COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF BIG RIVERS ELECTRIC CORPORATION FOR ENFORCEMENT OF RATE AND SERVICE STANDARDS	)))	CASE NO. 2019-00269

O R D E R

On July 31, 2019, Big Rivers Electric Corporation (BREC) submitted an application, pursuant to KRS 278.200, 278.030, and 278.040, seeking an order from the Commission enforcing the rates and service standards contained in the series of contracts that the city of Henderson, Kentucky, and the Henderson Utility Commission, d/b/a Henderson Municipal Power and Light (HMP&L) (collectively, Henderson) entered into with BREC related to the Station Two generating units (the Station Two Contracts). Specifically, in its application, BREC asks that the Commission find that (1) BREC correctly performed the calculations contained in the "Interim Accounting Summary" attached to the application, Henderson is contractually obligated to pay its share of costs as reflected therein, and BREC correctly determined each party's ownership of the coal and lime reagent remaining at Station Two; (2) Henderson has both a current and ongoing contractual obligation to share in the costs of decommissioning Station Two; (3) Henderson has current and ongoing contractual obligations to share in the costs of maintaining Station Two waste in BREC's Green Station landfill (Green Landfill); and (4) Henderson is contractually obligated to allow BREC to continue utilizing city-owned joint use facilities.

On October 29, 2019, Henderson was permitted to intervene in this matter. On February 4, 2020, the Commission denied a motion to dismiss this matter for lack of jurisdiction. Henderson and BREC both filed direct written testimony and responded to requests for information from each other and Commission Staff, and BREC filed written rebuttal testimony. A hearing was held in this matter on October 22, 2020, and BREC and Henderson both responded to post hearing request for information pursuant to an October 22, 2020 Order. BREC filed its post-hearing brief on November 17, 2020, Henderson filed its post-hearing response brief on December 1, 2020, and BREC filed a post-hearing reply brief on December 8, 2020. This matter is now before the Commission for a decision on the merits.

BACKGROUND

BREC owns generating assets and purchases, transmits, and sells electricity at wholesale. It provides wholesale electricity requirements to its three distribution cooperative members: Jackson Purchase Energy Corporation, Kenergy Corp., and Meade County Rural Electric Cooperative Corporation. The cooperative members provide retail electric service to approximately 118,000 retail members located in 22 western Kentucky counties.[1]

The city of Henderson is a municipality and political subdivision in western Kentucky with the power to furnish utility services to its residents in accordance with the requirements of KRS 96.530. HMP&L is owned by the city of Henderson.[2] Pursuant to KRS 96.530, HMP&L controls the municipal retail electric system in every respect

[1] *See* BREC's Brief (filed Nov. 17, 2020) at 2.

[2] *See* Henderson's Post-Hearing Brief (filed Dec. 1, 2020) at 7.

including daily operations and fiscal management, except that electric rates are set subject to the city of Henderson's approval.[3]

The city of Henderson owns two coal-fired electric generating units near Sebree, Kentucky (Station Two), which have a total net capacity of 312 MW.[4] BREC operated Station Two pursuant to a series of contracts and amendments thereto (collectively, Station Two Contracts). The Station Two Contracts "include the 1970 Power Sales Contract, the 1970 Power Plant Construction and Operation Agreement, the 1970 Joint Facilities Agreement, the 1974 System Reserves Agreement, and amendments to the Station Two Contracts that were made in years 1993, 1998, and 2005."[5]

The Power Sales Contract, in part, "governs the allocation of capacity and energy, billing and payment, and certain operating standards associated with Station Two."[6] The Power Plant Construction and Operation Agreement, in part, "sets forth standards for Station Two site acquisition, construction, fuel supply, general plant equipment, capital funds, bond sales, operation, maintenance, control, cost allocation, budgeting, accounting, and billing."[7] That contract also provided the details of Henderson's role as the owner of Station Two and BREC's role as the station operator. With respect to BREC's role as operator, that contract stated, among other things, that BREC "agreed to 'at all times operate City's Station Two on a best efforts basis, in an efficient and economical manner . . . and the City agreed to 'pay Big Rivers, on a monthly basis its

[3] *Id.*

[4] BREC Brief at 2.

[5] Application, footnote 1 at 1.

[6] BREC Brief at 9.

[7] *Id.* at 10.

reasonable expenditures incurred in the operation and maintenance of City's Station Two . . . .' If at any time Big Rivers did not operate Station Two in a continuous and economic manner, the City had the right under the Operation Agreement 'to immediately take over the complete operation and maintenance of Station Two.'"[8]

The Joint Facilities Agreement "governs the allocation, title, costs, O&M, operating standards, and obligations associated with the Joint Use Facilities that will be used by both Station Two and Big Rivers' Reid plant."[9] According to BREC, "[e]ach party is responsible for the continued operating, maintenance, repair and replacement costs of its joint use facilities" and "[j]oint use facilities will continue to be provided so long as either party operates or maintains a generating station that uses such facilities."[10]

BREC contends that the System Reserve Agreement required both BREC and Henderson to maintain adequate reserve generating capacity on its system so as not to impose disproportionate demands upon the other for assistance in meeting the normal contingencies of operating its power system. Under the original agreement, BREC contended that fulfilling this requirement meant maintaining a planning reserve margin of 15 percent. Further, BREC argued that the city's contingency reserve requirement, which required spinning, unloaded generation, was equal to the amount of capacity the city reserved from Station Two each year. However, BREC notes this requirement was later modified in the 1998 Amendments.[11]

[8] *Id.* at 11-12.

[9] *Id.* at 12. The three 1970 Contracts were approved by the Commission on October 22, 1970, in Case No. 5406.

[10] *Id.* at 12.

[11] *Id.* at 13.

The 1993 Amendments to the Power Sales Contract, the Power Plant Construction and Operation Agreement, the Joint Facilities Agreement and added a new Section 8 titled Station Two Decommissioning Costs. The amendments authorized the construction of a scrubber on Station Two to comply with the Acid Rain Provisions of the Clean Air Act."[12] "The new Section 8 provides that if Big Rivers exercises its option to extend the life of the Contracts for the operating life of Station Two, the parties shall bear decommissioning costs of Station Two in the proportions in which they shared capacity costs during the life of Station Two."[13] There is no dispute that BREC exercised its option to extend the contract termination date in 1998. The 1993 Power Sales Contract was amended to change the definition of Station Two, which was expanded to include the Station Two ash pond, as well as Station Two ash pond dredgings stored in the Green Landfill.[14]

The 1993 Amendments also addressed operating and maintenance (O&M) costs of the new scrubber. Among other things, the 1993 Amendment provided that "[t]he costs of operating and maintaining the FGD Joint Facilities . . . and the cost of sludge stackout and disposal (including haulage and deposit in appropriate landfills) therefrom, shall be allocated to the Green Station and Station Two . . . in the proportions in which the stations put sulfur through the Green and Station Two FGD systems."[15] The allocation of scrubber sludge "storage" costs were also addressed in that amendment.

[12] *Id.* at 13–14.

[13] *Id.* at 14.

[14] *Id.* at 14–15.

[15] *Id.* at 15.

The 1998 contract amendments, among other things, amended the 1974 System Reserves Agreement to eliminate the 15 percent reserve margin requirement that could be met by owned or purchased capacity.[16] The new requirement applied to both Henderson and BREC to allow them to comply with any system capacity requirements required or imposed in the future by a regional transmission organization. All the amendments were approved by the Commission on July 14, 1998, in Case No. 1998-00267.[17]

BREC regained control of its generation in 2009 pursuant to the "Unwind" of the long-term lease with the unregulated LG&E entities, BREC agreed to continue providing Transmission Operations, Generation Operations and Balancing Authority functions for Henderson.[18] Station Two was retired in February 2019 and the parties whether unable to resolve disputes regarding how costs should be allocated under the Station Two Contracts.

JURISDICTION

Henderson claims that the Commission does not have jurisdiction over the issues raised in BREC's application. First, as it did when it contested jurisdiction in its motion to dismiss, Henderson asserts that the issues raised in BREC's application are unrelated to utility rates and service standards. Henderson further argues that certain issues, such as decommissioning costs, are not ripe, because the costs have not been incurred and, according to Henderson, might not be incurred. Henderson argues that BREC asks the

[16] *Id.* at 16–17.

[17] *Id.*

[18] *Id.*

Commission to assign liability for costs that are incapable of verification, which are outside of the Commission's jurisdiction and cannot be assessed to determine if the rates are fair, just and reasonable.[19] Henderson also argues that the Commission does not have jurisdiction to define ambiguous contract terms or to interpret the settlement agreement between the parties resolving the Henderson Circuit Court "damages suit."[20] Alternatively, Henderson asserts that "[e]ven if Big Rivers had raised an issue related to a rate or service standard, the relevant contracts have terminated and cannot be a basis for Commission jurisdiction over Henderson pursuant to KRS 278.200."[21]

BREC responds to Henderson's arguments regarding the Commission's jurisdiction by noting that the majority of its arguments were previously raised by Henderson, responded to by BREC, and rejected by the Commission. BREC indicates Henderson arguably makes only two new arguments: (1) that the Commission lost its jurisdiction when the Power Plant Construction Contract, the Power Sales Contract, and the System Reserve Agreement ended; and (2) that the Commission does not have jurisdiction to interpret terms Henderson considers to be ambiguous, i.e., the term "decommissioning."[22] However, in response to the first "new" argument, BREC asserts that the end of the contracts did not bar the Commission from addressing costs incurred pursuant to the contracts, and BREC notes that all contracts have not ended. BREC further argues that Henderson's contention that a term in a contract is ambiguous does not deprive the Commission of jurisdiction over the contract.

[19] Henderson's Brief at 8–15.

[20] *Id.* at 17–19.

[21] *Id*. at 8.

[22] BREC Reply Brief at 1–3.

The Commission has exclusive jurisdiction over the regulation of rates and service of utilities pursuant to KRS 278.040(3). More importantly, KRS 278.200 states:

> The commission may, under the provisions of this chapter, originate, establish, change, promulgate and enforce any rate or service standard of any utility that has been or may be fixed *by any contract, franchise or agreement between the utility and any city, and all rights, privileges and obligations arising out of any such contract, franchise or agreement, regulating any such rate or service standard*, shall be subject to the jurisdiction and supervision of the commission, but no such rate or service standard shall be changed, nor any contract, franchise or agreement affecting it abrogated or changed, until a hearing has been had before the commission in the manner prescribed in this chapter.[23]

Further, the Kentucky Supreme Court has interpreted KRS 278.200 as extending Commission jurisdiction, as indicated therein, to a situation in which a city-owned utility is providing utility service to a utility defined by KRS 278.010(3) or a situation in which a utility defined by KRS 278.010(3) is providing wholesale utility service to a city-owned utility.[24]

As the Commission noted in its February 4, 2020 Order in this matter, the Station Two Contracts consist of a Power Sales Contract, a Power Plant Construction and Operation Agreement, a Joint Facilities Agreement, and a System Reserves Agreement. The first of these contracts was executed by BREC and Henderson in August 1, 1970, and approved by the Commission on October 22, 1970.[25] The contracts were then

[23] KRS 278.200 (emphasis added).

[24] *See Simpson County Water District v. City of Franklin*, 872 S.W.2d 460 (Ky. 1994).

[25] Case No. 5406, *Application of the City of Henderson, Kentucky, and City of Henderson Utility Commission for a Certificate of Convenience and Necessity for the Purpose of Constructing Additional Generating Facilities and Related Transmission Facilities as an Extension and Permanent Improvement of its Municipal Light and Power System, and, Application for Approval of Power Plant Construction and Generation Agreement, Joint Facilities Agreement and Power Sales Contract Between City of Henderson, Kentucky and City of Henderson Utility Commission, and Big Rivers Electric Cooperative Corporation* (Ky. PSC Oct. 22, 1970).

amended in 1993, 1998, and 2005 and those amendments were also approved by the Commission.[26] Under the terms of the Station Two Contracts, BREC operates Station Two and purchases the capacity generated above and beyond the capacity that Henderson reserves to serve the residents of the city.[27] The Station Two Contracts allocate Station Two's fixed costs and operating expenses between BREC and Henderson based upon their annual share of plant capacity and allocate variable costs such as fuel cost based on the amount of energy actually taken by Henderson and BREC.[28]

The issues raised in BREC's complaint concern the amounts owed to BREC under the Station Two Contracts; Henderson's share of the decommissioning costs under Section 8 of the 1993 amendments; Henderson's share of the costs of maintaining Station Two coal combustion residuals that were disposed of at BREC's Green Landfill under various provisions of the Joint Facilities Agreement; and BREC's ability to utilize city-owned joint use facilities in order to continue operation of its Green generating units. These issues implicate the service standards and rates in the various Station Two

[26] The 1993 amendments were approved in Case No. 1994-00032, *Big Rivers Electric Corporation Application for Approval of Contract Amendments with the City of Henderson and City of Henderson, Utility Commission and to File Plan for Compliance with Clean Air Act and Environmental Surcharge* (Ky. PSC Mar. 31, 1995). The 1998 amendments were approved in Case No. 1998-00267, *Application of Big Rivers Electric Corporation for Approval of the 1998 Amendments to Station Two Contracts Between Big Rivers Electric Corporation and the City of Henderson, Kentucky and the Utility Commission of the City of Henderson* (Ky. PSC July 14, 1998). The 2005 amendments were approved in Case No. 2005-00532, *Application of Big Rivers Electric Corporation, LG&E Energy Marketing, Inc., Western Kentucky Energy Corp., WKE Station Two, Inc., and WKE Corp. for Approval of Amendments to Station Two Agreements* (Ky. PSC Feb. 24, 2006).

[27] *See generally* Application Exhibit 8, Power Sales Agreement.

[28] *See, e.g.,* Application, Exhibit 9, Power Plant Contraction and Operation Agreement, Section 13.6, Section 13.8.

Contracts.[29] Further, even if all of the issues raised did not implicate rates and service standards, KRS 278.200 grants the Commission jurisdiction over rates and service standards fixed by contract between a utility and a city as well as "all rights, privileges and obligations arising out of any such contract." Finally, the fact that the Station Two Contracts ended would not terminate the Commission's jurisdiction to interpret and enforce those contracts in the same way that the termination of a retail customer's service would not prevent the Commission from determining whether the customer was properly charged pursuant to the applicable tariff. Thus, BREC's application is within the scope of the Commission's jurisdiction under KRS 278.200 and KRS 278.040.

DISCUSSION

Accounting Summary

BREC requests an order from the Commission finding that Henderson must pay its share of costs under the Station Two Contracts as set forth in the Interim Accounting Summary, which was attached as Exhibit 1 to BREC's application and amended with costs through December 31, 2019.[30] The revised Interim Accounting Summary indicated

[29] The Commission observes that some of the amounts at issue are similar to retail rates. For instance, if BREC takes the excess Henderson energy, it is required to pay a fixed per MWh amount and variable fuel and environmental costs much like those paid by retail customer. Moreover, the annual O&M costs at issue are generally based on capacity reservations and are otherwise based on a sharing mechanism specified in the Station Two Contracts, such that the Station Two Contracts generally establish formula rates with a true-up and a built in allocation methodology. Such arrangements are not unusual in situations involving wholesale utility rates. *See, e.g.,* Case No. 2007-00299, *Purchased Water Adjustment of Bath County Water District*, Order (Ky. PSC Sept. 26, 2007) (discussing how an agreement for the purchase of water between the City of Morehead, Bath District, and Rowan Water, Inc. established a the formula rate, subject to Commission jurisdiction, for the purchase of water that provided a "detailed methodology for allocating the cost of constructing and operating" Morehead's proposed water treatment facility).

[30] The Commission notes that it was amended again after June 30, 2020 but the changes reflected therein would not affect this decision.

that Henderson owed BREC $1,157,982 as of December 31, 2019, pursuant to the breakdown below:[31]

Description	Date	Amount
Excess Henderson Energy – MISO Revenue less Coal & Lime Shortfall	1/5/18 – 5/31/19	($3,310,483)
HMP&L Native Load Coal & Lime Shortfall	1/5/18 – 5/31/19	$4,693,587
MISO Fees	12/1/10 – 5/31/16	$1,422,762
FY 17/18 Annual Settlement True-Up	6/1/17 – 5/31/18	($1,649,923)
FY 18/19 Annual Settlement True-Up	6/1/18 – 5/31/19	($793,170)
Auxiliary Power	10/1/18 – 1/31/19	$78,751
Decommissioning Costs	1/1/19 – 6/30/19	$716,458
NET TOTAL		$1,157,982

While Henderson does not dispute all of the line items mentioned above or portions thereof, Henderson does dispute portions of the amounts and alleges that BREC owes additional amounts not mentioned in BREC's accounting summary. Specifically, Henderson provided its own accounting summary that indicated BREC owed it $6,252,304 pursuant to the breakdown below:[32]

Description	Amount
Total FY 2015/2016 Amount Due (To) / From BREC	$352,526
Total FY 2016/2017 Amount Due (To) / From BREC	$728,695
Total FY 2017/2018 Amount Due (To) / From BREC	$2,311,477

[31] BREC's Motion to Amend Exhibits (filed Jan. 22, 2020).

[32] Amended Direct Testimony of Barbara Moll (filed Oct. 15, 2020), Amended Exhibit Moll 3.

Total FY 2018/2019 Amount Due (To) / From BREC	$2,962,684
Auxiliary Power	($64,566)
MISO Fees (December 2010 – May 2016)	($38,512)
NET TOTAL	$6,252,304

The differences shown in fiscal year 2015/2016 and 2016/2017 are amounts Henderson contends it was improperly charged for a vertical wall expansion at the Green Landfill in those years. The difference between BREC's "FY 17/18 Annual Settlement True-Up" and Henderson's "Total FY 2017/2018 Amount Due (To) / From BREC" reflects Henderson's removal of the charge Henderson alleges was for the vertical wall expansion at the Green Landfill that Henderson claims was improperly included in the true-up and MISO fees that Henderson claims were improperly included. The difference between BREC's "FY 18/19 Annual Settlement True-Up" and Henderson's "Total FY 2017/2018 Amount Due (To) / From BREC" primarily reflects Henderson's elimination of cost of severance payments to employees at Station Two, MISO fees, costs for the vertical expansion wall at the Green Landfill, and a reduction of costs based on a capacity reservation of 115 MW as opposed to the 125 MW used by BREC.

The difference in the amounts for auxiliary power reflect a dispute in the sharing percentage between the parties and the reduction in the MISO fees for December 2010 through May 2016 represents a dispute between the parties regarding Henderson's responsibility for MISO fees. Henderson also did not include decommissioning costs in its accounting summary because it claims it is not responsible for the decommissioning costs alleged by BREC. Lastly, Henderson's accounting summary does not include the net of the excess Henderson energy costs and revenues or the native load coal and lime

shortfalls because it disputes those amounts. The disputes affecting the parties' accounting summaries are discussed below.

MISO Fees

BREC contends that Henderson is responsible for a proportionate share of all MISO fees related to North American Electric Reliability Corporation (NERC) compliance since December 2010. BREC asserts the System Reserves Agreement was modified as part of the 1998 Amendments to recognize the potential need to join a regional transmission authority such as MISO.[33] Specifically, BREC argues that the 1998 Amendments eliminated the requirement that both BREC and Henderson maintain a 15 percent planning reserve margin requirement that could be met by owned or purchased capacity and replaced it with new language requiring BREC and Henderson to "'comply with any system capacity requirements, now required or imposed at a future date' by 'any regional transmission authority.'"[34] BREC contends that this language expanded the scope of the original language to cover both planning reserve requirements as well as contingency reserve requirements, and made it clear that Henderson must meet the MISO planning reserve margin. BREC, partially quoting the 1998 amendment, also argued that Henderson "agreed 'to comply with any requirements validly imposed by . . . [MISO] . . . upon Big Rivers based on Big Rivers' role as control area operator, but only if and to the extent that such requirements imposed on Big Rivers are on account of or due to the generation or load of the City.'"[35] BREC claims that the 2010 registration of

[33] BREC's Brief at 57.

[34] *Id.*

[35] *Id*.

Henderson's load and generation in MISO was required to ensure Henderson's compliance with NERC requirements and that the registration directly benefitted the city.[36]

BREC asserts that, as operator of Station Two, it acted as the "Market Participant" for Station Two generation and Henderson's native load transactions within the MISO market from December 2010 until February 2019. In its role as Market Participant, BREC asserts that it was invoiced fees incurred as a direct result of Henderson's load and generation participating in MISO. BREC asserts that it then allocated Henderson's share of those MISO fees based upon the ratio of Henderson load and generation to the total of Henderson and BREC load and generation. BREC asserts that Henderson is responsible for those allocated expenses, which BREC indicated totaled $1,901,580 from December 2010 through February 2019.[37]

BREC notes that Henderson claims that it is only required to pay $38,512.03 of the $1,901,590. BREC indicates that the $38,512.03 in MISO fees that Henderson agrees to pay are the 2010-02016 fees associated with MISO Schedule 24 (Local Balancing Authority Cost Recovery). BREC asserts that the non-Schedule 24 MISO fees that Henderson has failed and refused to pay fall into three categories: (1) MISO Schedule 17 fees associated with energy and operating reserve markets support administrative service, (2) operating reserve fees, and (3) MISO Schedule 23 fees. BREC contends Henderson is responsible for its allocated share of each of those fees.[38]

[36] *Id.* at 54.

[37] *Id.* at 55–56.

[38] *Id.* at 57–61.

Henderson argues that BREC registered Henderson's generation and load in MISO without Henderson's authorization and in BREC's name without Henderson's approval. Henderson asserts that BREC is incorrect in stating that the only feasible way for Henderson to satisfy the NERC reliability standards in 2010 was to join MISO and notes that there was no NERC requirement that required the registration of Henderson's load and/or generation in MISO. Henderson asserts that BAL-005-0 provides simply that generation, transmission, and load operating within an interconnection must be included within the metered boundaries of a Balancing Area Authority. Henderson asserts that its generation, transmission, and load were located within BREC's Balancing Authority Area and, therefore, that it was in compliance with BAL-005-0. Henderson argues that BREC's decision to join MISO did not impact Henderson's compliance with BAL-005-0.[39]

Henderson also disputes that MISO fees represented a "direct pass through" of fees BREC incurred on Henderson's behalf and attributed to Henderson's native load and generation. Among other things, Henderson asserts that the MISO fees for which BREC is seeking recovery are load related, as opposed to being generation related, and would have been incurred regardless of whether the Station Two units were registered with MISO. Henderson also asserts that BREC failed to register "Henderson's load into a Henderson-owned Commercial Model until 2019" and did not register Henderson's transmission assets. Henderson alleges that it never would have registered its load without contemporaneously registering its generation and transmission assets, because such registrations would have resulted in offsetting revenues.

[39] Henderson's Response Brief at 52–54.

In its reply brief, BREC asserts that Henderson seeks to avoid paying its share of MISO fees incurred from December 2010 to February 2019 based upon an unfounded allegation that it could have complied with NERC's reliability standards for power plant owners without joining MISO. BREC notes that Henderson could have chosen a different Balancing Authority to satisfy NERC Standard BAL-005-0 during that period but that it did not. Rather, BREC contends that Henderson remained reliant on BREC despite its knowledge that BREC joined MISO at the end of 2010 as part of a Commission approved least cost plan to comply with NERC reliability standards. BREC argues that once it joined MISO, that MISO became the pertinent Balancing Authority for NERC compliance purposes.[40]

The Commission disagrees with Henderson that BREC registered its generation and load with MISO without authority. Section 2.1 of the System Reserve Agreement, as amended in 1998, states that:

> The City and Big Rivers covenant and agree that each will comply with any system reserve capacity requirements now required or imposed at a future date applicable to it . . . by NERC, ECAR, any successor organizations to NERC and ECAR (as applicable), any applicable regulatory or governmental agency, and any regional transmission authority, reliability council or like organization, in each case having any system reserve capacity requirements applicable to it.[41]

As argued by BREC, this language does indicate that Henderson and BREC are responsible for complying with certain requirements imposed "by NERC . . . [and] any regional transmission authority, reliability council or like organization," which would

[40] BREC's Reply Brief at 10–11.

[41] Application Exhibit 13, 1998 Amendment, at 10.

include requirements imposed by MISO (an Independent System Operator and Regional Transmission Organization). Moreover, Section 2.1 of the System Reserves Agreement, as amended, also states that absent such a requirement, "neither [Henderson] nor Big Rivers shall have any obligation pursuant to this Agreement to maintain system reserves."[42]

NERC Standard BAL-005-0 required that Henderson's load and generation be included within the metered boundaries of a Balancing Authority Area. Pursuant to NERC Standard BAL-005-0, R1.1, "[e]ach Generator Operator with generation facilities operating in an interconnection shall ensure that those generation facilities are included within the metered boundaries of a Balancing Authority Area." Moreover, prior to joining MISO, Henderson's load and generation was within BREC's Balancing Authority Area, and the undisputed evidence indicates that BREC had been acting as the Balancing Authority for Henderson with Henderson's permission before BREC joined MISO. In fact, pursuant to a 2009 Memorandum of Understanding, BREC and Henderson agreed that BREC would "continue to provide and be responsible for compliance with all TOP, GOP, and [Balancing Authority] Reliability Standard functions related to Henderson Municipal Power and Light."[43] Thus, while the System Reserve Agreement placed the obligation on Henderson to comply with NERC balancing standards, BREC had authority to take actions on Henderson's behalf to comply with relevant balancing standards.

The Commission also does not agree with Henderson that it is not responsible for its share of MISO fees, because BREC could have satisfied the relevant NERC

[42] *Id.*

[43] Application Exhibit 15, Memorandum of Understanding.

requirements in other ways. NERC Standard BAL-002-0 requires each Balancing Authority to carry enough contingency reserve to cover the most severe single contingency, i.e., generally the loss of its largest generating unit.[44] Prior to joining MISO, BREC, as the Balancing Authority in the area that included Henderson's load and generation, met those contingency obligations through reserve sharing arrangements, as permitted by NERC Standard BAL-002-0. However, in 2010, BREC joined MISO, with approval from the Commission, as the least cost alternative for complying with NERC Standard BAL-002-0. The Commission finds, as it did in Case No. 2010-00043, that joining MISO was the most reasonable means for BREC to meet the NERC balancing standards, and further finds that meeting those standards by joining MISO was consistent with its past practice of entering into reserve sharing arrangements to spread the contingency reserve obligations across a larger group. Thus, the Commission finds that BREC was authorized to join MISO and to register both Henderson's load and generation with MISO when it joined to comply with the relevant NERC and MISO requirements.

In fact, the Commission observes that Henderson was aware that BREC had joined MISO but took no action to move to another balancing authority such that Henderson would not be subject to MISO requirements and costs. Further, when Henderson was included in its own Balancing Authority Area after Station Two ceased operations, Henderson then joined MISO itself to meet the relevant NERC balancing authority obligations among other things. Thus, it is hard for Henderson to now argue

[44] NERC Standard BAL-002-0; s*ee also* Case No. 2010-00043, *Application of Big Rivers Electric Corporation for Approval to Transfer Functional Control of its Transmission System to Midwest Independent Transmission System Operator, Inc.* (Ky. PSC Nov. 1, 2010), Order (noting that the single largest contingency in BREC's Balancing Authority Area would be the loss of BREC's largest generating unit at the D.B. Wilson Generating Station).

that it was unreasonable for BREC to meet those obligations by joining MISO or that Henderson should not be responsible for its share of MISO costs, and therefore, the Commission finds that Henderson should be responsible for the MISO costs as alleged by BREC.

Allocation of Costs

Henderson argues its share of operating costs for Station Two in FY 2018/2019 should be based on the generation capacity it reserved pursuant to a written notice provided to BREC in the amount of 115 MW. Henderson notes that its 115 MW capacity reservation represented 36.86 percent of the capacity available from Station Two. Thus, Henderson contends that pursuant to Station Two Contracts, it would be responsible for 36.86 percent of the operating and maintenance costs incurred during FY 2018/2019.[45] BREC does not dispute that Henderson's notice only reserved 115 MW of capacity in FY 2018/2019 or that the Station Two Contracts require the operation and maintenance costs to be allocated, in relevant part, based on capacity reservations. However, BREC asserts that Henderson agreed to comply with any capacity requirements imposed upon BREC by any regional transmission authority based upon BREC's role as a control area operator. Further, BREC argues that pursuant to the 1998 Amendment to the System Reserves Agreement Henderson was no longer permitted to meet its capacity obligations through third-party purchases. BREC indicated that Henderson failed to comply with MISO's capacity reserve requirements when it reserved only 115 MW and that Henderson had to reserve approximately 125 MW to meet those requirements and comply with the

[45] Moll Testimony at 7.

term of the contract requiring Henderson to comply with requirements imposed by a regional transmission authority such as MISO.[46]

The Commission notes that the plain language of the requirement in the Station Two Contracts referenced by BREC requiring Henderson to comply with the requirements of a regional transmission authority indicates that it is intended, among other things, to require Henderson to reserve sufficient capacity to meet generation capacity reserve requirements of an applicable regional transmission authority, which in this case is MISO. Moreover, the Commission finds that BREC correctly calculated the capacity Henderson must reserve meet MISO's Planning Reserve Margin Requirement (PRMR), which is a specific mechanism set forth in MISO's approved tariff. However, as noted by Henderson, the Station Two Contracts also only permit it to increase its capacity reservation by 5 MW per year, and there is no dispute that Henderson had been reserving only 115 MW in prior years such that it could only have increased its capacity reservation by 5 MW to 120 MW. Thus, the Commission finds that Henderson would be in breach of the Station Two Contracts if it failed to reserve 120 MW in FY 2018/2019.

Based on the above, the Commission finds that the operating and maintenance costs for Station Two in FY 2018/2019 should be based on a reservation of 120 MW. As noted by Henderson, a decrease in the sharing percentage based on a 115 MW reservation as opposed to a 125 MW reservation would result in a decrease in the allocated expense for FY 2018/2019 in the amount of $454,090 as calculated by Henderson. Thus, the Commission finds that the allocated expense in FY 2018/2019 should be decreased by $227,045.

[46] BREC's Brief at 48–52.

Severance Costs

Henderson's accounting summary makes adjustments for the removal of severance costs that it claims BREC improperly included in the shared costs for FY 2018/2019. Specifically, Henderson asserts that BREC improperly made $2,998,970 in severance payments to employees at Station Two as part of Station Two ceasing operations. Henderson claims that it disputed those costs in the annual budget and that those amounts represent unapproved costs that BREC had no contractual authority to pass on to Henderson. As discussed above, Henderson also alleged that BREC sought to have Henderson improperly share in those costs based on a 125 MW as opposed to a 115 MW capacity reservation.[47] Henderson also noted that BREC acknowledged in response to requests for information that the budget reconciliation amount for FY 2018/2019 shown in BREC's Interim Accounting Summary attached to the application reflected budgeted severance payments of $3,356,897, as opposed to the $2,998,970 actually made, such that the severance costs included the FY 2018/2019 budget reconciliation would need to be reduced by $143,400 to reflect the difference between the budgeted and actual amounts.[48]

BREC contends that Henderson did not have to agree to the severance payments in the annual budget for it to be responsible for the costs and that the costs are authorized by the Station Two Contracts. Specifically, BREC noted that the Power Plant Construction and Operation Agreement "holds Big Rivers to a 'best efforts' standard in the efficient and economical operation of the plant as an independent contractor and

[47] Moll Testimony at 8–9.

[48] *Id.*; *see* BREC's Response to Staff's First Request, Item 5 (in which BREC acknowledged this reduction from the projected cost).

applies a reasonableness standard to costs payable by the City."[49] BREC claims that the severance payments were reasonable, because it made them to ensure that Station Two employees remained on the job and could continue operating Station Two during the period Henderson requested BREC continue operating Station Two, despite BREC's desire to cease operations, to allow Henderson additional time to obtain alternative capacity.

The Power Plant Construction and Operation Agreement requires Henderson to pay monthly estimated operating and maintenance expenses for Station Two in each month of each contract year and to pay an annual true-up of actual operating and maintenance expenses for Station Two after each contract year.[50] The estimated monthly payments in each contract year are based on an annual budget that is subject to "adoption" by Henderson and "approval" by BREC.[51] However, Section 13.6 states that Henderson will pay BREC, as allocated in the contract, "its reasonable expenditures incurred in the operation and maintenance of City's Station Two."[52] Further, Section 16.6, which establishes the true-up based on actual costs, requires Henderson to pay its share of the actual operating and maintenance expenses, stating:

> On or before one hundred twenty (120) days after the end of each Contract Year, Big Rivers shall submit to City a detailed summary of its monthly statements for payment for the operation and maintenance of City's Station Two, showing the actual charges due to be paid to Big Rivers by City for the

[49] BREC's Reply Brief at 7 *citing* Power Plant Construction and Operation Agreement at Sections 13.4 and 13.6.

[50] Power Plant Construction and Operation Agreement, Section 14 and Section 16; *see also* Power Plant Construction and Operation Agreement, Section 13.1 ("Except as otherwise provided herein, City shall have full ownership, management, operation and control of its Station Two.").

[51] *Id.* at Section 14.

[52] *Id.* at Section 13.6.

> entire Contract year based upon the annual audit of accounts provided for in Section 15.2. If, on the basis of such summary the actual aggregate operation and maintenance charges for such Contract Year exceeded the amounts paid to Big Rivers under the Annual Budget, or otherwise, then City shall pay to Big Rivers promptly the amount to which Big Rivers is so entitled.[53]

While those provisions offer some support for Henderson's position, the Commission finds that the terms of the contract, when read in context, apply a reasonableness standard for determining whether costs incurred by BREC for the operation of Station Two should be recoverable from Henderson, subject to the relevant allocation methodology.

The Power Plant Construction and Operation Agreement requires BREC to operate Station Two "on a best efforts basis, in an efficient and economical manner," to maintain, preserve and keep said Station Two and every part and parcel thereof in good repair, working order and condition," and to "make all necessary and proper repairs, renewals and replacements thereto so that at all times the business to be carried on by the City in connection therewith shall be properly and efficiently conducted."[54] It would be illogical to impose such a burden on one party while granting the other the right to veto any costs incurred to fulfill those obligations by refusing to accept a proposed budget.[55] Further, the contract clearly contemplated that Henderson would be paying actual costs, even if it disputed, by requiring BREC to maintain detailed records of the costs and allowing for a true-up of the actual costs at the end of each calendar year.[56] Most

[53] *Id.* at Section 16.6.

[54] *Id.* at Section 13.4.

[55] *See, e.g., Stonestreet Farm, LLC v. Buckram Oak Holdings N.V.*, Nos. 2008–CA–002389–MR, 2010 WL 2696278 (Ky. App. Jul 9, 2010) (unpublished) (interpreting a writing to avoid an absurd result).

[56] *Id.* at Section 13.5,

importantly though, Section 13.6 is explicit in stating that Henderson must pay BREC "its reasonable expenditures incurred in the operation and maintenance of City's Station Two,"[57] and nothing in Section 14, or elsewhere in the contract, limits that standard for the costs Henderson is required to pay for the operation and maintenance of Station Two. Thus, the Commission finds, as indicated by BREC, that the Power Plant Construction and Operation Agreement, like KRS Chapter 278, applies a reasonableness standard for determining whether costs incurred by BREC for the operation of Station Two should be recoverable from Henderson, subject to the relevant allocation methodology.

The Commission also agrees with BREC that payment of the severance was a reasonable operation and maintenance expense for Station Two. BREC has been attempting to close Station Two for some time while Henderson at least initially sought to keep it open, and when Henderson ultimately agreed to shut down Station Two, it requested time to find alternative generating capacity such that Station Two remained open with a plan to close. However, because BREC had an obligation, as noted above, to continue operating Station Two on a best efforts basis, it had an obligation to furnish personnel for that purpose and the severance payments served that purpose.[58] The Commission has regularly found that such payments are reasonable and recoverable from utility customers for that reason. Thus, the Commission finds that the severance payments to employees whose employment was terminated as a result of the closure of Station Two, in the amount of $2,998,970, were reasonable expenses for the operation

[57] *Id.* at Section 13.6.

[58] *See* BREC's Response to Commission Staff's First Request, Item 9.

and maintenance of Station Two that are recoverable from Henderson, subject to the relevant sharing mechanism, pursuant to the Power Plant Construction and Operation Agreement. However, as noted by Henderson and acknowledged by BREC, BREC's Interim Accounting Summary attached to the application reflected budgeted severance payments of $3,356,897, as opposed to the $2,998,970 actually made, and therefore, the costs in the FY 2018/2019 budget reconciliation would need to be adjusted by $143,400 to reflect that change.

Green Landfill Operating and Maintenance

Henderson contends that it is no longer responsible for operation and maintenance expense at the Green Landfill. Specifically, Henderson argues that its sole responsibility with respect to the Green Landfill stems from its obligations regarding Joint-Use Facilities, which are defined to include Station Two ash pond dredgings. Henderson notes, as pointed out by BREC, that Section 6.1 of the Joint Facilities Agreement obligates Henderson to share in the costs of operating and maintaining joint-use facilities, including the Station Two ash pond dredgings, "so as to assure the continuous operation of the parties' respective generating station or stations served thereby."[59] However, Henderson notes that Section 8.1 of the agreement states that this obligation remains in effect "so long as either party continues to operate or maintain a generating station which is served by any such joint-use facility."[60] Henderson argues that neither party is currently operating or maintaining a generation station that is "served by" the Station Two ash pond

[59] Henderson's Brief at 56.
[60] *Id.*

dredgings and, therefore, that Henderson is no longer required to pay operation and maintenance expenses related to the Green Landfill.[61]

Henderson also asserts that it was improperly changed in FY 2015/2016 through FY 2018/2019 for certain portions of the operation and maintenance expenses at the Green Landfill. Specifically, Henderson asserts that beginning in FY 2015-2016 BREC increased the per ton disposal rate for the Station Two ash-pond waste from $1.78 to $5.61 and that BREC confirmed that increase was largely attributable to a vertical expansion designed to add approximately 20 years to the life of the landfill. Henderson indicates that those costs were unreasonable because "[t]here is nothing to indicate that Big Rivers used competitive-bidding procedures to secure bids for the project" and because BREC indicated that the Green generating plant will be shuttered in 2022 such that the landfill expansion will not be needed.[62] Even if an expansion were needed to extend the life of the landfill, Henderson asserts it should not be responsible for the cost of the expansion.[63]

BREC argues that Henderson's accounting summary eliminates about $1.75 million of Station Two scrubber sludge and ash pond dredgings disposal, storage, and maintenance costs actually incurred at the Green Landfill for the period 2015 through 2019. BREC asserts that Henderson made "its calculation by arbitrarily locking in the 2014/2015 low point of the landfill cost curve, instead of paying the actual cost for each year over the five year period in question."[64] BREC contends that Henderson cannot

[61] *Id.*

[62] *Id.* at 56–57.

[63] *Id.*

[64] BREC's Reply Brief at 13.

"cherry pick" the costs it will pay by excluding the cost of the vertical wall expansion and asserts that "but for" the accumulation of the City's Station Two waste and Henderson's stated expectation at the time that Station Two would continue to operate for many years the costs of the vertical wall expansion that Henderson now contests would not have been incurred.[65] BREC argues that it is therefore reasonable and consistent with the principles of cost causation for Henderson to pay its share of those costs.

BREC also claims that Henderson is not able to simply disclaim responsibility for the Station Two ash pond dredgings once they are placed in the Green Landfill. BREC noted that the 1993 Amendments to the Station Two Contracts expanded the definition of Station Two joint-use facilities to include the Station Two ash pond, as well as Station Two ash pond dredgings stored in the Green Landfill, and addressed operating and maintenance costs of the Station Two scrubber, including scrubber sludge "stackout," "disposal," and "storage" in the Green Landfill. BREC asserts that pursuant to the 1993 Amendments BREC is required to pay those costs in proportion to its use of the Station Two scrubber.[66] Further, BREC argues that it did not purchase or take ownership of Henderson's share of the scrubber waste or ash pond dredgings and that BREC continues to incur costs for the dredgings for which Henderson is, in part, responsible pursuant to the 1993 Amendments to Station Two Contracts.

Having reviewed the record and being otherwise sufficiently advised, the Commission finds that Henderson is responsible for the historical O&M costs through at least FY 2018/2019. The Commission finds that those costs were calculated consistent

[65] *Id.*

[66] *Id.*

with the Station Two Contracts including the 1993 Amendments thereto and that the costs for the vertical wall expansion were reasonable. There is really no dispute that at the time the vertical wall expansion was conceived that both parties intended to continue operating Station Two for many years and that the vertical wall expansion was necessary to ensure that the Green Landfill had the capacity to store existing waste from Station Two and to continue to accept additional waste from Station Two. Moreover, as noted by BREC, Henderson sought to have BREC continue operating Station Two even when it became uneconomic such that it only recently became clear that the parties would cease generating power at Station Two. Finally, there is no evidence that the cost of the vertical wall expansion was unreasonable. Thus, the Commission finds the costs of the vertical wall expansion were prudent, that BREC properly calculated Henderson's share of those costs through FY 2018/2019, except with respect to the capacity allocation in FY 2018/2019 as discussed above, and that Henderson should be responsible for its share of those costs through FY 2018/2019.

The Commission also agrees with BREC that Henderson should be responsible for ongoing O&M at Green Landfill in any year following FY 2018/2019 despite the closure of Station Two. While the joint use facility at issue with respect to the Green Landfill is the ash pond dredgings themselves not the Green Landfill, the 1993 Amendment, which more specifically relates to the dredgings that the cost provisions in the original contract, clearly contemplated that the parties would be responsible for their share of ongoing storage costs of the Stations Two dredgings, regardless of whether a generation facility was being operated with respect to the facility. Further, as discussed below with respect to decommissioning costs, once Green Landfill stops serving a generating unit operated

by BREC, then Henderson will be required to pay its share of the decommissioning costs for Green Landfill as discussed below.

Decommissioning Costs

BREC and Henderson do not disagree that the Station Two Contracts require them to share in the cost of "decommissioning." There is no dispute that Section 8 of the 1993 Amendments to the Station Two Contracts state that the "parties shall bear decommissioning costs of Station Two in the proportions in which they shared capacity costs during the life of Station Two." Rather, the parties dispute the meaning of the term "decommissioning," as used in the contract, and therefore, what costs must be shared in the proportions in which they shared capacity costs during the life of Station Two.

BREC generally argues that in order to "decommission" Station Two and joint use facilities, the facilities would have to be demolished, remediated, and restored to a state suitable for future industrial use and that the decommissioning process would also include all ongoing maintenance, environmental monitoring, and environmental remediation that may be required in the future.[67] Henderson argues that the Station Two generating facility was decommissioned when it was retired and removed from service in April 2019. Notably, Henderson does not dispute that it would be responsible for decommissioning costs at joint-use facilities when those facilities are removed from service but argues that the allocation of such decommissioning costs should be determined by the time-weighted capacity of the units supported by the facility as opposed to an allocation based solely on the shared capacity at Station Two.

[67] BREC's Brief at 24–25; *see also* Application at 13–14.

The review of the meaning of a contract should begin with an examination of the plain language of the document. In the absence of ambiguity, the language of a contract should be assigned "its ordinary meaning and without resort to extrinsic evidence."[68] However, when words in a contract "are used as technical terms in a transaction entered into by parties knowledgeable in a technical field then the technical meanings of such words are the meanings to be ascribed to those words."[69] Further, a "[c]ontract is ambiguous if a reasonable person would find it susceptible to different or inconsistent interpretations."[70]

Here, the Commission finds that BREC interpretation of the term "decommissioning" is consistent with the ordinary meaning of the term in the context of the decommissioning of a power plant and related facilities. As noted by BREC in its brief and in response to requests for information, decommissioning is ordinarily used to refer to the broad range of activities referred to in BREC's definition. For instance, the Commission used to the term "decommission" to refer to the activities surrounding the closure of Kentucky Power Company's Big Sandy Plant in Case No. 2017-00179,[71] which BREC noted included "demolition of boiler and turbine infrastructure . . . with environmental remediation being performed;" asset retirement obligations such as the "fly

[68] *Wehr Constructors, Inc. v. Assurance Company of America*, 384 S.W.3d 680, 687 (Ky. 2012) *quoting Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 106 (Ky. 2003).

[69] *Cook United, Inc. v. Waits*, 512 S.W.2d 493, 495 (Ky. 1974).

[70] *Hammond v. Commonwealth*, 569 S.W.3d 404, 410 (Ky. 2019).

[71] Case No. 2017-00179, *Electronic Application of Kentucky Power Company for (1) A General Adjustment of Its Rates for Electric Service; (2) An Order Approving Its 2017 Environmental Compliance Plan; (3) An Order Approving Its Tariffs and Riders; (4) An Order Approving Accounting Practices to Establish Regulatory Assets and Liabilities; And (5) An Order Granting All Other Required Approvals and Relief* (Ky. PSC Jan. 18, 2018).

ash pond closure" and the removal of asbestos; "the demolition of out buildings, turbine, and main boiler building;" "Removal of remaining coal related equipment;" "Big Sandy Fly Ash Reservoir Closure;" "Begin to excavate, haul, and place ash. Place borrow pit materials as subgrade fill. Installation of Geosynthetics;" and "Maintain Safe Plant Environment as well as environmental compliance."[72] Similarly, as noted by BREC, Louisville Gas and Electric Company (LG&E) recently completed the decommissioning of its Paddy's Run and Cane Run coal-fired generating stations, which included both coal-fired stations being dismantled, environmentally remediated, and then demolished;[73] and ultimately returned to green space.[74] Additionally, East Kentucky Power Cooperative, Inc. (EKPC) described the decommissioning process at EKPC's Dale Station in its 2018 Annual Report as "include[ing] demolition, removal of environmentally regulated materials such as asbestos, and conversion of the plant to a brownfield site."[75]

Along the same lines, BREC notes that in Case No. 2017-00321, the Commission approve Duke Energy Kentucky, Inc.'s (Duke Kentucky) depreciation rates which included costs of decommissioning all of Duke Kentucky's power plants, which included "dismantling, demolishing and restoring the sites to a condition suitable for future industrial use."[76]

[72] BREC's Reply Brief at 2–3.

[73] *Id.* at 3.

[74] *Id.* at 3.

[75] *Id.* at 3–4.

[76] *Id.* at 4.

Finally, BREC explains that the term decommissioning is consistent with guidance provided by United States Environmental Protection Agency (EPA). Specifically, BREC referenced a 2016 Report titled "Coal Plant Decommissioning," in which the EPA noted that decommissioning "begins with an announcement that the plant is closing and ends when operations completely cease. Unlike nuclear plant decommissioning which the federal government strictly regulates, the process of decommissioning a coal-fired power plant is not always clear and may overlap with remediation and redevelopment."[77]

The EPA further noted:

> During decommissioning, the electrical generating units are shut down and all operating permits are terminated. Any unused coal and hazardous materials associated with both the generation process and the buildings/structures (e.g., process chemicals, asbestos in the building or in equipment, polychlorinated biphenyls [PCBs], lead) are removed. Electrical generating equipment is cleaned and may be removed for use at other locations or sold as scrap. Some demolition of buildings/structures may be performed to facilitate cleaning or equipment removal. Power plants with onsite coal ash ponds or solid waste landfills must follow the federal and state permit requirements for closure of these facilities.[78]

BREC further clarifies that its understanding of the decommissioning process is consistent with the Electric Power Research Institute's use of the term in a 2010 Report, entitled "Decommissioning Process for Fossil-Fueled Power Plants." According to the 2010 Report, "the term 'decommissioning' is intended to mean the process for removing from a plant site structures, infrastructures, impacts, and other encumbrances that may be present on a property. This includes environmental abatement and decontamination

[77] *Id.* at 4–5.

[78] *Id.* at 5.

within super structures; demolition of structures, foundations, utilities, and other subsurface structures, remediation of impacts to the surface and subsurface, and reclamation of the property depending on the designated end use."[79]

Based on the explanation and examples provided above, the Commission finds that Henderson's contentions regarding the meaning of decommissioning costs in the Station Two Contracts to be unpersuasive. BREC's interpretation of the decommissioning process is consistent with previous Commission determinations and the use of the term by utilities and persons in the utility field who work in connection with electric generation, and federal guidelines. Thus, with a couple of exceptions discussed below, the Commission finds that BREC's interpretation of "decommissioning" in the Station Two Contracts is consistent with the language of the contract and, therefore, that the term should be interpreted to include "the entire process associated with taking the plant out of service, demolishing the plant, and restoring the site to a state that is suitable for future industrial use;"[80] "ongoing environmental monitoring and any environmental remediation that may be required in the future"[81] and all maintenance activities necessary to maintain the plant and the site in a safe, secure and legally compliant condition before demolition.[82]

However, the Commission also finds that the term "decommission" would not include all maintenance activities necessary to maintain the plant and the site in a safe, secure and legally compliant condition after the facility is demolished and returned to a

[79] *Id.* at 5–6.

[80] *Id.* at 1.

[81] *Id.* at 1.

[82] *Id.* at 2–3.

green space or a condition for future industrial work, because such a finding would be too broad, though the Commission does agrees that all monitoring and remediation mandated due to the operation of a generation facility would fall within the meaning of decommissioning. The Commission also agrees with Henderson's contention that decommissioning of joint use facilities, where applicable, should be determined by the time-weighted capacity of the units supported by the facility as opposed to an allocation based solely on the shared capacity at Station Two, as that is the most reasonable method of cost allocation and is consistent with the intent of the Station Two Contracts. Further, because the decommission costs are constantly in flux as decommissioning is ongoing, the Commission declines to find that there is a specific amount owed for decommissioning costs at this time. Rather, the Commission only finds that BREC and Henderson are responsible for decommissioning costs as described above.

Excess Henderson Energy

BREC states that excess Henderson energy (EHE) represents the hourly difference between the amount of capacity that Henderson reserved through the Power Sales Contract and the amount of capacity needed by Henderson to serve its native load and for sale to third parties. BREC correctly observes that in Case No. 2016-00278 the Commission interpreted the 1998 Amendments to the Power Sales Contract as defining EHE as:

> [E]nergy that is not taken or scheduled by Henderson within its reserved capacity. In other words, Excess Henderson Energy is the difference between Henderson's reserved capacity under the Power Sales Contract, or 115 MW as of 2016, and the amount of capacity needed by Henderson to

> serve its native load and for sale by Henderson to third-parties.[83]

BREC notes that the Commission found in that case that BREC is not responsible for variable costs incurred to produce EHE that BREC declines to take. BREC asserts that it applied the Commission's interpretation of the 1998 Amendments to the Power Sales Contract when it calculated the amounts owed or credited for the EHE pursuant to that contract in its interim accounting summary (as indicated above, the amount was ultimately a credit).[84]

Henderson raises a number of objections to BREC's calculation of EHE in the Interim Accounting Statement. First, Henderson indicated that it still disputes the Commission's interpretation of the 1998 Amendments to the Power Sales Contract and that its appeal is pending before the Franklin Circuit Court. Second, Henderson contends that the calculation of the credit for EHE should be the net of certain costs and revenues from June 2016 as opposed to the net of the costs and revenues from January 5, 2018 forward. By including the costs and revenues from that period, Henderson determined that BREC owed it $1,233,583.77 for EHE from June 2016 through January 2019.[85] Notably that number is actually lower than the number calculated by BREC that it owed Henderson a principal amount of $3,310,482.54 for EHE from January 5, 2019, but the lower number appears to arise from BRECs inclusion of any coal and lime short falls within the cost of EHE regardless of whether or not they were attributable to the generation of EHE or Henderson's native load, such that the inclusion of the costs and

[83] BREC's Brief at 62.

[84] BREC's Brief at 63.

[85] Moll's Testimony at 4–6, Exhibit Moll-2.

revenue from June 2016 would result in a net increase in the amount owed to Henderson for EHE.[86]

BREC argues that the calculation of EHE costs and revenues begins on January 5, 2018 pursuant to the terms of the December 15, 2017 Settlement Agreement and Release between BREC and Henderson that resolved all of Henderson's claims relating to EHE prior to January 5, 2018. Henderson responds that the settlement only pertained to "wanted" EHE whereas the EHE at issue in this matter pertains to "unwanted" Henderson energy, which includes the EHE from June 2016 forward, which was not addressed in the settlement.

Having reviewed the record and being otherwise sufficiently advised, the Commission finds that the December 15, 2017 Settlement Agreement and Release addressed any claims with respect to the EHE prior to January 5, 2018.[87] The Commission further finds that BREC appropriately calculated the net of the EHE costs and revenues from January 5, 2018 forward, and the coal and lime shortfalls.

Interest

BREC has indicated that it is owed interest in this matter though it did not include it in its Interim Accounting Summary filed with the application. The only provision of the

[86] BREC's accounting summary indicated that it owed Henderson $3,310,482.54 for the net of the revenues and variable costs of the EHE and that Henderson owed it $4,693,587.29 arising from a shortfall in coal and lime for native load generation. Based on the net of those numbers, Henderson would owe BREC $1,383,104.75. *See* Application, Exhibit 1. When it calculated its accounting summary, Henderson did not include either of those line items among the net of the amounts owed to or from BREC. Rather, BREC included the coal and lime shortfalls in the net of the expenses and revenue from the EHE and determined that BREC owed it $1,233,583.77. *See* Moll Testimony, Exhibit Moll-2.

[87] To the extent the agreement sought to determine matters with the Commission's exclusive jurisdiction, there may be questions regarding its validity. However, the Commission understands that agreement sought to resolve complicated issues regarding the amounts owed under the Station Two Contracts. It appears that the agreement was negotiated in could faith, and to the extent it resolved questions within the Commission's exclusive jurisdiction, the Commission believes that the resolution was reasonable and should not be disturbed.

Station Two Contracts that explicitly mentions interest is Section 16.3 of the Power Plant Construction and Operation Agreement, which states:

> If any such payment or portion thereof is not paid when due as herein provided, a penalty in the amount of one per cent (1 %) of the unpaid amount may, at the option of Big Rivers, be added thereto at the commencement of each thirty (30) day period thereafter, and due and payable therewith. Provided however that in the case of a bona fide dispute as to the amount of any such monthly payment, then the delayed payment charge will be applicable only to that unpaid portion thereof which is not reasonably in dispute.[88]

The Commission finds that interest charges would not be appropriate for any past due amounts owed prior to the issuance of an order in this matter, given the complexity of the disputes involved, and declines to address when potential future interest charges would be appropriate at this time.

Continued Use of Joint Use Facilities

In its application, BREC requested a finding from the Commission that it is entitled to continue using city owned joint use facilities as required by Section 1.5 of the Joint Facilities Agreement, and BREC contends that its continued use of such facilities is necessary on order to continue operation at BREC's Green generating units.[89] The Commission observes that Henderson acknowledged in this matter that BREC is entitled to continue using such joint use facilities.[90] Further, the plain language of the Joint Facilities Agreement, as amended, clearly contemplates that either party is permitted to

[88] Direct Testimony of Paul G. Smith at 18.
[89] Application at 5.

[90] Henderson's Brief at 59.

continue using the joint use facilities owned by the other so long as the party are operating a generation facility in connection therewith, regardless of whether the other party is involved with the generation facility. Thus, the Commission finds that BREC is entitled to continue using joint use facilities provided that it continues to operate a generation facility in connection therewith pursuant to the contract.

IT IS THEREFORE ORDERED that:

1. BREC's request for an order finding that it correctly performed the calculations contained in the "Interim Accounting Summary" attached to the application, or as updated as of December 31, 2019, is denied.

2. The Commission does find that BREC's Interim Accounting Summary, as updated for costs through December 31, 2019, accurately calculated the amounts due to BREC or Henderson pursuant to the Station Two Contracts, except as follows:

a. Any operating and maintenance or other costs in FY 2018/2019, subject to allocation based on Henderson's capacity reservation, shall be allocated based on a reservation of 120 MW, as opposed to the 125 MW proposed by BREC, which results in a reduction in the amount owed to BREC of $227,045 as indicated above;

b. Henderson is not required to pay $143,400 of the severance costs included in the Interim Accounting Summary due to the difference in the actual and projected costs; and

c. Henderson is required, pursuant to the Station Two Contracts, to share in the costs of decommissioning Station Two and joint-use facilities as discussed above, but the Commission currently declines to make a specific finding regarding the

amounts owed, including whether the amount in the Interim Accounting Summary is accurate, for the reasons discussed above.

3. Henderson is contractually obligated to allow BREC to continue utilizing city-owned joint-use facilities, subject to the terms and conditions of the Station Two Contracts.

4. This case is closed and removed from the Commission's docket.

By the Commission

Vice Chairman Kent A Chandler did not participate in the deliberations or decision concerning in this case.

ENTERED
AUG 02 2021
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