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PUBLIC SERVICE
COMMISSION

July 11, 2013

VIA HAND DELIVERY

Jeff Derouen
Kentucky Public Service Commission
211 Sower Blvd.
P.O. Box 615
Frankfort, KY 40602-0615

*Re: Joint Application of Kenergy Corp.)
and Big Rivers Electric Corporation)
for Approval of Contract and for a) Case No. 2013-00221
Declaratory Order)*

Dear Mr. Derouen:

Enclosed are an original and ten copies of Kenergy Corp. and Big Rivers Electric Corporation's: (1) Response to the Commission Staff's Initial Request for Information; (2) Response to the Office of the Attorney General's Initial Request for Information; (3) Response to the Kentucky Industrial Utility Customers, Inc.'s Initial Request for Information; (4) Petition for Confidential Treatment; and (5) Motion for Deviation in the above-referenced matter.

I certify that on this date a copy of these documents has been served on all persons on the attached service list by hand-delivery or by Federal Express.

Sincerely,

Edward T. Depp

ETD/lb
Enclosures

cc: Mark A. Bailey
Billie J. Richert

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PSC Case No. 2013-00221

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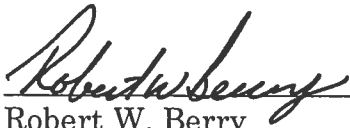
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BIG RIVERS ELECTRIC CORPORATION

JOINT APPLICATION OF KENERGY CORP.
AND BIG RIVERS ELECTRIC CORPORATION
FOR APPROVAL OF CONTRACTS AND
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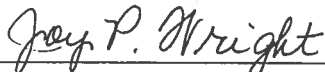
VERIFICATION

I, Robert W. Berry, verify, state, and affirm that I prepared or supervised the preparation of the data responses filed with this Verification, and that those data responses are true and accurate to the best of my knowledge, information, and belief formed after a reasonable inquiry.


Robert W. Berry

COMMONWEALTH OF KENTUCKY)
COUNTY OF HENDERSON)

SUBSCRIBED AND SWORN TO before me by Robert W. Berry on this
the 8 day of July, 2013.


Notary Public, Ky. State at Large
My Commission Expires _____

Notary Public, Kentucky State-At-Large
Commission Expires: July 3, 2014
J 421951

BIG RIVERS ELECTRIC CORPORATION
JOINT APPLICATION OF KENERGY CORP.
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VERIFICATION

I, Billie J. Richert, verify, state, and affirm that I prepared or supervised the preparation of the data responses filed with this Verification, and that those data responses are true and accurate to the best of my knowledge, information, and belief formed after a reasonable inquiry.


Billie J. Richert

COMMONWEALTH OF KENTUCKY)
COUNTY OF HENDERSON)

SUBSCRIBED AND SWORN TO before me by Billie J. Richert on this
the 8th day of July, 2013.


Notary Public, Ky. State at Large
My Commission Expires 1-12-17

BIG RIVERS ELECTRIC CORPORATION

JOINT APPLICATION OF KENERGY CORP.
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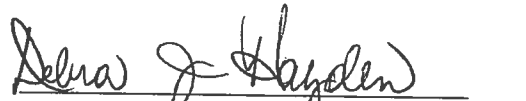
VERIFICATION

I, Gregory J. Starheim, verify, state, and affirm that I prepared or supervised the preparation of the data responses filed with this Verification, and that those data responses are true and accurate to the best of my knowledge, information, and belief formed after a reasonable inquiry.


Gregory J. Starheim

COMMONWEALTH OF KENTUCKY)
COUNTY OF HENDERSON)

SUBSCRIBED AND SWORN TO before me by Gregory J. Starheim on
this the 9th day of July, 2013.


Notary Public, Ky. State at Large
My Commission Expires 5-24-15

ORIGINAL

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

In the Matter of:

**JOINT APPLICATION OF KENERGY CORP.)
AND BIG RIVERS ELECTRIC CORPORATION)
FOR APPROVAL OF CONTRACTS AND)
FOR A DECLARATORY ORDER)**

Case No. 2013-00221

**Response to the Commission Staff's
Initial Request for Information
dated July 2, 2013**

FILED: July 11, 2013

ORIGINAL

**JOINT APPLICATION OF KENERGY CORP. AND
BIG RIVERS ELECTRIC CORPORATION
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**Response to the Commission Staff's
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1 **Item 1)** *Refer to page 13 of the application. Beginning at line 1, Big Rivers states that*
2 *“[p]art of this process also includes the approvals Big Rivers must obtain to be authorized by*
3 *its creditors to enter into a transaction with Kenergy for Century Kentucky.”*

4 *a. Provide the names of the creditors from whom Big Rivers must obtain*
5 *approval and the status of those approvals.*

6 *b. In the event that any of the creditors impose conditions or restrictions on*
7 *Big Rivers in return for granting the needed authorizations, provide*
8 *copies of all written documents referencing the conditions or*
9 *restrictions.*

10

11 **Response)**

12 a. The creditors of Big Rivers from which approval must be obtained in
13 connection with the proposed transaction are the United States Department
14 of Agriculture Rural Utilities Service (“RUS”), the National Rural
15 Utilities Cooperative Finance Corporation (“CFC”) and CoBank, ACB
16 (“CoBank”). Under its loan contract with RUS, Big Rivers must notify
17 RUS in writing of the proposed transaction, including a reasonably
18 detailed description of the transaction and a statement that the transaction

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1 is covered by the loan contract, and must provide RUS drafts of the
2 documents under which the transaction is to be effected and certified
3 copies of board resolutions from Big Rivers and Kenergy authorizing the
4 transaction. If RUS within 60 days notifies Big Rivers in writing that
5 RUS objects to the transaction, then Big Rivers cannot complete the
6 transaction without RUS approval. In the past, RUS typically has required
7 all or nearly all of those 60 days to complete its review of the transaction
8 under review. Big Rivers is pursuing RUS approval and gave the required
9 notice to RUS on June 12, 2013.

10 Big Rivers currently has two loan agreements with CFC. The first,
11 a term loan agreement, does not require Big Rivers to obtain the approval
12 of CFC for Big Rivers to enter into the proposed transaction. The second,
13 a revolving credit agreement, does not expressly require Big Rivers to
14 obtain the approval of CFC but under the terms of the existing agreement,
15 an event of default will occur upon the termination of the agreement
16 between Big Rivers and Kenergy relating to Kenergy's wholesale service
17 agreement relating to Century. As a result, Big Rivers and CFC have
18 negotiated an amended and restated revolving credit agreement to, among

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1 other things, resolve the event of default issue under the existing revolving
2 credit agreement and make clear that termination of the proposed
3 Arrangement Agreement will not result in an event of default under the
4 proposed amended and restated revolving credit agreement. The amended
5 and restated revolving credit agreement is pending approval of the
6 commission.

7 Big Rivers has a term loan agreement with CoBank. Under this
8 agreement Big Rivers covenants not to consent to any modification,
9 supplement or waiver of any of the provisions of its Member Wholesale
10 Power Contracts or Material Direct Service Contracts (as defined in the
11 agreement), if the effect thereof, either individually or in the aggregate,
12 would reasonably be expected to have a Material Adverse Effect (as
13 defined in the term loan agreement). Big Rivers has obtained from
14 CoBank its waiver, dated May 30, 2013 ("Waiver"), in which CoBank
15 waives any default or event of default under the term loan agreement to
16 the extent that the proposed Arrangement Agreement could be construed
17 to be an amendment, supplement or waiver of the current agreements
18 relating to Century. In addition, similar to the CFC existing revolving

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1 credit agreement, a termination of the proposed Arrangement Agreement
2 would be an event of default under the CoBank term loan agreement. As a
3 result, in the Waiver, CoBank waives as a default or an event of default
4 under the CoBank term loan agreement any termination of one or more of
5 the smelter retail service contracts (and, consequently, the corresponding
6 Material Direct Serve Contract) relating to service to an aluminum smelter
7 currently operated by Century or Rio Tinto Alcan entered into after the
8 date of the Waiver provided that such termination will not cause a
9 Material Adverse Effect (as defined in the CoBank term loan agreement).
10 The Waiver would apply to termination of the proposed Arrangement
11 Agreement.

12 b. Big Rivers acknowledges this request, and states that there are none as of
13 the date of filing these responses.
14
15

16 **Witness)** Billie J. Richert
17

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1 **Item 2)** *Refer to page 10 of 49 of the Direct Testimony of Robert W. Berry ("Berry*
2 *Testimony"). Starting at line 6, Mr. Berry states that Big Rivers has applied to the Midwest*
3 *Independent Transmission System Operator, Inc. ("MISO") for the establishment of a new*
4 *commercial pricing "node," the "Hawesville Node". State whether this approval has been*
5 *received. If no, state when a decision by MISO is expected.*

6

7 **Response)** Yes, MISO has approved the Attachment B that Big Rivers filed with MISO for
8 the June 1, 2013 MISO Commercial Model update with the effective date of August 20, 2013.

9

10

11 **Witness)** Robert W. Berry

12

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- 1 **Item 3)** *Refer to Exhibit 4 of the application, the Electric Service Agreement.*
- 2 *a. Refer to page 24. Section 8.1, Metering Facilities, states that “Kenergy*
- 3 *will provide or cause to be provided metering facilities at the Delivery*
- 4 *Point that measure Hourly kW, kWh, kilovars, kilovar-hours and*
- 5 *voltage-hours.” State whether the metering facilities are already in*
- 6 *place as a result of Kenergy providing service to Century under the 2009*
- 7 *Retail Electric Service Agreement (“2009 Retail Agreement”). If no,*
- 8 *explain why the metering facilities are not currently necessary and*
- 9 *provide the estimated cost of installing and maintaining the metering*
- 10 *facilities.*
- 11 *b. Refer to page 25. Section 9.2, Facilities Provided by Kenergy, states that*
- 12 *“Kenergy shall install and maintain, or shall cause to be installed and*
- 13 *maintained, any and all interconnection equipment, metering, or*
- 14 *substation equipment, and other equipment, including switching and*
- 15 *protective equipment but excluding the Capacitor Additions and the*
- 16 *Protective Relays, necessary to deliver Energy to Century at the Delivery*
- 17 *Point.” State whether this equipment is already in place as a result of*
- 18 *Kenergy providing service to Century under the 2009 Retail Agreement.*

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1 *If no, explain why the equipment is not currently necessary and provide*
2 *the estimated cost of installing and maintaining the equipment.*

3
4 **Response)**

5 a. Yes, the appropriate metering facilities are already in place and are the
6 same metering facilities that are currently being used to serve Century
7 under the 2009 Retail Agreement.

8 b. Yes, the appropriate equipment is already in place, and it is the same
9 equipment that is currently being used to serve Century under the 2009
10 Retail Agreement.

11

12 **Witnesses)** Robert W. Berry and

13 Gregory J. Starheim

14

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1 **Item 4)** *Refer to Exhibit 12 of the application, the Security and Lockbox Agreement.*
2 *Paragraph 7 on page 5 relates to fees and charges associated with the Lockbox Account.*
3 *Provide the estimated annual fees for the Lockbox Account and state whether Big Rivers will*
4 *be reimbursed by Century for the fees.*

5
6 **Response)** Based on similar transactions with the Depository Bank in the past, Big Rivers
7 estimates that the annual fees for the Lockbox Account will be \$420.00. Under paragraph 7 of
8 the Security and Lockbox Agreement, the Depository Bank shall submit a monthly statement
9 to Big Rivers setting forth these fees. These fees will then be deducted from the Lockbox
10 Account pursuant to that paragraph and paragraph 4(b)(i). Big Rivers will be entitled to
11 reimbursement of these fees by Kenergy under Section 4.5.10 of the Arrangement Agreement,
12 and Kenergy will in turn be entitled to reimbursement in a like amount from Century under
13 Section 4.6.11 of the Electric Service Agreement.

14

15

16 **Witness)** Robert W. Berry

17

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1 **Item 5)** *Refer to page 10 of the application, line 20. Should the "10,000,000 kW of*
2 *demand" be corrected to "10,000 kW of demand"?*

3

4 **Response)** Yes. A similar typographical error was acknowledged and corrected in a letter
5 dated June 13, 2013, from James M. Miller to Jeff Derouen, the Commission's Executive
6 Director.

7

8

9 **Witness)** Robert W. Berry

10

11

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1 **Item 6)** *Refer to page 2, lines 3-5, of Big Rivers' compliance filing made on June 26,*
2 *2013. What is the amount of "Base Load" that has been calculated by MISO?*

3

4 **Response)** At the date of this response, MISO has not completed the analysis to confirm
5 the Base Load amount. MISO continues to work with the appropriate transmission owners,
6 Big Rivers and Century's consultant (Siemens) to determine the Base Load amount.

7

8

9 **Witness)** Robert W. Berry

10

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1 **Item 7)** *The application, page 10, lines 13-15, requests Commission approval of the*
2 *Century Transaction pursuant to KRS 278.160(1) and 807 KAR 5:011, Section 13.*
3 *However, both the Electric Service Agreement, Article 18.2, and the Arrangement*
4 *Agreement, Article 18.2, provide that, "the Parties hereby agree that the courts of the*
5 *Commonwealth of Kentucky will have exclusive jurisdiction over any and all disputes."*
6 *Explain in detail why a contract between a Commission- regulated utility and a customer*
7 *that sets forth rates and terms and conditions of service is not within the exclusive*
8 *jurisdiction of the Commission.*

9
10 **Response)** The Electric Service Agreement and the Arrangement Agreement are subject to
11 the exclusive jurisdiction of the Commission to the extent that the Commission has jurisdiction
12 over those agreements pursuant to Kentucky law. Section 14.1.2 of each of those agreements
13 provides that "Nothing in this Agreement shall limit or expand the jurisdiction of the KPSC
14 over Kenergy, Big Rivers or the rates, terms and conditions of the provision of Electric
15 Services to Century." Section 18.2 of each of those agreements provides that "Nothing in
16 Section 16.2 or this Section 18.2 prohibits a Party from referring to FERC or any other
17 Governmental Authority any matter properly within its jurisdiction." Governmental Authority
18 is defined in those agreements to include the Commission.

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1 Article 16 and Section 18.2, respectively, of each of those agreements are
2 intended to set forth the order of precedence of dispute resolution processes to be used for
3 disputes that are not subject to the exclusive jurisdiction of the Commission or any other
4 Governmental Authority. Under the agreements, the parties first must attempt to resolve those
5 types of disputes through an informal process pursuant to Section 16.1. If the dispute is not
6 resolved pursuant to that process, then the parties may commence arbitration of the dispute in
7 accordance with Section 16.2 if the amount in controversy meets the \$100,000 threshold set
8 forth in that section. If not, the parties have recourse to the state or federal courts specified in
9 Section 18.2. The parties also have recourse to those courts under Section 16.2.7 to appeal or
10 request rehearing of a dispute arbitrated under Section 16.2, as well as under Section 16.2.9 to
11 seek interim, provisional or conservatory measures as set forth in that section.

12

13

14 **Witness)** Robert W. Berry

15 Counsel

16

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1 **Item 8)** *The application, page 11, lines 8-9, requests Commission approval of the*
2 *Alternate Service Agreement pursuant to KRS 278.160(1) and 807 KAR 5:011, Section 13.*
3 *However, the Alternate Service Agreement, Addendum 5.40, titled "Jurisdiction and Venue,"*
4 *provides that "[v]enue of any action, legal or equitable, having as its basis the enforcement*
5 *or interpretation of this contract, shall be Henderson County, Kentucky." Explain in detail*
6 *why a contract between a Commission-regulated utility and a customer that sets forth rates*
7 *and terms and conditions of service is not within the exclusive jurisdiction of the*
8 *Commission.*

9

10 **Response)** The Alternate Service Agreement is subject to the exclusive jurisdiction of the
11 Commission to the extent that the Commission has jurisdiction over that agreement pursuant to
12 Kentucky law. This is also found under Section 5.40 of the agreement. That section provides
13 that "service to the Consumer . . . is subject to the lawful order of the Kentucky Public Service
14 Commission. All respective rights and obligations of the parties shall be governed by the laws
15 of the State of Kentucky." Section 5.40 further provides that "[v]enue of any action, legal or
16 equitable, having as its basis the enforcement or interpretation of this contract, shall be
17 Henderson County, Kentucky." This provision is intended to refer only to actions relating to
18 the agreement that are not subject to the exclusive jurisdiction of the Commission.

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1

2 **Witnesses)** Robert W. Berry and

3 Counsel

4

JOINT APPLICATION OF KENERGY CORP. AND
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- 1 Item 9) *Refer to page 39, lines 16-20, of the Berry Testimony. Identify the exact*
2 *locations of each of the acknowledgements referenced in the Berry Testimony.*
- 3 a. *Explain what is meant by the term "tariff service" that Century is*
4 *acknowledging that it would not be entitled to receive from Kenergy if a*
5 *Century Transaction document is terminated.*
- 6 b. *Has Kenergy entered into any agreement, or does Kenergy intend to*
7 *enter into any agreement, that does or will affect Kenergy's rights and*
8 *obligations to provide retail electric service to Century pursuant to KRS*
9 *278.016 to 278.018?*

10

11 **Response)** The Berry Testimony at lines 16-20 provides that "acknowledgements
12 regarding Big Rivers' absence of an obligation to serve Century from Big Rivers' own
13 generation and purchase power resources survives as does Century's acknowledgement that it
14 is not entitled to tariff service from Kenergy." The former acknowledgement is set forth in
15 Section 3.7 of the Direct Agreement, Section 14.4 of the Arrangement Agreement and Section
16 14.5 of the Electric Service Agreement. The latter acknowledgement is set forth in Section
17 10.4 of the Electric Service Agreement.

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1 a. “Tariff service” relates to the right of Century to receive Electric Services
2 under an existing tariff of Kenergy as opposed to entry into a separately
3 negotiated contract for the provision of Electric Services. The
4 acknowledgement of Century is intended to provide that if the proposed
5 contractual arrangements are terminated, Kenergy and Century would
6 need to negotiate a new agreement for the provision of Electric Services
7 for any smelting load due to the unique challenges associated with serving
8 a smelter (e.g., credit risk, etc.). The purpose of the Alternate Service
9 Agreement is to provide for advance Commission approval of service to a
10 non-smelting load of Century if the proposed Electric Service Agreement
11 terminates.

12 b. No.

13
14 **Witnesses)** Robert W. Berry,
15 Gregory J. Starheim, and
16 Counsel
17

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1 **Item 10)** *Refer to Exhibit 4 of the application, page 35, Section 14.4, titled "Post*
2 *Termination Obligation." In the absence of a contractual obligation for Kenergy to serve*
3 *Century, will Kenergy still have a legal obligation to serve Century? If yes, explain the basis*
4 *for that legal obligation and explain why Century would not have a right to receive service*
5 *from Kenergy at rates based on Kenergy's average cost of electric power.*

6
7 **Response)** Yes, but the terms and conditions by which Century would be entitled to
8 receive service would need to be addressed prior to the effective date of "absence of a
9 contractual obligation," as Century's termination of the Retail Electric Service Agreement
10 approved in Case No. 2007-00455 leaves Kenergy with no tariff that would be applicable to
11 Century.

12 As a general matter, Kenergy's articles of incorporation obligate it to provide
13 service to "its members at the lowest cost consistent with sound economy and good
14 management" in fifteen counties, including Hancock County where Century's Hawesville
15 smelter is located. KRS 278.030(1-3) further imposes the following statutory obligations:

- 16 . (1) Every utility may demand, collect and receive fair, just and reasonable rates
17 for the services rendered or to be rendered by it to any person.
- 18 . (2) Every utility shall furnish adequate, efficient and reasonable service, and
19 may establish reasonable rules governing the conduct of its business and the

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1 conditions under which it shall be required to render service.

2 (3) Every utility may employ in the conduct of its business suitable and
3 reasonable classifications of its service, patrons and rates. The classifications
4 may, in any proper case, take into account the nature of the use, the quality
5 used, the quantity used, the time when used, the purpose for which used, and
6 any other reasonable consideration.

7 Those general statutory obligations are further recognized in the RUS area
8 coverage requirements set forth in 7 C.F.R. § 1710.103, which provides in relevant part:

9 (a) Borrowers shall make a diligent effort to extend electric service to all
10 unserved persons within their service area who:

- 11
12 (1) Desire electric service; and
13 (2) Meet all reasonable requirements established by the borrower as a
14 condition of service.
15

16 In the context of the Century load, Kenergy emphasizes the statutory language
17 that permits it to “establish reasonable rules governing the conduct of its business and the
18 conditions under which it shall be required to render service.” KRS 278.030(2). Kenergy also
19 emphasizes the statutory right of a utility to “employ in the conduct of its business suitable and
20 reasonable classifications of its service, patrons and rates.” KRS 278.030(3). “The
21 classifications may, in any proper case, take into account the nature of the use, the quality used,
22 the quantity used, the time when used, the purpose for which used, and any other reasonable
23 consideration.” *Id.*

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dated July 2, 2013**

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1 As an initial matter, Kenergy notes that the Century Transaction was negotiated
2 pursuant to an understanding that Century would not seek electric service pursuant to terms
3 other than what are memorialized in the application and the associated agreements. Under the
4 scenario posed by this request, however, Kenergy notes that the unusually high amount of
5 electricity used by Century, at an unusually high load factor, and the unique history of service
6 to Century compel the conclusion that any service to Century other than as proposed in this
7 application would need to be addressed in a subsequent proceeding designed to address the
8 “reasonable classifications” that Kenergy is permitted by law to employ in serving its
9 customers.

10 Although the scenario posed in this data request has not been the focus of the
11 parties’ collaborative efforts, Kenergy believes that it is likely that the provision of service to
12 Century in the absence of contractual arrangements (such as proposed in this case) would
13 unreasonably shift the unique risks of serving Century to other ratepayers if Kenergy were
14 required to serve Century at the average cost of service.

15 For this reason, Kenergy and Century have agreed that, absent circumstances
16 were the Alternate Service Agreement is applicable, a new contractual arrangement must be
17 entered into if the proposed contracts are terminated.

18

**JOINT APPLICATION OF KENERGY CORP. AND
BIG RIVERS ELECTRIC CORPORATION
FOR APPROVAL OF CONTRACTS AND FOR A DECLARATORY ORDER
CASE NO. 2013-00221**

**Response to the Commission Staff's
Initial Request for Information
dated July 2, 2013**

July 11, 2013

1 **Witnesses)** Gregory J. Starheim and
2 Counsel