
9 at issue in that appeal to the former Court of Appeals; the only issue was
10 whether the circuit court should have ordered the Commission to sign to
11 orders *nunc pro tunc*. *Frankfort Kentucky Natural Gas Co.* , 123 S.W.2d at
12 271. Nothing said in the *Frankfort Kentucky Natural Gas Company* opinion
13 supports KIUC's primary contention that the Commission loses jurisdiction to
14 order a rehearing when an appeal is filed.'

15 *Conclusion*

16 KIUC provides no authority for its position that Big Rivers' statutory
17 right to seek rehearing, and the Commission's statutory authority to consider
18 and grant or deny an application for rehearing within the time frames
19 established by statute are terminated by the KIUC Appeal. Under the
20 indisputable rules of statutory construction, and the clear language of the
21 relevant sections of KRS Chapter 278, a rational interpretation of KRS
22 278.400, and reconciliation of the right to seek rehearing with the right to

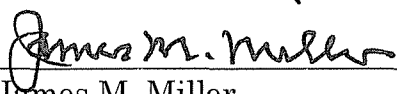
⁵ See Motion to Dismiss at 4-5

1 appeal requires that the rehearing granted to Big Rivers be permitted to
2 proceed. For these reasons, the Commission should deny KIUC's Motion to
3 Dismiss.

4 WHEREFORE, Big Rivers asks that the Commission deny KIUC's
5 Motion to Dismiss Rehearing and to Vacate Order of December 8, 2011, and
6 for all other relief to which it may appear entitled.

7 On this the 28th day of December, 2011.

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