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RECEIVED

MAY 29 2013

PUBLIC SERVICE  
COMMISSION

May 29, 2013

Hon. Jeff R. Derouen  
Executive Director  
Kentucky Public Service Commission  
211 Sower Blvd.  
Frankfort KY 40601-8294

***RE: In the Matter of: Application of Big Rivers Electric Corporation for a General Adjustment in Rates, Case No. 2012-00535***

Dear Mr. Derouen:

With this letter we have enclosed one (1) original and eleven (11) copies of Big Rivers Electric Corporation's Motion to Strike Sierra Club Exhibits and Referencing Testimony.

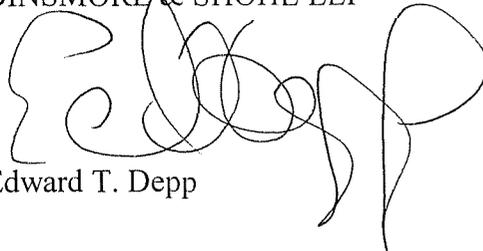
Please return a file stamped to our courier.

Thank you and if you have any questions, please call me.

Sincerely,

DINSMORE & SHOHL LLP

Edward T. Depp



ETD/kwi

Enclosures

cc: All Parties of Record

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY

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In the Matter of:

MAY 29 2013

Application of Big Rivers Electric )  
Corporation for a General )  
Adjustment in Rates )

Case No. 2012-00535

PUBLIC SERVICE  
COMMISSION

**BIG RIVERS ELECTRIC CORPORATION'S MOTION TO STRIKE SIERRA CLUB  
EXHIBITS AND REFERENCING TESTIMONY**

1. Big Rivers Electric Corporation ("Big Rivers") hereby moves the Kentucky Public Service Commission (the "Commission") to strike two exhibits and portions of testimony from the Direct Testimony of Frank Ackerman (the "Ackerman Testimony") filed on behalf of Sierra Club. As grounds for its motion, Big Rivers states the following.

**I. Factual Background**

2. In 2012, Rachel S. Wilson and William Steinhurst filed direct testimony (the "Wilson Testimony" and "Steinhurst Testimony," respectively) on behalf of Sierra Club in P.S.C. Case No. 2012-00063, the *Application of Big Rivers for Approval of Its 2012 Environmental Compliance Plan, for Approval of Its Amended Environmental Cost Recovery Surcharge Tariff, for Certificates of Public Convenience and Necessity, and for Authority to Establish a Regulatory Account*. Wilson and Steinhurst sponsored a combined total of 13 exhibits in that previous proceeding.

3. Neither Ms. Wilson nor Mr. Steinhurst is a witness in the current proceeding.

4. On May 24, 2013, Frank Ackerman filed 30 pages of testimony in this matter on behalf of Sierra Club. Mr. Ackerman sponsored seven exhibits. Two of the sponsored exhibits—Exhibits Ackerman-4 and Ackerman-5—consist of nothing but the Wilson Testimony

and Steinhurst Testimony, along with all exhibits that accompanied the prior testimony of those individuals.

5. Together, Exhibits Ackerman-4 and Ackerman-5 contain more than 500 pages of testimony and exhibits from a previous, unrelated case.

6. Mr. Ackerman reiterates and summarizes portions of the Wilson Testimony and Steinhurst Testimony from page 15:7 (beginning at “In testimony in”) to 15:29 and from page 16:3 to 16:12 of the Ackerman Testimony.

**II. The Commission Should Strike Exhibits Ackerman-4, Ackerman-5, and Related Portions of the Ackerman Testimony.**

7. Sierra Club’s attempt to incorporate more than 500 pages of testimony and exhibits from a previous, unrelated case is a violation of Big Rivers’ due process rights and should be barred.

8. Parties appearing before an administrative commission “are entitled to procedural due process.” *See Am. Beauty Homes Corp. v. Louisville and Jefferson Co. Planning and Zoning Comm.*, 379 S.W.2d 450, 456 (Ky. 1964). This requires that a party be granted "sufficient notice and opportunity to make his defense." *Somsen v. Sanitation Dist. of Jefferson Co.*, 197 S.W.2d 410, 411 (Ky. 1946). Due process is violated where a party is not given the chance to test, explain, or refute evidence considered by the fact-finder. *See, e.g.*, 16 Am.Jur.2d Const. Law § 1013.

9. In 2009, the Commission denied a request to incorporate comments and accompanying exhibits from one proceeding into another because the “materials were not presented by individuals who were under oath, were not subject to discovery, and were not subject to cross-examination at the evidentiary hearing.” *See In the Matter of Application of Kentucky Utils. Co. for Certificates of Public Convenience and Necessity and Approval of Its*

*2009 Compliance Plan for Recovery by Environmental Surcharge, and Application of Louisville Gas and Elec. Co. for a Certificate of Public Convenience and Necessity and Approval of Its 2009 Compliance Plan for Recovery by Environmental Surcharge*, P.S.C. Case Nos. 2009-00197 and 2009-00198, 2009 Ky. PUC LEXIS 1338 (Dec. 23, 2009). In an earlier case, the Commission similarly refused to incorporate testimony from a previous case because it “would deprive the Defendants of their right to due process.” *See Auxier Water Co. v. City of Prestonsburg and Prestonburg City’s Utilities Commission*, P.S.C. Case No. 96-362, 1998 Ky. PSC PUC LEXIS 329 (Feb. 9, 1998). In that case, the Commission emphasized that the due process violation would arise because, although the party “had an opportunity to cross-examine [the witness] in [the previous case], the issues involved in that case are not identical to those in this proceeding.” *Id.* at \*2.

10. As in those cases, Big Rivers would have no opportunity to cross-examine the relevant witnesses if the Wilson Testimony and Steinhurst Testimony are incorporated into this proceeding. Moreover, although Big Rivers would have had an opportunity to cross-examine Ms. Wilson and Mr. Steinhurst in the context of the 2012 environmental cost recovery proceeding had the parties not settled the case prior to the hearing, the issues in that case were different from the issues in this proceeding. Therefore, Big Rivers could not cross-examine those witnesses with respect to the implications of their testimony on the current proceeding.

11. Consequently, incorporation of the Wilson Testimony and Steinhurst Testimony would be a reversible violation of Big Rivers’ due process rights. *See, e.g., Somsen*, 197 S.W.2d at 411 (Ky. 1946) (due process requires that a party be granted “sufficient . . . opportunity to make his defense”); 16 Am.Jur.2d Const. Law § 1013 (party must have opportunity to test, explain, or refute evidence considered by the fact-finder). If the Commission were to permit the

Sierra Club's attempted incorporation by reference, it would permit the Sierra Club and possibly other parties to use more than 500 pages of testimony and exhibits against Big Rivers, while yet eviscerating any meaningful opportunity of Big Rivers to respond in the context of this rate case. As in the 2009 case cited above, the Wilson Testimony and Steinhurst Testimony are not presented by individuals under oath in this proceeding. The issues addressed by the Wilson Testimony and Steinhurst Testimony have also not been subject to discovery in this case (in part because the testimony addresses numerous matters that are not relevant to this proceeding). These facts both support the conclusion that the previous testimony should be stricken from the Ackerman Testimony.

12. If the Sierra Club wanted to introduce testimony and exhibits from these witnesses, its solution was simple: timely prepare and file testimony and exhibits from those witnesses. The Sierra Club freely chose not to do so. The rapidity of the procedural schedule in this matter is no excuse for Sierra Club, as all the parties have been forced to conduct themselves in accordance with this modified schedule that was occasioned by Sierra Club's late intervention in the first place.

13. Finally, as a procedural matter, 807 KAR 5:001, Section 11(5) provides that documents from previous cases may be incorporated as part of the record only "[u]pon motion of a party . . . ." Sierra Club has filed no such motion, and its attempt to circumvent this procedural protection further underscores the threat its purported incorporation poses to Big Rivers' due process rights.

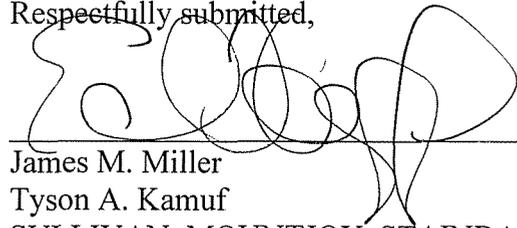
14. Having late-moved to intervene in this matter, Sierra Club was permitted to intervene upon the condition that its intervention would not unduly complicate the proceedings. Since that time, Sierra Club has required a modification to the procedural schedule, it has filed

confidential material in the public record, it has filed a spurious motion to compel, and it has now circumvented the Commission's procedural rules in an attempt to incorporate voluminous testimony and exhibits unrelated to the current proceeding from individuals who are not witnesses in this matter. Virtually everything the Sierra Club has done since being permitted to intervene has caused undue complication, and the Commission should not countenance these sorts of continued disruption.

WHEREFORE, for the reasons set forth above, Big Rivers respectfully requests that the Commission strike Exhibit Ackerman-4, Exhibit Ackerman-5, and the Ackerman Testimony from page 15:7 (beginning at "In testimony in") to 15:29 and from page 16:3 to 16:12.

On this the 29<sup>th</sup> day of May, 2013.

Respectfully submitted,



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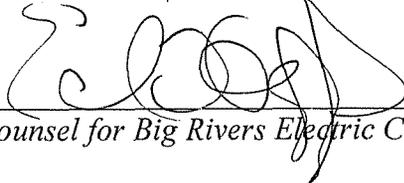
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**Certificate of Service**

I certify that, on the date this petition was filed with the Kentucky Public Service Commission, a true and accurate copy of the foregoing was served by Federal Express or by hand delivery upon the persons listed on the attached service list.

On this the 29<sup>th</sup> day of May, 2013.

  
\_\_\_\_\_  
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