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May 22, 2014

Via Federal Express

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211 Sower Boulevard, P.O. Box 615
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RECEIVED

MAY 23 2014


PUBLIC SERVICE
COMMISSION

RE: CASE NO. 2013-00199

Dear Mr. Derouen:

Enclosed are an original and ten (10) copies of Big Rivers Electric Corporation's response to the petition for rehearing filed jointly by Kentucky Industrial Utility Customers, Inc., the Attorney General, and Ben Taylor and Sierra Club. I certify that on this date, a copy of this letter and a copy of the response were served on each of the persons listed on the attached service list by first-class mail.

Sincerely,



Tyson Kamuf
Enclosures

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1 COMMONWEALTH OF KENTUCKY
2 BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY

3 RECEIVED

4
5 In the Matter of:

MAY 23 2014

6
7 Application of Big Rivers Electric)
8 Corporation for a General)
9 Adjustment In Rates)

Case No. 2013-00199

PUBLIC SERVICE
COMMISSION

10
11
12 **RESPONSE OF BIG RIVERS ELECTRIC CORPORATION TO THE PETITION FOR**
13 **REHEARING OF KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC., THE**
14 **ATTORNEY GENERAL, AND BEN TAYLOR AND SIERRA CLUB**
15

16 1. Comes now Big Rivers Electric Corporation (“Big Rivers”), through counsel, and
17 hereby submits its response to the Petition for Rehearing (the “Rehearing Petition”) of Kentucky
18 Industrial Utility Customers, Inc. (“KIUC”), the Attorney General, and Ben Taylor and Sierra
19 Club (collectively, the “Opposing Intervenors”).

20 **A. Introduction**

21
22 2. The Rehearing Petition seeks rehearing of the Public Service Commission’s
23 (“Commission’s”) April 25, 2014, order (the “Order”) on two grounds. The Opposing
24 Intervenors’ first assignment of error argues that “the Commission should clarify its Order by
25 explaining that Big Rivers should begin drawing from the [Rural Economic Reserve (“RER”)]
26 when the [Economic Reserve (“ER”)] fund no longer has sufficient cash to offset 100% of the
27 rate increase to customers, not when the ER fund is completely exhausted.” Rehearing Petition
28 at p. 2. The Opposing Intervenors’ second assignment of error argues that the Commission
29 should deviate from 807 KAR 5:013 Section 4 by expanding an audited utility’s right to
30 comment on certain aspects of the audit to parties that “have a vested interest in Big Rivers
31 operating in an efficient and cost-effective manner.” Rehearing Petition at p. 4. For the
32 following reasons, the Commission should deny rehearing on both issues.

1 **B. Rehearing of the Order to clarify that Big Rivers will draw from the RER fund**
2 **when the ER fund is insufficient to fully fund the MRSM credit is unnecessary and**
3 **should therefore be denied.**
4

5 3. The Rehearing Petition alleges that the Order prevents Big Rivers from using the
6 funds in the RER fund until the ER fund is exhausted, and it argues that Big Rivers should
7 instead begin drawing from the RER fund when the ER fund is no longer sufficient to offset
8 100% of the increase granted in this case. Rehearing Petition at p. 1. Big Rivers' tariff already
9 provides that Big Rivers will begin drawing from the RER fund when the ER fund is no longer
10 sufficient to fully fund the credit provided under Big Rivers' Member Rate Stability Mechanism
11 ("MRSM"). Rehearing on this issue is thus unnecessary and should be denied.

12 4. Prior to this proceeding, Big Rivers' tariff contained an MRSM through which the
13 ER fund was used to partially offset charges under Big Rivers' Fuel Adjustment Clause ("FAC")
14 and Environmental Surcharge ("ES") riders to Big Rivers' RDS and LIC rate classes. Big
15 Rivers' application, Tab 5, Current Tariff (P.S.C. KY. No. 24), Sheet Nos. 51-53. Big Rivers'
16 tariff also contained an RER Rider through which the RER fund would be used to partially offset
17 charges under Big Rivers' FAC and ES rider to Big Rivers' RDS rate class. Big Rivers'
18 application, Tab 5, Current Tariff (P.S.C. KY. No. 24), Sheet Nos. 57-58. The RER Rider
19 described when draws from the RER fund would begin: "This RER Rider shall be effective
20 beginning in the month in which the amounts in the Non-Smelter Economic Reserve (as
21 described in the Member Rate Stability Mechanism Rider) are insufficient to fully fund the
22 MRSM credit." Big Rivers' application, Tab 5, Current Tariff (P.S.C. KY. No. 24), Sheet No.
23 58.

24 5. The tariff changes Big Rivers proposed in this proceeding extended the credits
25 provided by the MRSM and RER Rider not only to offset FAC and ES charges but also to fully

1 offset the rate increase granted in this proceeding. See Big Rivers' application, Tab 5, Proposed
2 Tariff (P.S.C. KY. No. 26), Sheet Nos. 65, 70. The proposed tariff made no changes in the
3 beginning date of draws from the RER fund, and the RER Rider in the proposed tariff provided
4 that such draws would begin "in the month in which the amounts in the Non-Smelter Economic
5 Reserve (as described in the MRSM) are insufficient to fully fund the MRSM credit." Big
6 Rivers' application, Tab 5, Proposed Tariff (P.S.C. KY. No. 26), Sheet No. 72.

7 6. In the Order, the Commission briefly describes the ER and RER funds, including
8 a description of the background of the funds. Order at p. 36. As part of this background, the
9 Order states, "Upon exhaustion of the ER fund, the MRSM will utilize the RER fund." Order at
10 p. 36). Big Rivers does not believe the Commission intended this statement to require a change
11 in the MRSM or the RER Rider, and Big Rivers' tariff continues to provide that Big Rivers will
12 begin to draw from the RER fund when the ER fund is insufficient to fully fund the MRSM
13 credit. Because Big Rivers' tariff already provides the relief the Opposing Intervenors seek, a
14 rehearing on this issue is unnecessary and should be denied. However, if the Commission did
15 intend to change when Big Rivers would begin to draw from the RER fund, Big Rivers would
16 agree with the Opposing Intervenors that a rehearing is necessary on this issue.

17 **C. Rehearing of the Order to extend a utility's right to comment during an audit of the**
18 **utility to all interested parties should be denied.**
19

20 7. The Rehearing Petition notes that 807 KAR 5:013 Section 4 grants a utility being
21 audited the right to comment during the audit process within the following times:

- 22 (1) Fifteen (15) working days from receipt of the draft request for proposal.
- 23
- 24 (2) Fifteen (15) working days from receipt of each bidder's proposal
- 25 including the initial work plan.
- 26
- 27 (3) Twenty (20) working days from receipt of the preliminary draft report.
- 28

1 (4) Ten (10) working days from receipt of the final draft report.
2

3 Rehearing Petition at p. 4. Section 3 of the regulation is related and provides that, among other
4 things, detailed work plans and draft reports shall be submitted to the utility and Commission
5 Staff. 807 KAR 5:013 Section 3. KRS 278.255(4) similarly provides, “The audit procedures
6 [adopted by the Commission] shall provide the utility being audited the opportunity to comment
7 at various stages of the audit, including an opportunity to comment on the initial work plan and
8 the opportunity to review and comment on preliminary audit drafts prior to issuance of a final
9 document.” KRS 278.255(4) (emphasis added).

10 8. The Opposing Intervenors seek rehearing and ask the Commission to grant to
11 them the same comment rights that KRS 278.255 and 807 KAR 5:013 reserve to the utility being
12 audited. The Opposing Intervenors essentially ask the Commission to rewrite KRS 278.255(4),
13 807 KAR 5:013 Section 3, and 807 KAR 5:013 Section 4 to extend the rights granted to a utility
14 being audited to all “interested parties.” However, the Commission cannot simply add to or
15 subtract from a statute or regulation. *See Commonwealth v. Harrelson*, 14 S.W.3d 541, 546 (Ky.
16 2000) (“In cases involving statutory interpretations, the duty of the court is to ascertain and give
17 effect to the intent of the General Assembly. We are not at liberty to add or subtract from the
18 legislative enactment or discover meanings not reasonably ascertainable from the language
19 used”); *Revenue Cabinet, Commonwealth v. Gaba*, 885 S.W.2d 706, 708 (Ky. App. 1994) (“It is
20 well settled that in the construction and interpretation of administrative regulations, the same
21 rules apply that would be applicable to statutory construction and interpretation”).

22 9. The Opposing Intervenors rely on 807 KAR 5:013 Section 6 in support of their
23 argument. Rehearing Petition at p. 4. That section of the regulation provides, “For good cause
24 shown, the commission may permit deviations from these rules.” 807 KAR 5:013 Section 6. This

1 section of the regulation cannot be used to amend KRS 278.255. It also should not be used to
2 rewrite other sections of the regulation, and giving the Opposing Intervenors the relief they seek
3 would do just that. The Opposing Intervenors base their “good cause” on the notion that they
4 “have a vested interest in Big Rivers operating in an efficient and cost-effective manner.”
5 Rehearing Petition a p. 4. This is undoubtedly true of all customers of every utility that has ever
6 been or will be audited.¹ Consequently, granting the Opposing Intervenors’ motion on the basis
7 of their stated “good cause” would effectively, permanently, and unlawfully rewrite KRS 278.255
8 by permitting all customers of the utility to participate in an audit.

9 10. The Opposing Intervenors also cite to a management audit of East Kentucky Power
10 Cooperative (“EKPC”) and a study performed by Christensen Associates Energy Consulting, LLC
11 (“Christensen”). *See* Rehearing Petition at p. 3. These examples do not support the position of the
12 Opposing Intervenors. Big Rivers understands that, while KIUC and the Attorney General did
13 participate in an initial meeting relating to the EKPC audit, their involvement in that meeting was
14 because EKPC invited them to participate and not because the Commission otherwise granted
15 them authority to attend. *See* letter dated January 8, 2009, from Mark David Goss to Jeff Derouen
16 in Case No. 2008-00436. Big Rivers also understands that KIUC and the Attorney General had no
17 other involvement in the EKPC audit, they were not permitted to submit written comments, and the
18 only other meeting involving “interested parties” was a meeting between EKPC and Gallatin Steel
19 that occurred after the final audit report was issued and was thus not part of the audit process. The
20 Rehearing Petition also references that post-audit meeting. *See* Rehearing Petition at p. 3. The
21 Christensen report had no connection to any utility audit under KRS 278.255. Thus, neither the
22 EKPC audit nor the Christensen report is relevant to the present case.

¹ While Sierra Club is not a customer, its intervention in this rate case was tied to the interests of Mr. Taylor, who is a member of Kenergy, which is a Big Rivers customer-member. The same is true for KIUC, who intervened on behalf of three Kenergy members.

1 11. Additionally, the relief the Opposing Intervenors seek would transform the audit
2 process into an adversarial proceeding. The Opposing Intervenors have already made their
3 opinions on Big Rivers' mitigation plan, the scope of the audit, and Big Rivers' future
4 abundantly clear. The Commission has considered their proposals and issued its decision.
5 Allowing the Opposing Intervenors the same rights that Big Rivers has in the audit process
6 would allow them to unduly complicate and disrupt the audit process by permitting them to re-
7 litigate many of the same issues the Commission already considered in the April 25 Order.

8 12. Giving the Opposing Intervenors the relief they seek would also transform the
9 independent auditor into an adjudicator. The Opposing Intervenors propose a process that places
10 the auditor in the role of an appellate court, re-adjudicating the same arguments of the Opposing
11 Intervenors that the Commission considered in the Order.

12 13. Giving the Opposing Intervenors the same comment rights that the law provides
13 exclusively to Big Rivers will only serve to (i) increase the length and cost of the audit, (ii)
14 further distract Big Rivers from pursuing its mitigation plan, and (iii) unduly complicate and
15 disrupt the audit because any of the Opposing Intervenors' arguments regarding the auditor's
16 draft reports would involve the Opposing Intervenors disputing the conclusions the auditor
17 reached based on its findings resulting from an investigative process (including interviews and
18 document production and review) in which the Opposing Intervenors did not participate. This
19 burden would grow as numerous other "interested parties" attempt to insert themselves into the
20 audit process. For example, although the smelters are not parties to this proceeding and are not
21 represented by KIUC in this proceeding, the Opposing Intervenors claim that "extensive input"
22 from the smelters may be necessary. Rehearing Petition at p. 4.

1 14. Giving the Opposing Intervenors the same comment rights that the law provides
2 exclusively to Big Rivers is not necessary in order for the auditor to “review Big Rivers’
3 mitigation efforts” and “the strategic planning, management, and decision-making of Big Rivers
4 relating to the mitigation efforts.” Order at p. 48. The Opposing Intervenors have expressed
5 their views on these topics at length in the record in this proceeding, which will be available to
6 the independent auditor for review and consideration. Input from the Opposing Intervenors on
7 the draft request for proposals, each bidder’s proposal, the preliminary draft report, and the final
8 draft report is superfluous given the extensive record in this case describing the positions of the
9 Opposing Intervenors on Big Rivers’ mitigation plan.


10 15. Denying rehearing on this issue will prevent the Opposing Intervenors’ attempts
11 to rewrite the statute and regulation, to transform the audit into an adversarial process, to turn the
12 independent auditor into an adjudicator, and to re-litigate this case in front of the auditor, but it
13 will not impair any rights of potentially interested parties. Any rate impacts, proposals for long-
14 term power sales, changes in control of assets, or other steps resulting from Big Rivers’ actions
15 arising out of the audit process will be addressed by the Commission in future proceedings, and
16 interested parties will have an opportunity to seek intervention in such proceedings.

17 **D. Conclusion.**

18 16. For the foregoing reasons, the Rehearing Petition should be denied.
19
20

1 On this the 22nd day of May, 2014.

2 Respectfully submitted,
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28 *Counsel for Big Rivers Electric Corporation*
29
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31 **Certificate of Service**

32
33 I certify that a true and accurate copy of the foregoing was served by Federal Express or
34 by regular mail upon the persons listed on the accompanying service list, on or before the date
35 this response is filed with the Kentucky Public Service Commission.
36

37 On this the 22nd day of May, 2014,
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40 
41 _____
42 Counsel for Big Rivers Electric Corporation