

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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In the Matter of:

Application of Big Rivers Electric Corporation for Approval of)
its 2012 Environmental Compliance Plan, Approval of its) CASE NO. 2012-00063
Amended Environmental Cost Recovery Surcharge Tariffs,)
and for the Certificates of Public Convenience and Necessity,)
and the Authority to Establish a Regulatory Account)

SIERRA CLUB'S MOTION TO DISMISS BIG RIVERS ELECTRIC CORPORATION'S
CPCN FILING IN ITS ENTIRETY AND RESPONSE IN PARTIAL SUPPORT OF
KENTUCKY INDUSTRIAL UTILITY, INC.'S MOTION TO DISMISS

In an August 21, 2012 decision, the D.C. Circuit Court of Appeals vacated the U.S. Environmental Protection Agency's Cross-State Air Pollution Rule ("CSAPR"). *See EME Homer City Generation, L.P. v. Environmental Protection Agency et al.*, No. 11-1302 (D.C. Cir. Aug. 21, 2012). Because CSAPR formed the basis—both directly and indirectly—for all of the projects that Big Rivers Electric Corporation ("Big Rivers" or the "Company") has proposed for its 2012 Environmental Compliance Plan, the Commission should deny without prejudice Big Rivers' application for a Certificate of Public Convenience and Necessity ("CPCN").

As explained in Kentucky Industrial Utility Customers, Inc.'s ("KIUC") Motion to Dismiss, KRS 278.183 provides for the recovery of costs required by an existing and effective environmental law. KRS 278.183 states in part:

[A] utility shall be entitled to the current recovery of its costs of complying with a Federal Clean Air Act as amended and those federal, state, or local environmental requirements which apply to coal combustion wastes and by-products from facilities utilized for production of energy from coal in accordance with the utility's compliance plan as designated in subsection (2) of this section.

As KIUC noted, Big Rivers' Projects 4, 5, 6 and 7 were intended to comply with CSAPR. *See* KIUC Mot. to Dismiss, 2; *see also* Big Rivers' CPCN App. Ex. 4 (Dir. Test. of Robert W. Berry), 18–22. Because the D.C. Circuit Court of Appeals has vacated CSAPR, Sierra Club agrees with KIUC's motion to dismiss those portions of Big Rivers' application seeking a CPCN for Projects 4, 5, 6, and 7.

The vacatur of CSAPR also compels the dismissal of the remaining portions of Big Rivers' application—Projects 8, 9, 10, and 11. While those projects are based on Big Rivers' intended compliance with the Mercury and Air Toxics Standards (“MATS”) rule, the Company's application makes clear that its MATS compliance proposals are intertwined with the CSAPR proposals. For example, as explained by Big Rivers' engineering consultant Sargent and Lundy, the Projects selected for compliance with CSAPR determined which MATS Projects were later selected:

Unlike SO₂ and NO_x emission reduction strategies for achieving CSAPR compliance, the potential options for MACT [that was later revised to the MATS rule] are more straightforward but also dependant [*sic*] on the technologies selected to meet CSAPR emissions. . . . Since selection of these technologies is dependant [*sic*] on the implemented CSAPR technologies, a final recommendation of what is necessary for compliance will be determined after the cost benefits (NPV) of each CSAPR technology has been explored and compliance plan has been developed.

Big Rivers CPCN Application Ex. 5 (Dir. Test. of William DePriest), DePriest Ex. 2, 4–17.

Similarly, Big Rivers explained that Dry Sorbent Injection “and the necessary reductions to meet the 2014 CSAPR allocations will result in unit SO₂ emission rates below 0.20 lb/MMBtu, which will allow for use of SO₂ emissions data as a surrogate for demonstrating compliance with the acid gas provisions of the MATS rule.” *See id.* Ex. 6 (Dir. Test. of Thomas L. Shaw) at 16 (emphasis added).

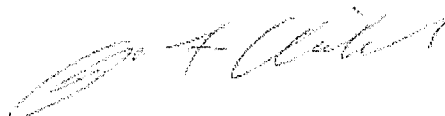
Given the intertwined nature of the CSAPR and MATS compliance proposals and the analysis behind their selection, Big Rivers cannot simply rely on its proposed MATS Projects to move forward with its application. Doing so would strip these Projects from the context in which they were selected and would deprive the parties, Staff, and Commission of the opportunity to fully evaluate the sufficiency and reasonableness of Big Rivers' MATS compliance plan. Instead, Big Rivers must conduct a new analysis that considers the least cost option to comply with the MATS rule in light of the vacatur of CSAPR.

More than enough time exists for Big Rivers to submit and the Commission to evaluate a revised MATS compliance plan. The deadline for complying with the MATS rule is April 2015 or as late as April 2016, if the one year extension provided for in the Clean Air Act is granted. Assuming *arguendo* that activated carbon injection and dry sorbent injection systems are the least cost method for complying with the MATS rule, Big Rivers could install these controls in 15 to 16 months. *See* DePriest Ex. 2, 6-3, 6-5. Given this short amount of time between engineering to system start up, Big Rivers has more than enough time to submit a revised application.

For all the foregoing reasons, this Commission should deny without prejudice Big Rivers' application for a Certificate of Public Convenience and Necessity ("CPCN").

Dated: August 22, 2012

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that I served a copy of this Motion to Dismiss Big River Electric Corporation's CPCN Filing in its Entirety and Response in Partial Support of Kentucky Industrial Utility Inc.'s Motion to Dismiss via e-mail and in person on August 22, 2012 to the following:

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