EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, DC INTERNATIONAL

June 3, 2013

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

Via Courier

Re: Docket CASE NO. 2012-00535 Sierra Club Motion to Intervene

Dear Mr. Derouen:

Enclosed for filing are an original and ten copies of our *Reply In Support Of The Motion Of Ben Taylor And Sierra Club To Compel Big Rivers Electric Corporation To Respond To Their Supplemental Requests For Information, And To Supplement Their Testimony,* the *Response Of Ben Taylor And Sierra Club To Big Rivers Electric Corporation's Motion To Strike Sierra Club Exhibits And Referencing Testimony,* and a certificate of service in docket 2012-00535 before the Kentucky Public Service Commission. This filing contains no confidential information.

Sincerely,

Grant Tolley
Earthjustice
1617 John F. Kennedy Boulevard
Suite 1675
Philadelphia, PA 19103
(215) 717-4523

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

Application of Big Rivers Electric Corporation For a General Adjustment in Rates	)))	**CASE NO. 2012-00535**

RESPONSE OF BEN TAYLOR AND SIERRA CLUB TO BIG RIVERS ELECTRIC CORPORATION'S MOTION TO STRIKE SIERRA CLUB EXHIBITS AND REFERENCING TESTIMONY

Ben Taylor and the Sierra Club (collectively, "Intervenors") hereby respond to Big Rivers Electric Corporation's ("BREC") Motion to Strike Sierra Club Exhibits and Referencing Testimony. For the reasons set forth below, Intervenors respectfully request that the Commission deny BREC's motion as without merit. Intervenors' submission of testimony from Dr. Frank Ackerman of the firm Synapse Energy Economics that discusses and attaches testimony submitted to the Commission last year from two of Dr. Ackerman's Synapse colleagues does not implicate BREC's rights to procedural due process, was not procedurally improper, and does not unduly complicate these proceedings, as BREC contends. The opinions expressed in Dr. Ackerman's testimony are entirely his own, and BREC will have the right to cross-examine Dr. Ackerman at the hearing, including regarding those opinions that Dr. Ackerman formed in part by reviewing his Synapse colleagues' analysis of BREC's 2012 application for a Certificate of Public Convenience and Necessity ("CPCN"). BREC has not established any legally valid grounds for striking any portions of Dr. Ackerman's testimony, and thus its motion should be denied.

Although Intervenors agree with BREC that it is entitled to procedural due process in this proceeding, including the right to cross-examine adverse witnesses – *see, e.g.*, *Kaelin v. City of*

Louisville, 643 S.W.2d 590, 591-592 (Ky. 1982) – Dr. Ackerman's discussion of his Synapse colleagues' prior analysis in his own testimony does not implicate BREC's procedural due process rights. BREC will have the opportunity to cross-examine Dr. Ackerman at the hearing in this case. Dr. Ackerman verified in a sworn affidavit that he "prepared or supervised the preparation of [his] testimony," stating that "my testimony is true and accurate to the best of my knowledge, information, and belief formed after reasonable inquiry." (Ackerman Testimony at 31.) The mere fact that portions of Dr. Ackerman's testimony rely on opinions he developed through review of the Synapse analysis of BREC's 2012 CPCN application does not render Dr. Ackerman incapable of answering questions on cross-examination about those opinions. Nor does it make it inappropriate for Dr. Ackerman to attach his firm's prior testimony as exhibits to his own testimony, just as Dr. Ackerman attaches various other exhibits to his testimony that he relied upon in forming his opinions. In his testimony, Dr. Ackerman explains the relevance and significance of the exhibits he cites, and BREC will be able to cross-examine Dr. Ackerman about those exhibits, including the Synapse analysis of BREC's 2012 CPCN, at the hearing.

None of the cases that BREC cites regarding procedural due process have any application here. The only relevance of the two Court of Appeals cases BREC cites is to affirm the general proposition that BREC has the right to administrative due process in this proceeding – an issue that is not in dispute. *See Am. Beauty Homes Corp. v. Louisville & Jefferson Cty. Planning & Zoning Comm'n*, 379 S.W.2d 450 (Ky. 1964) (addressing constitutionality of zoning appeals statute); *Somsen v. Sanitation Dist. No. 1 of Jefferson Cty.*, 197 S.W.2d 410 (Ky. 1946) (addressing constitutionality of the Sanitation District Law). BREC also cites two Commission decisions, but neither is on point because in each one the Commission merely rejected an attempt to enter testimony without the adverse party having an opportunity to cross-examine any witness

regarding such testimony. The language BREC quotes from the Commission's decision on a 2009 application for a CPCN by Louisville Gas & Electric pertained to a request to admit into evidence comments from members of the public at a public hearing that were not subject to cross-examination. *See* P.S.C. Case Nos. 2009-00197 and 2009-00198, 2009 Ky. PUC LEXIS 1338, at *5 (Dec. 23, 2009). Similarly, the language BREC quotes from the Commission's 1998 *Auxier Water Company* decision pertained to a request to admit into evidence testimony from a prior proceeding without requiring any witness to be made available at the hearing for cross-examination regarding that testimony. *See Auxier Water Co. v. City of Prestonsburg & Prestonburg City's Utilities Comm'n*, P.S.C. Case No. 96-362, 1998 Ky. PUC LEXIS 329, at *2 (Feb. 9, 1998). Moreover, in *Auxier Water Company*, the Commission found that the appropriate cure for any due process concerns, rather than excluding the prior testimony altogether, was for the witness to appear at the hearing under subpoena in order to be subject to cross-examination on her prior testimony. *Id.* Here, however, because Dr. Ackerman will be available for cross-examination at the hearing regarding the Synapse analysis of BREC's 2012 CPCN, none of the due process concerns raised in the cases cited by BREC apply.[1]

Nor does BREC's citation to 807 KAR 5:001, Section 11(5) have any bearing here. That portion of the Commission's rules authorizes parties to request that the Commission incorporate filings from prior proceedings "by reference only." But Intervenors have not made such a request here. Rather, because Dr. Ackerman's testimony in this case touches on issues pertaining to BREC's 2012 CPCN filing, Dr. Ackerman references his colleagues' prior analysis as one of the bases for his testimony here and attaches that testimony as an exhibit alongside a

[1] BREC's claim that "the issues addressed by the Wilson Testimony and Steinhurst Testimony have also not been subject to discovery in this case" (BREC Motion at p. 4) is puzzling given that BREC was entitled to submit requests for information to Intervenors regarding Dr. Ackerman's testimony and exhibits by Friday, May 31 and, in fact, did so.

number of other documents that he also relied upon. Nothing in 807 KAR 5:001, Section 11(5) bars witnesses from discussing prior proceedings in their testimony, or from attaching testimony from those prior proceedings as exhibits, as Dr. Ackerman did here.[2]

In addition, Dr. Ackerman's discussion of BREC's 2012 CPCN filing (and the issues that his colleagues identified with that filing) does not "unduly complicate" these proceedings, as BREC contends. In its order granting Intervenors full intervention in this proceeding, the Commission found that Intervenors "possess sufficient expertise on issues that are within the scope of this base rate proceeding, such as whether Big Rivers' proposed rate increase is reasonable in light of all available alternatives to mitigating the loss of a significant load." (Apr. 17, 2013 Order at 6.) Intervenors offer Dr. Ackerman's testimony to assist the Commission in evaluating these issues, including by demonstrating the connections between issues that Intervenors raised with BREC's 2012 CPCN filing and this proceeding, such as the environmental costs facing BREC's coal-fired generating units and the potential for demand-side management and other energy resources to provide a cost-effective alternative to those units. Dr. Ackerman's opinions on these issues are integral to his testimony, and BREC will have the opportunity to cross-examine Dr. Ackerman on those opinions in the ordinary course of these proceedings without causing undue complications.

Although BREC has raised concerns about the relevance of these issues to this proceeding, those concerns are unfounded. Dr. Ackerman's testimony, including the portions of testimony that BREC has moved to strike, is aimed at assisting the Commission[3] in ensuring that

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[2] The Attorney General's witness David Brevitz also discusses testimony from prior BREC proceedings and attaches testimony from those proceedings as exhibits to his testimony in this proceeding, also without invoking the procedure in 807 KAR 5:001, Section 11(5). (Brevitz Testimony at p. 9-12, Exhibit DB-2.)

[3] Pursuant to KRS § 278.310, the Commission "is not bound by the technical rules of legal evidence" in this proceeding, but instead "retains discretion for determining their level of application" as appropriate to fulfill its statutory mandates and consistent with providing the parties with procedural due process. *In the Matter of Petition*

the full range of options for addressing BREC's significant loss of load and revenues, including the potential retirement of some generating resources and pursuit of demand side management, is fully and objectively evaluated in this proceeding. Any concerns that BREC might raise about the materiality of Synapse's 2012 analysis of its CPCN application to this rate proceeding go to the weight that the Commission should give Dr. Ackerman's testimony, not to its relevance or admissibility. Although BREC no doubt disagrees with Dr. Ackerman's conclusions in his testimony, BREC has failed to identify any legally valid ground to strike any portion of Dr. Ackerman's testimony or find it inadmissible.

Accordingly, Intervenors respectfully request that the Commission deny BREC's motion to strike portions of Dr. Ackerman's testimony and exhibits referenced therein.

Respectfully submitted,

Joe Childers, Esq.
Joe F. Childers & Associates
300 Lexington Building
201 West Short Street
Lexington, Kentucky 40507
859-253-9824
859-258-9288 (facsimile)

Of counsel:

Robb Kapla
Sierra Club
85 Second Street
San Francisco, CA 94105
Phone: (415) 977-5760
Fax: (415) 977-5793
robb.kapla@sierraclub.org

of Windstream Kentucky East, LLC for Arbitration of an Interconnection Agreement with New Cingular Wireless PCS, LLC d/b/a AT&T Mobility, P.S.C. Case No. 2009-00246, at *5 (Nov. 24, 2009).

Shannon Fisk
Earthjustice
1617 John F. Kennedy Blvd.
Suite 1675
Philadelphia, PA 19103
Phone: (215) 327-9922
sfisk@earthjustice.org

Dated: June 3, 2013

CERTIFICATE OF SERVICE

I certify that I had filed with the Kentucky Public Service Commission and served a copy of this **RESPONSE OF BEN TAYLOR AND SIERRA CLUB TO BIG RIVERS ELECTRIC CORPORATION'S MOTION TO STRIKE SIERRA CLUB EXHIBITS AND REFERENCING TESTIMONY** via electronic mail and U.S. Mail on June 3, 2013 to the following:

Mark A. Bailey
President CEO
Big Rivers Electric Corporation
201 Third Street
Henderson, KY 42419-0024

Honorable Thomas C. Brite
Attorney At Law
Brite & Hopkins, PLLC
83 Ballpark Road
P.O. Box 309
Hardinsburg, KENTUCKY 40143

David Brown
Stites & Harbison, PLLC
1800 Providian Center
400 West Market Street
Louisville, KENTUCKY 40202

Jennifer B. Hans
Assistant Attorney General's Office
1024 Capital Center Drive, Ste. 200
Frankfort, KENTUCKY 40601-8204

J. Christopher Hopgood
Dorsey, King, Gray, Norment & Hopgood
318 Second Street
Henderson, KENTUCKY 42420

Honorable Michael L Kurtz
Attorney at Law
Boehm, Kurtz & Lowry
36 East Seventh Street
Suite 1510
Cincinnati, OHIO 45202

Burns E. Mercer
Manager
Meade County R.E.C.C.
P. O. Box 489
Brandenburg, KY 40108-0489

Honorable James M. Miller
Attorney at Law
Sullivan, Mountjoy, Stainback & Miller, PSC
100 St. Ann Street
P.O. Box 727
Owensboro, KENTUCKY 42302-0727

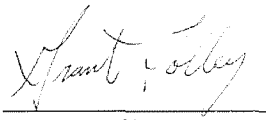
G. Kelly Nuckols
President & CEO
Jackson Purchase Energy Corporation
2900 Irvin Cobb Drive
P. O. Box 4030
Paducah, KY 42002-4030

Billie J. Richert
Vice President Accounting, Rates & CFO
Big Rivers Electric Corporation
201 Third Street
Henderson, KY 42419-0024

Donald P. Seberger
Rio Tinto Alcan
8770 West Bryn Mawr Avenue
Chicago, ILLINOIS 60631

Melissa D. Yates
Attorney
Denton & Keuler, LLP
555 Jefferson Street
P. O. Box 929
Paducah, KENTUCKY 42002-0929

Edward T. Depp
Dinsmore & Shohl LLP
101 S. 5th Street, Suite 2500
Louisville, Kentucky 40202-3115



Grant Tolley

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

Application of Big Rivers Electric Corporation	)	
For a General Adjustment in Rates	)	**CASE NO. 2012-00535**
	)	

REPLY IN SUPPORT OF THE MOTION OF BEN TAYLOR AND SIERRA CLUB TO COMPEL BIG RIVERS ELECTRIC CORPORATION TO RESPOND TO THEIR SUPPLEMENTAL REQUESTS FOR INFORMATION, AND TO SUPPLEMENT THEIR TESTIMONY

In their motion to compel, Ben Taylor and the Sierra Club (collectively, "Intervenors") seek a Commission order requiring Big Rivers Electric Corporation ("BREC" or "Company") to produce post-2016 modeling and projections that are directly relevant to whether it is just and reasonable for the Company's remaining ratepayers to shoulder the burden of maintaining all of BREC's generating units after the Company has lost approximately two-thirds of its load. In response, BREC attempts to limit this proceeding to an evaluation of only the twelve month test period running through August 31, 2014 that the Company proposed. But there is no legal basis for doing so, and the record, including BREC's own discovery responses, establish that BREC's requested rate increase could only be just and reasonable if there is a credible expectation that it will be beneficial for ratepayers in the long run for the Company to continue investing in all four of its coal units. BREC claims that it will be, but refuses to disclose any of the modeling or projections upon which that claim is purportedly based. Nothing in BREC's response overcomes the relevance of such modeling and projections and, therefore, the Commission should compel

the Company to respond to SC 2-2, 2-3, 2-4, 2-5, and 2-8, and provide Intervenors with an opportunity to submit supplemental testimony regarding such responses.[1]

I. BREC's Post-2016 Modeling and Projections Are Relevant to Whether the Proposed Rate Increase is Just and Reasonable.

Faced with the imminent loss of 32% of its load (and with an additional 24% loss coming soon thereafter), BREC is asking its remaining ratepayers and the Commission to make a major gamble. Namely, BREC wants its ratepayers to pay substantially higher rates in order to maintain all of the Company's existing generating units on the hope that market conditions will change so significantly over the next few years that BREC will be able to once again profitably sell energy from those units. The riskiness of this proposal is heightened by the fact that BREC is asking its ratepayers and the Commission to make this gamble blindly instead of producing for review any of the modeling and projections that the Company claims justifies its hope that market conditions will change. To help ensure that all relevant information regarding BREC's rate increase and alternatives to it are considered, the Commission should compel the production of the modeling and projections requested in SC 2-2, 2-3, 2-4, 2-5, and 2-8, and provide Intervenors with the opportunity to submit supplemental testimony regarding the information that BREC failed to timely disclose.

In response, BREC contends that while long-term modeling and projections are relevant in a certificate of public convenience and necessity or an integrated resource plan proceeding, they are not relevant to a rate case that is based on a single forward looking test period. (BREC Resp. at p. 4 ¶ 9). But there is nothing in the provision of Kentucky law allowing a utility to use a projected test year in a rate proceeding, KRS 278.192, that restricts the Commission to

[1] BREC correctly notes that the portion of Intervenors' motion regarding SC 2-13c and 2-24 through 2-28, which sought information relating to the "tentative agreement" that BREC has reached with the Century smelter, is moot because BREC has already produced the requested information to KIUC after the Commission rejected BREC's opposition to such disclosure. PSC May 22, 2013 Order at p. 2.

considering information from only that year. Instead, the overriding standard for the Commission is to ensure that any requested rate increase is "fair, just, and reasonable."[2] KRS 278.030(1), 278.040. In order to satisfy that standard, the Commission should not turn a blind eye to information regarding likely conditions after the projected test year but, instead, should consider all information that is relevant to whether the requested rate increase is fair, just, and reasonable.

BREC asserts that the post-2016 modeling and projections are irrelevant because its rate increase request is based solely on the Company's 2013-2016 budget and financial plan, and not on the post-2016 modeling. (BREC Resp. at p. 3 ¶ 5). But that 2013-2016 budget and financial plan is based on the assumption that BREC's generating units will be profitable again after 2016, otherwise why would that budget include approximately $60 million in spending to bring BREC's generating units into compliance with the federal Mercury and Air Toxics Standards, $212 million of scheduled "asset replacement and capital improvements," and additional amounts on deferred maintenance between now and 2016. (Berry Test. at pp. 14-16). Certainly, if it is unreasonable to project that BREC's generating units will be profitable to operate after 2016 then it makes little sense for BREC to be implementing a budget and financial plan that includes hundreds of millions of dollars of spending on those units, and a rate increase based on that plan would be neither just nor reasonable.

BREC's claims to the contrary here notwithstanding, the fact that the Company carried out "15 year production cost model runs to forecast when the idled unit will be cost effective to

[2] BREC contends that Intervenors have provided no support for the contention that a rate increase should only be granted if it is part of a least cost approach to serving customer energy needs. (BREC Resp. at p. 4 ¶ 8). But the Commission has long recognized that "'least cost' is one of the fundamental principles utilized when setting rates that are fair, just, and reasonable." *In the Matter of Application of Kentucky Power Co.,* Case No. 2009-00545,2010 WL 2640998 (Ky. P.S.C. 2010).

return to service" (BREC Resp. to SC 2-2(a)(i)), further demonstrates the relevance of the post-2016 modeling and projections to this proceeding. It strains credulity to suggest that BREC would carry out such modeling without factoring the results into determining whether the best response to the Century smelter termination is to seek a rate increase coupled with the idling of a generating unit, as opposed to some other approach. The Commission and parties are, similarly, entitled to review such post-2016 modeling and projections in evaluating the reasonableness of the Company's proposal.

II. BREC's Portrayal of the Requested Rate Increase as a Temporary Stopgap is Disingenuous and Contrary to the Company's Own Statements in the Record.

The Commission should reject BREC's argument that production of post-2016 information is a "waste of time and resources" because the requested rate increase would only be in effect until January 31, 2014. (BREC Resp. at p. 7 ¶17). BREC's argument is disingenuous, as the presently-requested rate increase would not disappear after that date; instead, the Company would be seeking to add on top of the present increase yet another rate increase after January 31, 2014 in order to address the termination of the Alcan smelter contract. In fact, BREC has acknowledged in a fact sheet circulated to its members regarding this proceeding that the requested rate increase would not be temporary, explaining that:

> It is Big Rivers' and its Members' plan to reduce expenses and replace system load, combined with an eventual recovery of prices in the wholesale power market, will enable Big Rivers to reduce its rates in the future. However, because we cannot know if and when and under what circumstances these favorable events will occur, Big Rivers cannot characterize its proposed rate increase as "temporary."

(Attachment to BREC Resp. to AG 1-133, at p. 7). Given BREC's projection, based on undisclosed modeling, that the Wilson station will not be profitable to operate again until 2019, it appears that the Company is expecting at least a significant portion of the present rate increase (plus whatever rate increase is sought due to the Alcan termination) to continue for more than five years, rather than just through January 31, 2014. Disclosure of the modeling and other post-2016 projections upon which that five-year projection is based is plainly relevant to the question of whether it is just and reasonable to grant the rate increase to begin with.

III. BREC Is Not Foreclosed From Retiring Some of Its Generating Units

BREC next claims that the post-2016 information is irrelevant because regardless of what that modeling shows, "Big Rivers cannot retire generating capacity because of its need to maintain equity." (BREC Resp. at p. 5 ¶¶ 11, 13). Yet when Intervenors asked BREC whether it had evaluated retirement of any of its generating units in response to the Century or Alcan terminations, BREC never mentioned a need to maintain equity as its reason for failing to do so. (BREC Resp. to SC 1-23). Instead, the Company explained that:

> Big Rivers has not evaluated the retirement, rather than idling, of any of its generating units as an option for mitigating the impact of the termination of the Century contract and/or the decline in off-system sales. Despite the fact that current wholesale electricity market prices are low, Big Rivers' generating units have significant remaining useful life and Big Rivers' members would be unduly harmed if Big Rivers were to retire assets instead of temporarily idling them. Although Big Rivers' members will continue to incur some costs over the next three years associated with idled units, Big Rivers' members will be able to reap significant benefits from the units in the future, either by selling wholesale power and using the proceeds to reduce member rates or by supporting the Western Kentucky economy by supplying power to industries.[3]

[3] BREC Resp. to Sierra Club Request for Information 1-23. Similarly, BREC contends that it expects to end the proposed idling of the Wilson Station in 2019 on the basis that ACES market price forecast projections show that Wilson will be profitable again at that time. See BREC Resp. to Sierra Club Request for Information 1-21d.

The information sought in SC 2-2, 2-3, 2-4, 2-5, and 2-8 goes directly towards whether BREC's identified justification for failing to evaluate the potentially cost-saving option of some generating unit retirements is reasonable.

In addition, BREC's claim that it must maintain all of its equity stems from a concern that the Company would otherwise default on its loans and/or have its credit rating downgraded. But that concern is based in BREC's strategy of attempting – through rate increases, continued spending on its generating units, and a hope that market conditions will change – to maintain all of its generating units until they are profitable again years in the future. As witnesses for Intervenors and KIUC have explained, however, there may be other less-bad options for ratepayers, including debt restructuring or even bankruptcy. (Dir. Test. of Dr. Frank Ackerman at pp. 27-30; Dir. Test. of Lane Kollen at pp. 73-80). An evaluation of if or when it is reasonable to expect the changed market conditions that BREC is apparently projecting is directly relevant to whether the Company's proposal would be more beneficial to ratepayers than the other options at BREC's disposal and, therefore, the post-2016 modeling and projections should be disclosed.

IV. BREC's Claim of Delay and Prejudice Is Meritless

BREC's claim that Intervenors are somehow engaging in "ambush tactics" to further delay the proceeding with an untimely motion to compel is similarly unsupported by the record. (BREC Resp. at p. 8 ¶ 20). In fact, Intervenors reached out to BREC's counsel about the Company's inadequate responses only three business days after those responses were produced, and filed the present motion to compel two days later. In other words, Intervenors moved in a reasonable and prompt manner after receiving BREC's inadequate responses.

BREC contends, however, that Intervenors should have moved to compel earlier because the Company purportedly "made clear in its responses to Sierra Club's First Requests for Information that it did not consider information beyond 2016 relevant and was not providing the irrelevant information." (BREC Resp. at p. 8 ¶20).[4] This argument fails because BREC never raised such relevance objection in response to Intervenors' First Requests for Information. Instead, with regards to Intervenors' first requests, the Company responded to requests seeking post-2016 information that:

> Big Rivers' operating plan consists of the current year budget and a three year financial plan; therefore, we can only provide 2013 through 2016 for this request

(BREC Resp. to SC 1-7), that "Big Rivers only has available 2013 through 2016," (BREC Resp. to SC 1-14), and that "Big Rivers' budget and financial plan only extends through 2016, not 2031." (BREC Resp. to SC 1-25). Such responses suggested that BREC did not have the requested post-2016 information, not that the Company was withholding such information as purportedly irrelevant. As such, Intervenors inquired in their second set of requests as to whether BREC had done any modeling or planning for after 2016 and, if so, requested disclosure of such modeling or planning and the projections upon which it relied. (*See* SC 2-2, 2-3, 2-4, 2-5, and 2-8). It was only in response to that second set of requests that BREC made clear that "it has performed 15 year production cost model runs to forecast when the idled unit will be cost effective to return to service," but that it was objecting to producing any such post-2016 information on the grounds that it was not relevant. (See BREC Resp. to SC 2-2, 2-3, 2-4, 2-5, and 2-8). Intervenors then timely moved to compel within five business days of receiving BREC's objections and inadequate responses.

[4] BREC also attempts to relitigate the timeliness of Intervenors' motion to intervene (BREC Resp. at p. 7 ¶ 19), but that issue was already decided when the Commission granted Intervenors' motion, which was filed within a month of BREC's application and only fourteen days after the Commission issued the original procedural schedule in this proceeding.

It is also important to note that Intervenors crafted their motion to avoid delay. In particular, rather than requesting a continuance of the May 24 deadline for pre-filed testimony, Intervenors timely submitted such testimony and merely seeks the opportunity to address the post-2016 information in supplemental testimony. To the extent that BREC is concerned that its time to respond to any such supplemental testimony may be limited, that potential is the result of BREC's failure to disclose plainly relevant information in response to Intervenors' timely submitted requests for information, not of the actions of the Intervenors.

V. Conclusion

For the foregoing reasons and those set forth in their initial motion, Intervenors request that the Commission compel BREC to fully respond to Intervenors' supplemental requests for information numbers SC 2-2, 2-3, 2-4, 2-5, and 2-8, and to grant Intervenors leave to submit supplemental testimony within 10 days of the date of such production.

Respectfully submitted,

Joe Childers, Esq.
Joe F. Childers & Associates
300 Lexington Building
201 West Short Street
Lexington, Kentucky 40507
859-253-9824
859-258-9288 (facsimile)

Of counsel:

Robb Kapla
Sierra Club

85 Second Street
San Francisco, CA 94105
Phone: (415) 977-5760
Fax: (415) 977-5793
robb.kapla@sierraclub.org

Shannon Fisk
Earthjustice
1617 John F. Kennedy Blvd.
Suite 1675
Philadelphia, PA 19103
Phone: (215) 327-9922
sfisk@earthjustice.org

Dated: June 3, 2013

CERTIFICATE OF SERVICE

I certify that I had filed with the Kentucky Public Service Commission and served a copy of this **REPLY IN SUPPORT OF THE MOTION OF BEN TAYLOR AND SIERRA CLUB TO COMPEL BIG RIVERS ELECTRIC CORPORATION TO RESPOND TO THEIR SUPPLEMENTAL REQUESTS FOR INFORMATION, AND TO SUPPLEMENT THEIR TESTIMONY** via electronic mail and U.S. Mail on June 3, 2013 to the following:

Mark A. Bailey
President CEO
Big Rivers Electric Corporation
201 Third Street
Henderson, KY 42419-0024

Honorable Thomas C. Brite
Attorney At Law
Brite & Hopkins, PLLC
83 Ballpark Road
P.O. Box 309
Hardinsburg, KENTUCKY 40143

David Brown
Stites & Harbison, PLLC
1800 Providian Center
400 West Market Street
Louisville, KENTUCKY 40202

Jennifer B. Hans
Assistant Attorney General's Office
1024 Capital Center Drive, Ste. 200
Frankfort, KENTUCKY 40601-8204

J. Christopher Hopgood
Dorsey, King, Gray, Norment & Hopgood
318 Second Street
Henderson, KENTUCKY 42420

Honorable Michael L Kurtz
Attorney at Law
Boehm, Kurtz & Lowry
36 East Seventh Street
Suite 1510
Cincinnati, OHIO 45202

Burns E. Mercer
Manager
Meade County R.E.C.C.
P. O. Box 489
Brandenburg, KY 40108-0489

Honorable James M. Miller
Attorney at Law
Sullivan, Mountjoy, Stainback & Miller, PSC
100 St. Ann Street
P.O. Box 727
Owensboro, KENTUCKY 42302-0727

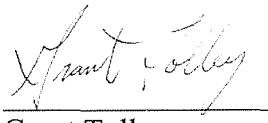
G. Kelly Nuckols
President & CEO
Jackson Purchase Energy Corporation
2900 Irvin Cobb Drive
P. O. Box 4030
Paducah, KY 42002-4030

Billie J. Richert
Vice President Accounting, Rates & CFO
Big Rivers Electric Corporation
201 Third Street
Henderson, KY 42419-0024

Donald P. Seberger
Rio Tinto Alcan
8770 West Bryn Mawr Avenue
Chicago, ILLINOIS 60631

Melissa D. Yates
Attorney
Denton & Keuler, LLP
555 Jefferson Street
P. O. Box 929
Paducah, KENTUCKY 42002-0929

Edward T. Depp
Dinsmore & Shohl LLP
101 S. 5th Street, Suite 2500
Louisville, Kentucky 40202-3115



Grant Tolley