

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AN ELECTRONIC EXAMINATION OF THE	)	
APPLICATION OF THE FUEL ADJUSTMENT	)	CASE NO.
CLAUSE OF BIG RIVERS ELECTRIC	)	2024-00149
CORPORATION FROM MAY 1, 2023 THROUGH	)	
OCTOBER 31, 2023	)	

ORDER

Pursuant to 807 KAR 5:056, the Commission established this case on August 2, 2024, to review and evaluate the operation of the Fuel Adjustment Clause (FAC) of Big Rivers Electric Corporation (BREC) for the six months that ended on October 31, 2023.<sup>1</sup> As part of this review, BREC responded to four requests for information.<sup>2</sup> An informal conference was held on December 6, 2024, and a formal hearing was held on June 4, 2025. On June 19, 2025, BREC requested a decision on the existing record.<sup>3</sup> This case was opened contemporaneously with the review of BREC's operation of its FAC for the six months that began on November 1, 2022, and ended on April 30, 2023.<sup>4</sup> There is an issue, discussed below, that is common across the review periods. During

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<sup>1</sup> Opening Order (Ky. PSC Aug. 2, 2024).

<sup>2</sup> BREC's Response to Commission Staff's First Request for Information (Staff's First Request) (filed Aug. 26, 2024); BREC's Response to Commission Staff's Second Request for Information (Staff's Second Request) (filed Sept. 23, 2024); BREC's Response to Commission Staff's Third Request for Information (Staff's Third Request) (filed Feb. 28, 2025) and BREC's Response to Commission Staff's Fourth Request for Information (Staff's Fourth Request) (filed Sept. 12, 2025).

<sup>3</sup> BREC's Request for a Decision on the Existing Record (filed June 19, 2025).

<sup>4</sup> Case No. 2024-00141, *An Electronic Examination of the Application of the Fuel Adjustment Clause of Big Rivers Electric Corporation from November 1, 2022 Through April 30, 2023* (Ky. PSC Aug. 2, 2024).

the review of this case and Case No. 2024-00141,<sup>5</sup> discovery responses to the same questions were filed in both cases, and in some instances, in the record of one or the other case. For the sake of administrative efficiency, the Commission finds that the record of Case No. 2024-00141 should be incorporated by reference into this proceeding.

### ISSUES

During this proceeding, it became apparent that when calculating its FAC, BREC excluded the sales to one industrial customer but included the fuel and purchased power costs to serve that industrial customer in the FAC calculation, indicating a possible higher FAC factor than should be calculated. After this case was initiated, the Federal Energy Regulatory Commission (FERC) approved a settlement agreement on September 5, 2024,<sup>6</sup> with BREC concerning outages at BREC's Green River Unit 2 that occurred during the review period.<sup>7</sup>

#### Exclusion of Sales to Nucor

Pursuant to discovery issued in this case, beginning on December 1, 2022, BREC ceased charging the FAC to a new industrial customer, later identified as Nucor Corporation (Nucor).<sup>8</sup> BREC asserted that it did not charge Nucor a FAC pursuant to a special contract, approved by the Commission, between Meade County Rural Electric

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<sup>5</sup> Case No. 2024-00141, *An Electronic Examination of the Application of the Fuel Adjustment Clause of Big Rivers Electric Corporation from November 1, 2022 Through April 30, 2023*.

<sup>6</sup> Commission Staff Exhibit 1 (FERC Order).

<sup>7</sup> BREC's Response to Staff's Second Request Item 9, page 2.

<sup>8</sup> BREC's Response to Staff's Third Request, Item 1, *passim*.

Cooperative Corporation (Meade County RECC), BREC, and Nucor.<sup>9</sup> This contract provided that, *inter alia*, sales to Nucor, during the current phase of the contract were not subject to “the FAC or other riders.”<sup>10</sup> This exclusion was offered as an incentive for Nucor to locate within Meade County RECC’s territory.<sup>11</sup> Nucor ultimately located its new steel mill in Meade County RECC’s service territory. While the special contract excluded Nucor from the FAC, it did not contain provisions directing BREC to include the fuel and purchased power costs accrued to serve Nucor in the FAC applicable to BREC’s remaining customers.

BREC, when calculating the FAC, would include energy consumed by Nucor in the “Non-Tariff Market Rate Sales to Members” on page 3 of BREC’s monthly FAC Form A filings.<sup>12</sup> “Non-Tariff Market Rate Sales to Members” was then excluded from the “Total Sales” used to calculate the monthly FAC factor.<sup>13</sup> BREC asserted that because of the special contract with Nucor, “[d]uring the current phase of the contract, the FAC does not apply to energy sales to Nucor. As such, these energy sales to Nucor are not included in the Total Sales volume used in the FAC calculation.”<sup>14</sup> BREC admitted,

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<sup>9</sup> BREC’s Response to Staff’s Third Request, Item 1, page 4. See also Case No. 2019-00365, *Electronic Joint Application of Big Rivers Electric Corporation and Meade County Rural Electric Cooperative Corporation for (1) Approval of Contracts for Electric Service with Nucor Corporation; and (2) Approval of Tariff* (Ky. PSC Aug. 17, 2020).

<sup>10</sup> BREC’s Response to Staff’s Third Request, Item 1, page 4

<sup>11</sup> BREC’s Response to Staff’s Third Request, Item 1, page 1.

<sup>12</sup> BREC’s Generator FAC form A filings are located on the Kentucky Public Service Commission’s website at <https://psc.ky.gov/Home/Library?type=FAC>.

<sup>13</sup> BREC’s Response to Staff’s Third Request, Item 1, page 1. See also Hearing Video Transcript (HVT) of the June 4, 2025 Hearing, Testimony of Katherine Cheatham (Cheatham Testimony) at 10:02:07.

<sup>14</sup> BREC’s Response to Staff’s Third Request, Item 1, page 4.

however, that if it had included the sales to Nucor in the FAC, “[t]otal Sales volume would be higher, and the \$/kWh FAC charge that retail customers pay would be less.”<sup>15</sup>

BREC, at the hearing, described that sales to members that received market, but not tariffed rates, are included in “Non-Tariff Market Rate Sales to Members.”<sup>16</sup> This occurs when BREC purchases power at a wholesale market price for an individual customer and charges the customer for the purchased power.<sup>17</sup> Nucor, however, under the retail service agreement does not pay wholesale power prices, rather, it pays a fixed price for power.<sup>18</sup> In excluding the Nucor sales from the FAC, BREC treated the sales to Nucor as BREC treats sales to other wholesale customers, which are listed on BREC’s Form A monthly FAC filings as “Non-Tariff Market Rates Sales to Members.”<sup>19</sup> BREC acquires power on the wholesale market for these customers and, except for Nucor, passes those costs on directly to the customers.<sup>20</sup> BREC does not incur fuel costs for serving customers that receive non-tariff market rates. BREC does incur fuel costs for sales to Nucor, which are included in the monthly Form A, however, sales to Nucor were excluded in the FAC Form A.

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<sup>15</sup> BREC’s Response to Staff’s Third Request, Item 1, page 4.

<sup>16</sup> The fuel and power costs of Non-Tariff Market Rate Members are not included in the FAC factor calculation. HVT of the June 4, 2025 Hearing, Cheatham Testimony at 09:48:10.

<sup>17</sup> HVT of the June 4, 2025 Hearing, Cheatham Testimony at 10:03:50.

<sup>18</sup> HVT of the June 4, 2025 Hearing, Cheatham Testimony at 10:04:02 and Testimony of Donald Gulley (Gulley Testimony) at 10:05:19.

<sup>19</sup> HVT of the June 4, 2025 Hearing, Cheatham Testimony at 10:02:27.

<sup>20</sup> HVT of the June 4, 2025 Hearing, Testimony of Christopher Warren (Warren Testimony) at 09:46:33.

BREC stated that it first discovered the retail service agreement may lead to an under recovery of costs when BREC was modeling its 2023 budget.<sup>21</sup> A base rate was considered as one option to recover the Nucor costs.<sup>22</sup> After discussions at the highest level of the company, the decision was made to recover the costs through the FAC because Nucor was a member of Meade County RECC, unlike other fixed contract customers.<sup>23</sup>

In response to Staff's Fourth Request, BREC stated that, if the Commission ordered BREC to refund any over collection due to the exclusion of the Nucor sales, BREC would request that the refund be amortized over 36 months, or the amount of time over which the sales were excluded from the FAC factor calculation.<sup>24</sup> BREC also stated that the refund and inclusion of sales to Nucor in the FAC calculation would trigger an emergency rate case because BREC's Times Interest Earned Ratio (TIER) and Margin for Interest Ratio (MFIR) would fall below the required 1.10 required by its debt covenants.<sup>25</sup>

BREC asserted that the contract was critical to have Nucor locate in BREC's territory and that the resulting increased sales have been a net positive to BREC, BREC's retail customers, and the territory in general.<sup>26</sup> Nucor's load replaced the lost load from two smelters, whom stopped purchasing power from BREC and purchased

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<sup>21</sup> HVT of the June 4, 2025 Hearing, Warren Testimony at 10:06:00.

<sup>22</sup> HVT of the June 4, 2025 Hearing, Warren Testimony at 10:09:20.

<sup>23</sup> HVT of the June 4, 2025 Hearing, Warren Testimony at 10:09:34.

<sup>24</sup> BREC's Response to Staff's Fourth Request, Item 3, page 1.

<sup>25</sup> BREC's Response to Staff's Fourth Request, Item 3, page 1.

<sup>26</sup> BREC's Response to Staff's Fourth Request, Item 4, page 2.

from the wholesale market.<sup>27</sup> BREC also returned to investor-grade credit ratings for its debt instruments.

BREC asserted that this increased load has benefited its customers.<sup>28</sup> BREC's margins in excess of those needed to meet its 1.30 TIER requirement have been returned to its customers through 40 percent of the excess amount being passed on to its retail customers through the Member Rate Stability Mechanism (MRSM) credit,<sup>29</sup> and the remaining 60 percent of the excess amount being used to reduce BREC's regulatory asset balances.<sup>30</sup>

BREC argued that, because Nucor sales are excluded from the calculation of the MRSM, the MRSM credit has been higher for BREC's retail customers and the regulatory asset balance is lower than either otherwise would have been.<sup>31</sup> BREC stated that if it is not permitted to recover the full amount of Nucor costs, it would have to reduce the MRSM credit to its customers and decrease MRSM credits in the future as well as reduce the balance of the regulatory assets.<sup>32</sup>

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<sup>27</sup> See, e.g., Case No. 2014-00370, *Joint Application of Kenergy Corp. and Big Rivers Electric Corporation for Approval of Contracts* (KY PSC Nov. 25, 2014).

<sup>28</sup> BREC's Response to Staff's Fourth Request, Item 3.

<sup>29</sup> BREC's Response to Staff's Fourth Request, Item 3, page 2-3. The TIER Credit returns net margins above a 1.30 TIER each year to the benefit of our Members. Sixty percent of the TIER Credit is used as a reduction of the Smelter Loss Mitigation regulatory assets that are recoverable from our Member-Owners (which were a result of the changes at BREC from losing the two large, concentrated smelter loads in 2013 and 2014). Forty percent of the TIER Credit is returned to BREC's Member-Owners as a direct bill credit through the MRSM. Sixty percent of the TIER Credit accelerates the reduction of the regulatory assets.

<sup>30</sup> BREC's Response to Staff's Fourth Request, Item 3, page 2-3.

<sup>31</sup> BREC's Response to Staff's Fourth Request, Item 4, page 2.

<sup>32</sup> BREC's Response to Staff's Fourth Request, Item 3, page 2.

BREC argued that neither the FAC regulation nor BREC's FAC tariff allows for the exclusion of reasonably incurred fuel and power costs from the calculation of the FAC. BREC also argued that it believes it is reasonable to recover through the FAC all reasonable power costs incurred to serve its members.<sup>33</sup> BREC alleged that if it does not recover the costs to serve Nucor through the FAC, then BREC would need a base rate increase to recover those costs.<sup>34</sup>

BREC, however, acknowledged that the question of how to handle the Nucor sales in the calculation of the FAC was not contemplated at the time the contract was approved by the Commission.<sup>35</sup> BREC claimed that if it could not recover Nucor's costs, or exclude Nucor's sales from the FAC, it would cause significant and immediate financial harm.<sup>36</sup> The FAC allows for timely recovery of fuel procurement costs and BREC claimed that if it were to utilize other methods of recovery (e.g. the non-FAC Power Purchase Agreement (PPA) tariff), the recovery would be delayed, resulting in impacts to cash flow, causing a negative impact on financial ratings and an inability to satisfy debt covenants, requiring an emergency rate case.<sup>37</sup>

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<sup>33</sup> BREC's Response to Staff's Third Request, Item 1, page 7.

<sup>34</sup> BREC's Response to Staff's Third Request, Item 1, page 12. See *also* HVT of the June 4, 2025 Hearing, Gulley Testimony at 10:15:35.

<sup>35</sup> BREC's Response to Staff's Third Request, Item 1, page 11. See *also* HVT of the June 4, 2025 Hearing, Gulley Testimony at 09:30:27.

<sup>36</sup> BREC's Response to Staff's Third Request, Item 1, page 12.

<sup>37</sup> BREC's Response to Staff's Third Request, Item 1, page 12. See *also* HVT of the June 4, 2025 Hearing, Gulley Testimony at 10:47:02.

Commission Staff, during pre-hearing discovery, requested that BREC provide alternatives to BREC's current calculation of the FAC. BREC provided the following four alternatives.

1. Continue Calculating the FAC as it is but provide a monthly report of the portion attributable to NUCOR to each RECC, BREC's Board, and the Commission

BREC asserted that this is the least disruptive option and ensures that any excess margins are still returned to retail members through the MRSM.<sup>38</sup> BREC's member cooperatives have filed a statement in support of this proposal.<sup>39</sup>

2. Add NUCOR's FAC costs to the Non-FAC PPA tariff rider each month.

This rider, to recover fuel and power costs not recovered through the FAC, is adjusted annually. BREC asserted that because Nucor's load has been volatile, this option creates potential for over and under recoveries that would impact BREC's cash flows.<sup>40</sup>

3. Revise the MRSM or file a new tariff rider for the NUCOR charges that would appear on the monthly bill.

BREC claimed this is the least favorable as it would add an additional billing line-item and cause additional expenses to the cooperative member-owners because it would compel them to have to reprogram their billing programs. BREC also claimed that it will cause confusion for cooperative customers.<sup>41</sup>

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<sup>38</sup> BREC's Response to Staff's Third Request, Item 1, page 13.

<sup>39</sup> BREC's Response to Staff's Third Request, Item 1, page 13. See *also* HVT of the June 4, 2025 Hearing, Gulley Testimony at 10:45:48.

<sup>40</sup> BREC's Response to Staff's Third Request, Item 1, page 13-14. See *also* HVT of the June 4, 2025 Hearing, Gulley Testimony at 10:47:02.

<sup>41</sup> BREC's Response to Staff's Third Request, Item 1, page 14-15.

4. File an emergency base rate case.

Besides the costs to file a rate case, BREC pointed out that the rates would not adjust once Nucor began paying the FAC.<sup>42</sup>

BREC argued that using the MRSM or other rider, or a base rate increase, will cause complicating factors, including additional time and expense for BREC and its RECC members. BREC requests that should the Commission require BREC to recover charges through a mechanism other than the FAC, the Commission allow BREC to continue recovering the costs through the FAC until the new method is implemented.<sup>43</sup>

BREC recalculated its FAC from November 2022 until July 2025 and determined that \$27,093,443 was over collected due to the exclusion of the sales to Nucor.<sup>44</sup> BREC, however, averred that its member-owner cooperatives benefited through the TIER Credit approved in modifications to the MRSM.<sup>45</sup> BREC claimed that the over-collection of the FAC was offset by the TIER Credit benefit on a dollar-by-dollar basis in the form of (1) direct credit to customers; and (2) advanced retirement of a regulatory asset.<sup>46</sup>

BREC provided quantitative data showing the benefits that the member-owner cooperatives have received from the TIER Credit and the early regulatory asset retirement through the MRSM. Since 2020 the MRSM has returned \$137,062,728 to member-owner cooperatives.<sup>47</sup> BREC stated that since the TIER Credit was

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<sup>42</sup> BREC's Response to Staff's Third Request, Item 1, page 14.

<sup>43</sup> BREC's Response to n Staff's Third Request, Item 1, page 13-15.

<sup>44</sup> BREC's Response to Staff's Fourth Request, Item 1, page 2.

<sup>45</sup> BREC's Response to Staff's Fourth Request, Item 1, page 2.

<sup>46</sup> BREC's Response to Staff's Fourth Request, Item 3, page 2.

<sup>47</sup> BREC's Response to Staff's Fourth Request, Item 4, page 1-2.

implemented in 2020, net margins greater than a 1.30 TIER were returned to BREC's member-owner cooperatives in the amounts of \$33.3 million, \$44.5 million, \$29.3 million, \$25.9 million and \$7.0 million for 2020 through 2024, respectively.<sup>48</sup> Nucor does not receive the TIER Credit.<sup>49</sup>

BREC listed other benefits of Nucor's opening. BREC stated that Nucor's decision to locate in its territory increased BREC's credit-rating with ratings agencies,<sup>50</sup> which decreased annual borrowing costs by \$225,000.<sup>51</sup> BREC also stated that Nucor's load increased BREC's margins by \$17.8 million dollars since 2022, which was returned for a dollar-for dollar amount to Member-Owners through the TIER credit.<sup>52</sup> BREC also listed several other benefits including increased tax revenue and jobs in the area. BREC stated that if it cannot recover the additional costs to serve Nucor, it will not attain the 1.10 TIER and MFIR necessary to meet its loan covenants.<sup>53</sup> To avoid an emergency base rate case, BREC proposed a new billing line-item in the form of a rider to recover these costs.<sup>54</sup>

The new rider would be filed in tandem each month with the FAC rider filing. When compared with BREC's current methodology for calculating the FAC, the FAC would decrease in an amount equal to the amount that would flow through the rider,

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<sup>48</sup> BREC's Response to Staff's Fourth Request, Item 3, page 3.

<sup>49</sup> BREC's Response to Staff's Fourth Request, Item 3, page 3.

<sup>50</sup> BREC's Response to Staff's Third Request, Item 1, pages 5-6.

<sup>51</sup> BREC's Response to Staff's Fourth Request, Item 4, page 4.

<sup>52</sup> BREC's Response to Staff's Fourth Request, Item 4, pages 2-3.

<sup>53</sup> BREC's Response to Staff's Fourth Request, Item 5, page 1.

<sup>54</sup> BREC's Response to Staff's Fourth Request, Item 5, page 1.

which would be labeled the “Interim Energy Adjustment” tariff. BREC stated that this would not affect its new margins.<sup>55</sup>

Compared to the options presented in previous discovery, BREC asserted that the rider would be the lowest cost option and use fewer administrative resources.<sup>56</sup> BREC stated that upon an order from the Commission that directs BREC to include the sales to Nucor in the calculation, BREC and the Member-Cooperatives would file the new rider tariff and flow through tariffs for Commission approval.<sup>57</sup>

#### Generation and reporting obligations to MISO

The second significant issue regarding BREC’s FAC for the review period concerned alleged violations of FERC’s Anti-Manipulation Rule. The allegations concerned two separate incidents for BREC’s Green 2 generation unit. The first incident occurred between April 15, 2023, to July 6, 2023.

As a member of the Midcontinent Independent System Operator, Inc. (MISO), BREC participates in MISO’s Day Ahead and Real Time Market.<sup>58</sup> BREC also participates in MISO’s capacity market.<sup>59</sup>

BREC offered its Green 2 generation unit into the capacity auction for the 2023 summer season and its offer cleared. BREC then had to enter Green 2 generation unit into the Day Ahead and Real Time Market.<sup>60</sup> MISO’s rule, *inter alia*, includes Capacity

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<sup>55</sup> BREC’s Response to Staff’s Fourth Request, Item 5, pages 1-2.

<sup>56</sup> BREC’s Response to Staff’s Fourth Request, Item 5, page 2.

<sup>57</sup> BREC’s Response to Staff’s Fourth Request, Item 5, pages 2-3.

<sup>58</sup> FERC Order, paragraph 4.

<sup>59</sup> FERC Order, paragraph 5.

<sup>60</sup> FERC Order, paragraph 6.

Replacement Non-Compliance Charges (CRNCC) which impose penalties if a generating unit is not available during a capacity season. The rule limited Green 2 generation unit to an outage of no longer than 31 days during the summer capacity season, which started on June 1, 2023.<sup>61</sup> BREC placed Green 2 generation unit on a maintenance outage beginning on April 15, 2023, and continuing through May 30, 2023. BREC extended the outage though June 29, 2023. The 31-day outage allowance ran through July 1, 2023.<sup>62</sup>

According to the FERC report, in late June 2023, BREC realized that the 31-day planned outage would soon expire and if the outage extended past July 1, 2023, BREC, because it had not acquired replacement capacity, could be subject to CRNCC penalties exceeding \$50,000.<sup>63</sup> In order to avoid the penalties, on June 28, 2023, BREC's former Vice-President of Energy Services suggested to his colleagues to switch Green 2 generation unit's status to "Forced Outage."<sup>64</sup> Consequently, BREC informed MISO that its Green 2 generation unit was in a forced outage.<sup>65</sup> On July 6, 2023, BREC informed MISO that the forced outage had ended.<sup>66</sup>

On July 5, 2023, one of the Green 2 generation unit's fan motors broke, was removed from the unit, was sent to a contractor for repair, and was reinstalled on July

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<sup>61</sup> FERC Order, paragraph 7.

<sup>62</sup> FERC Order, paragraph 8.

<sup>63</sup> FERC Order, paragraph 9.

<sup>64</sup> FERC Order, paragraph 9.

<sup>65</sup> FERC Order, paragraph 10.

<sup>66</sup> FERC Order, paragraph 12.

31, 2023.<sup>67</sup> From July 6, 2023, through July 25, 2023, BREC submitted its Green 2 generation unit into MISO's day ahead market on economic standby, which represented that the unit's capacity of 223 MW was fully available if dispatched by MISO.<sup>68</sup>

MISO, on July 25, 2023, gave the Green 2 generation unit a Day Ahead award for its full availability. On July 26, 2023, the Green 2 generation unit, without the fan, was only able to achieve an output of 105 MW, which was 118 MW short of the capacity that was supposed to be available. BREC then reported a derate of 118 MW until the fan was replaced on July 31, 2023.<sup>69</sup>

MISO requested information from BREC concerning the reporting of the forced outage and the derate.<sup>70</sup> Eventually MISO's Independent Market Monitor referred the matter to FERC, which initiated an investigation.<sup>71</sup>

FERC made initial determinations that BREC had violated FERC's Anti-Manipulation Rule<sup>72</sup> by: (1) falsely reporting to MISO that Green 2 generation unit's planned outage ended on June 29, 2023 and went into forced outage until July 6, 2023; (2) submitting the Green 2 generation unit at full availability from July 6, 2023, to July 25, 2023, when BREC knew or should have known the missing fan would cause performance issues; and (3) submitting false and misleading information to MISO's

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<sup>67</sup> FERC Order, paragraph 14.

<sup>68</sup> FERC Order, paragraph 15.

<sup>69</sup> FERC Order, paragraph 16.

<sup>70</sup> FERC Order, paragraphs 18-21.

<sup>71</sup> FERC Order, paragraph 22.

<sup>72</sup> 18 C.F.R. § 1c.2(a).

Independent Market Monitor.<sup>73</sup> BREC and FERC, however, resolved the investigation by settlement agreement, and BREC admitted no fault.<sup>74</sup>

As a result of the settlement, BREC paid a total of \$675,211 in penalties; a \$336,870 penalty to the federal government, and \$308,341 to MISO. BREC also agreed to provide MISO compliance training to its employees.<sup>75</sup>

BREC, in response to the opening order in this case, provided information regarding its generating units' outage during the review period. BREC categorized the outages from June 29, 2023, through July 5, 2023 as forced outages.<sup>76</sup> At the hearing BREC testified that, despite the FERC Order, it would not change the categorization of the outages to planned because BREC had admitted no fault in the FERC investigation.<sup>77</sup>

## DISCUSSION

### Exclusion of Sales to Nucor

BREC's FAC factor, since December 1, 2022, when Nucor began taking service under the retail service agreement, appears artificially higher than it otherwise would be. This stems from how the FAC is calculated. The FAC formula, set out in 808 KAR 5:056, Section 1(1) is:

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<sup>73</sup> FERC Order, paragraph 24.

<sup>74</sup> FERC Order, paragraphs 25-26.

<sup>75</sup> FERC Order, paragraphs 27-29.

<sup>76</sup> BREC's Response to Staff's First Request, Item 15 Attachment, page 3.

<sup>77</sup> HVT of the June 4, 2025 Hearing, Testimony of Jeffrey Brown (Brown Testimony) at 11:05:45.

$$\text{Adjustment Factor} = \frac{F(m)}{S(m)} - \frac{F(b)}{S(b)}$$

Where F(b) is the cost of fuel in the base period, F(m) is the cost of fuel in the current period, S(b) is sales in the base period, and S(m) is sales in the current period, all as established in subsections (2) through (6) of this section.

The focus for monthly FAC is the first equation, F(m)/S(m). This is the FAC factor that changes monthly. F(b)/S(b) is the FAC base amount set either in two-year reviews or in utility base rate cases. If F(m)/S(m) is greater than F(b)/S(b) then the FAC factor is a charge to the customer. If it is less, then the FAC factor is a credit to customers.

BREC, by excluding the sales to Nucor from S(m), but including the fuel and power costs for Nucor in F(m), calculated a higher FAC factor than if the fuel costs had been excluded, or if Nucor sales had been included. BREC's other customers are paying an inflated FAC factor, essentially subsidizing what Nucor would otherwise pay through the FAC (if it had been charged an FAC).

BREC testified at the hearing that, when entering the special contract with Nucor, it had not considered how it would handle accounting for the exclusion of the collection of surcharges for sales to BREC.<sup>78</sup> BREC further testified that it realized it would be an issue when BREC was preparing its annual financial planning documents for 2023, and that the exclusion of the FAC from sales to BREC would lead to BREC under collecting the cost to serve Nucor.<sup>79</sup> BREC, thus, determined that it should exclude sales to Nucor, but include the costs of serving Nucor in the FAC factor, to recover the full costs of serving Nucor.<sup>80</sup>

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<sup>78</sup> HVT of the June 4, 2025 Hearing, Gulley Testimony at 09:30:27

<sup>79</sup> HVT of the June 4, 2025 Hearing, Warren Testimony at 10:07:30.

<sup>80</sup> HVT of the June 4, 2025 Hearing, Warren Testimony at 10:09:34.

The FAC regulation, 807 KAR 5:056, unlike many of the Commission's other regulations, does not have a clause allowing for deviation from its provisions. The definition of sales in 807 KAR 5:056 does not support BREC's exclusion of Nucor sales from the FAC.

As discussed above, the monthly FAC factor is determined by the following equation.

$$\text{Adjustment Factor} = \frac{F(m)}{S(m)} - \frac{F(b)}{S(b)}$$

Where F(b) is the cost of fuel in the base period, F(m) is the cost of fuel in the current period, S(b) is sales in the base period, and S(m) is sales in the current period, all as established in subsections (2) through (6) of this section.

Commission regulation 807 KAR 5:056, Section 1(5) provides the following definition of sales.

(5) Sales (S) *shall be all KWH's sold*, excluding intersystem sales. Utility used energy shall not be excluded in the determination of sales (S). If, for any reason, billed system sales cannot be coordinated with fuel costs for the billing period, sales may be equated to:

- (a) Generation; plus
- (b) Purchases; plus
- (c) Interchange-in; less
- (d) Energy associated with pumped storage operations; less
- (e) Intersystem sales referred to in subsection (3)(d) of this section; less
- (f) Total system losses. (*Emphasis Added*)

There is no debate that BREC is selling power to Nucor, versus acquiring the power on the market and passing those costs directly onto the customer. Here, BREC is either generating or purchasing power to serve its native load, and Nucor is part of BREC's native load. Commission regulation 807 KAR 5:056 Section 1(5)(c)-(f) lists what can be excluded from sales when calculating the FAC, none of which apply to the

sales to Nucor. The sales to Nucor fall under the regulatory definition of sales and should be included in the calculation of BREC's FAC.

Commission regulation 807 KAR 5:056, Section 3(3)(b) provides that, "[t]he commission shall order a utility to charge off and amortize, by means of a temporary decrease of rates, any adjustments the commission finds unjustified due to improper calculation or application of the charge or improper fuel procurement practices." BREC, by excluding the Nucor sales, improperly calculated, and currently improperly calculates, the FAC factor. The Commission, therefore, would be justified in ordering BREC to refund, by way of a decrease to the FAC charge, the difference between what the FAC should have been if the Nucor sales had been included in the FAC factor and what was charged. In addition, the Commission would be justified in ordering BREC to start including the Nucor sales in the calculation of the FAC.

BREC CEO Don Gulley testified that the Commission ordering a refund of the recalculated FAC calculation would be the "nuclear option" that would require BREC to file an immediate emergency base rate case.<sup>81</sup> Ordering a refund, while justified under a strict reading of 807 KAR 5:056, overlooks the benefits received by BREC member-cooperatives, and the cooperatives' retail customers, from the increase to the credit through the MRSM and the early retirement of the regulatory asset.

In response to post-hearing data requests, BREC showed that the benefits that flowed through the MRSM and the regulatory asset retirement from the Nucor sales were at least equal to, or exceeded, the amount the FAC factor was increased by the

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<sup>81</sup> HVT of the June 4, 2025 Hearing, Gulley Testimony at 10:15:35 and 10:21:05.

exclusion of the sales to Nucor.<sup>82</sup> Therefore, even though BREC did not follow the FAC regulation to the letter of the law, consumers were not negatively affected due to the increased sales to Nucor. Put another way, had BREC properly calculated the FAC by including sales to Nucor, resulting in a lower FAC factor, customers would have received a corresponding lower MRSB credit and lower payments towards the early retirement of the regulatory assets.

The Commission finds that BREC has been, and is improperly calculating its FAC factor by excluding sales to Nucor. The Commission finds that ordering a refund would lead to an unreasonable result that would negatively affect BREC's credit rating and require an emergency rate case, the costs of which are ultimately borne by BREC's member cooperatives. The Commission also finds that customers were not materially harmed by the exclusion of the Nucor sales from the FAC calculation because the Nucor sales led to a corresponding increase to the MRSB credit and increased payments towards retiring a regulatory asset.

The Commission finds that BREC should include the sales to Nucor in its calculation of the FAC. However, because reasonable costs to serve Nucor are eligible for possible recovery by BREC, the Commission further finds that BREC may recover these reasonable costs through the proposed "Interim Energy Adjustment" tariff, which will appear as a separate line item on monthly bills. This finding should not be construed as acceptance of the tariff but merely a recognition that this methodology of addressing the issue is accepted.

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<sup>82</sup> BREC's Response to Staff's Fourth Request, Item 4, Attachment 4\_4.

The Commission will review the tariff filing and may open an investigation into the reasonableness of the tariff. However, there are some specific terms that BREC should include in its filing that may assist in the review process. BREC should include a specific termination date coinciding with the date the Nucor contract no longer excludes riders in its rate calculation. In addition, BREC should provide enough information for a person to be informed as to what will pass through this rider. In order to assist in the review of this mechanism, BREC should footnote in its monthly FAC filings the calculation and amount flowed through this mechanism each month. The footnote should be included in the first full month's filing coinciding with the inclusion of the rider.

#### Generation and reporting obligations to MISO

Also of concern is BREC's handling of the Green 2 generation unit during the review period. While BREC admitted no fault to the FERC regarding improperly classifying the outages at Green 2 generation unit as a forced outage, it is apparent to the Commission that the outage occurring from June 28, 2023, to July, 5, 2025, should have been reported to the Commission in this proceeding, instead of being listed as a forced outage.<sup>83</sup> The proper categorization of an outage is important to the calculation of the FAC because a generator, for a forced outage, may only recover the "the cost of fuel that would have been used in plants suffering forced generation or transmission outages, but less the cost of fuel related to substitute generation ..."<sup>84</sup> A generator for a planned outage, however, may recover the cost through the FAC of any "economy

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<sup>83</sup> BREC's Response to Staff's First Request, Item 15, Attachment 15\_1, page 3.

<sup>84</sup> 807 KAR 5:056, Section 1(3)(a).

purchase.” All other power purchase to serve native load, including power to replace a planned outage, are limited in recovery to whether the power purchases are economy purchases<sup>85</sup> or non-economy purchases.<sup>86</sup> Therefore, the amount of purchased power allowed to be recovered through the FAC is affected by whether it is a forced outage, and, if not a forced outage, whether the purchased power is an economy purchase.

In this proceeding, it does not appear that classifying the Green 2 generation unit outage as forced had a material effect on the calculation of the FAC for the review period, and, consequently, no adjustment to the FAC for the review period is necessary. The Commission is concerned, however, regarding the way that BREC handled reporting of the availability of its generating units, and which, although it did not affect

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<sup>85</sup> Economy purchases are:

[R]ecoverable through an electric utility's FAC as purchases that an electric utility makes to serve native load, that displace its higher cost of generation, and that have an energy cost less than the avoided variable generation cost of the utility's highest cost generating unit available to serve native load during that FAC expense month.

Case No. 2000-00496-B, *An Examination by the Public Service Commission of the Fuel Adjustment Clause of East Kentucky Power Cooperative, Inc.* from May 1, 2001 to October 31, 2001 (Ky. PSC May 2, 2002), Order at 4.

<sup>86</sup> Non-economy energy purchases are “energy purchases made to serve native load that have an energy cost greater than the avoided variable cost of the utility's highest cost generating unit available to serve native load during that FAC expense month.”

Recovery of non-economy purchases is limited to:

We interpret Administrative Regulation 807 KAR 5:056 as permitting an electric utility to recover through its FAC only the lower of the actual energy cost of the non-economy purchased energy or the fuel cost of its highest cost generating unit available to be dispatched to serve native load during the reporting expense month. Costs for non-economy energy purchases that are not recoverable through an electric utility's FAC are considered “non-FAC expenses” . . . .

Case No. 2000-00496-B, *An Examination by the Public Service Commission of the Fuel Adjustment Clause of East Kentucky Power Cooperative, Inc.* from May 1, 2001 to October 31, 2001 (Ky. PSC May 2, 2002), Order at 4.

the calculation of the FAC in this proceeding, misreporting could materially affect the calculation of the FAC in future reviews. After all, BREC ultimately did incur over \$600,000 in fines for its reporting of the availability of the Green 2 generation unit.

The Commission is concerned about the BREC's decision to exclude the sales to Nucor from the FAC calculation, which lead to an artificially high FAC factor, and the manner in which BREC handled the reporting of its Green 2 generation unit's outage status and availability to MISO.

Pursuant to KRS 278.255, the Commission has the authority to perform periodic management and operations audits upon its utilities. Specifically, KRS 278.255 states, in part:

(2) The commission may provide for management or operations audits, or both, of any utility under its jurisdiction on a regular or irregular schedule to investigate all or any portion of the management and operating procedures or any other internal workings of the utility. . .

Based on the evidence of record in this case, the Commission considered ordering a management audit that would focus on BREC's management of its generation assets and aspects of the FAC, including, but not limited to, its FAC application and calculation, and power and fuel procurement. The Commission acknowledges, however, that neither the decision to exclude the sales to Nucor from the FAC nor the handling of the Green 2 generation unit outages occurred during the tenure of the current CEO, Don Gulley.<sup>87</sup> The Commission further acknowledges that Mr. Gulley, and the rest of BREC's leadership have been candid and forthcoming with the Commission concerning issues that BREC has faced and continues to face.

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<sup>87</sup> HVT of the June 4, 2025 Hearing, Brown Testimony at 11:05:45.

Therefore, rather than order a focused management audit in this proceeding, the Commission will request further information to address its concerns. Specifically, the Commission finds that BREC should provide a report within 21 days of the date of entry of this Order. In the report, BREC should describe, with specificity, the timeline, the discussions, and the people responsible for deciding to exclude the sales to Nucor from the calculation of the FAC. In addition, BREC should provide, in detail, changes that it has made in personnel, policies, and procedure concerning the management of BREC's generation fleet, including, but not limited to, how, and by whom, BREC bids its generating units into MISO and what internal controls exist that ensure that BREC's relevant policies and procedures are being followed appropriately. The report should be filed in the post case correspondence of this proceeding.

Except as discussed above, a review of BREC's monthly FAC filings shows that the fuel cost billed for the six months under review ranged from a low of \$0.027045 per kWh in May 2023 to a high of \$0.036211 per kWh in October 2023 with a six-month average of \$0.030199 per kWh. Having considered the evidence of record and being otherwise sufficiently advised, the Commission finds no additional evidence of improper calculation or application of BREC's FAC charges or improper fuel procurement practices.

IT IS THEREFORE ORDERED that:

1. The record of Case No. 2024-00141 is incorporated by reference.
2. Within 30 days of the date of this Order BREC shall file, using the Commission electronic tariff filing system, its proposed "Interim Energy Adjustment" tariff.

3. Upon approval of BREC's "Interim Energy Adjustment" tariff, BREC shall begin including the sales to Nucor in its FAC calculation for the month following approval of the tariff.

4. The charges and credits billed by BREC through its FAC from May 1, 2023, through October 31, 2023, are approved.

5. Within 21 days of service of this Order, BREC shall file a report in the post case correspondence of this proceeding that includes:

a. A specific description of the timeline, the discussions, and the people responsible for deciding to exclude the sales to Nucor from the calculation of the FAC.

b. Changes that it has made in personnel and procedure concerning the management of BREC's generation fleet, including, but not limited to, how, and by whom, BREC bids its generating units into MISO.

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


Entered on this 29th day of May, 2026.

PUBLIC SERVICE COMMISSION




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Angie Hatton  
Chair



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Mary Pat Regan  
Commissioner



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Andrew W. Wood  
Commissioner



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Barry L. Mayfield  
Commissioner

ATTEST:



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Linda C. Bridwell, PE  
Executive Director

Case No. 2024-00149

## Service List for 2024-00149

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