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JUL 08 2013

PUBLIC SERVICE
COMMISSION

July 8, 2013

Via Hand Delivery

Hon. Jeff Derouen
Executive Director
Kentucky Public Service Commission
211 Sower Blvd.
P. O. Box 615
Frankfort, KY 40601

***Re: In the Matter of Application of Big Rivers Electric Corporation for a
General Adjustment in Rates, Case No. 2013-00221***

Dear Mr. Derouen:

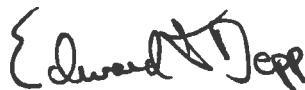
With this letter I am enclosing one (1) original and eleven (11) copies of Big Rivers Electric Corporation's response and objection to the petition of Ben Taylor and Sierra Club for full intervention in regard to the above matter.

Please return a file stamped copy to our courier.

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

Sincerely,

DINSMORE & SHOHL LLP



Edward T. Depp

ETD/kwi
Enclosure

cc: All Parties of Record

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY

RECEIVED

JUL 08 2013

PUBLIC SERVICE
COMMISSION

In the Matter of:

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

Case No. 2013-00221

**BIG RIVERS ELECTRIC CORPORATION'S RESPONSE AND OBJECTION
PETITION OF BEN TAYLOR AND SIERRA CLUB FOR
FULL INTERVENTION**

Big Rivers Electric Corporation ("Big Rivers"), by counsel, and for its response and objection to the Petition of Ben Taylor and Sierra Club (each individually a "Petitioner" and collectively the "Petitioners") for Full Intervention (the "Petition"), states as follows.

The Public Service Commission of Kentucky's (the "Commission") authority to grant a petition to intervene "is not unlimited." (*See In the Matter of Application of Big Rivers Elec. Corp. for an Adjustment of Rates*, Case No. 2012-00535, Order of April 17, 2013, p. 5 (the "Rate Case Intervention Order").) Under 807 KAR 5:001 § 4(11)(b), the Commission may grant leave to intervene only if either: (i) the requesting entity has a "special interest in the case that is not otherwise adequately represented;" or (ii) "that intervention 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." The Commission grants requests for intervention "only upon a determination that the criteria set forth in 807 KAR 5:001 [§4(11)(b)] have been satisfied." *In the Matter of: The 2008 Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company*, Ky. P.S.C. Case No. 2008-00148, Order of

July 18, 2008. Each Petitioner, therefore, must demonstrate that it satisfies the requirements of at least one of the Commission's grounds for intervention.

In a recent order in Big Rivers' general ratemaking proceeding, Case No. 2012-00535, the Commission found that these Petitioners did not "have a special interest that is not otherwise adequately represented" in that case. (*See* Rate Case Intervention Order, p. 6.) The Petitioners were only permitted to intervene after the Commission found that "Sierra Club, acting on behalf of Mr. Taylor, does possess sufficient expertise on issues that are within the scope of this base rate proceeding" (*Id.*) As an example of the relevant expertise, the Commission cited Sierra Club's potential expertise on whether "Big Rivers' proposed rate increase is reasonable in light of all available alternatives to mitigating the loss of a significant load." (*Id.*) No such issue exists in this case, and to the extent that Petitioners attempt to justify intervention here on the assertion that this proceeding could somehow affect rates, those issues will be addressed in the rate application proceedings to which Petitioners either are party (Case No. 2012-00535) or have moved to become a party (Case No. 2013-00199). Therefore, the grounds on which the Petitioners have sought intervention in the rate cases do not apply to this proceeding.

Here, as in Big Rivers' rate case, Petitioners do not have a "special interest in the case that is not otherwise adequately represented." However, unlike the rate case, which involved the possible analysis of how possible "alternatives to mitigating the loss of a significant load" would affect rates, the present case involves only the approval of a set of special contracts with a specific entity. As a result of the narrow scope of this proceeding, Petitioners are not "likely to present issues or to develop facts that assist the commission in fully considering the matter without unduly complicating or disrupting the proceeding." To the extent that this proceeding is relevant to ratemaking in any way, Petitioners are free to address it in the relevant rate cases.

Petitioners' intervention in this case, however, can serve only to unduly complicate or disrupt the proceedings.

As a result, the Petitioners fail to satisfy the requirements of both permissible grounds for intervention pursuant to 807 KAR 5:001 § 4(11)(b), and Big Rivers respectfully requests that the Commission deny the Petition.

I. The Commission Should Deny the Petition to Intervene Because Neither Petitioner Has a Special Interest in this Proceeding That is Not Otherwise Adequately Represented.

In order to meet the first ground for intervention under Section 4(11)(b), a petitioner must demonstrate that it has an "interest in the case" that is a "special" interest, which is "not otherwise adequately represented." Petitioners cannot meet this requirement.

As an initial matter, the Commission already found that Petitioners do not "have a special interest that is not otherwise adequately represented" in Big Rivers' general rate case. (*See* Rate Case Intervention Order, p. 6.) Any alleged "special interest" is even less compelling here, where the matters at issue are a set of special contracts with a specific entity.

Furthermore, although the Petition frequently (albeit inconsistently) attempts to fuse Mr. Taylor and Sierra Club into a singular entity with an indistinguishable foundation for intervention, each Petitioner must qualify separately for intervention. In the present case, neither Petitioner satisfies the requirements of the "special interest" ground for intervention.

A. Mr. Taylor Does Not Have a "Special Interest in the Case That Is Not Otherwise Adequately Represented."

Mr. Taylor's intervention should be denied because he fails to satisfy two separate components of this ground for intervention: (i) Mr. Taylor does not have a "special interest;" and (ii) any interest Mr. Taylor may espouse is "adequately represented" by the Office of the Attorney General (the "Attorney General") in this proceeding.

The Petition states that Mr. Taylor is “a customer and rate payer of Kenergy Corporation, which is one of Big Rivers’ distribution cooperative members.” (Petition, p. 9.) As a customer, the Petition continues, “he helps fund Big Rivers’ operations,” and this proceeding “may impact his bills.” (*Id.*). Finally, the Petition posits that Mr. Taylor “is impacted by the economic, public health, and environmental effects of the resource decisions that Big Rivers makes.” (*Id.*).

These concerns are not “special interests” in this proceeding within the meaning of 807 KAR 5:001 § 4(11)(b). Big Rivers’ member cooperatives provide end-user services to more than 112,000 homes, farms, businesses, and industries located across 22 counties. (*See In the Matter of: Application of Big Rivers Elec. Corp. for a General Adjustment of Rates*, Big Rivers Elec. Corp.’s Application of Jan. 16, 2013, Volume 2 of 5, Tab No. 35, “Annual Report of Big Rivers Electric Corporation for the Year Ended December 31, 2011,” p. 2.) Many of these end-users, like Mr. Taylor, are concerned with their electric bills. In fact, Petitioners even admit Mr. Taylor’s interests are not special when they argue that “Sierra Club has member(s) who are customers and ratepayers of a distribution cooperative of Big Rivers and, therefore, have the same interests as [Mr. Taylor].” (Petition, p. 9 (emphasis added).)

The Commission has consistently held that status as a customer is not a sufficient special interest to warrant full intervention. *See, e.g., In the Matter of Application of Louisville Gas and Electric Company for a Certificate of Public Convenience and Necessity and Approval of Its 2009 Compliance Plan for Recovery by Environmental Surcharge*, Ky. P.S.C. Case No. 2009-00198, Order of August 28, 2009 (denying customer’s intervention because she could not demonstrate that she “was likely to assist the Commission” and, as a customer, she would “have ample opportunity to participate in [the] proceeding even though she [was] not granted intervenor status”); *In the Matter of: Application of Kentucky Utilities Company for an Order*

Approving the Establishment of a Regulatory Asset, Ky. P.S.C. Case No. 2009-00174, Order dated June 26, 2009 (denying State Representative’s intervention because, although he supported his motion to intervene on the basis that he lived in the service area at issue, he “offered no factual basis to justify his request” and he did not demonstrate that he had “a special interest in the issues to be adjudicated”). Furthermore, even if Mr. Taylor was the only customer possessing his unique ideology with respect to decisions that Big Rivers makes, “a particular position on issues pending in this case does not create the requisite ‘special interest’ to justify full intervention.” *In the Matter of: Joint Application of Louisville Gas and Electric Company, Association of Community Ministries, Inc., People Organized and Working for Energy Reform, and Kentucky Association for Community Action, Inc. for the Establishment of a Home Energy Assistance Program*, Case No. 2007-00337, Order dated September 14, 2007. Therefore, Mr. Taylor’s interest in this proceeding is not a “special interest” as required by 807 KAR 5:001 § 4(11)(b).

Additionally, any interest Mr. Taylor may advocate is adequately represented by the Attorney General, who is “statutorily required to represent these customers.” *In the Matter of: Application of Louisville Gas and Electric Company for an Adjustment of its Electric and Gas Rates, A Certificate of Public Convenience and Necessity, Approval of Ownership of Gas Service Lines and Risers, and a Gas Line Surcharge*, Ky. P.S.C. Case No. 2012-00222, Order of September 7, 2012. The Attorney General has already been granted full intervention in this proceeding by the Commission. (See Order of June 21, 2013.) The Attorney General’s intervention immediately interposed a party in this proceeding who has not only considerable experience with utility proceedings, but also significant expertise in representing the interests of hundreds of thousands of utilities customers. To the extent Mr. Taylor’s interests relate to

potential rate effects associated with these agreements, those issues will be addressed in the two rate cases. Therefore, Mr. Taylor's interests, which are undoubtedly shared to some extent among the many homes, farms, businesses, and industries affected by this proceeding, are "adequately represented" by the Attorney General in this proceeding.

Because Mr. Taylor does not have a "special interest in this proceeding" and his interests are already "adequately represented" by the Attorney General, he does not meet the requirements of 807 KAR 5:001 § 4(11)(b) and his Petition should be denied.

B. Sierra Club Does Not Have a Special "Interest in this Proceeding" That Is Not Otherwise Adequately Represented.

Sierra Club's intervention should likewise be denied because it does not have an "interest in this proceeding." The interests of its members are also already "adequately represented" by the Attorney General.

Whatever the stated intent of Sierra Club, identified in its Petition as "one of the oldest conservation groups in the country," (Petition, p. 5.), its intervention would turn a special contract proceeding into an environmental policy proceeding. This is evidenced by Sierra Club's explicit argument that no other party can "adequately represent [Sierra Club's] 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." (*Id.* at 9 (emphasis added).) This is the only "special interest" Sierra Club raises in the Petition, and it is not at issue in the case.

As the Commission observed in denying a previous motion to intervene, "[n]otably absent from the Commission's jurisdiction are environmental concerns, which are the responsibility of other agencies within Kentucky state government." *In the Matter of the 2008*

Joint Integrated Resource Plan of Louisville Gas and Electric Company and Kentucky Utilities Company, Ky. P.S.C. Case No. 2008-00148, Order dated July 18, 2008. Sierra Club claims that the special contracts may impact rates, but the Commission has stated in denying a previous intervention request that “knowledge and experience in the area of renewable energy and energy efficiency . . . are not [necessarily] sufficient to prove that [Petitioner] is knowledgeable about issues of utility ratemaking and rate structures.” (*In the Matter of: Application of Louisville Gas and Electric Company for an Adjustment of its Electric and Gas Rates, A Certificate of Public Convenience and Necessity, Approval of Ownership of Gas Service Lines and Risers, and a Gas Line Surcharge*, Ky. P.S.C. Case No. 2012-00222, Order of September 7, 2012.) Even the Sierra Club acknowledges that the Commission does not make decisions related to environmental considerations. (Petition, p. 7.) The relevance of those considerations are even more remote where, as here, the case does not even involve ratemaking—which is addressed in Case No. 2012-00535 and Case No. 2013-00199—but rather the approval of special contracts with a specific entity.

Of the seven proceedings cited by Sierra Club in support of its intervention, four deal with either an Environmental Surcharge or an Environmental Compliance Plan, and, of those four, Sierra Club’s intervention petition was unopposed in two proceedings.¹ The other proceedings involved “complex questions regarding whether natural gas fired facilities represent

¹ See, *In the Matter of: Application of Louisville Gas & Electric for an Amended Environmental Compliance Plan, a Revised Surcharge to Recover Costs, and Certificates of Public Convenience and Necessity for the Construction of Necessary Environmental Equipment*, Ky. P.S.C. Case No. 2011-00162; *In the Matter of: Application of Kentucky Utilities for Certificates of Public Convenience and Necessity and Approval of Its 2011 Compliance Plan for Recovery by Environmental Surcharge*, Ky. P.S.C. Case No. 2011-00161; *In the Matter of: Application of Kentucky Power Company for Approval of its Environmental Compliance Plan, Approval of its Amended Environmental Cost Recovery Surcharge Tariffs, and for the Grant of Certificates of Public Convenience and Necessity for the Construction and Acquisition of Related Facilities*, Ky. P.S.C. Case No. 2011-00401 (intervention petition unopposed); *In the Matter of: Application of Big Rivers Electric Corporation for Approval of its 2012 Environmental Compliance Plan, Approval of its Amended Environmental Cost Recovery Surcharge Tariffs, and for the Certificates of Public Convenience, and the Authority to Establish a Regulatory Account*, Ky. P.S.C. Case No. 2012-00063 (intervention petition unopposed).

the least cost option to replacing the coal units the Companies [were] retiring” and similar issues. (See, e.g., *Joint Application of Louisville Gas and Electric and Kentucky Utilities for Certificates of Public Convenience and Necessity to Construct Combined Cycle Natural Gas Plant*, Case No. 2011-00375, Order dated December 14, 2011; Rate Case Intervention Order at 6.). In contrast, only special contracts for service are at issue in this proceeding.

Consequently, this is not a proceeding in which Sierra Club has a recognizable interest. Permitting the Sierra Club to intervene would create an inappropriate *de facto* right for a policy-related organization to intervene in special contract proceedings, however far removed that proceeding is from the organization’s policy goals.

In an attempt to overcome its lack of a recognizable interest in this proceeding, the Petition focuses almost entirely on Mr. Taylor’s “special interests” as a ratepayer. (Petition, p. 9.) As demonstrated in Section I.A above, however, the common interests of ratepayers are already adequately represented by the Attorney General in this proceeding, as well as the Petitioners’ roles as intervenors in Case No. 2012-00535 and putative intervenors in Case No. 2013-00199.

Moreover, long-standing procedural rules prohibit ascribing Mr. Taylor’s interests to Sierra Club. As stated by the Supreme Court of the United States, a person “generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.” *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Even if the Commission recognizes this generalized consumer interest, KRS § 367.150(8)(b) establishes that the Attorney General is the appropriate entity to adequately represent “consumer interests” related to rates. In other words, if the interests of Sierra Club’s members are imputed to Sierra Club itself, then the interests of Sierra Club in this proceeding are already adequately represented because “a

particular position on issues pending in this case does not create the requisite ‘special interest’ to justify full intervention.” *In the Matter of: Joint Application of Louisville Gas and Electric Company, Association of Community Ministries, Inc., People Organized and Working for Energy Reform, and Kentucky Association for Community Action, Inc. for the Establishment of a Home Energy Assistance Program*, Ky. P.S.C. Case No. 2007-00337, Order dated September 14, 2007.

For these reasons, the Sierra Club does not have any recognizable interest, much less the required “special interest,” necessary to satisfy the standard for full intervention in this proceeding. Its interest in this proceeding is of an environmental nature. This proceeding, however, does not relate to environmental concerns but instead relates to special service contracts with Century Aluminum of Kentucky General Partnership (“Century”). Moreover, to the extent Sierra Club’s interest can instead be characterized as the economic interests of its members, those interests are already adequately represented here by the Attorney General and by the Petitioners in the two pending rate cases.

Because the Sierra Club does not have a “special interest in this proceeding” and because its members’ relevant interests are already “adequately represented” by the Attorney General, it does not meet the requirements of 807 KAR 5:001 § 4(11)(b), and its Petition should be denied.

II. The Commission Should Deny the Petition to Intervene Because the Petitioners are Not Likely to Present Issues or to Develop Facts that Assist the Commission in Fully Considering the Matter Without Unduly Complicating or Disrupting the Proceedings.

In order to meet the other permissible ground for intervention under Section 4(11)(b), a petitioner must demonstrate the likelihood of presenting issues or developing facts that “assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings.” Therefore, a Petitioner must be able to demonstrate not only that it could assist the

Commission in fully considering the matter, but, additionally, that such assistance would not unduly complicate or disrupt the proceedings. Petitioners cannot make such a showing.

Kenergy Corp. and Big Rivers filed a joint petition for approval of certain special contracts with Century. These special contracts are separate from Big Rivers' ratemaking proceedings and, as explained in the Joint Application, are not expected to adversely affect Big Rivers' rates. (*See* Testimony of Robert W. Berry, pp. 44:16-46:2.) In this context, Petitioners offer two possible ways in which they may be able to contribute to this proceeding.

First, Petitioners appear to take for granted that, because they intervened in other Big Rivers, they should be given leave to intervene in this proceeding as a matter of course. (*See* Petition at pp. 4-5 ("Given that the Commission has previously permitted the Movants to intervene in cases filed by Big Rivers that involve related issues, the Commission should also allow the Movants to intervene in this case.")) As set forth above, this is not the law. Petitioners must demonstrate either a special interest or the ability to present issues or develop facts to assist the Commission without unduly complicating or disrupting the proceedings. 807 KAR 5:001 § 4(11)(b). They cannot do so. As discussed above, this proceeding is not expected to have any adverse impact on Big Rivers' rates, so Sierra Club's alleged vigilance to "ensure that ratepayers are not asked to bear unconscionable cost," while perhaps well-intentioned, is not a legitimate basis for its intervention. (*See* Petition at p. 7.) To the extent that this proceeding is relevant to ratemaking in any way, Petitioners are free to address it in the relevant rate cases. However, given the Attorney General's recognized role in addressing these same issues Petitioner seeks to address, Petitioners' intervention in this case would serve only to unduly complicate and disrupt this proceeding—a dangerous proposition in light of the exigent circumstances and rapid procedural timeline necessitated by the impending termination of the

existing service agreements with Century. Finally, as discussed above, the Attorney General has already intervened in this proceeding on behalf of the ratepayers, and that office is already charged with presenting any issues and developing any facts necessary to ensure the economic protection of ratepayers.

Second, Petitioners argue that their involvement in MISO's SSR tariffs and an SSR agreement in Michigan uniquely qualifies them to contribute to the development of issues in this case. (*See* Petition at p. 8.) However, there are no SSR agreements before the Commission for approval in this matter, nor is it clear if an SSR agreement will ever become necessary. Petitioners' experience, therefore, does not inform the current proceeding.

The Petitioners' proposed presentation of information regarding renewable energy, energy efficiency, and SSR agreements likewise does not have a sufficient nexus to the special contracts at issue in this proceeding to be of any assistance without causing undue disruption and complication. To the contrary, this information would distract from the appropriate scope of this proceeding and endanger a timely resolution of this matter.

Even if the Petitioners could demonstrate that they would present issues or develop facts that would assist the Commission in this proceeding—a showing that has not been made—intervention by either or both of the Petitioners would unduly complicate and disrupt this proceeding. *See, e.g., In the Matter of: Application of Louisville Gas and Electric Company for an Adjustment of Its Electric and Gas Base Rates*, Ky. P.S.C. Case No. 2008-00252, Order dated October 10, 2008 (holding that a petitioner's interest as an environmentalist in the utility's rate structure was "beyond the scope of the Commission's jurisdiction," and, as a result, allowing the petitioner to intervene would "unduly complicate and disrupt the proceeding"); *In the Matter of: The Joint Application Pursuant to 1994 House Bill No. 501 for the Approval of Kentucky Power*

Company Collaborative Demand-Side Management Programs and Authority to Implement a Tariff to Recover Costs, Net Lost Revenues and Receive Incentives Associated with the Implementation of the Kentucky Power Company Collaborative Demand-Side Management Programs, Ky. P.S.C. Case No. 2008-00350, Order dated October 13, 2008 (holding that a petitioner's interest as an environmentalist in the utility's DSM application was "beyond the scope of the Commission's jurisdiction," and, as a result, allowing the petitioner to intervene would "unduly complicate and disrupt the proceeding"). The Petition argues that, because the Petitioners are "represented by experienced counsel and will comply with all deadlines," their participation will not disrupt the proceeding. (Petition, p. 9.) This statement, however, ignores the fact that Petitioners seek to address issues that are beyond the scope of the special contracts approval process.

Because the Petitioners' intervention would unduly complicate and disrupt this proceeding, they do not meet the requirements of 807 KAR 5:001 § 4(11)(b), and their Petition should be denied.

III. Conclusion.

Neither Petitioner has "a special interest in the case that is not otherwise adequately represented or is likely to present issues." Neither Petitioner has demonstrated that its intervention 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." Mr. Taylor does not have a special interest because his interests originate from his status as a customer and are shared by other similarly situated individuals. Moreover, his interest is represented by the Attorney General, who has already intervened in this proceeding. Sierra Club does not have an interest in this proceeding because its environmental interests have no bearing on the special

contracts at issue, and the interests of its members cannot be imputed to the organization. Even so, those interests are already represented in this proceeding by the Attorney General. Furthermore, Petitioners' interests in potential rate impacts resulting from this proceeding are already represented through their intervention in Case No. 2012-00535 and, presumably, in Case No. 2013-00199.

In addition, neither Petitioner is likely to present issues or develop facts to assist the Commission without unduly complicating or disrupting this proceeding. Any information offered to assist the Commission with respect to the Petitioners' purported interest in the economic well-being of ratepayers will be unnecessarily duplicative of the Attorney General's recognized role in the proceeding. Moreover, any other issues they purport to address are beyond the scope of the special contract approvals sought in this proceeding. Given the impending termination date of the existing service agreements for Century Aluminum, the timely approval of these special contracts is paramount. The interests of those who will be affected by the Commission's decision in this matter significantly outweigh the possibility that any duplicative or tangential interests raised by the Petitioners will assist the Commission without unduly complicating or disrupting this proceeding.

WHEREFORE, Big Rivers respectfully requests that the Commission deny the Petition of Ben Taylor and Sierra Club.

Respectfully submitted,



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Counsel for Big Rivers Electric Corporation

Certificate of Service

I certify that a true and accurate copy of the foregoing was served by first class mail, postage prepaid, upon the persons listed on the attached service list, on this the 8th day of July, 2013.


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