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PUBLIC SERVICE
COMMISSION

Via Hand Delivery

January 9, 2012

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

Re: Case No. 2011-00036

Dear Mr. Derouen:

Please find enclosed the original and ten (10) copies of REPLY TO BIG RIVERS ELECTRIC CORPORATION'S RESPONSE TO KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC'S MOTION TO DISMISS REHEARING AND TO VACATE ORDER OF DECEMBER 8, 2011 BY KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC. for filing in the above-referenced matter.

By copy of this letter, all parties listed on the Certificate of Service have been served. Please place these documents of file.

Very Truly Yours,



Michael L. Kurtz, Esq.

Kurt J. Boehm, Esq.

BOEHM, KURTZ & LOWRY

MLKkew

Attachment

cc: Certificate of Service
Richard Raff, Esq.
David C. Brown, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by electronic mail (when available) or by mailing a true and correct copy by overnight mail, unless other noted, this 9th day of January, 2012 to the following



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**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

IN THE MATTER OF:

**APPLICATION OF BIG RIVERS ELECTRIC CORPORATION) CASE NO. 2011-00036
FOR A GENERAL ADJUSTMENT IN RATES)**

**REPLY TO BIG RIVERS ELECTRIC CORPORATION’S RESPONSE
TO KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC.’S
MOTION TO DISMISS REHEARING AND
TO VACATE ORDER OF DECEMBER 8, 2011
BY KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC.**

On December 12, 2011, KIUC filed a Motion to dismiss Big Rivers Electric Corporation’s (“Big Rivers”) Petition for Rehearing and to vacate the Kentucky Public Service Commission’s (“Commission”) December 8, 2011 Order (“Motion”). In its Motion, KIUC argued that the Commission lacks subject matter jurisdiction over Big Rivers’ Petition for Rehearing because an appeal to the Franklin Circuit Court was filed by KIUC prior to the filing of Big Rivers’ Petition for Rehearing. On December 20, 2011, the Commission issued an Order establishing a procedural schedule for the parties to brief the issue of whether the Commission has jurisdiction over the November 17, 2011 Order. The next day, December 21, 2011, the Commission filed an Answer to KIUC’s appeal at the Franklin County Circuit Court, in which the Commission departed from its own precedent and effectively pre-decided the issue of whether the Commission has jurisdiction to review its November 17, 2011 order.¹ On December 29, 2011, Big Rivers filed a Response to KIUC’s Motion.

¹ Answer of Defendant, Kentucky Public Service Commission, Civil Action No. 11-CI-1700. In ¶3 of the Commission’s Second Affirmative Defense, the Commission states “[t]he Defendant Commission, pursuant to KRS 278.400, retains jurisdiction of the proceeding in Ky. PSC Case No. 2011-00036 because within 20 days of service of the Order, any party to a proceeding may apply to the Commission for a rehearing specifying the matters on which rehearing is sought.” Id. at 5.

In its Response to KIUC's Motion, Big Rivers fails to present a valid reason for the Commission to deny KIUC's Motion. Big Rivers' Response does not reconcile its arguments with the plain language of KRS 278.410, which provides:

Any party to a commission proceeding or any utility affected by an order of the commission may, within thirty (30) days after service of the order, or within twenty (20) days after its application for rehearing has been denied by failure of the commission to act, or within twenty (20) days after service of the final order on rehearing, when a rehearing has been granted, bring an action against the commission in the Franklin Circuit Court to vacate or set aside the order or determination on the ground that it is unlawful or unreasonable.²

Under the plain language of the statute, a party affected by an order of the Commission has three options for when they can bring an action related to that order in the Franklin Circuit Court: 1) within 30 days after service of the order; *or* 2) within 20 days after an application for rehearing has been denied by operation of law; *or* 3) within 20 days after service of a final order on rehearing when the Commission has granted rehearing. The plain language of the statute specifically uses the term "or" between each of these alternatives, establishing three separate and distinct options for when a party can appeal a Commission order.

In construing statutory language, the Commission is guided by the fundamental principle that the words in statutes are to be accorded their plain and common meaning. KRS 446.080(4) provides "...all words and phrases shall be construed according to the common and approved usage of language. . . ."

² Emphasis added.

Further, “[t]he ‘plain meaning’ of statutes controls when interpreting statutory language.”³ Only where there is ambiguity on the face of a statute may the Commission look to extrinsic references to aid in the construction of the statute.⁴

In the present case, the plain language of KRS 278.410 is unambiguous, setting out three options for parties seeking to appeal a Commission order. KIUC has merely chosen to exercise the first option provided by the statute. KRS 278.410 does not state that a party must wait until a rehearing decision has occurred to file an appeal. Rather, the statute explicitly sets out three options for when a party can appeal a Commission order, only one of which is available after the Commission has granted rehearing of the order.

Because KRS 278.410 is unambiguous regarding the options for when a party can appeal a Commission order, Big Rivers’ statutory construction arguments for the denial of KIUC’s Motion, including the *in pari materia* argument, are inapplicable to this case.⁵ Essentially, Big Rivers asks the Commission to rewrite the plain language of an unambiguous statute. But “[a] reviewing court cannot amend [a statute] by means of a so-called interpretation contrary to the plain meaning.”⁶ In this situation, the plain language of the statute controls. KIUC appealed the Commission’s November 17, 2011 Order consistent with its right under KRS 278.410 to exercise the first statutory option for the filing of an appeal. Jurisdiction over that Order now lies with the Franklin Circuit Court. Accordingly, the Commission should grant KIUC’s Motion.

³ *Lamb v. Holmes*, 162 S.W. 3d 902, 909 (Ky. 2005).

⁴ *In the Matter of the Application of Bluegrass Wireless LLC for Issuance of a Certificate of Public Convenience and Necessity to Construct a Cell Site (Lily 11) in Rural Service Area #6 (Laurel) of the Commonwealth of Kentucky*, Case No. 2005-0320, June 27, 2006 Order at 3 (citing *Lewis v. Jackson Energy Co-op. Corp.*, 189 S.W.3d 87, 94 (Ky. 2005) (“Where a statute is unambiguous, there is no need to use extrinsic evidence of legislative intent and public policy which the statute is intended to effect. A reviewing court cannot amend it by means of a so-called interpretation contrary to the plain meaning.”)).

⁵ Big Rivers Response at 4-5; 6-7.

⁶ *Lewis v. Jackson Energy Co-op. Corp.*, 189 S.W.3d 87, 94 (Ky. 2005)

In addition to its failure to address the plain language of KRS 278.410, Big Rivers' Response is flawed in that Big Rivers provides no applicable case law in support of its position. Big Rivers attempts to distinguish the case law cited by KIUC in support of its Motion, saying that the legal principles cited by KIUC were applied to a different set of facts than the facts of the present case. However, KIUC cited those cases for the legal principle found in those cases, not for the specific facts of those cases. As KIUC noted in its Motion, the Commission and Kentucky courts have held that an adjudicative body loses jurisdiction over a matter once the matter is appealed. The Court of Appeals of Kentucky has said that the "*general rule, with certain exceptions, ... that the trial court loses jurisdiction over matters that have been appealed until mandate has issued.*"⁷ The Supreme Court of Kentucky stated that "[a] notice of appeal, when filed, transfers jurisdiction of the case from the circuit court to the appellate court."⁸

The Commission itself has adhered to the principle that, once an appeal of a Commission Order is filed with the Franklin Circuit Court, the Commission's jurisdiction is extinguished.⁹ That the cases cited by KIUC in its Motion may differ factually from the present case does not undermine the legal principles asserted in those cases. Rather, the legal principle that the Commission loses jurisdiction over a matter once the matter is appealed to a higher court is directly applicable to the facts of this case, in which an appeal to a higher court has been made. Consequently, the Commission should grant KIUC's Motion because jurisdiction over review of the November 17, 2011 Order now lies with the Franklin Circuit Court.

⁷ *Johnson Bonding Co. v. Ashcroft*, Ky., 483 S.W.2d 118 (1972).

⁸ *City of Devondale v. Stallings*, Ky., 795 S.W.2d 954 (1990).

⁹ *Union Light Heat and Power Company's Motion for Extension of Filing Date and Continuation of its Current Rider AMRP Rates* December 7, 2005 Order at 5 (citing *Johnson* and *Devondale*, supra); *In the Matter of an Examination by the Public Service Commission of the Environmental Surcharge Mechanism of Kentucky Utilities Company as Billed from February 1, 1995 to July 31, 1995*, Case No. 1995-00445, Order at 3; *Schimmoeller v. Kentucky-American Water Company*, Case No. 2009-00096, November 24, 2009 Order at 4.

The Attorney General agrees with Petitioner's position that the Franklin Circuit Court should now resolve issues related to the November 17, 2011 Order. In response to the Commission's order requesting briefs on the jurisdictional issue, the Attorney General states that "*the interests of judicial economy would be best served by allowing the Franklin Circuit Court to immediately hear all contested issues arising from the instant case.*"¹⁰

Big Rivers attempts to analogize the Commission's right to grant rehearing to the right of a trial court to rule on certain post-trial motions.¹¹ But the trial process and the utility regulatory process are two separate and distinct arenas with entirely different rules and procedures. KIUC filed its appeal according to the law for an appeal of a Commission decision as specifically set forth in Chapter 278. That law specifically establishes the process by which an affected party can appeal a Commission order. KIUC followed that law. The fact that rules relevant to trial courts may lead to different results is irrelevant to this case. KIUC acted pursuant to the relevant law in filing its appeal. Accordingly, jurisdiction over the November 17, 2011 now lies with the Franklin Circuit Court.

Big Rivers' complains that none of the issues that Big Rivers raised on rehearing before the Commission are the subject of the KIUC appeal and that "none of these issues would be resolved by the KIUC Appeal."¹² Yet Big Rivers has already filed its own appeal at the Franklin Circuit Court, "raising the same issues it raises in its petition for rehearing."¹³ Presumably, the Franklin Circuit Court, which now has jurisdiction over review of the November 17, 2011 Order because of both appeals currently before it, could consolidate the two appeals and resolve both KIUC's and Big River's issue simultaneously. Even if the Court does not consolidate the two appeals, Big Rivers can receive resolution of the same issues it raises on rehearing at the Franklin Circuit Court through its own appeal.

¹⁰ Attorney General's Comments Regarding Commission's Continuing Jurisdiction, Case No. 2011-00036 (Dec. 28, 2011) at 1.

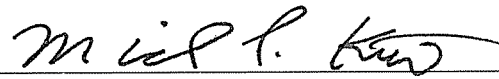
¹¹ Big Rivers Response at 3-4.

¹² Big Rivers Response at 6.

¹³ Big Rivers Response at 2.

WHEREFORE, for the reasons set forth herein, KIUC moves the Commission to grant KIUC's Motion to Dismiss Rehearing and to Vacate Order of December 8, 2011.

Respectfully submitted,



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