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February 14th, 2013

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

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

Dear Mr. Derouen:

Enclosed for the filing are an original and ten copies of the *Petition of Ben Taylor and Sierra Club For Full Intervention* and a certificate of service in docket 2012-00535 before the Kentucky Public Service Commission. This filing contains no confidential information.

Sincerely,

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Sierra Club Environmental Law Program
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(415)977-5737

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

In the Matter of:

**APPLICATION OF BIG RIVERS)
ELECTRIC CORPORATION, INC.)
FOR AN ADJUSTMENT OF RATES)**

CASE NO. 2012-00535

**PETITION OF BEN TAYLOR AND
SIERRA CLUB FOR FULL INTERVENTION**

Pursuant to K.R.S. §278.310 and 807 K.A.R. 5:001 § 3(8), Ben Taylor and Sierra Club (collectively “Movants”), petition the Commission for full intervention in this case. The Movants have a wealth of knowledge and experience in a wide variety of the complex and rapidly changing issues which impact Big Rivers Electric Corporation’s (“Big Rivers”) application for an adjustment of rates (“Rate Increase”), and interests in this proceeding that are not adequately represented by any other party to the proceeding. The Movants seek full intervention to help to ensure that any Rate Increases are approved only if they represent the best option to satisfy their members’ interest in low cost energy service.

On January 15, 2013, Big Rivers filed an application for a Rate Increase pursuant to the Public Service Commission’s authority under the Kentucky Revised Statutes and Kentucky Administrative Code to regulate the electric utilities in the state. KRS § 278.180, and 807 KAR 5:011, Sections 6(3)(b). Big Rivers seeks approval to change its base rates and tariffs for electric service. The proposed changes will result in a net increase in operating revenue of approximately

\$74.5 million per year, roughly a 21.4% increase.¹ Big Rivers cites the termination of a contract with the Century Aluminum smelter as causing roughly \$63 million of the revenue shortfall, with off-system sales decreases and depreciation rate changes causing the remaining \$11 million.² Big Rivers claims the Rate Increase is needed to maintain investment level credit ratings. Big Rivers asserts that these ratings are especially important as it plans to borrow \$212 million for retrofits of its generating units in the next two years.³

As with its Certificate for Public Convenience and Necessity (“CPCN”) for pollution controls filed last year,⁴ which Movants were granted intervention in, this proceeding comes at a critical juncture for Big Rivers. As a result of the Century smelter termination, Big Rivers will lose 482MW of peak load starting August 20, 2013. And since Big Rivers filed its application, its second smelter customer, Alcan, has announced its planned termination, which will reduce Big Rivers’ peak load by an additional 372MW. In addition, the recent significant decrease in current and projected natural gas prices, along with the increasing availability of demand side management and renewable resources, have lowered the market price of power, thereby reducing Big Rivers’ off system sales revenues. And existing or expected federal Clean Air Act and Clean Water Act regulations will require Big Rivers to install pollution controls on any coal generating units that continue operating for more than a couple more years.

The combined impact of all of these developments is that the economic viability of Big Rivers’ coal-fired generation assets has decreased significantly. Yet Big Rivers has applied for a substantial rate increase that does not address any of these fundamental changes in supply- and

¹ See Big River’s Electric Corporation’s Application for a General Adjustment in Rates, at 4.

² Direct Testimony of Mark Bailey, p.8.

³ Direct Testimony of Robert Berry, p.10.

⁴ See Application of Kentucky Power for Certificate of Public Convenience and Necessity Authorizing the Transfer to the Company of an Undivided Fifty Percent Interest in the Mitchell Generating Station and Associated Assets (Docket No. 2012-00578).

demand-side conditions and simply asks consumers to pay 20% more so that the company can continue to maintain its same set of aging generating units.

Big Rivers' application also appears to ignore energy efficiency as an option to help save ratepayer money. For the Commission, energy efficiency and conservation are paramount considerations for determining the rates and services of utilities. And their importance will continue to grow "as more constraints are . . . placed on utilities that rely significantly on coal-fired generation[,]"⁵ yet the application calls for continuing the minimal investment of \$1 million annually in energy efficiency – less than Big Rivers plans on spending for legal fees on this Rate Increase.⁶

In short, Big Rivers faces a new reality involving a significantly lower load, a growing set of costs to its existing generation fleet, an expanding set of options for how to service its customers, and an increasingly complex set of factors relevant to identifying the lowest cost mix of supply- and demand-side resources for meeting its customers' needs. The organizational Movant, on behalf of its members, has gained significant expertise on these issues in proceedings throughout the country, and seek to bring such expertise to this proceeding.

I. THE MOVANTS

Movants seek full intervention in order to ensure that their interests in lower cost and cleaner energy options are fully represented, and to bring to this proceeding their expertise in developing plans for providing a lower cost and cleaner energy future. Movant Ben Taylor is a customer of Kenergy Corporation, which is a Big Rivers' distribution cooperative, and a long-

⁵ *In the Matter of: Joint Application of PPL Corporation, E.ON AG, E.ON US Investments Corp., E.ON U.S. LLC, Louisville Gas and Electric Company, and Kentucky Utilities Company for Approval of an Acquisition of Ownership and Control of Utilities* (Case No. 2010-00204) Order, Sept. 30, 2010 at 20 (noting that the Commission stated its support for energy-efficiency programs in a report "to the Kentucky General Assembly in July 2008 pursuant to Section 50 of the 2007 Energy Act").

⁶ Direct Testimony of Albert Yockey, p.10.

time Sierra Club member, and has a deep interest in seeing Big Rivers transform to meet the new reality in a way that is both low cost and cleaner. His address is as follows:

Ben Taylor
419 Yelvington Grandview Road
Maceo, KY 42355-9749

Sierra Club is one of the oldest conservation groups in the country with over 625,000 members nationally in sixty-four chapters in all fifty states including the District of Columbia and Puerto Rico. Sierra Club has almost 5,000 members in Kentucky, which are part of the Cumberland Chapter. The Cumberland Chapter's address is:

Sierra Club
Cumberland Chapter
P.O. Box 1368
Lexington, KY40588-1368

II. LEGAL BACKGROUND

The Commission's regulations regarding intervention provide that a person may seek leave to intervene in a Commission proceeding and, upon timely motion:

If the commission determines that a person has a special interest in the proceeding which is not otherwise adequately represented **or** that full intervention by [the] party is likely to present issues or to develop facts that assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings, such person shall be granted full intervention.

807 K.A.R. 5:001 § 3(8)(emphasis added). In other words, the Commission must grant full intervention if Movants either have interests in this proceeding that are not adequately represented or they offer expertise that would assist in evaluation of the Rate Increase application. As explained below, Movants satisfy both standards for intervention.

Movants are seeking intervention in a Rate Increase proceeding that is governed by KRS § 278.180.⁷ Pursuant to that statute, Big Rivers must receive Commission approval to change its

⁷ See Big Rivers Application at 1.

rates. The burden is on the utility to prove that the Rate Increase “is just and reasonable.” KRS § 278.190(3). This proceeding is intended to evaluate the reasonableness of Big Rivers’ application.

III. THE COMMISSION SHOULD GRANT MOVANTS FULL INTERVENTION

A. This Petition to Intervene is Timely Filed

This request to intervene is timely. Big Rivers filed its Rate Increase application on January 15, 2013. On February 1, 2013, the Commission issued a scheduling order in this proceeding, which requires the filing of discovery requests by February 14, 2013 and intervenors’ written testimony by April 11, 2013. Movants have submitted this Petition for intervention on February 14, 2013. As such, this Petition is timely.

B. Movants Will Present Issues and Develop Facts That Will Assist the Commission in Fully Considering the Matter Without Unduly Complicating or Disrupting the Proceedings.

The Commission should grant Movants full intervention as they are “likely to present issues or to develop facts that assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings.” 807 K.A.R. 5:001 § 3(8). This proceeding involves complex questions regarding whether the Rate Increase is just and reasonable in light of the additional costs that will result from granting the increase and the myriad of demand- and supply-side alternatives, including retirement of some generating units and increased implementation of demand side management, that could mitigate the need for a 20% Rate Increase. Big Rivers presents the Rate Increase as its only option for addressing the loss of the Century smelter contract, but its application and supporting testimony makes clear that no demand- or supply-side options were considered. As parties to this proceeding, the Movants will ensure that the options beyond simply raising rates are examined, such as retiring existing capacity, and/or replacing capacity with natural gas, renewable energy sources, and/or

efficiency.⁸ Movants bring to this docket their unique perspective and experience in advancing technical and regulatory solutions to increasing renewable and demand side energy sources.

Movant Sierra Club has developed expertise that encompasses a broad range of environmental and energy concerns that fully complement the myriad of technical and policy issues parties will face in this proceeding. In particular, Sierra Club's staff and consultants have extensive experience in resource planning, analyzing the potential for cost effective energy efficiency, and in the laws and regulations regulating energy production. Sierra Club has jointly or individually intervened and/or provided testimony on these issues in a multitude of similar proceedings in a number of states including Arkansas, Arizona, California, Colorado, Florida, Illinois, Iowa, Louisiana, Kentucky, Michigan, Mississippi, Missouri, New York, New Jersey, Nevada, Ohio, Oklahoma, Oregon, South Carolina, Utah, Wisconsin, and Wyoming. Moreover, Sierra Club recently intervened and provided testimony on these issues in five other dockets before this Commission, including Big Rivers' previous application for a CPCN to retrofit a number of its existing generating units,⁹ and has recently been granted intervention in a sixth

⁸ “[A]s more constraints are . . . placed on utilities that rely significantly on coal-fired generation,” this is an important issue for the Commission to consider. *See, e.g., In the Matter of: Joint Application of PPL Corporation, E.ON AG, E.ON US Investments Corp., E.ON U.S. LLC, Louisville Gas and Electric Company, and Kentucky Utilities Company for Approval of an Acquisition of Ownership and Control of Utilities* (Case No. 2010-00204) Order, Sept. 30, 2010 at 20 (noting that the Commission stated its support for energy-efficiency programs in a report “to the Kentucky General Assembly in July 2008 pursuant to Section 50 of the 2007 Energy Act”).

⁹*See, Application of Louisville Gas & Electric for Certificates of Public Convenience and Necessity and Approval of Its 2011 Compliance Plan for Recovery by Environmental Surcharge* (Docket No. 2011-00162), *Application of Kentucky Utilities for Certificates of Public Convenience and Necessity and Approval of Its 2011 Compliance Plan for Recovery by Environmental Surcharge* (Docket No. 2011-00161); *Joint Application of Louisville Gas & Electric and Kentucky Utilities for Certificates of Public Convenience and Necessity to Construct Combined Cycle Natural Gas Plant* (Docket No. 2011-00375); *Application of Kentucky Power Company for Approval of its 2011 Environmental Compliance Plan and Certificates of Public Convenience and Necessity* (Docket No. 2011-00401); *Application of Big Rivers Electric Cooperative for Certificate of Public Convenience and Necessity and Approval of Its Compliance Plan for Recovery by Environmental Surcharge* (Docket No. 2012-00063) .

proceeding.¹⁰ Sierra Club has also regularly presented testimony before the U.S. Congress and various state legislatures on issues related to the electric utility industry, including energy efficiency, renewable energy, and coal generation.

Movants are aware of past holdings by the Commission that it does not make decisions about environmental regulations.¹¹ But the Movants are not seeking intervention to opine about the environmental impacts of Big Rivers' coal plants and its environmental compliance plans. Instead, Movants are seeking to present testimony regarding whether the Rate Increase proposed by Big Rivers, which will further Big Rivers' dependence on its existing coal assets, is just and reasonable in light of the substantial loss of demand the utility needs to serve, the full range of regulatory, capital, operating, and fuel costs that the Big Rivers plants face, and the increasing availability of low cost energy efficiency and renewable energy alternatives. The Commission cannot reach a logical determination on the reasonableness of Big Rivers' 20% Rate Increase without evaluating each of those issues. As such, Movants are seeking intervention to address topics that are directly at issue in this proceeding.

The Commission must examine whether substantially increasing rates without any cuts in expenses, such as could be achieved by retiring one or more aging coal units, is just and reasonable. In its application, Big Rivers insists that it must increase rates now in order to maintain credit ratings that will allow it to invest an additional \$200 million in these units—for capacity it currently cannot sell—within the next two years. But it appears from the Company's application that it has likely underestimated the full range of costs those units face, overestimated the likelihood of being able to replace the substantial loss in load from the Century smelter

¹⁰ Application of Kentucky Power for Certificate of Public Convenience and Necessity Authorizing the Transfer to the Company of an Undivided Fifty Percent Interest in the Mitchell Generating Station and Associated Assets (Docket No. 2012-00578).

¹¹ In the Matter of The 2008 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company (Case No. 2008-148) Order, July 18, 2008 at 5-6.

termination, and ignored the ability of energy efficiency to reduce costs for its ratepayers. In this way, Big Rivers is asking ratepayers to pay increasing rates in order to keep operating an aging coal generating fleet that is old, costly, and likely overbuilt. Big Rivers does not address any other methods for decreasing costs in its application and solely focuses on having remaining ratepayers pay for the loss of revenue from the Century smelter contract. Movants want to ensure that the Commission evaluates the full implications of Big Rivers' myopic strategy, so it can accurately determine whether this Rate Increase is just and reasonable. Movants are not advocating any particular resource mix or alternative at this time, and instead simply endorse a robust examination of the comparative options available for meeting Big Rivers' decline in load and revenue without placing the entire burden on ratepayers.

Through full intervention, Sierra Club, on behalf of their members including the individual Movant, will use their expertise and consultants to provide current data and analysis to investigate Big Rivers' proposed Rate Increase, explore additional alternatives for replacing capacity, investigate the adequacy of Big Rivers' limited analyses, and present evidence and argument in support of energy efficiency, renewable energy resources, and other low carbon generation technologies such as purchasing an existing gas plant if they represent reasonable and prudent alternatives for Big Rivers to pursue.

Finally, the Movants are represented by experienced counsel and will comply with all deadlines in the proceeding established by the Commission. As such, Movants' participation will not disrupt this proceeding.

C. Movants Have Special Interests in This Proceeding That Are Not Adequately Represented.

As noted above, 807 K.A.R. 5:001 §3(8) provides two alternative bases for granting full intervention. Parties either need to have a special interest not adequately represented or present

issues and facts that will help the Commission fully consider the matter. As explained in Section III.B., above, the Movants will present issues and facts that will help the Commission fully consider the matter. Therefore, the Commission can grant full intervention on that basis alone and need not consider the Movants' special interest. Nevertheless, as explained below, the Movants also have special interests that are not adequately represented.

The individual Movant is a customer and rate payer of Kenergy Corporation, which is one of Big Rivers' distribution cooperative members. As such, he helps fund Big Rivers' operations, and the Commission's decision about whether to grant the Rate Increase will directly impact his bills. In addition, the individual Movant lives within the Big Rivers distribution cooperatives' service territory and, therefore, is impacted by the economic, public health, and environmental effects of the resource decisions that Big Rivers makes. Organizational Movant Sierra Club has member(s) who are customers and ratepayers of a distribution cooperative of Big Rivers and, therefore, have the same interests as the individual Movant. In addition, Movants' desire to promote energy efficiency, peak demand reduction, renewable energy, and cost-effective low carbon energy sources in Kentucky is directly related to the issues of this proceeding.

Movants' interests are not adequately represented by any of the parties in the proceeding, as none of the other parties can adequately represent the organizational Movants' interests as a national organization that seeks to promote energy efficiency, renewable energy, and other low carbon generation sources as the most reasonable and cost effective way for Big Rivers to maintain essential electric services and meet new and emerging federal regulatory requirements.

The Attorney General cannot adequately represent the Movants' interest. The Attorney General has the unenviable task of representing all consumers and all of their diverse interests,

even if some of the interests are diametrically opposed to each other. In fact, courts have “repeatedly held that private companies can intervene on the side of the government, even if some of their interests converge.” *See, e.g., Hardin v. Jackson*, 600 F. Supp. 2d 13, 16 (D.D.C. 2009). That is because “government entities are usually charged with representing the interests of the American people, whereas aspiring intervenors, like the [Movants] here, are dedicated to representing their personal interests or the interests of their members or members’ businesses.” *County of San Miguel, Colo. v. MacDonald*, 244 F.R.D. 36, 48 (D.D.C.2007); *Purnell v. Akron*, 925 F.2d 941, 949 (6th Cir. 1991) (granting intervention in a wrongful death suit when intervenors’ interests were personal and narrower than the current defendants); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 737 (D.C. Cir. 2003) (movant satisfied its burden where it sought to protect interests that were “more narrow and parochial” than the government’s interests); *Am. Horse Prot. Ass’n v. Veneman*, 200 F.R.D. 153, 159 (D.D.C. 2001) (granting intervention of right where intervenors had “more narrow interests and concerns” than the government entity); *Jansen v. Cincinnati*, 904 F.2d 336, 343 (6th Cir. 1990) (granting intervention when intervenors agreed with the government’s conclusion but differed in their rationale); *Southern Utah Wilderness v. Norton*, 2002 WL 32617198, at *5 (D.D.C. June 28, 2002) (concluding that government entity may not adequately represent specific interests of private entity).

While the Attorney General is tasked with representing the overall, and sometimes conflicting, public interest(s) in this proceeding, the Movants have a more narrow interest and concern in ensuring that the full range of options for addressing Big Rivers’ significant loss of load and revenues, including the potential retirement of some generating resources and pursuit of

demand side management, are adequately presented to the Commission and thoroughly and objectively evaluated.

The Attorney General may not be able to represent the Movants' interest, or at least not as forcefully, because of the Attorney General's obligation to represent all consumers. The Attorney General has previously encouraged the Commission to allow public interest groups to intervene when the "Attorney General is not capable of providing the same perspective and representation" as a public interest group.¹² Moreover, the Commission cannot interpret its regulations to provide that the mere fact that the Attorney General intervened in this case to mean that the Movants' interests are adequately represented, for that is the situation in every case. Such an interpretation would render the intervention provision for parties other than the Attorney General superfluous, which would run contrary to the rules of statutory and regulatory interpretation. *See Lexington-Fayette Urban County Government v. Johnson*, 280 S.W.3d 31, 34 (Ky. 2009), *University of Cumberlands v. Pennybacker*, 308 S.W.3d 668, 683-84 (Ky. 2010).

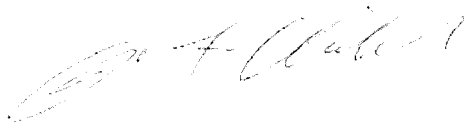
Finally, allowing Movants to intervene will serve the public interest because no other party to this proceeding has the capacity or the incentive to assure that Movants' concerns are addressed.

IV. CONCLUSION

For the foregoing reasons, the Movants respectfully request full intervention in this matter.

Respectfully submitted,

¹²See *In the Matter of: Application of Columbia Gas of Kentucky, Inc. for an Adjustment of Rates for Gas Service* (Case No. 2009-00141), Attorney General's Comments Regarding the Motion of Stand Energy Corporation Customer Group to Intervene, June 17, 2009 at 1 (arguing that the Commission should grant the SEC Customer Group's motion to intervene).



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Dated: February 14, 2013

CERTIFICATE OF SERVICE

I certify that I mailed a copy of this Petition for Full Intervention by FedEx mail on February 14, 2013 to the following:

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