



STOLL · KEENON · OGDEN
P L L C

2000 PNC PLAZA
500 WEST JEFFERSON STREET
LOUISVILLE, KY 40202-2828
MAIN: (502) 333-6000
FAX: (502) 333-6099
www.skofirm.com

KENDRICK R. RIGGS
DIRECT DIAL: 502-560-4222
DIRECT FAX: 502-627-8722
kendrick.riggs@skofirm.com

December 31, 2008

RECEIVED

DEC 31 2008

PUBLIC SERVICE
COMMISSION

VIA HAND DELIVERY

Stephanie L. Stumbo
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, Kentucky 40601

RE: The Application of Big Rivers Electric Corporation for: (i) Approval of Wholesale Tariff Additions for Big Rivers Electric Corporation, (ii) Approval of Transactions, (iii) Approval to Issue Evidences of Indebtedness, and (iv) Approval of Amendments to Contracts; and of E.ON U.S. LLC, Western Kentucky Energy Corp., and LG&E Energy Marketing, Inc. for Approval of Transactions
Case No. 2007-00455

Dear Ms. Stumbo:

Enclosed please find and accept for filing the original and ten copies of the Joint Applicants' Post-Hearing Brief in the above-referenced matter. Please confirm your receipt of this filing by placing the stamp of your Office with the date received on the enclosed additional copies and return them to me in the enclosed self-addressed stamped envelope.

Should you have any questions please contact me at your convenience.

Sincerely,

Kendrick R. Riggs

KRR: ec
Enclosures
cc: Parties of Record

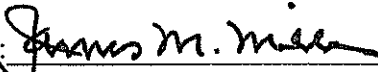
COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE APPLICATIONS OF BIG RIVERS)	
ELECTRIC CORPORATION FOR:)	
(I) APPROVAL OF WHOLESALE TARIFF)	
ADDITIONS FOR BIG RIVERS ELECTRIC)	CASE NO. 2007-00455
CORPORATION, (II) APPROVAL OF)	
TRANSACTIONS, (III) APPROVAL TO ISSUE)	
EVIDENCES OF INDEBTEDNESS, AND)	
(IV) APPROVAL OF AMENDMENTS TO)	
CONTRACTS; AND OF E.ON U.S. LLC,)	
WESTERN KENTUCKY ENERGY CORP. AND)	
LG&E ENERGY MARKETING, INC.)	
FOR APPROVAL OF TRANSACTIONS)	

JOINT APPLICANTS' POST-HEARING BRIEF

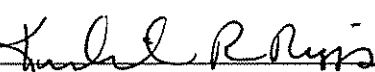
Respectfully submitted,

By: 
James M. Miller
Tyson Kamuf
Sullivan, Mountjoy, Stainback & Miller,
P.S.C.
100 St. Ann Street
P.O. Box 727
Owensboro, Kentucky 42302-0727
Telephone: (270) 926-4000

Douglas L. Beresford
George F. Hobday, Jr.
Hogan & Hartson, LLP
Columbia Square
555 Thirteenth Street, NW
Washington, D.C. 20004
Telephone: (202) 637-5600

COUNSEL FOR BIG RIVERS
ELECTRIC CORPORATION

Respectfully submitted,

By: 
Kendrick Riggs
Deborah T. Eversole
Sarah K. M. Adams
Stoll Keenon Ogden PLLC
2000 PNC Plaza
500 West Jefferson Street
Louisville, Kentucky 40202-2828
Telephone: (502) 333-6000

Allyson Sturgeon
Senior Corporate Attorney
E.ON U.S. LLC
220 West Main Street
Louisville, Kentucky 40202
Telephone: (502) 627-2088

COUNSEL FOR E.ON U.S. LLC,
WESTERN KENTUCKY ENERGY
CORP. AND LG&E ENERGY
MARKETING, INC.

TABLE OF CONTENTS

	Page
INTRODUCTION	1
STANDARD OF REVIEW	7
BACKGROUND	9
Summary of Conditions Under the 1998 Transactions	9
Summary of Unwind Transaction and Resulting Outlook for Big Rivers, Its Members, and the Smelters	12
ARGUMENT	13
THE TERMS OF THE PROPOSED UNWIND TRANSACTION AND RELATED PROPOSALS ARE REASONABLE, ARE CONSISTENT WITH THE PUBLIC INTEREST, AND SHOULD BE APPROVED.	13
I. The Transaction Termination Agreement and the Amendments Thereto are for a Proper Purpose, are Consistent with the Public Interest, and Should Be Approved.....	13
II. The Commission Should Approve the Agreements Related to the Transaction Termination Agreement.	17
A. The Generation Dispatch Support Services Agreement Should Be Approved.	17
B. The Information Technology Support Services Agreement Should Be Approved.	18
C. The Terms and Conditions Relating to the Reversion to Big Rivers of the Station Two Contracts Should Be Approved.	18
D. The Smelter Wholesale Agreements, Retail Agreements, Coordination Agreements, Lockbox Agreements and Guaranties Should Be Approved.	21
1. The Rates in the Smelter Wholesale Agreements and Retail Agreements are Reasonable.	25
2. The Smelter Wholesale Agreements and Retail Agreements Contain Appropriate Mitigants Against the Potential Impacts of Smelter Agreement Termination.....	30
3. The Smelter Termination Rights are Reasonable.	32

	4.	The Smelter Wholesale Agreements and Retail Agreements Pro-Actively Work to Address Potential Future Issues Between the Parties.....	35
	5.	Conclusion.....	36
	E.	The Wholesale Power Contract Amendments Should Be Approved.....	37
III.		The Concerns Raised With Regard to the Unwind Transaction Have Been Fully Addressed.....	40
	A.	The Commission Should Follow Its Own Precedents and Refrain From Delaying a Final Decision in this Case Based on the Status of Conditions Precedent to Closing That are Outside Its Jurisdiction.....	40
	B.	The Financial Model Demonstrates a Positive Financial Outlook for Big Rivers, Unconstrained by the Economics Issues Affecting E.ON During the Contract Period.....	43
	C.	There are No Concerns Related to the Plants' Condition That Should Delay Commission Approval of the Unwind Transaction.....	47
	D.	The Attorney General's Recommendations Should Be Rejected.....	55
	E.	The Tariff Changes Proposed by Big Rivers are Fair, Just and Reasonable.....	60
	F.	The Fuel Adjustment Clause is Fair, Just and Reasonable, and Should Be Approved.....	62
	G.	Big Rivers' Environmental Surcharge, Already Conditionally Approved by the Commission, Should Be Implemented.....	63
	H.	The Unwind Surcredit is Reasonable and Should Be Approved.....	64
	I.	The Member Rate Stability Mechanism is Reasonable and Should Be Approved.....	65
	J.	The Proposed Rebate Adjustment is Reasonable and Should Be Approved.....	66
	K.	The Member Discount Adjustment Rider Should Be Removed From Big Rivers' Tariff.....	67
	L.	Big Rivers' Decision to Retain Rate Schedule 10 in Its Tariff is Reasonable.....	68

M.	The Costs of the Phase 2 Transmission Project are Appropriately Included in Member Rates.....	69
N.	The Proposed Changes to Big Rivers' Open Access Transmission Tariff are Reasonable and Should Be Approved.....	70
IV.	The Commission Should Approve Certain Proposed Accounting Treatment, Including the Establishment of the Proposed Regulatory Accounts.....	71
A.	The Economic Reserve Regulatory Account Should Be Approved.....	71
B.	The Proposed Transition Reserve Account Should Be Approved.....	72
C.	The Proposed Purchased Power Regulatory Accounts Should Be Approved.....	73
D.	The Proposed Accounting Relating to Termination Agreement Provisions Should Be Approved.....	75
E.	The Proposed Accounting Treatment Relating to The Bank of America Termination Agreement and PMCC Termination Agreement Should Be Approved.....	75
V.	Big Rivers Should be Authorized to Issue the Evidences of Indebtedness Identified in the Application.....	76
A.	Issuance of the Revolving Line of Credit Agreement Between Big Rivers and National Rural Utilities Cooperative Finance Corporation Should Be Authorized.....	79
B.	Issuance of the Revolving Credit Agreement Between Big Rivers and CoBank ACB, Including the Note Between Big Rivers and CoBank ACB, Should Be Authorized.....	81
C.	Issuance of the PCB Series 2001A Note Should Be Authorized.....	82
D.	Issuance of the Ambac Municipal Bond Insurance, Policy Series 1983 Note, Should Be Authorized.....	82
E.	Issuance of the Standby Bond Purchase Agreement Note (Series 1983 Bonds) Should Be Authorized.....	83
F.	Issuance of the Termination of the Third Amended and Restated Subordination, Nondisturbance, Attornment and Intercreditor Agreement Should Be Authorized.....	83

G.	Issuance of the Termination of the Third Restated Mortgage and Security Agreement Should Be Authorized.....	83
H.	Issuance of the Creditor Consent, Termination and Release Agreement Should Be Authorized.....	84
I.	Issuance of the Letter Agreements Regarding “Funding of Certain Amounts to be Paid to the Bank of America” and “Payment Regarding the Buy-Out of the Bank of America” Should Be Authorized.....	84
J.	Issuance of the Indenture Should Be Authorized.	85
VI.	The Commission Should Approve the Termination of Certain Commitments and Proceedings That Will Be Rendered Obsolete by the Unwind Transaction.	86
A.	Certain Merger Commitments of E.ON AG, PowerGen plc, E.ON U.S. LLC (fka LG&E Energy Corp.), Louisville Gas and Electric Company, and Kentucky Utilities Company Will Be Rendered Irrelevant After the Unwind, and the Commission Should So Recognize in Its Order.....	86
B.	Big Rivers’ Current Integrated Resource Plan Proceeding Should Be Terminated and a New Plan Should Be Filed by November 2010.....	87
C.	Big Rivers Should Be Relieved of Certain Reporting Requirements Ordered by the Commission in Case Nos. 97-204 and 98-267.....	87
VII.	The Commission Should Grant the Joint Applicants’ Pending Motions.	88
	CONCLUSION.....	90

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE APPLICATIONS OF BIG RIVERS)	
ELECTRIC CORPORATION FOR:)	
(I) APPROVAL OF WHOLESALE TARIFF)	
ADDITIONS FOR BIG RIVERS ELECTRIC)	CASE NO. 2007-00455
CORPORATION, (II) APPROVAL OF)	
TRANSACTIONS, (III) APPROVAL TO ISSUE)	
EVIDENCES OF INDEBTEDNESS, AND)	
(IV) APPROVAL OF AMENDMENTS TO)	
CONTRACTS; AND OF E.ON U.S. LLC,)	
WESTERN KENTUCKY ENERGY CORP. AND)	
LG&E ENERGY MARKETING, INC.)	
FOR APPROVAL OF TRANSACTIONS)	

JOINT APPLICANTS' POST-HEARING BRIEF

The Applicants (“Joint Applicants”), Big Rivers Electric Corporation (“Big Rivers”), E.ON U.S. LLC (“E.ON”), Western Kentucky Energy Corp. (“WKEC”), and LG&E Energy Marketing Inc. (“LEM”) (E.ON, WKEC, and LEM are referred to collectively herein as the “E.ON Entities”), by counsel, for their joint post-hearing brief¹ in this matter, state as follows:

INTRODUCTION

Joint Applicants seek the Public Service Commission’s (“Commission”) approval of their agreement for the early termination, or “unwind,” of certain lease and related agreements entered into as a result of the Big Rivers plan of reorganization and approved by the Commission in Case Numbers 97-204² and 98-267³ (the “1998 Transactions”), along with associated actions required

¹ For the reader’s convenience, a Glossary of Terms used in this brief is attached as Appendix C.

² *The Application of Big Rivers Electric Corporation, Louisville Gas and Electric Company, Western Kentucky Energy Corp., Western Kentucky Leasing Corp., and LG&E Station Two Inc for Approval of Wholesale Rate Adjustment for Big Rivers Electric Corporation and for Approval of Transaction*, PSC Case No. 97-204 (Final Order dated April 30, 1998).

³ *The 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*, PSC Case No. 98-267 (Final Order dated July 14, 1998).

by Big Rivers to implement the unwind of the 1998 Transactions. While the totality of the instant transaction is complex, the ultimate issue before the Commission is simple: will the opportunity for early termination of the 1998 Transactions, on the terms and conditions proposed in this case (the “Unwind Transaction”), provide better economic opportunities and security to Big Rivers, its members, their customers and the entire service area than would continued operation of the 1998 Transactions, particularly in light of the recent buyout of the Philip Morris Capital Corporation (“PMCC”) leveraged leases? The answer is yes.

The Unwind Transaction offers a fresh start and a bright future for all parties concerned, as well as for the citizens and utility customers of a large portion of western Kentucky. It is the most advantageous and amicable way for Big Rivers and E.ON to terminate the 1998 Transactions, and is far more desirable than the difficult transition already being anticipated by the parties if the 1998 Transactions run their full term.⁴ The alternative for Big Rivers is an immediate estimated twenty to twenty-five percent wholesale rate increase, continued inability of Big Rivers to obtain financing even in crisis situations (as illustrated by the recent need to deplete cash reserves to address the buyout of the leveraged leases due to the unexpected Ambac Assurance Corporation [“Ambac”] downgrade),⁵ the potential of another Big Rivers bankruptcy if cash reserves cannot meet cash needs,⁶ and the probable closure of the Smelters,⁷ which will be without a stable source of cost-based power when their current supply contracts sourced at the wholesale level by WKEC expire in 2010 and 2011.

⁴ See Blackburn Testimony, Transcript of Hearing (“Tr.”) Dec. 3, 2008, at p. 122, l. 21-23.

⁵ See Blackburn Testimony, Tr. Dec. 3, 2008, at pp. 125-126 (explaining that if unwind had already occurred when Big Rivers’ PMCC leases were suddenly deemed in default by the downgrade of the Ambac credit rating, Big Rivers could have gone to the market, borrowed money to place in a cash collateral account, and collected interest, rather than depleting its cash to meet the emergency).

⁶ See Blackburn Testimony, Tr. Dec. 3, 2008, at p. 80, l. 16-18.

⁷ The two aluminum smelters are Alcan Primary Products Corporation (“Alcan”) and Century Aluminum of Kentucky General Partnership (“Century”) (collectively, the “Smelters”).

The favorable terms offered by the E.ON Entities to the various stakeholders, including Big Rivers, will enable Big Rivers to regain control of its own assets and resume all aspects of its mission as supplier of power to its Members,⁸ even as it transforms its financial condition and relieves the E.ON Entities of obligations under fixed contracts that have become uneconomical for them. Unwinding the 1998 Transactions under the terms proposed remedies numerous additional problems, including the looming issue of a stable source of power for the Smelters. The Smelters, whose continued operation is vital to the economic interests of a large portion of western Kentucky, have testified that, even if the price of aluminum remains depressed, the terms of their new agreements will provide them a reasonable opportunity to continue operations.⁹

The Smelters clearly expect that the new arrangements will be long term: their agreements do not provide for re-negotiation until 2023,¹⁰ and the Smelters' representatives have testified that they expect to remain in operation.¹¹ In fact, the Smelters were very interested in negotiating extensions to their contracts earlier than 2023, because the Smelter plants can operate beyond 2023.¹² But even if the Smelters ultimately leave the system, the record shows that Big Rivers is confident that it will be able to sell the 850 MW of power and energy that would otherwise be taken by the Smelters.¹³ And because the market price would probably be higher than the rates charged to the Smelters, Big Rivers would need to sell less than 100% of that 850 MW to remain revenue neutral.¹⁴

⁸ Big Rivers' member distribution cooperatives are Jackson Purchase Energy Corporation, Kenergy Corp. ("Kenergy"), and Meade County Rural Electric Cooperative Corporation (collectively, the "Members").

⁹ Smelters' November 6, 2008, Response to Attorney General's Supplemental Request for Information, Item 3.

¹⁰ Fayne Testimony, Tr. Dec. 3, 2008 at p. 169, l. 13-25.

¹¹ Hale Testimony, Tr. Dec. 2, 2008 at pp. 150-151; Authier Testimony, Tr. Dec. 2, 2008 at pp. 156-157.

¹² Fayne Testimony, Tr. Dec. 3, 2008 at pp. 169-170.

¹³ Third Supplemental Direct Testimony of C. William Blackburn, October 9, 2008, Motion to Amend and Supplement Application ("October Motion to Amend"), Exhibit 78, at 60-61.

¹⁴ *Id.* at 61-62.

The Unwind Transaction, with all of its component and related agreements, is the culmination of a carefully negotiated, six year process involving Big Rivers, Big Rivers' Members, the Smelters, Big Rivers' senior creditors, and the E.ON Entities. The result of these years of negotiations is a comprehensive and carefully balanced set of documents reflecting and preserving the interests of these parties, the retail customers of Big Rivers' Members and western Kentucky as a whole. Accordingly, in order to serve the public interest and to avoid disturbing the delicate balance of the final agreements, the Commission should enter its approval without imposing potentially destabilizing changes to the proposed terms.

The Unwind Transaction should be completed because in the following ways it will more fully serve the public interest than will the 1998 Transactions:

- Provide a comprehensive, long-term resolution of a currently untenable arrangement between E.ON and Big Rivers -- a resolution that is *unopposed* by any party,¹⁵ and which eliminates potential litigation among and between the parties to the Unwind Transaction that is virtually assured if the 1998 Transactions continue.¹⁶
- Avoid an immediate and substantial (estimated 20-25%) rate increase for Big Rivers' Members if the Unwind Transaction does not close.¹⁷
- Provide Big Rivers total cash and other consideration from E.ON estimated at \$756 million,¹⁸ which will unquestionably not be available to Big Rivers from the E.ON Entities if the 1998 Transactions run their term. This amount includes cash consideration from E.ON of \$60.9 million to defray one-half of the PMCC lease buyout, for which Big Rivers will be solely responsible immediately if the Unwind Transaction does not close.¹⁹ This amount also includes cancellation of the currently estimated \$141.4 million Residual Value Payment due from Big

¹⁵ Brevitz Testimony, Tr. Dec. 3, 2008 at p. 239, l. 7-15 ("A. As stated in my supplemental testimony, we cannot at this time recommend approval of the transaction. Q. But you're not opposing the transaction? A. That's correct").

¹⁶ Blackburn Testimony, Tr. Dec. 3, 2008 at p. 57, l. 9-14; Spainhoward Testimony, Tr. Dec. 2, 2008 at pp. 262-263.

¹⁷ Blackburn Testimony, Tr. Dec. 3, 2008 at p. 23, l. 8-17 (notice will be filed with the Commission at the end of January 2009; cash is immediately necessary because Big Rivers cannot borrow under its current condition); *id.* at p. 142, l. 2 (estimating amount of increase to be \$25 million).

¹⁸ Exhibit CWB-15 to the Third Supplemental Testimony of C. William Blackburn, October Motion to Amend, Exhibit 78.

¹⁹ Third Supplemental Direct Testimony of C. William Blackburn, October Motion to Amend, Exhibit 78, at 10-11.

Rivers to E.ON,²⁰ which grows to \$377 million if the 1998 Transactions run their term.²¹

- Restore financial strength and flexibility to Big Rivers, permitting it to become an investment-grade rated utility, and restoring its ability to borrow on a long-term, secured basis to meet the challenges it may face (it cannot do so now).²² Big Rivers' equity will go from a negative 11% to a positive 26%.²³
- Enable Big Rivers to eliminate its restrictive RUS²⁴ mortgage in favor of an indenture, which will allow Big Rivers to secure future borrowings that comply with the indenture without protracted RUS review, and to have access to the open financial markets in its quest for the most favorable borrowing terms.²⁵ This option is not available to Big Rivers during the term of the 1998 Transactions.²⁶
- Eliminate Big Rivers' current pre-payment obligations on the RUS ARVP Note, which is a zero interest note that does not mature until 2023.²⁷ This option is not available to Big Rivers unless the Unwind Transaction closes.²⁸
- Enhance Big Rivers' financial ability to meet its Members' demands for power for economic development, system growth and expansion.²⁹ Big Rivers has only a limited amount of power available to it under the arrangements with the E.ON Entities in the 1998 Transactions,³⁰ and almost no financial ability under the 1998 Transactions to acquire additional power by purchase or through construction of additional generation.³¹
- Provide the Smelters with a stable, low-cost, long-term power supply, which they agree will help keep 5,000 jobs and other benefits in Kentucky.³²

²⁰ Exhibit CWB-15 to Third Supplemental Direct Testimony of C. William Blackburn, October Motion to Amend, Exhibit 78.

²¹ Blackburn Testimony, Tr. Dec. 3, 2008 at p. 140, l. 25.

²² Application ¶ 62.

²³ Exhibit CWB-17 to the Third Supplemental Direct Testimony of C. William Blackburn, October Motion to Amend, Exhibit 78; Supplemental Direct Testimony of Robert S. Mudge, October Motion to Amend, Exhibit 98, at 14; Exhibit MHC-2 to the Supplemental Direct Testimony of Michael H. Core, October Motion to Amend, Exhibit 102.

²⁴ The Rural Utilities Service ("RUS").

²⁵ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 118-123; Second Amendment and Supplement to Application ¶¶ 1, 2, 4; Third Amendment and Supplement to Application ¶ 15.

²⁶ Second Amendment and Supplement to Application ¶¶ 1, 2, 4.

²⁷ Blackburn Testimony, Tr. Dec. 3, 2008 at pp. 127-129.

²⁸ *Id.* at p. 128, l. 14.

²⁹ Application ¶ 10; Direct Testimony of Michael H. Core, Application, Exhibit 14, at 14.

³⁰ Application ¶ 17.

³¹ Core Testimony, Tr. Dec. 2, 2008 at pp. 61-63.

³² Direct Testimony of Henry W. Fayne, at 2-3.

- Secure for Big Rivers and its Members consideration from the Smelters of \$327.9 million through their contract term.³³
- Return Big Rivers' generating units to Big Rivers so that it can fulfill its historic mission as a generation and transmission cooperative,³⁴ and restore to Big Rivers' Members complete control of their wholesale power supplier and its assets.³⁵
- Capture for the City of Henderson significant financial benefits under the Unwind Transaction (the value offered to the City is currently in excess of \$10 million³⁶), while maintaining the long-standing contractual relationship between Big Rivers and the City of Henderson for operation of Station Two and disposition of the generating output of Station Two.³⁷

The Unwind Transaction has given Big Rivers the opportunity to mitigate risks inherent in the transition from the 1998 Transactions to the Unwind Transaction, with a high level of cooperation from the E.ON Entities and the Smelters that would be unreasonable to expect in the transition that would otherwise occur at the expiration of the term of the 1998 Transactions.

Under these unique circumstances, Big Rivers has been able to negotiate arrangements that:

- Provide continuity for the management and operation of the generating plants. The plants will be managed and operated by the same employees who currently manage and operate them.³⁸ The E.ON Entities have further cooperated with Big Rivers by agreeing to arrangements for the smooth transition of the personnel, inventory, personal property, permits, allowances, contracts, leases and licenses (including licenses for intellectual property) that Big Rivers needs to operate the generating plants.³⁹ Additionally, the E.ON Entities have agreed to provide generation dispatch services and information technology services to Big Rivers for 18 months following the closing to further facilitate the transition.⁴⁰

³³ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 12; Big Rivers' November 7, 2008, Updated Response to Item 67 of the Attorney General's Initial Data Request.

³⁴ Application ¶ 10; Direct Testimony of Paul W. Thompson, Application, Exhibit 15, at 18.

³⁵ Direct Testimony of Burns E. Mercer, Application, Exhibit 26, at 11.

³⁶ Thompson Testimony, Tr. Dec. 2, 2008 at pp. 212-213.

³⁷ Supplemental Direct Testimony of David A. Spainhoward, October Motion to Amend, Exhibit 99, at 5.

³⁸ Nearly every western Kentucky based employee of WKEC will become an employee of Big Rivers, including the plant managers and personnel, many of whom were employees of Big Rivers prior to 1998. These employees will therefore bring with them a thorough knowledge of the units' operation. Application ¶ 61; Direct Testimony of Mark A. Bailey, Application, Exhibit 5, at 7-8. Indeed, Big Rivers' management is primarily composed of long-term Big Rivers employees who were employees of Big Rivers when it operated its plants. Application ¶ 61; Direct Testimony of Mark A. Bailey, Application, Exhibit 5, at 8-10.

³⁹ Application ¶¶ 30, 35, 36; Summary of Termination Agreement, Application, Exhibit 12, at 5-8.

⁴⁰ Application ¶ 32; Direct Testimony of Mark A. Bailey, Application, Exhibit 5, at 11-12.

- Provide consumers rate stability, subject to increases due to actual environmental and fuel cost increases.⁴¹ A \$157 million Economic Reserve account is being established to “feather” anticipated cost increases,⁴² and non-Smelter Members’ revenue responsibility is being mitigated through payments from the Smelters.⁴³
- Mitigate Big Rivers’ reliance on the Smelters through transmission enhancements to access other power markets.⁴⁴
- Enhance Big Rivers’ ability to meet new environmental and climate change laws and regulations.⁴⁵
- Establish a \$35 million Transition Reserve to cushion the impact on Big Rivers’ Members if the Smelters close.⁴⁶

A comparison of operations under the Unwind Transaction compared to continued operations without the Unwind Transaction is set forth in Appendix A to this brief. The Joint Applicants respectfully submit that the Commission should approve the Unwind Transaction.

STANDARD OF REVIEW

The Commission should apply the “public interest” standard of review in KRS Chapter 278 to the proposal to “unwind” the 1998 Transactions. The Commission has jurisdiction over this matter pursuant to KRS 278.218 and, as necessary and applicable, KRS 278.390. The record demonstrates that the Unwind Transaction meets the “proper purpose” and “public interest” standards of KRS 278.218. The Joint Applicants are also seeking pursuant to KRS 278.390 the

⁴¹ October Motion to Amend ¶ 19.

⁴² Direct Testimony of William Steven Seelye, Application, Exhibit 25, at 27; June 11, 2008, Motion to Amend and Supplement Application (“June Motion to Amend”) ¶ 1; October Motion to Amend ¶ 19; Supplemental Direct Testimony of William Steven Seelye, October Motion to Amend, Exhibit 103, at 3-10.

⁴³ See Application ¶ 43; Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 57.

⁴⁴ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 66.

⁴⁵ Big Rivers’ February 14, 2008 Response to Item 43 of the Attorney General’s Initial Request for Information, at 2.

⁴⁶ Application ¶ 53; Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 84-87.

modification of the previous Commission Orders approving the 1998 Transactions that would, absent the Unwind Transaction, remain in effect until 2023.⁴⁷

There is no question that the Commission has jurisdiction over the Unwind Transaction under its general grant of authority, KRS 278.040, as the Commission is “charged with responsibility, and vested with power, to see that the service of public utilities is adequate.”

Public Service Comm’n v. Cities of Southgate, Highland Heights, 268 S.W.2d 19, 21 (Ky. 1954).

Accordingly, the legal focus must be upon whether the transaction, including all of its component parts, is reasonable, is consistent with the public interest, and will enable Big Rivers to provide adequate service at reasonable prices. Again, the answer is yes.

This case also involves the Commission’s authority over rates and tariffs, as well as KRS 278.300, which provides the legal standard for the financing approvals sought by Big Rivers. The rates, tariff changes, and financing sought herein are necessary corollaries to Big Rivers’ resumption of its mission as a generation and transmission cooperative operating its own generating system. For the reasons shown in this application, the rates, tariff changes, and financing proposed are reasonable and lawful. The financing is necessary, appropriate for and consistent with Big Rivers’ proper performance of its service to the public, and will not impair Big Rivers’ ability to perform that service.

⁴⁷ In the January 16, 2008 Informal Conference Memorandum, Commission Staff stated, and Joint Applicants now agree, that KRS 278.020 (5) and (6) do not apply directly, as this case does not concern transfer of a “utility” as defined in KRS 278.010 or its assets. But even if they did apply, it is clear that Big Rivers has the financial, technical, and managerial capacity to operate its generating assets, particularly given the favorable terms of the Unwind Transaction and the experience of its employees and management. Nearly every western Kentucky based employee of WKEC will become an employee of Big Rivers, including the plant managers and personnel, many of whom were employees of Big Rivers prior to 1998. These employees will therefore bring with them a thorough knowledge of the units’ operation. Application ¶ 61; Direct Testimony of Mark A. Bailey, Application, Exhibit 5, at 7-8. Indeed, Big Rivers’ management is primarily composed of long-term Big Rivers employees who were employees of Big Rivers when it operated its plants. Application ¶61; Direct Testimony of Mark A. Bailey, Application, Exhibit 5, at 8-10. Big Rivers’ new president and chief executive officer, Mark A. Bailey, has significant investor-owned and cooperative utility experience. Application ¶ 61. Moreover, Big Rivers has established a number of policies and procedures to ensure that it will be able to manage the generating facilities in a reliable and efficient manner in the years to come. Direct Testimony of Mark A. Bailey, Application, Exhibit 5, at 23.

The Unwind Transaction and related proposals for which the Joint Applicants seek approval will serve the public interest well, and they meet all legal standards for Commission approval.

BACKGROUND

Summary of Conditions Under the 1998 Transactions

Big Rivers and the E.ON Entities currently operate under agreements and circumstances that were defined by Big Rivers' 1998 plan of reorganization. Under the terms of that plan, WKEC, a merchant operator, entered into a twenty-five year lease of all of Big Rivers' generating stations. WKEC also assumed Big Rivers' contractual rights and obligations relating to the operation and maintenance of, and purchase of excess power from, Henderson Municipal Power & Light ("HMP&L") Station Two, which is owned by the City of Henderson, Kentucky.⁴⁸ Another of the E.ON Entities, LEM, agreed to supply a specified amount of power and energy to Big Rivers for its needs, and contracted to supply energy to one of the Smelters through 2010, and to the other Smelter through 2011.

The 1998 Transactions represented a feasible solution to Big Rivers' financial problems in 1998, and offered the advantage of relatively fixed rates on the amount of power made available to Big Rivers from LEM for approximately 25 years. But the plan has limitations. Because WKEC currently controls the facilities and output of Big Rivers' generating plants and Station Two, Big Rivers lacks the ability to control its own destiny, to respond to the changing power needs of western Kentucky, or to finance electricity infrastructure improvements vital to the economic development efforts of its Members and their communities. In addition, because of the constraints imposed by its existing financing documents, Big Rivers cannot finance the purchase of additional power resources or construction of new generation necessary to meet the

⁴⁸ Application ¶ 16.

needs of the Smelters⁴⁹ or other large potential customers who might consider locating in western Kentucky.

Indeed, Big Rivers' current value to the region's economic development efforts is seriously compromised: its representatives have "been told on more than one occasion that the firms were uncomfortable with Big Rivers because of its weak balance sheet and potentially its ability to deliver to them reliable power at the prices that we were giving them."⁵⁰ The Unwind Transaction resolves these problems.⁵¹ Big Rivers' equity will change from approximately a negative 11% to approximately a positive 26%, and Big Rivers will have cash of \$125 million and \$100 million in lines of credit.⁵² Its debt will be investment-grade rated, and Big Rivers will be able to borrow money in the ordinary course of business, something Big Rivers is now fundamentally incapable of doing.⁵³

The current agreements are uneconomical for WKEC because the contract prices for its wholesale sales of power, including both sales to Big Rivers for ultimate consumption by its non-Smelter Members and sales to Kenergy for the two largest consumers of power in the region, the Smelters, are fixed and have not kept pace with the rising costs of fuel, capital, operation, maintenance and environmental compliance.⁵⁴ Although WKEC's uneconomical power contracts with Kenergy for Century and Alcan will expire in 2010 and 2011, respectively, WKEC will not be wholly relieved of its uneconomical obligations even then, because it will remain obligated to supply a substantial portion of the energy from the generating plants

⁴⁹ Application ¶ 19.

⁵⁰ Blackburn Testimony, Tr. Dec. 3, 2008 at p. 142, l. 19-25

⁵¹ Application ¶ 10.

⁵² Exhibit CWB-17 to the Third Supplemental Direct Testimony of C. William Blackburn, October Motion to Amend, Exhibit 78; Supplemental Direct Testimony of Robert S. Mudge, October Motion to Amend, Exhibit 98, at 14; Exhibit MHC-2 to the Supplemental Direct Testimony of Michael H. Core, October Motion to Amend, Exhibit 102.

⁵³ Application ¶ 62.

⁵⁴ Rebuttal Testimony of Paul W. Thompson at 1-2.

(including a portion of the energy formerly sold to Kenergy for the Smelters) to Big Rivers at generally fixed prices.⁵⁵

Finally, the Smelters face extreme economic uncertainty after the expiration of their current power contracts in 2010 and 2011 – an uncertainty that places the aluminum-dependent western Kentucky economy in jeopardy. Together, the Smelters directly and indirectly support over 5,000 jobs in the region.⁵⁶ The two Smelters are the largest single taxpayers in Hancock and Henderson counties.⁵⁷ If the Smelters close, it is estimated that the region would lose over 5,000 jobs, \$193 million annually in payroll, and \$15.3 million in state income and sales taxes, and that the county governments and local school districts would lose at least \$1.4 million annually.⁵⁸ The cost of electricity is the most significant determination of a smelter's economic health.⁵⁹ Therefore, it is critical that the Smelters have the more limited exposure to market prices that the terms and conditions of the proposed, post-unwind power purchase arrangements with Big Rivers and Kenergy will provide.

Because of its importance, this case has drawn the interest of numerous Kentucky officials. Indeed, House Bill 275 was passed with bipartisan support in the 2006 legislative session to facilitate the Unwind Transaction, and numerous individual public officials have placed their support for the Unwind Transaction on record.⁶⁰

⁵⁵ It is important to note that none of this contract pricing will survive the Unwind Transaction; consequently, the pricing issues that have plagued the E.ON Entities will not be passed on to Big Rivers as a result of the unwind.

⁵⁶ Direct Testimony of Henry W. Fayne at 2-3.

⁵⁷ Direct Testimony of Paul A. Coomes, PhD at 3.

⁵⁸ Direct Testimony of Paul A. Coomes, PhD at 4.

⁵⁹ Direct Testimony of Henry W. Fayne at 4.

⁶⁰ See Letter from State Senate Majority Whip Carroll Gibson to Chairman Mark David Goss dated January 8, 2008; Letter from Senator Boswell to Chairman Mark David Goss dated January 9, 2008; Letter from State Senator Robert J. Leeper to Chairman Mark David Goss dated January 9, 2008; Letter from State Senator Jerry P. Rhoads to Chairman Mark David Goss dated January 9, 2008; Letter from State Senator J. Dorsey Ridley to Chairman Mark David Goss dated January 8, 2008; Letter from State Senator Robert Stivers to Chairman Mark David Goss dated January 9, 2008.

Summary of Unwind Transaction and Resulting Outlook for Big Rivers, Its Members, and the Smelters

The Unwind Transaction promises benefits for everyone concerned. Financial projections for Big Rivers, as set forth in Big Rivers' Financial Model, and based upon the tariff changes proposed in this case, are positive, and have drawn the support of Big Rivers' Members and the Smelters. This is particularly true in that the terms and conditions of the Unwind Transaction include \$453 million in cash consideration to be paid to Big Rivers by the E.ON Entities.⁶¹ This cash will immediately resolve at closing Big Rivers' current financial constraints, which have left Big Rivers with a greatly diminished cash balance and a current inability to borrow additional funds. As a result of the benefits offered in the Unwind Transaction, Big Rivers will obtain investment-grade credit ratings on or before closing, allowing it to restructure its restrictive financing arrangements to allow future borrowing. Big Rivers will offer Kenergy power to meet the needs of the Smelters through 2023, providing a stable source of power at predictable prices that will enable them to continue operations.

The tariff changes, proposed financing and other related proposals and agreements, as further described below, should also be approved as necessary corollaries to the Unwind Transaction. Intervening events, including termination of Big Rivers' leveraged leases, have simplified a number of facets of the proposed Unwind Transaction since the filing of the initial Application. A table listing all the approvals being sought by the Joint Applicants (the "Approvals Table") is attached as Appendix B to this brief. The Approvals Table is the final update of earlier iterations of that table, the last of which was attached as Exhibit 89 to the

⁶¹ The \$453 million is the \$387.7 million in "Cash" that Big Rivers will receive from E.ON at closing, plus the additional \$65 million in cash that Big Rivers has or will receive from E.ON for the buyout of the "Leveraged Leases," as shown in Exhibit CWB-15 to the Third Supplemental Testimony of C. William Blackburn, October Motion to Amend, Exhibit 78. The \$65 million "Leveraged Leases" amount includes approximately \$5.125 million that Big Rivers received from E.ON relating to the buyout of the Bank of America Leasing Corporation leveraged leases, which payment is not contingent on the Unwind Transaction. See Exhibit CWB-9 to the Third Supplemental Direct Testimony of C. William Blackburn, October Motion to Amend, Exhibit 78, at line 8.

October Motion to Amend. The reasons those listed approvals should be granted are discussed below.

ARGUMENT

THE TERMS OF THE PROPOSED UNWIND TRANSACTION AND RELATED PROPOSALS ARE REASONABLE, ARE CONSISTENT WITH THE PUBLIC INTEREST, AND SHOULD BE APPROVED.

I. The Transaction Termination Agreement and the Amendments Thereto are for a Proper Purpose, are Consistent with the Public Interest, and Should Be Approved.

The Applicants seek approval of the Transaction Termination Agreement dated March 26, 2007 among Big Rivers, WKEC and LEM, a First Amendment to the Termination Agreement, a December 4, 2007, Letter Agreement amending the Termination Agreement, a Second Amendment to the Termination Agreement, and a Third Amendment to the Termination Agreement (collectively, the “Termination Agreement”). The Termination Agreement, filed as Exhibit 3 to the Application, together with the other definitive documents referred to herein, memorialize the agreements between Big Rivers and the E.ON Entities that make up the Unwind Transaction, and are the documents that establish the terms and conditions on which the 1998 Transactions will be terminated.⁶² A listing of the 1998 Transactions agreements and their disposition under the Unwind Transaction is provided in Exhibit 7 to the Application, and the 1998 Transactions documents are found in Appendix A to the Application.

The Termination Agreement provides that none of the obligations between Big Rivers and the E.ON Entities under the 1998 Transactions will survive beyond the dates contemplated in the Termination Agreement.⁶³ The E.ON Entities will compensate Big Rivers for accepting early termination of the 1998 Transactions and will indemnify Big Rivers for certain post-closing

⁶² Application ¶ 10. *See also* Summary of Termination Agreement, Application, Exhibit 12, at 1.

⁶³ Application ¶ 28 and Exhibit 11.

environmental matters. Big Rivers will resume operating its generating plants and Station Two immediately upon closing.⁶⁴ At closing, the E.ON Entities will pay Big Rivers \$453 million subject to adjustment for the value of the inventory and personal property that the E.ON Entities also will convey to Big Rivers at the closing.⁶⁵ There will also be certain true-up payments owed by one party to the other for certain items such as Incremental Environmental O&M and Incremental Capital Costs.⁶⁶ The Termination Agreement covers all aspects of the Unwind Transaction, including the transfer of inventory and personal property from the E.ON Entities to Big Rivers, the transfer of personnel from the E.ON Entities to Big Rivers and numerous representations, warranties, indemnities and releases.⁶⁷ The E.ON Entities will additionally transfer the various permits, allowances, contracts, leases and licenses (including licenses for intellectual property) that Big Rivers needs to operate the generating plants.⁶⁸

The First Amendment to the Termination Agreement substitutes certain schedules to the Termination Agreement and makes other minor changes.⁶⁹ The December 4, 2007, Letter Agreement amends the Termination Agreement to correct a minor error.⁷⁰

The Second Amendment to the Termination Agreement incorporates a resolution among Big Rivers, the E.ON Entities and the Smelters of an issue relating to increases in projected fuel costs.⁷¹ This resolution increases E.ON's termination payment to Big Rivers by an additional \$82 million.⁷² Big Rivers will use that additional amount to increase its Economic Reserve

⁶⁴ Application ¶ 29.

⁶⁵ Summary of Termination Agreement, Application, Exhibit 12, at 2; Second Amendment to Termination Agreement, June Motion to Amend, Exhibit 1; Exhibit CWB-15 to the Third Supplemental Testimony of C. William Blackburn, October Motion to Amend, Exhibit 78.

⁶⁶ Summary of Termination Agreement, Application, Exhibit 12, at 3.

⁶⁷ Application ¶¶ 30, 35, 36.

⁶⁸ Summary of Termination Agreement, Application, Exhibit 12, at 5-8.

⁶⁹ First Amendment to Transaction Termination Agreement, Application, Exhibit 3, at 617-622.

⁷⁰ Letter Agreement, Application, Exhibit 3A.

⁷¹ June Motion to Amend ¶ 1.

⁷² June Motion to Amend ¶ 1.

(discussed below).⁷³ The Second Amendment also resolves an issue relating to the responsibility for certain taxes and changes certain time periods for performance of specified tasks.⁷⁴

The Third Amendment to the Termination Agreement reflects, among other items, the various resolutions of certain environmental, operational and other issues that were identified in the course of routine due diligence; an update of Exhibit S to include a number of additional, more timely documents relating to the Unwind Transaction; and additional amounts E.ON will pay Big Rivers at closing.⁷⁵

The Third Amendment also reflects a commitment of E.ON to pay Big Rivers additional amounts (captured in an increase of the closing date “Termination Payment”) to reimburse Big Rivers for a portion of the amounts paid by it in connection with the recent buyout of the leveraged leases Big Rivers entered into in 2000 with affiliates of PMCC.⁷⁶ The PMCC buyout resolved a serious financial problem resulting from the downgrade of Ambac’s credit rating.⁷⁷ This downgrade required Big Rivers to take immediate action to replace Ambac’s credit support in the PMCC leases or buy out the leases.⁷⁸ Big Rivers elected the buyout option because it did not have the financial strength and borrowing ability in the existing circumstances to implement more financially-favorable options.⁷⁹

Big Rivers funded the PMCC buyout from cash on hand built up during the life of the lease transaction and through a short-term loan from PMCC itself, but upon closing of the

⁷³ June Motion to Amend ¶ 1 and Exhibit I; Second Supplemental Testimony of C. William Blackburn, June Motion to Amend, Exhibit 7, at 3-4.

⁷⁴ June Motion to Amend ¶ 1.

⁷⁵ Exhibit 80 to the October Motion to Amend; Supplemental Testimony of Paul W. Thompson, October Motion to Amend, Exhibit 91, at 8; Supplemental Direct Testimony of David A. Spainhoward, October Motion to Amend, Exhibit 99, at 20-21.

⁷⁶ October Motion to Amend ¶ 11.

⁷⁷ October Motion to Amend ¶ 4.

⁷⁸ The Ambac/PMCC issue is unrelated to the 1998 Lease Transactions and the Unwind Transaction, and Big Rivers would have had to resolve it in any event. Supplemental Direct Testimony of Michael H. Core, October Motion to Amend, Exhibit 102, at 8.

⁷⁹ Affidavit of C. William Blackburn, October Motion to Amend, Exhibit 92, at 15-31.

Unwind Transaction, the E.ON Entities will reimburse Big Rivers one-half of the net amount Big Rivers paid to PMCC, plus one-half of a \$332,868 shortfall payment Big Rivers made to CoBank ACB.⁸⁰ Thus, the total additional payment by the E.ON Entities to Big Rivers will be approximately \$60.9 million.⁸¹ This payment provides further incentive for Big Rivers to close the Unwind Transaction.⁸² The additional E.ON payment will not be made if the Unwind Transaction does not close.⁸³

Pursuant to the Unwind Transaction, Big Rivers will resume its full contractual rights and obligations with regard to operation and maintenance services for, and purchase of excess power from, Station Two, a generating station owned by the City of Henderson.⁸⁴ These rights and obligations have, for the most part, been exercised by an E.ON Entity since the 1998 Transactions pursuant to the “Station Two Agreement” and the “Station Two Contracts,” each as defined in the Termination Agreement.⁸⁵ While the City of Henderson and HMP&L have not yet consented to the Unwind Transaction, the terms and conditions they have been offered, and which are presented to the Commission in this case, are more than reasonable, and the Joint Applicants believe there will be ultimate agreement. The issues relating to the termination of the Station Two Agreement and the re-assignment to Big Rivers of responsibility for performing under the Station Two Contracts are further discussed below.

Finally, the Termination Agreement contains various indemnification and risk assumption commitments on the part of the E.ON Entities that are intended to afford Big Rivers protections against various environmental risks associated with the leased generators and Station

⁸⁰ October Motion to Amend ¶ 11.

⁸¹ *Id.*; Third Supplemental Direct Testimony of C. William Blackburn, October Motion to Amend, Exhibit 78, at 10-11.

⁸² Supplemental Direct Testimony of Michael H. Core, October Motion to Amend, Exhibit 102, at 8.

⁸³ Supplemental Direct Testimony of Michael H. Core, October Motion to Amend, Exhibit 102, at 8.

⁸⁴ Application ¶ 33.

⁸⁵ Application ¶ 16.

Two, and against various risks associated with WKEC's operation of those generators during the term of the 1998 Transactions.

The Termination Agreement, as amended, and all the transactions contemplated in the Termination Agreement are proposed for a proper purpose, and are consistent with the public interest. The Commission should approve them without change.

II. The Commission Should Approve the Agreements Related to the Transaction Termination Agreement.

Accompanying the basic documents ending the 1998 Transactions are additional agreements containing provisions that ensure a smooth transition of control from WKEC to Big Rivers. In addition, there are agreements that address the reversion of the Station Two Contracts, the rights and obligations of the Smelters going forward, and the terms and conditions upon which Big Rivers' Members will receive wholesale service. As described below, these agreements are integral to the Unwind Transaction, are just and reasonable, are consistent with the public interest and should be approved.

A. The Generation Dispatch Support Services Agreement Should Be Approved.

The *Generation Dispatch Support Services Agreement*, attached as Exhibit 16 to the Application, should be approved as an integral part of the Unwind Transaction. Under the agreement, certain of the E.ON Entities will provide generation dispatch services on Big Rivers' behalf at cost for a period of up to 18 months following the closing of the Unwind Transaction.⁸⁶ This ongoing assistance will facilitate the transition of the generating units from the E.ON Entities' control to Big Rivers' control.⁸⁷ Given the importance of ensuring a smooth transition, the agreement is reasonable and should be approved.

⁸⁶ Application ¶ 32; Direct Testimony of Mark A. Bailey, Application, Exhibit 5, at 11.

⁸⁷ Application ¶ 32; Direct Testimony of Mark A. Bailey, Application, Exhibit 5, at 11.

B. The Information Technology Support Services Agreement Should Be Approved.

The Information Technology Support Services Agreement, attached to the Application as Exhibit 17, will also facilitate the transition of control of the generating units.⁸⁸ Pursuant to this agreement, the E.ON Entities will provide information technology services, such as hosting payroll, asset management, and financial management software, to Big Rivers at cost for up to 18 months following closing.⁸⁹ As with the Generation Dispatch Support Services Agreement, the Information Technology Support Services Agreement will facilitate a smooth transition of control.⁹⁰ The Joint Applicants do not believe this agreement requires Commission approval, but if the Commission disagrees, approval should be granted.

C. The Terms and Conditions Relating to the Reversion to Big Rivers of the Station Two Contracts Should Be Approved.

As part of the overall Unwind Transaction, the E.ON Entities will relinquish their respective rights under the various contracts, agreements, leases, subleases, licenses, sublicenses, permits, and other rights and obligations related to the operation, maintenance, or repair of Station Two, thereby allowing Big Rivers to re-assume sole possession and control over these rights and obligations.⁹¹ Prior to 1998, Big Rivers operated Henderson's Station Two generating plants pursuant to the 1970 Station Two Contracts.⁹² In 1998, in connection with the 1998 Transactions, Big Rivers transferred to the E.ON Entities substantially all of its rights and obligations under the Station Two Contracts (including its responsibility to operate Station Two and its right to purchase power generated from the facility in excess of the City of Henderson's

⁸⁸ Application ¶ 32.

⁸⁹ Direct Testimony of Mark A. Bailey, Application, Exhibit 5, at 11-12.

⁹⁰ Application ¶ 32.

⁹¹ Application ¶ 33.

⁹² Application ¶ 13; Supplemental Direct Testimony of David A. Spainhoward, October Motion to Amend, Exhibit 99, at 5.

needs).⁹³ Big Rivers will have the capability, experience, and financial strength following the Unwind Transaction to operate and maintain Station Two.⁹⁴ The reversion of Station Two contract rights to Big Rivers, the termination of the E.ON Entities' corresponding contract rights, and Big Rivers' corresponding release of the E.ON Entities as contemplated in the Termination Agreement, on the terms proposed by Big Rivers in the five draft agreements filed with the October Motion to Amend as Exhibit 87 to the Application, should be approved.

Under the terms of the 1998 Transactions, Henderson must consent to this early reversion of contract rights and obligations.⁹⁵ At present, Big Rivers and the E.ON Entities are negotiating with Henderson regarding the demands Henderson has made as conditions to giving its consent.⁹⁶ To resolve those demands, the five contracts proposed by Big Rivers provide as follows:

a. Second Amendatory Agreement - Provides for an early expiration of the 1998 Station Two Agreement, which amended the 1970 Station Two Contracts to give the E.ON Entities the right to operate Station Two and to purchase excess power therefrom.⁹⁷ Henderson will retain all of its rights under the Station Two Agreement, including its rights to bring certain claims against the E.ON Entities, which were contemplated by express terms in the Station Two Agreement to survive the expiration of the agreement.⁹⁸ The Second Amendatory Agreement also provides for payments from the E.ON Entities to Henderson to secure Henderson's agreement to execute and perform the Second Amendatory Agreement.⁹⁹

b. Amendment to 1970 Power Sales Contract ("Amendment to Station Two Contract") - Pursuant to this contract, Big Rivers will increase its payment to Henderson by \$1.00 per MWh (to \$2.50 per MWh) for all Excess Henderson Energy and energy associated

⁹³ Application ¶¶ 10, 16. The Station Two Contracts are contained in Appendix B to the Application, and the 1998 Transactions documents (including the Station Two Agreement) are contained in Appendix A to the Application.

⁹⁴ Direct Testimony of Mark A. Bailey, Application, Exhibit 5, at 4-10.

⁹⁵ Application ¶¶ 37(e), 64.

⁹⁶ Application ¶ 33; Direct Testimony of David A. Spainhoward, Application, Exhibit 18, at 5-10.

⁹⁷ Supplemental Testimony of Paul W. Thompson, October Motion to Amend, Exhibit 91, at 12.

⁹⁸ *Id.*

⁹⁹ *Id.* at 13.

with Excess Henderson Capacity.¹⁰⁰ This is more than is currently required under the 1970 Station Two Contracts with Henderson.¹⁰¹ Big Rivers will also take and pay for all Excess Henderson Energy and Energy Associated with Excess Henderson Capacity that is available.¹⁰² Big Rivers is agreeing to the increased payment and increased take and pay obligation as an incentive to secure Henderson's consent to the Unwind Transaction, and to eliminate any questions about whether Big Rivers has a take or pay obligation.¹⁰³

c. Station Two Termination and Release Agreement - Effects the termination and release of the rights and obligations of the E.ON Entities and Big Rivers with regard to Station Two.¹⁰⁴

d. Station Two G&A Allocation Agreement - Provides for the allocation of general and administrative expenses associated with the operation and maintenance of Station Two between Big Rivers and Henderson.¹⁰⁵

e. Agreement for Assignment of Responsibility for Complying with Reliability Standards. - Allocates responsibility between Big Rivers and Henderson for complying with North American Electric Reliability Corporation electric reliability standards with respect to Station Two and Henderson's operation of its transmission system.¹⁰⁶

Big Rivers believes these agreements and amendments to agreements will be necessary to secure Henderson's consent to the Unwind Transaction.¹⁰⁷ Although Henderson did not review or approve these agreements and amendments before they were filed, Big Rivers is comfortable that they provide a reasonable resolution of all outstanding issues with Henderson.¹⁰⁸ Big Rivers is seeking approval of these documents at this time anticipating that Henderson will settle

¹⁰⁰ October Motion to Amend ¶ 28.

¹⁰¹ October Motion to Amend ¶ 28.

¹⁰² *Id.*

¹⁰³ Supplemental Direct Testimony of David A. Spainhoward, October Motion to Amend, Exhibit 99, at 10.

¹⁰⁴ *Id.* at 14.

¹⁰⁵ Supplemental Direct Testimony of David A. Spainhoward, October Motion to Amend, Exhibit 99, at 12.

¹⁰⁶ *Id.*

¹⁰⁷ October Motion to Amend ¶ 28.

¹⁰⁸ *Id.* ¶ 29.

with Big Rivers on the terms stated, and Big Rivers and Henderson will not have to return to the Commission for further time-consuming proceedings.¹⁰⁹

The Unwind Transaction will not close without the necessary Henderson consents. Big Rivers understands that if a resolution between Big Rivers and Henderson changes the terms of the documents Big Rivers is asking the Commission to approve, Big Rivers and Henderson must obtain Commission approval of those changes, and the Unwind Transaction closing will likely be delayed.¹¹⁰ Although Henderson's consent is required under the 1998 Transactions before the Unwind Transaction can close, Henderson's consent is not required for the Commission to enter an order approving the Unwind Transaction and the other relief requested in this proceeding. Henderson's consent is simply one of several conditions to closing the Unwind Transaction.¹¹¹

The proposed agreements with Henderson are meant to act in concert to eliminate the role of the E.ON Entities as the entity responsible for operating Station Two, and to permit Big Rivers to resume that role.¹¹² To the extent that Big Rivers regaining the operation and maintenance of Station Two constitutes a change in control requiring Commission approval, Big Rivers requests that the Commission approve that change in control.¹¹³

D. The Smelter Wholesale Agreements, Retail Agreements, Coordination Agreements, Lockbox Agreements and Guaranties Should Be Approved.

Big Rivers' ten agreements relating to service to the Smelters (the "Smelter Agreements") are reasonable and should be approved. The Smelter Agreements include a wholesale agreement between Big Rivers and Kenergy for each Smelter; a retail agreement between Kenergy and each Smelter; a Coordination Agreement between Big Rivers and each

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Application ¶ 37.

¹¹² Supplemental Direct Testimony of David A. Spainhoward, October Motion to Amend, Exhibit 99, at 5.

¹¹³ Application ¶ 57.

Smelter; a security and lock box agreement among Big Rivers, Kenergy, Old National Bank and each Smelter; and a guaranty from each Smelter.¹¹⁴ These agreements have been revised during the course of this proceeding.

The revised versions of the wholesale agreements, retail agreements, security and lock box agreements, and guaranties for which approval is sought (should the Commission determine that approval of each such agreement is necessary) are attached as Exhibit 81 to the October Motion to Amend, except that a revised version of Exhibit A to the wholesale and retail agreements is attached as Exhibit 113 to the November 24, 2008, Motion to Amend and Supplement Application. The revised versions of the Coordination Agreements for which approval is sought (should the Commission determine that approval is necessary) are attached as Exhibit 111 to the November 24, 2008, Motion to Amend and Supplement Application. The Smelter wholesale and retail agreements,¹¹⁵ which provide a long-term solution to the Smelters' power needs, unquestionably require – and should receive – Commission approval.

Under current arrangements, the Smelters obtain approximately two-thirds of their electric power needs through Kenergy under retail agreements entered into in connection with the 1998 Transactions that expire at the end of 2010 (with respect to Century) and 2011 (with respect to Alcan).¹¹⁶ Kenergy obtains the majority of the wholesale power required to meet the Smelters' needs from the E.ON Entities under contracts that expire concurrently with the Smelter retail contracts.¹¹⁷ The balance of each Smelter's power requirement is met through "Tier 3" purchases by Kenergy in the open power market from the best available sources, which has

¹¹⁴ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 36; October Motion to Amend.

¹¹⁵ The Commission has ruled that it will consider the reasonableness of the Smelter retail contracts in this proceeding. Order dated December 12, 2008, in *The Application of Kenergy Corp. for Approval of Retail Tariff Riders and Revised Tariffs, Approval of Smelter Agreements, and Approval of Amendment to Wholesale Agreement*, Case No. 2008-00009, at 3.

¹¹⁶ Application ¶ 40; Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 41.

¹¹⁷ Application ¶ 40; Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 41.

occasionally included Big Rivers.¹¹⁸ Big Rivers has contracted with Kenergy for a portion of the Smelters' 2008 Tier 3 Energy requirements.¹¹⁹

The Smelters' current arrangements do not provide a long-term source of affordable power after the expiration of their contracts in 2010 and 2011 and, as the Smelters have explained, "absent affordable rates, continued operation is problematic."¹²⁰ Retaining the Smelters as an economic engine in western Kentucky is crucial because the Smelters employ approximately 1,400 people earning over \$115 million in wages and benefits annually.¹²¹ In his direct testimony, Paul A. Coomes summarized the importance the Smelters have on the economy of western Kentucky:

[T]he smelter operations are crucial components of the tax and economic base in Hancock and Henderson counties. The two firms are the largest single taxpayers in each county. The Century operation in Hawesville accounts for over twenty percent of all wages and salaries earned in Hancock County, contributing a similar share of the county's occupational tax receipts. The Hawesville plant also accounts for about fifteen percent of all property taxes collected to support the Hancock County Public School system and county government operations. The Alcan operation accounts for almost five percent of wages and salaries in (much more populated) Henderson County, and about three percent of all property taxes collected for public schools and county governments.¹²²

If the Smelters close, Mr. Coomes estimates that total job loss in the region will exceed 5,000, the payroll loss will be \$193 million annually, the loss to the Kentucky state government in income and sales taxes will be at least \$15.3 million annually, and the loss to county

¹¹⁸ Application ¶ 40; Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 41.

¹¹⁹ Application ¶ 40.

¹²⁰ Smelter Comments filed June 8, 2005 in PSC Case No. 2005-00090, *An Assessment of Kentucky's Electric Generation, Transmission and Distribution Needs* (also stating that "power costs constitute approximately a third of the cost to produce aluminum;" "high electricity costs have caused the closure of other smelters;" and "other state commissions have taken action to preserve smelters in their states").

¹²¹ Direct Testimony of Paul A. Coomes at 2.

¹²² Direct Testimony of Paul A. Coomes at 3.

governments and local public school districts will be at least \$1.4 million annually.¹²³ The impact on the economy of western Kentucky would be devastating. The potential for solving this problem with benefits accruing to all parties provided great incentive for the parties to pursue the Unwind Transaction.¹²⁴

After lengthy negotiations balancing the interests of the parties, Big Rivers and the Smelters agreed to terms that create a long-term power supply for the Smelters, while simultaneously minimizing the risk to Big Rivers and its Members of serving the Smelters.¹²⁵ The Smelter Agreements will replace the existing Smelter power supply arrangements, including the 2008 and 2009 Tier 3 Energy wholesale agreements between Big Rivers and Kenergy.¹²⁶

The Smelter's retail agreements with Kenergy, for which Kenergy seeks approval, are essentially identical to the wholesale agreements and create a pass-through arrangement for the obligations between Big Rivers and the Smelters.¹²⁷ The Coordination Agreements set forth direct obligations between Big Rivers and each Smelter, giving each a mechanism to enforce the other's obligations under the wholesale and retail agreements.¹²⁸ The Security and Lock Box Agreements provide for the Smelters to make payments due under the retail agreements to a depository bank selected by the parties, and for the bank automatically to disburse each payment due from Kenergy to Big Rivers.¹²⁹

The Smelter Agreements provide that Big Rivers will supply, subject only to the occurrence of an event of force majeure, Base Energy to the Smelters in an amount up to 850

¹²³ Direct Testimony of Paul A. Coomes at 4.

¹²⁴ Application ¶ 38; Direct Testimony of Michael H. Core, Application, Exhibit 14, at 15-16.

¹²⁵ Application ¶¶ 38, 42.

¹²⁶ Application ¶ 43.

¹²⁷ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 38-39.

¹²⁸ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 37, 68.

¹²⁹ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 37, 70.

MW of electric energy and related services (368 MW for Alcan and 482 MW for Century).¹³⁰ Big Rivers may also sell additional quantities of electric energy and related services (Market Energy) upon a Smelter's request, or Kenergy may obtain Market Energy from other wholesale suppliers.¹³¹ Big Rivers may also sell interruptible electric energy and related services (and, if requested, buy-through electric energy in the event of an interruption) to Kenergy for resale to the Smelters.¹³² It is important to note that the arrangements contained in the Smelter wholesale and retail agreements with respect to the purchase of Interruptible Energy, Buy-Through Energy and Market Energy reflect the refinement of the Tier 3 Energy purchase arrangements among Big Rivers, Kenergy and the Smelters over the past decade. The parties have found these products as embodied in the Smelter wholesale and retail agreements to have worked well and to have met the needs of all the parties.

1. The Rates in the Smelter Wholesale Agreements and Retail Agreements are Reasonable.

The rates and rate formulae to which Big Rivers and the Smelters have agreed in the Smelter Wholesale Agreements and Retail Agreements are reasonable. The Smelters will pay a rate for Base Energy that is \$0.25 per MWh above the wholesale rate charged by Big Rivers to its Members for power for resale to other dedicated delivery point large industrial customers (as may be adjusted from time to time upon Commission approval), assuming a 98% load factor.¹³³ The Smelters will also pay, among other amounts, charges passed through the Big Rivers fuel adjustment clause ("FAC") and environmental surcharge; charges which are paid by all retail customers of Big Rivers' Members.¹³⁴ The Smelters further pay a TIER Adjustment Charge, a

¹³⁰ Application ¶ 43; Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 41.

¹³¹ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 42.

¹³² Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 42.

¹³³ Application ¶ 43; Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 48.

¹³⁴ Application ¶ 43; Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 48.

Smelter Surcharge, and a non-FAC Purchase Power Adjustment (“Non-FAC PPA”). None of these charges are paid by those other Member retail customers, but in fact benefit those other retail customers.¹³⁵ The charges for interruptible energy, market energy, and buy-through energy will be agreed to from time to time by Big Rivers and the Smelters.¹³⁶ Big Rivers believes a 1.24 TIER is necessary for it to obtain and maintain investment grade credit ratings.¹³⁷ If Big Rivers does not otherwise achieve a 1.24 TIER as defined in the Smelter Agreements, the TIER Adjustment will be a positive amount, and the Smelters will pay a TIER Adjustment Charge to help Big Rivers achieve a 1.24 contract TIER each fiscal year, as calculated pursuant to the agreements.¹³⁸ The charge will support Big Rivers’ earnings by furnishing an amount above base rates that will, within certain limitations, be sufficient for Big Rivers to achieve a 1.24 contract TIER.¹³⁹ The TIER Adjustment Charge can increase up to a level that keeps the resulting Smelter rates within a specified bandwidth.¹⁴⁰ If Big Rivers otherwise achieves a contract TIER higher than 1.24, there will be no TIER Adjustment Charge, and the amount by which the TIER Adjustment is negative will be the Excess TIER Amount. When there is an Excess TIER Amount, Big Rivers may return the entire amount to its Members and the Smelters in the form of a rebate, allocated on the basis of energy sales.¹⁴¹ Since the rebate of the Excess TIER Amount is allocated based on energy sales, it will affect all of Big Rivers’ Member rates by the same amount per kWh, and the Smelters will continue to pay the Large Industrial Rate (assuming a 98% load factor) plus \$0.25 per MWh, plus the FAC, Environmental Surcharge, and

¹³⁵ Application ¶ 43; Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 57. The Members may eventually pay their proportionate amount of purchased power costs through general rate adjustments.

¹³⁶ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 49.

¹³⁷ Application ¶ 44; Direct Testimony of Mark W. Glotfelty, Application, Exhibit 21, at 6-9; Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 51-52.

¹³⁸ Application ¶ 44.

¹³⁹ Application ¶¶ 44, 46.

¹⁴⁰ Application ¶ 46.

¹⁴¹ Application ¶ 46; Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 60.

Non-FAC PPA.¹⁴² If Big Rivers chooses to retain the portion of any Excess TIER Amount that would have been allocated to the non-Smelter Member sales, Big Rivers is still obligated to provide credit to Kenergy for the Smelters' energy allocated portion of the Excess TIER Amount, in which case, it is considered an Equity Development Credit. However, the Equity Development Credit, is limited so that the rate for Smelter sales will not be less than the sum of the Large Industrial Rate (assuming a 98% load factor), plus the FAC, Environmental Surcharge, and Non-FAC PPA.¹⁴³

The annual caps on the TIER Adjustment Charge do not prevent Big Rivers from seeking an increase in Member Base Rates in order to obtain additional revenue without regard to whether it has achieved a 1.24 TIER. Because the Smelter rates are tied to Big Rivers' Large Industrial Customer rate, an increase in Member Base Rates would correspondingly increase Smelter Base Rates.¹⁴⁴ As such, the Smelters are subject to increases in their contribution to Big Rivers' revenue requirements beyond the amounts that are recoverable directly from the Smelters through the TIER Adjustment Charge.¹⁴⁵

The parties' treatment of Smelter fuel costs is reasonable. During the pendency of this case, Big Rivers and the Smelters negotiated certain changes to the Smelter Agreements, as described in the June Motion to Amend and in the October Motion to Amend, to take into account resolution of an increase in projected fuel prices and to alleviate other concerns expressed during this proceeding.¹⁴⁶ Under the June version of the agreements, Big Rivers would have paid \$7 million to the Smelters over time through a FAC Reserve to offset projected

¹⁴² Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 60.

¹⁴³ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 61.

¹⁴⁴ Rebuttal Testimony of C. William Blackburn at 17.

¹⁴⁵ Rebuttal Testimony of C. William Blackburn at 17.

¹⁴⁶ June Motion to Amend ¶ 2.

increases in fuel costs.¹⁴⁷ The final version of the agreements eliminates the FAC Reserve.¹⁴⁸ Under the October revisions, Big Rivers would pay the Smelters \$7 million at closing.¹⁴⁹ This solution removes an unnecessary complication to the tariffs.¹⁵⁰

In the November revision to the Coordination Agreements, a formula for determining an additional closing incentive payment was set forth as an inducement for the Smelters to sign onto the Unwind Transaction in the face of the projected cost increases.¹⁵¹ That formula would calculate a payment based on the difference between the amount charged each Smelter for Tier 3 energy under their current contracts with Kenergy during the period from October 6, 2008, through the date of the closing of the Unwind Transaction, and the amount that would be owed for a similar quantity of energy under the Unwind Transaction rates.¹⁵²

The June revisions to the Smelter Agreements also address a concern regarding potential results of the ultimate outcome of the appeal of the August 1, 2007, opinion of the Franklin Circuit Court in *Commonwealth of Kentucky ex rel. Gregory D. Stumbo, Attorney General v. Public Service Comm'n and Union Light, Heat and Power Co.*, C.A. No. 06-CI-269, amended in part and reversed in part by *Kentucky Public Service Commission and the Duke Energy Kentucky, Inc., F/K/A/ The Union Light Heat and Power Company v. Commonwealth of Kentucky, Ex Rel., Greg Stumbo*, Case No. 2007-CA-001635-MR, November 7, 2008, Motion for Reconsideration pending.¹⁵³ The November 7, 2008 opinion of the Court of Appeals in this case should obviate concerns that any rate mechanism proposed in this case is legally infirm. However, the June amendments provide a mechanism through which Big Rivers and the

¹⁴⁷ June Motion to Amend ¶ 2.

¹⁴⁸ Third Supplemental Direct Testimony of C. William Blackburn, October Motion to Amend, Exhibit 78, at 50.

¹⁴⁹ Third Supplemental Direct Testimony of C. William Blackburn, October Motion to Amend, Exhibit 78, at 50.

¹⁵⁰ Third Supplemental Direct Testimony of C. William Blackburn, October Motion to Amend, Exhibit 78, at 50.

¹⁵¹ Third Supplemental Direct Testimony of C. William Blackburn, October Motion to Amend, Exhibit 78, at 53; November 24, 2008, Motion to Amend and Supplement Application ¶ 3.

¹⁵² Third Supplemental Direct Testimony of C. William Blackburn, October Motion to Amend, Exhibit 78, at 54.

¹⁵³ June Motion to Amend ¶ 2.

Smelters can resolve any adverse impacts that future judicial conclusions in this case may have on the Smelter Agreements.¹⁵⁴ If Big Rivers and the Smelters are unable to agree on a resolution, Big Rivers may seek appropriate relief from the Commission.¹⁵⁵

The Smelter Agreements also require the Smelters to pay a Smelter Surcharge each month, to be applied as a credit to fuel charges payable by Big Rivers' non-Smelter Members.¹⁵⁶ The Smelter Surcharge is derived from four amounts: (1) an annual aggregate payment of (i) \$5,110,000 from the effective date of the agreements through December 2011; (ii) \$7,300,000 from January 2012 through December 2016; and (iii) \$10,182,813 from January 2017 through the expiration of the agreements;¹⁵⁷ (2) the product of a Smelter's Base Fixed Energy for any billing month multiplied by \$0.60 per MWh;¹⁵⁸ (3) the product of the Base Fixed Energy for any billing month and the number of cents (between 0 and 60) per MW per hour that Big Rivers' fuel costs for coal-fired generation per MWh for a given fiscal year exceed the amounts set forth in Schedule 4.11(c) for that fiscal year;¹⁵⁹ and (4) less \$200,000 per month for the first 96 months after closing of the Unwind Transaction.¹⁶⁰

The Smelters will also pay the Non-FAC PPA.¹⁶¹ The Non-FAC PPA requires the Smelters to pay, on a current basis, the proportion of the Big Rivers' non-FAC purchased power expenses attributable to the Smelters' proportionate energy consumption.¹⁶²

¹⁵⁴ *Id.*; Second Supplemental Testimony of C. William Blackburn, June Motion to Amend, Exhibit 7, at 4.

¹⁵⁵ June Motion to Amend ¶ 2.

¹⁵⁶ Application ¶ 47; Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 58.

¹⁵⁷ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 58.

¹⁵⁸ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 58.

¹⁵⁹ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 58.

¹⁶⁰ Third Supplemental Direct Testimony of C. William Blackburn, October Motion to Amend, Exhibit 78, at 16.

¹⁶¹ Application ¶ 48; Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 57.

¹⁶² Application ¶ 48.

2. The Smelter Wholesale Agreements and Retail Agreements Contain Appropriate Mitigants Against the Potential Impacts of Smelter Agreement Termination.

The Smelter Agreements permit each Smelter to terminate its contract on one year's written notice that it will cease all aluminum smelting activities at its smelting plant.¹⁶³ However, no termination is permitted prior to December 31, 2010, and only one Smelter may terminate its wholesale agreement prior to December 31, 2011, unless Big Rivers has completed the transmission upgrade authorized by the Commission in its Order dated October 30, 2007, in Case No. 2007-00177, which will ensure that Big Rivers will have the capability to move any unused Smelter power off its system.¹⁶⁴ Big Rivers and its Members thus will be protected even if both Smelters leave the system.

In addition to ensuring that it had the transmission export capacity to move the entire Smelter load to its border for sale in the wholesale market,¹⁶⁵ Big Rivers has taken other steps to mitigate the risks associated with the large Smelter load. The Smelter Agreements place a large share of risk on the Smelters through the TIER Adjustment Charge and the Smelter Surcharge, among other protections.¹⁶⁶ Further, Big Rivers will set aside \$35 million from the consideration it is receiving from the E.ON Entities to hold in a Transition Reserve Account that will be available to offset any temporary cash shortfalls that could occur if one or both Smelters cease operation.¹⁶⁷ The reserve will be adequate to enable Big Rivers to withstand a three-year period after the loss of one of the Smelters even if such a loss coincided with a reasonable downturn in the market price of electricity.¹⁶⁸

¹⁶³ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 66.

¹⁶⁴ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 66.

¹⁶⁵ Application ¶ 53.

¹⁶⁶ Big Rivers' Responses to the Attorney General's Initial Request for Information, Item 32(b).

¹⁶⁷ Application ¶ 53; Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 84-87.

¹⁶⁸ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 86.

Next, Big Rivers and the Smelters have agreed to provisions which should help the Smelters have a better understanding of activities relating to Big Rivers' costs, and enable them to plan appropriately. The Smelter Agreements create a Coordinating Committee¹⁶⁹ that includes representatives of Big Rivers, Big Rivers' Members and the Smelters. The purposes of the Coordinating Committee are to provide a high degree of information sharing, discussion and collaboration among the parties in a non-adversarial setting that will reduce the potential for disputes and identify opportunities to reduce operating costs while maintaining the reliability that is so important to Big Rivers, its Members and the Smelters.¹⁷⁰ The Smelters are provided an opportunity to have an independent expert review Big Rivers' operating budget.¹⁷¹ The Smelter Agreements do not, however, give the Smelters any control or veto rights over Big Rivers' decision-making.¹⁷² It is reasonable for Big Rivers to provide the Smelters with a high degree of access to information given the nature of the TIER Adjustment Charge, which exposes the Smelters to 100% first-dollar responsibility for Big Rivers' non-fuel and purchased power cost increases up to the TIER Adjustment Charge caps.¹⁷³ But the Smelters' access and consultation rights are advisory rights that contribute to, rather than detract from, the viability of the Unwind Transaction.¹⁷⁴

A Smelter has an alternative to termination of its Retail Agreement in the event it needs to curtail production from one potline. A Smelter can shut down one potline (which would be approximately a 115 MW reduction in a Smelter's load), and Big Rivers will sell into the

¹⁶⁹ See Section 4 of the Smelter Coordination Agreements, filed as Exhibit 111 to the November 24, 2008, Motion to Amend and Supplement Application.

¹⁷⁰ Rebuttal Testimony of Mark A. Bailey at 6-7.

¹⁷¹ Rebuttal Testimony of Mark A. Bailey at 6-7.

¹⁷² Rebuttal Testimony of Mark A. Bailey at 6-7.

¹⁷³ Rebuttal Testimony of Mark A. Bailey at 6.

¹⁷⁴ Rebuttal Testimony of Mark A. Bailey at 7.

wholesale power market the amount of energy that the potline would have consumed.¹⁷⁵ The Smelter will get a credit to its monthly charge equal to the net proceeds of that sale.¹⁷⁶ This option is only available to a Smelter upon actual cessation of aluminum smelting operations on a potline, where such cessation is expected to be for greater than 12 months, and there has not been a potline reduction sale in the prior 12 months.¹⁷⁷

Concerns have been expressed in this proceeding that the Smelters have little incentive to make a long-term commitment to the region because of the impression that the benefits under the Smelter Agreements are front-end loaded. The Attorney General's consultant calculated that the Smelters need only pay \$86 million of the \$327.9 million (or approximately 26%) in present value that the Smelters were initially projected to provide over comparable large industrial rates over the full term of the Smelter Agreements if they depart the system by 2012.¹⁷⁸ But the agreements are not unreasonably front-end loaded.¹⁷⁹ That 26% of the present value will be provided during the first 29% of the transaction term.¹⁸⁰ Moreover, the Smelter Agreements are expected to offer below-market rates in their later years.¹⁸¹

3. The Smelter Termination Rights are Reasonable.

The Smelters clearly expect that the new arrangements will be long term: their agreements do not provide for re-negotiation until 2023,¹⁸² and the Smelters' representatives have testified that they expect to remain in operation.¹⁸³ In fact, the Smelters were very

¹⁷⁵ Blackburn Testimony, Tr. Dec. 3, 2008 at p. 78, l. 9-25.

¹⁷⁶ See Alcan Wholesale Agreement (October Motion to Amend, Exhibit 81C) § 10.3

¹⁷⁷ See *id*

¹⁷⁸ Direct Testimony of David Brevitz at 42-43. When Mr. Brevitz performed this calculation, the present value of the benefits the Smelters were providing to Big Rivers over large industrial rates was \$327 million. See *id*. The value of those benefits has now increased to \$327.9 million. See Big Rivers' November 7, 2008 Updated Response to Attorney General Data Request No. 67.

¹⁷⁹ Rebuttal Testimony of W. William Blackburn at 18.

¹⁸⁰ Rebuttal Testimony of C. William Blackburn at 18.

¹⁸¹ Rebuttal Testimony of C. William Blackburn at 18.

¹⁸² Fayne Testimony, Tr. Dec. 3, 2008 at p. 169, l. 13-25.

¹⁸³ Hale Testimony, Tr. Dec. 2, 2008 at pp. 150-151; Authier Testimony, Tr. Dec. 2, 2008 at pp. 156-157.

interested in negotiating extensions to their contracts earlier than 2023, because the Smelter plants can operate beyond 2023.¹⁸⁴ But even if the Smelters ultimately leave the system, the record shows that Big Rivers will be able to sell the 850 MW of power and energy that would otherwise be taken by the Smelters.¹⁸⁵ And because the market price would probably be higher than the rates charged to the Smelters, Big Rivers would need to sell less than 100% of that 850 MW to remain revenue neutral.¹⁸⁶

The termination rights of the Smelters in their wholesale and retail contracts are reasonable in the context of the Unwind Transaction, and in the context of the circumstances that exist today rather than over a decade ago. A Smelter has the right under the proposed Smelter agreements to terminate its contract after the Unwind Closing upon one year's notice under Section 7.3 of the Smelter Retail Agreement, subject to certain conditions. The undercurrent of cross-examination was that the right to terminate on a notice period of one year is unreasonable to Big Rivers and its Members, and that it telegraphs a lack of commitment on the part of the Smelters to long-term operation of the Smelter facilities, one of the principal goals hoped to be achieved by the Unwind Transaction. This termination right was contrasted against the long-term take-or-pay obligations of the Smelters under their pre-1998 contracts for electric service.

First, the Smelters' unilateral right to terminate (other than for a default) after the Unwind Closing is limited to circumstances where the Smelter certifies that it is ceasing all aluminum smelting operations, with no current intention of re-commencing smelting operations at that

¹⁸⁴ Fayne Testimony, Tr. Dec. 3, 2008 at pp. 169-170.

¹⁸⁵ Third Supplemental Direct Testimony of C. William Blackburn, October 9, 2008, Motion to Amend and Supplement Application ("October Motion to Amend"), Exhibit 78, at 60-61.

¹⁸⁶ *Id.* at 61-62.

site.¹⁸⁷ The earliest a Smelter may terminate is December 31, 2010, and if one Smelter has given a notice to terminate, the other Smelter cannot terminate prior to December 31, 2011.¹⁸⁸

Second, focusing on the single issue of the right to terminate ignores the dramatic differences between the proposed contracts and the pre-1998 contracts. When the Smelter contracts were entered into decades ago, creditors required that the contracts be long-term, with a high minimum demand charge to assure repayment of debt incurred by Big Rivers to construct the facilities from which the Smelters would be served.¹⁸⁹ No major capital expenditures are being made to serve the Smelters in the Unwind Transaction, no creditor is demanding long-term contracts, and contracts of that nature are not common today.¹⁹⁰ The pre-1998 Smelter contracts certainly contained none of the payments from the Smelters that are being required in the proposed Smelter contracts to mitigate the rates of the Members' non-Smelter customers.¹⁹¹

Third, Big Rivers' circumstances post-Unwind Transaction closing will also be remarkably improved over what they were when it was previously providing wholesale service for the Smelter load. There is now a robust wholesale market for power that did not exist prior to 1998.¹⁹² Big Rivers did not have the transmission capacity to export all the Smelter power prior to 1998, but will have that capacity post-Unwind Transaction.¹⁹³ And prior to a change in law in 2006, Big Rivers did not have the legal capacity to make a sale of power as large as the Smelter load to a non-member.¹⁹⁴

¹⁸⁷ See Alcan Retail Agreement (October Motion to Amend, Exhibit 81A) § 7.3.1.

¹⁸⁸ *Id.*

¹⁸⁹ Blackburn Testimony, Tr. Dec. 3, 2008 at p. 66, l. 13-19.

¹⁹⁰ Blackburn Testimony, Tr. Dec. 3, 2008 at p. 136, l. 8-18.

¹⁹¹ Blackburn Testimony, Tr. Dec. 3, 2008 at p. 134, l. 13-18.

¹⁹² Blackburn Testimony, Tr. Dec. 3, 2008 at p. 134, l. 20-22.

¹⁹³ Blackburn Testimony, Tr. Dec. 3, 2008 at p. 135, l. 1-9.

¹⁹⁴ Blackburn Testimony, Tr. Dec. 3, 2008 at p. 135, l. 10-25.

Finally, the Smelters plan to make significant capital expenditures to improve their smelting operations if the Unwind Transaction closes.¹⁹⁵ The Smelters would not make such a commitment if they did not intend to keep their doors open. Given the change in circumstances, the radically different market conditions, and the Smelters' stated desire to operate their facilities for the long-term, the Smelter termination rights are eminently reasonable.

4. The Smelter Wholesale Agreements and Retail Agreements Pro-Actively Work to Address Potential Future Issues Between the Parties.

Big Rivers, Kenergy and the Smelters tried to anticipate in their negotiations future issues that could arise between or among the parties, and to at least establish a framework for resolution of those issues. For example, depreciation rates have a significant effect on the economics of the transaction for each party, and the parties relied on the rates used in the Unwind Financial Model in evaluating the overall transaction.¹⁹⁶ Big Rivers believes those depreciation rates are currently reasonable,¹⁹⁷ but the Smelter Agreements contain provisions allowing Big Rivers to seek changes to its depreciation rates.¹⁹⁸ The depreciation rates can only be modified with the consent of the Commission, and Big Rivers would coordinate and discuss any proposed modification with the Smelters prior to filing an application for a depreciation rate adjustment.¹⁹⁹ The depreciation rates in the Unwind Financial Model constitute an increase in rates over the existing rates.²⁰⁰

¹⁹⁵ See Alcan and Century Response to Item 2 of the Commission Staff's Supplemental Request; Alcan and Century Response to Item 4 of the Commission Staff's First Data Request.

¹⁹⁶ Rebuttal Testimony of Michael H. Core at 9.

¹⁹⁷ See e.g., Rebuttal Testimony of Michael H. Core at 9.

¹⁹⁸ Big Rivers can seek an increase in the depreciation rates if the change would not increase the weighted average depreciation rates for the period through December 21, 2016, to exceed those set forth in the Unwind Financial Model. Further, Big Rivers can initiate a request to change its depreciation rates based on actions by a governmental authority, the rating agencies or its auditors. Rebuttal Testimony of Michael H. Core at 9.

¹⁹⁹ Rebuttal Testimony of Michael H. Core at 8.

²⁰⁰ Rebuttal Testimony of Michael H. Core at 9.

The October revisions to the Smelter Agreements also resolve an issue related to the buyout of the PMCC leveraged leases. The buyout decreased Big Rivers' prepayment to the RUS, thereby necessitating an increase in Big Rivers' projected wholesale rates should the Unwind Transaction not close when contemplated.²⁰¹ In order to mitigate the effects of this increase on the Smelters, the October revisions provide a \$200,000 downward adjustment in the monthly Smelter Surcharge for the initial 8 years of the agreements.²⁰² In order to prevent any front-end loading of benefits, a Smelter will lose any unrealized benefit of the adjustment if it does not take service under its retail agreement for the full 8 years.²⁰³

5. Conclusion.

The Smelter wholesale agreements are reasonable, will provide substantial benefits to Big Rivers, the Smelters, and Big Rivers' Members, and should be approved.²⁰⁴ The Smelter Agreements provide the "best alternative available" to allowing the Smelters a reasonable opportunity for continued operation.²⁰⁵ Indeed, the record demonstrates that the proposed transaction will head off the looming potential disaster to the Smelters and the economy of a large part of western Kentucky that would otherwise result from the Smelters' loss of a stable source of power. The Smelters have invested hundreds of millions of dollars in their Kentucky operations, and they will make substantial additional capital investment if the Unwind Transaction closes, as they believe that the Unwind Transaction will enable them to survive beyond 2010 and 2011.²⁰⁶ Alcan intends to invest approximately \$40 million once the Unwind Transaction closes and approximately \$6 million annually thereafter.²⁰⁷ Century plans to invest

²⁰¹ Third Supplemental Direct Testimony of C. William Blackburn, October Motion to Amend, Exhibit 78, at 16.

²⁰² Third Supplemental Direct Testimony of C. William Blackburn, October Motion to Amend, Exhibit 78, at 16.

²⁰³ *Id*

²⁰⁴ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 67.

²⁰⁵ Direct Testimony of Henry W. Fayne at 13-14.

²⁰⁶ See Alcan and Century Response to Item 2 of the Commission Staff's Supplemental Request.

²⁰⁷ Alcan and Century Response to Item 4 of the Commission Staff's First Data Request.

approximately \$46 million after the close of the Unwind Transaction to increase energy efficiency and approximately \$14 million annually thereafter.²⁰⁸

The terms and conditions upon which the Smelters will receive service are just and reasonable. *The Smelter Agreements should be approved.*

E. The Wholesale Power Contract Amendments Should Be Approved.

The Commission should approve the amended wholesale power contracts, attached as Exhibit 27 to the Application, between Big Rivers and its Members. Pursuant to the amendments, the contracts' terms will be extended to December 31, 2043.²⁰⁹ This extension will accommodate the maturities of Big Rivers' debt refinancing, and should allow for the maturity of any other debt that Big Rivers will incur in the near term without further contract amendments.²¹⁰ These amendments also include typical language to protect the assets of the borrower generation and transmission cooperatives from the potential departure of a member from their systems.²¹¹ The amendments to the wholesale agreements are necessary corollaries to the new financing arrangements.

A key benefit of the Unwind Transaction to Big Rivers and its Members is the improvement in Big Rivers' financing capabilities, which currently range between minimal and non-existent.²¹² The Unwind Transaction will enable Big Rivers to finance system additions, power purchases, and the demands associated with growth on its system, an ability Big Rivers has lacked since 1998.²¹³ Big Rivers will continue to labor under this disadvantage for many

²⁰⁸ Alcan and Century Response to Item 4 of the Commission Staff's First Data Request.

²⁰⁹ Application ¶ 50.

²¹⁰ Application ¶ 50.

²¹¹ Application ¶ 50.

²¹² Application ¶ 49.

²¹³ Application ¶ 51; Direct Testimony of Michael H. Core, Application, Exhibit 14, at 14.

years if the Unwind Transaction does not close, and will be severely challenged to deal with any unexpected events or new opportunities that arise in the interim.²¹⁴

The Members have participated fully in the planning of the Unwind Transaction and unanimously support it.²¹⁵ They view the transactions as an opportunity to restore their generation and transmission cooperative to a level of financial health not achieved in many years.²¹⁶ The Members understand the risks; however, the increased financial health of Big Rivers more than offsets the risk of potential rate increases attributable to variable cost changes inherent in the Unwind Transaction.²¹⁷ The strengthened financial position that Big Rivers will achieve after the Unwind Transaction closes will give Big Rivers the financial flexibility to meet unexpected events and to invest in new generation to meet Member load increases.²¹⁸ Importantly, as clarified by both Mr. Core and Mr. Bailey in their testimony during the hearing, Big Rivers does not intend to use its increased financial flexibility to engage in non-regulated activities; this flexibility will accrue for the benefit of Big Rivers' Members.²¹⁹

Moreover, the Members have worked with Big Rivers and the other parties to the transaction to minimize the risks of the Unwind Transaction to the non-Smelter ratepayers, and to offset some of the potential rate increases from variable cost changes.²²⁰ The proposal to apply the ratemaking principle of gradualism to “feather” drawdowns of the Economic Reserve

²¹⁴ Application ¶ 51; Direct Testimony of Burns E. Mercer, Application, Exhibit 26, at 11.

²¹⁵ Direct Testimony of Burns E. Mercer, Application, Exhibit 26, at 3.

²¹⁶ Direct Testimony of Burns E. Mercer, Application, Exhibit 26, at 3.

²¹⁷ Direct Testimony of Burns E. Mercer, Application, Exhibit 26, at 7-9.

²¹⁸ *Id.* at 11-12.

²¹⁹ See Core Testimony, Tr. Dec. 2, 2008 at pp. 53-54; Bailey Testimony, Tr. Dec. 2, 2008 at p. 112, l. 15-22.

²²⁰ Direct Testimony of Burns E. Mercer, Application, Exhibit 26, at 7-9.

through the Member Rate Stability Mechanism has been implemented with the encouragement of Big Rivers' Members.²²¹ The expected rate increases are thus gradual.²²²

For Meade County Rural Electric Cooperative, Rate 1 projected residential increases per kWh are 3.02% in 2010; 2.85% in 2011; 2.95% in 2012; 4.03% in 2013; and 3.17% in 2014.²²³ For Jackson Purchase Energy Corporation, residential increases are expected to be 3.06% in 2010; 2.88% in 2011; 2.99% in 2012; 4.08% in 2013; and 3.21 % in 2014.²²⁴ For Kenergy, residential increases expected are 2.99% in 2010; 3% in 2011; 3.11% in 2012; 4.24% in 2013; and 3.33% in 2014.²²⁵ As Big Rivers has shown in its Exhibit 100, filed with the October Motion to Amend, and in Big Rivers Redirect Exhibit 4, introduced through Mr. Blackburn at the hearing, the projected rates in the Unwind Transaction compare favorably with, or may even be lower than, the anticipated rates Big Rivers will require in the existing transaction if the Unwind Transaction fails to close.²²⁶

The proposed wholesale power contract amendments are necessary for Big Rivers to enter into the financial arrangements it has proposed in this proceeding, which themselves are inextricably linked to the overall Unwind Transaction and Big Rivers' viability going forward. The amendments should be approved.

²²¹ Supplemental Testimony of Burns E. Mercer, October Motion to Amend, Exhibit 101, at 5.

²²² Supplemental Testimony of William Steven Seelye, October Motion to Amend, Exhibit 103, at 5-6 and Exhibit WSS-17.

²²³ Big Rivers' Response to the Commission Staff's October 24, 2008 Supplemental Data Request, Item 9.

²²⁴ Big Rivers' Response to the Commission Staff's October 24, 2008 Supplemental Data Request, Item 7.

²²⁵ Big Rivers' Response to the Commission Staff's October 24, 2008 Supplemental Data Request, Item 8.

²²⁶ See Blackburn Testimony, Tr. Dec. 3, 2008 at pp. 22-23.

III. The Concerns Raised With Regard to the Unwind Transaction Have Been Fully Addressed.

A. The Commission Should Follow Its Own Precedents and Refrain From Delaying a Final Decision in this Case Based on the Status of Conditions Precedent to Closing That are Outside Its Jurisdiction.

The Attorney General has argued that the Commission should consider delaying its decision in this case until after the occurrence of certain conditions precedent to closing, i.e., HMP&L's consent to the early expiration of the Station Two Agreement (and/or the E.ON Entities' associated rights under the Station Two Contracts) and the credit rating agencies' decision on Big Rivers' investment grade credit rating. The evidence in the record does not support this recommendation and in fact shows the serious consequences to Big Rivers and the customers of member cooperatives if the Unwind Transaction cannot be completed.

HMP&L itself has characterized the issues being discussed in connection with its consent as "independent of and unrelated to any action the Commission may take in approving the unwind,"²²⁷ and the Commission can condition its approval on Joint Applicants' obtaining Henderson's consent. Even the Attorney General's witness, though continuing to press for delay in approving the transaction, admitted on cross-examination that the Commission "can condition the order in any fashion it chooses."²²⁸ He also admitted that, if Big Rivers is required to return to the Commission for additional review and approval of any changes to the Henderson agreement (which Big Rivers pledges to do), the Henderson consent is not at issue.²²⁹ He further accepted that "it's Big Rivers' intent not to close without an investment grade credit rating."²³⁰ Joint Applicants submit that the procedure is clear. Neither the consent of Henderson nor the

²²⁷ September 3, 2008 Letter of John H. Hughes, Attorney for HMP&L, to Stephanie Stumbo.

²²⁸ Brevitz Testimony, Tr. Dec. 3, 2008 at p. 227, l. 12-13.

²²⁹ Brevitz Testimony, Tr. Dec. 3, 2008 at p. 247, l. 14-16.

²³⁰ Brevitz Testimony, Tr. Dec. 3, 2008 at p. 258, l. 8-9; see also Blackburn Testimony, Tr. Dec. 3, 2008 at p. 43, l. 8-9 ("Big Rivers will obviously not close this transaction unless we are investment grade").

investment grade credit rating need be obtained prior to Commission approval; both may be conditions of the Commission's approval.

The vital importance of deciding this case as expeditiously as possible has been repeatedly emphasized by the Joint Applicants and the Smelters. The transaction constitutes a delicate balance of competing interests, negotiated and renegotiated over a period of years despite daunting obstacles. It provides for financial stability for Big Rivers, as well as a framework that gives the Smelters a reasonable opportunity to survive. Once the pieces of a complex transaction start coming together, as they have in this case, delay is the greatest threat to achieving a closing.

Further, the issues directly of jurisdictional concern to the Commission are not dependent upon HMP&L's consent. Big Rivers' obligations going forward can and have been structured such that they will be unaffected by resolution of the HMP&L consent question. The financial model and its projections will be unaffected by resolution of the HMP&L consent question as Big Rivers has definitively stated that it will not consent to any settlement with Henderson that will adversely affect its Members' rates.²³¹ The jurisdictional concerns of the Commission will, however, be seriously affected if the transaction as presented unravels due to delay.

As with any complex transaction, the proposed Unwind Transaction is subject to scores of contingencies that could derail it up to the moment of closing. The Termination Agreement between the E.ON Entities and Big Rivers contains at least *43 conditions* to Big Rivers' obligation to close. HMP&L's consent to the Unwind Transaction, the investment grade ratings for Big Rivers, and the Commission's approval are only three of those conditions. A complex transaction can close only if all contingencies are pursued on parallel paths. The Commission

²³¹ Response of Big Rivers to Attorney General's October 24, 2008 Supplemental Request for Information, Item 28, lines 11-18.

may, of course, condition its approval upon HMP&L's consent and Big Rivers' receipt of an investment grade rating; and the Commission may be assured that, if any material changes to the proposed Unwind Transaction should be negotiated after Commission approval as a result of future unforeseen events, those changes would be presented for Commission review. Deliberate delay is not only unnecessary, but counterproductive.

The Commission has, in case after case, successfully discharged its responsibility under KRS Chapter 278 to act on cases before it in a timely manner, without waiting on the resolution of parallel issues. Commission orders dealing with issues across the spectrum of utility regulation demonstrate that the Commission has routinely issued final orders conditioned upon the *future* occurrence of certain necessary events, or the issuance of other agency approvals or permits.²³² Similarly, the Commission has also routinely taken into account relevant time frames when they affect the bottom lines of utilities, even when information deemed necessary by the regulations has not been produced.²³³ Delay in this case is risky, unnecessary and

²³² See, e.g., *Application of Bluegrass Wireless LLC for Issuance of a Certificate of Public Convenience and Necessity to Construct a Cell Site (Woodbine) in Rural Service Area #11 (Whitley) of the Commonwealth of Kentucky*, PSC Case No. 2008-00080 (Order dated Sept. 26, 2008) (issuing final order even though the applicant's applications with the Federal Aviation Administration and the Kentucky Airport Zoning Commission remained pending, and instructing the applicant to file copies of the final decisions of the FAA and KAZC within ten days of receiving them); *Joint Application of Classic Construction, Inc and Coolbrook Utilities, LLC for Approval of the Transfer of Wastewater Treatment Plant to Coolbrook Utilities, LLC*, PSC Case No. 2008-00257 (Order dated Oct. 21, 2008) (approving the transfer of the utility upon the condition that the buyer obtain an irrevocable letter of credit and line of credit and the necessary permits for the operation of the utility, including a Kentucky Pollutant Discharge Elimination System Permit); *Joint Application for Transfer of Louisville Gas and Electric Company and Kentucky Utilities Company in Accordance with E.ON AG's Planned Acquisition of Powergen PLC*, PSC Case No. 2001-104 (Order dated Aug. 6, 2001) (approving the transfer upon numerous conditions, including the requirement that the necessary approvals of other federal and state agencies be filed with the Commission within ten days of receipt).

²³³ See, e.g., *Application of the North Hopkins Water District for a Certificate of Public Convenience and Necessity to Construct and Finance an Improvements Project Pursuant to KRS 278.300*, PSC Case No. 2001-243 (Order dated Aug. 30, 2001) (granting a deviation from numerous filing requirements of 807 KAR 5:001, to save the utility the time of compiling the financial information because the construction project had been bid and the loss of time would risk loss of favorable bids); *Application of Henry County Water District No. 2 to Issue Securities in the approximate Principal Amount of \$2,958,000 for the Purpose of Refunding Certain Outstanding Revenue Bonds of the District Pursuant to the Provisions of KRS 278.300 and 807 KAR 5:001*, PSC Case No. 2002-00411 (Order dated Dec. 16, 2002) (granting a deviation from filing requirements of 807 KAR 5:001 because the "volatility of the bond market" made it risky to delay the closing of the loan while the utility expended the time necessary to compile the necessary financial information).

contrary to Commission precedent. The Attorney General has offered no reasonable argument otherwise.

B. The Financial Model Demonstrates a Positive Financial Outlook for Big Rivers, Unconstrained by the Economics Issues Affecting E.ON During the Contract Period.

At closing Big Rivers is projected to become one of the financially strongest generation and transmission cooperatives in the United States.²³⁴ The Smelters, whose economic survival is tied to that of Big Rivers, “believe that the forecast is achievable without question.”²³⁵ The total financial benefit of the Unwind Transaction to Big Rivers is in excess of \$1 billion.²³⁶ This financial benefit results from (1) closing payments and debt forgiveness to be made by the E.ON Entities and (2) ongoing power purchase payments at rates in excess of non-Smelter Member rates made by the Smelters under their restructured contracts with Kenergy.²³⁷ The total consideration in cash assets and debt forgiveness received by Big Rivers from the E.ON Entities will be approximately \$756 million.²³⁸ The total compensation in cash and increased power purchase payments from the Smelters will be approximately \$327.9 million.²³⁹

At closing, Big Rivers’ equity will move from approximately a negative 11% to approximately a positive 26%, and Big Rivers will have cash of \$125 million and \$100 million in lines of credit.²⁴⁰ Its debt will be investment-grade rated, and Big Rivers will be able to

²³⁴ Direct Testimony of Michael H. Core, Application, Exhibit 14, at 11.

²³⁵ Fayne Testimony, Tr. Dec. 3, 2008 at p. 175, l. 8-9.

²³⁶ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 12; Exhibit CWB-15 to Third Supplemental Direct Testimony of C. William Blackburn, October Motion to Amend, Exhibit 78.

²³⁷ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 12.

²³⁸ Exhibit CWB-15 to Third Supplemental Direct Testimony of C. William Blackburn, October Motion to Amend, Exhibit 78.

²³⁹ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 12; Big Rivers’ November 7, 2008 Updated Response to Attorney General Data Request No. 67.

²⁴⁰ Application ¶ 62; Direct Testimony of Michael H. Core, Application, Exhibit 14, at 11; Exhibit CWB-17 to the Third Supplemental Direct Testimony of C. William Blackburn, October Motion to Amend, Exhibit 78; Supplemental Direct Testimony of Robert S. Mudge, October Motion to Amend, Exhibit 98, at 14; Exhibit MHC-2 to the Supplemental Direct Testimony of Michael H. Core, October Motion to Amend, Exhibit 102.

borrow money in the ordinary course of business.²⁴¹ Big Rivers will regain its ability to finance system additions, power purchases, and other arrangements to meet growth associated with system expansion and economic development, an ability Big Rivers has lacked since 1998.²⁴²

The October version of the Unwind Financial Model, which provides the best available financial information to predict Big Rivers' future operating results following the closing of the Unwind Transaction, projects that Big Rivers will achieve no less than a 1.27 conventional TIER in every year modeled.²⁴³ The model shows that Big Rivers should have more than sufficient revenues to cover its debt service in each year.²⁴⁴ In addition, Big Rivers should be able to maintain a reasonable amount of cash on hand as measured by days of operating cash on hand, whether including or excluding lines of credit.²⁴⁵ In fact, according to the financial model's projections, Big Rivers' cash on hand, including \$100 million in lines of credit, will be in excess of 100 days in *every year through 2023*.²⁴⁶ Many of the terms of the proposed contracts are aimed at ensuring that Big Rivers has increased financial strength. Such terms include conditioning closing on Big Rivers' attainment of an investment grade credit rating and the inclusion of a TIER Adjustment mechanism in the Smelter Agreements.²⁴⁷

Other terms of the proposed contracts are designed to lessen the risk associated with Big Rivers' large Smelter load should economic circumstances change such that one or both Smelters is forced to close. For example, the \$35 million Transition Reserve Big Rivers will create offsets

²⁴¹ Application ¶ 62.

²⁴² Application ¶ 51.

²⁴³ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 23; Application ¶ 24; Third Supplemental Direct Testimony of C. William Blackburn, October Motion to Amend, Exhibit 78, at 44.

²⁴⁴ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 23; Third Supplemental Direct Testimony of C. William Blackburn, October Motion to Amend, Exhibit 78, at 44.

²⁴⁵ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 23.

²⁴⁶ Third Supplemental Direct Testimony of C. William Blackburn, October Motion to Amend, Exhibit 78, at 43; Direct Testimony of Robert S. Mudge, Application, Exhibit 9, at 7.

²⁴⁷ Application ¶ 52.

— any temporary revenue shortfalls that could occur if one or both Smelters cease operation.²⁴⁸ In addition, the Kentucky General Assembly in 2006 amended KRS 279.120 to eliminate a potential legal obstacle related to Big Rivers’ status as a cooperative under Kentucky law that could have prevented Big Rivers from selling the unused Smelter power into the wholesale power market.²⁴⁹ Further, Big Rivers obtained a certificate of public convenience and necessity in PSC Case No. 2007-00177 to construct transmission facilities that will enable Big Rivers to move any unused Smelter energy to its border for sale in the wholesale market.²⁵⁰

Big Rivers is confident that a ready market exists for the off-system resale of the unused Smelter energy that would result if one or both Smelters left the Big Rivers system.²⁵¹ Big Rivers is situated near a number of robust energy markets: just south of the Midwest Independent System Operator market, and just north of the Tennessee Valley Authority (“TVA”) market and the Southern Company market.²⁵² The Smelters’ total quarterly MWh commitment of 1,861,500 MWh is less than 1% of the total first quarter 2008 size of 252,044,916 MWh for these markets.²⁵³ Thus, even if Big Rivers lost the entire Smelter load, it is entirely reasonable to project that the entire unused Smelter energy amount could be sold at market price – a price that is likely to be higher than the rates charged to the Smelters.²⁵⁴ Big Rivers estimates it will need only to sell between 81% and 97% (depending on the year) of the stranded Smelter power to be revenue neutral.²⁵⁵ Further, as described above, the barriers to such sales – both legally and as a matter of transmission infrastructure – have been removed. These risks that Big Rivers faced providing service to the Smelters over a decade ago no longer exist.

²⁴⁸ Application ¶ 53.

²⁴⁹ Application ¶ 53.

²⁵⁰ Application ¶ 53.

²⁵¹ Third Supplemental Direct Testimony of C. William Blackburn, October Motion to Amend, Exhibit 78, at 60.

²⁵² *Id.* at 60-61. Blackburn Testimony, Tr. Dec 3, 2008 at p. 46, l. 11-14.

²⁵³ Third Supplemental Direct Testimony of C. William Blackburn, October Motion to Amend, Exhibit 78, at 61.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 62.

Nor should issues related to the growing national consensus that global warming legislation is required be permitted to impede the Unwind Transaction on a belief that Big Rivers would be better off remaining in the existing transaction. If a carbon tax is imposed, Big Rivers will be solely responsible for paying that tax on the energy it uses, regardless of whether the Unwind Transaction occurs.²⁵⁶ If a cap and trade system is imposed, the exposure for Big Rivers is not so clear if the Unwind Transaction does not take place. The record discloses that the parties already dispute responsibility for the costs for cap and trade under the 1998 Transactions, foreshadowing strained relations between the parties at best, and litigation at worst.²⁵⁷ By contrast, if the Unwind Transaction closes, Big Rivers will clearly be responsible for cap and trade costs as well as carbon taxes – just like every other generating utility in Kentucky and the region.²⁵⁸ Market prices almost certainly will reflect these costs too, leaving Big Rivers no worse than its competitors in the wholesale market.

Proper treatment of emissions allowances was another issue raised at hearing. Big Rivers does not propose to commit at this time to a permanent policy of selling or banking excess emission allowances without regard to market conditions.²⁵⁹ But it was necessary for modeling purposes to include a plan for managing emission allowance inventories.²⁶⁰ The modeled plan (based upon zeroing out allowance inventories each year for allowances allocated to Big Rivers (excluding the 14,000 SO₂ allowances the E.ON Entities will transfer to Big Rivers following the closing) for purposes of modeling consistency²⁶¹) was based on the study Global Insight

²⁵⁶ Blackburn Testimony, Tr. Dec. 3, 2008 at p. 141, l. 1-7.

²⁵⁷ Blackburn Testimony, Tr. Dec. 3, 2008 at p. 57, l. 12-14; Spainhoward Testimony, Tr. Dec. 2, 2008 at p. 263.

²⁵⁸ Spainhoward Testimony, Tr. Dec. 2, 2008 at p. 253, l. 17-18.

²⁵⁹ Big Rivers' June 24, 2008, Updated Response to Item 43 of the Commission Staff's Initial Information Requests; Big Rivers' May 30, 2008, Updated Response to Item 43 of the Commission Staff's Initial Information Requests.

²⁶⁰ See Big Rivers' June 24, 2008, Updated Response to Item 43 of the Commission Staff's Initial Information Requests; Big Rivers' May 30, 2008, Updated Response to Item 43 of the Commission Staff's Initial Information Requests.

²⁶¹ Spainhoward Testimony, Tr. Dec. 2, 2008 at p. 255, l. 23-25.

prepared for Big Rivers prior to the judicial decision involving the Clean Air Interstate Rule, which depressed allowance prices for the near term.²⁶² In practice, however, Big Rivers believes that decisions about managing emission allowance inventories are fundamentally decisions that should be left to management of the utility using information available at the time the decision is made based upon market conditions and the latest allowance forecast information available to Big Rivers.²⁶³ Thus, actual disposition of excess emissions allowances may differ from what is included in the Financial Model. Big Rivers will regularly reassess and readjust its policy on selling or banking excess allowances as market and regulatory conditions evolve.²⁶⁴

As the discussion above demonstrates, Big Rivers' financial outlook is bright if the Unwind Transaction takes place. It will not be placed in the constricted position that has made operation of the generating assets such a financial problem for the E.ON Parties, as it will not be bound by the same uneconomical contracts. The financial projections for Big Rivers, its Members, the Smelters, and western Kentucky are the focus of this inquiry, and those projections warrant Commission approval.

C. There are No Concerns Related to the Plants' Condition That Should Delay Commission Approval of the Unwind Transaction.

Misplaced concerns have been raised during this proceeding about the condition of the generating assets to be returned to Big Rivers' control. The crux of those concerns is that the cost of maintaining Big Rivers' generating units after closing of the Unwind Transaction is not adequately reflected in the Unwind Financial Model. The only competent testimony on this subject, which remains un rebutted and uncontested, is that the Production Work Plan filed in this

²⁶² See Big Rivers' June 24, 2008, Updated Response to Item 43 of the Commission Staff's Initial Information Requests; Big Rivers' May 30, 2008, Updated Response to Item 43 of the Commission Staff's Initial Information Requests.

²⁶³ Big Rivers' June 24, 2008, Updated Response to Item 43 of the Commission Staff's Initial Information Requests; Big Rivers' May 30, 2008, Updated Response to Item 43 of the Commission Staff's Initial Information Requests.

²⁶⁴ Big Rivers' June 24, 2008, Updated Response to Item 43 of the Commission Staff's Initial Information Requests; Big Rivers' May 30, 2008, Updated Response to Item 43 of the Commission Staff's Initial Information Requests.

case (and reflected in the Unwind Financial Model) contains the funds required to adequately maintain the generating plants and obtain the generation levels projected.²⁶⁵ That evidence came from two persons who have a vested interest in seeing that the Big Rivers generating plants are returned to Big Rivers in proper operating condition: (i) Bob Berry, who will be Vice President and Chief Production Officer after the Unwind Transaction, and the vice president responsible for achieving generating budgetary and production goals; and (ii) Mark Bailey, Big Rivers' President and CEO, the person with ultimate responsibility for achieving those production and budgetary goals. Mr. Berry has 27 years of experience in the Big Rivers plants, and Mr. Bailey, an electrical engineer, has extensive generating plant maintenance and management experience from a 30-year career with American Electric Power.²⁶⁶

The Attorney General raised the plant maintenance issue through his only witness, David Brevitz, who has focused on this issue in both his original testimony and his supplemental testimony. Yet when it came to the hearing, Mr. Brevitz testified:

- He has absolutely no expertise in the matter: he has toured only one power plant in his life (a nuclear plant and not a coal-fired one), and this single tour took place twenty-five years ago.²⁶⁷ He has no engineering degree and received no professional engineering advice in preparing his testimony.²⁶⁸
- He does not have the background or information to evaluate the adequacy of generating plant maintenance budgets²⁶⁹
- He does not have the education or experience to dispute the conclusions of Mr. Bailey or Mr. Berry regarding generating plant conditions.²⁷⁰
- He does not have the education or experience to dispute the assertions of Mr. Bailey and Mr. Berry that any issues with the plant condition that need to be

²⁶⁵ See Berry Testimony, Tr. Dec. 2, 2008 at p. 176, l. 14-19; Bailey Testimony, Tr. Dec. 2, 2008 at pp. 112-113.

²⁶⁶ Berry Testimony, Tr. Dec. 2, 2008 at p. 182, l. 15-18; Bailey Testimony, Tr. Dec. 2, 2008 at p. 104, l. 14-16.

²⁶⁷ Brevitz Testimony, Tr. Dec. 3, 2008 at p. 201, l. 15-17.

²⁶⁸ Brevitz Testimony, Tr. Dec. 3, 2008 at p. 204, l. 1-4.

²⁶⁹ Brevitz Testimony, Tr. Dec. 3, 2008 at p. 205, l. 13-19.

²⁷⁰ Brevitz Testimony, Tr. Dec. 3, 2008 at pp. 251-252.

addressed are covered by the Production Work Plan, and the associated costs are included in the Unwind Financial Model.²⁷¹

- Finally, despite having raised and promoted his “concerns” for months, he stated that he was not, in fact, “taking a position or testifying as to the condition of the plant ...”²⁷²

The unfounded “concerns” of the Attorney General’s witness are contradicted by the testimony of every engineering expert who testified on the record in this case, all three of whom definitively state that the condition of the plants is satisfactory, and that their level of performance meets or exceeds norms.²⁷³ Other witnesses have also taken a position and testified as to the condition of the plants. Henry Fayne, a witness for the Smelters, testified that the plant condition, Big Rivers’ current work plan, and the reliability forecast are satisfactory and that there is “no basis today to have any major concern.”²⁷⁴ Mr. Fayne’s testimony is significant because reliability is of vital importance to the Smelters. It is a cost issue.²⁷⁵ Even more to the point, both Big Rivers and the E.ON Entities placed legitimate engineering experts on the stand, experts who possess engineering degrees, years of experience, and familiarity with the plants. Their opinions clearly and definitively refute the Attorney General’s “concerns.” So does the undisputed performance of the units over the last ten years. The units all operate in the top half or top quartile of generating plants.²⁷⁶

²⁷¹ Brevitz Testimony, Tr. Dec. 3, 2008 at p. 252.

²⁷² Brevitz Testimony, Tr. Dec. 3, 2008 at p. 203, l. 2-3.

²⁷³ See the respective testimonies of Engineer Robert W. Berry, Plant Manager and future Vice President and Chief Production Officer of Big Rivers; Engineer Mark Bailey, President and Chief Executive Officer of Big Rivers going forward; Engineer Ralph Bowling, Vice President, Power Operations for Energy Services for E.ON U.S. LLC.

²⁷⁴ Fayne Testimony, Tr. Dec. 3, 2008 at p. 176, l. 8-14.

²⁷⁵ Fayne Testimony, Tr. Dec. 3, 2008 at p. 176, l. 5-7. See also Alcan and Century’s Response to Item 4 of the Attorney General’s Supplemental Request for Information to Alcan and Century.

²⁷⁶ Bowling Testimony, Tr. Dec. 2, 2008 at p. 196, l. 6-12.

The E.ON Entities have discussed and explained²⁷⁷ issues raised by the Stone & Webster Report of March 24, 2008, which was prepared for the Smelters.²⁷⁸ The Stone & Webster Report is riddled with errors due to lack of operator opportunity to review it before it was submitted to the Smelters. Those errors are summarized in Exhibit A to the Bowling Rebuttal Testimony, and range from relatively minor errors (such as reporting a low water event in the wrong unit) to relatively serious ones (such as finding WKEC's maintenance not to have been "proactive," despite the existence of over 1,400 preventive maintenance procedures in the work management system).²⁷⁹ Even so, the ultimate conclusion of the Stone & Webster Report was that the plants are in reasonable condition and capable of performing reliably, consistent with industry standards.²⁸⁰

E.ON has provided evidence that the generating units' performance under WKEC management has, at a minimum, matched their performance during Big Rivers' prior tenure, and has exceeded industry averages for units of similar size and vintage.²⁸¹ In addition, since 1998, WKEC has made millions of dollars of capital improvements to the plants under budgets reviewed, investigated, and contributed to by Big Rivers and, where applicable, Henderson.²⁸²

Despite the overwhelming weight of the evidence, the Attorney General has continued to assert nebulous "concerns" about the plants, echoing the "concerns" cited by the City of

²⁷⁷ See, e.g., Rebuttal Testimony of Ralph Bowling.

²⁷⁸ Stone & Webster Management Consultants, Inc., *Final Report: Technical Assessment of Reid station, Henderson Station Two, Green Station, K.C. Coleman Station, D.B. Wilson Station* (March 24, 2008) (the "Stone & Webster Report")

²⁷⁹ Rebuttal Testimony of Ralph Bowling, at 2.

²⁸⁰ Alcan and Century's Response to Item 4 of the Attorney General's Supplemental Request for Information.

²⁸¹ Rebuttal Testimony of Ralph Bowling, at 2-3, and Exhibit B.

²⁸² Big Rivers' May 30, 2008, Updated Response to Item 88 of the Attorney General's Supplemental Request for Information.

Henderson as it seeks additional compensation for giving its consent to the transaction.²⁸³ On cross-examination at the hearing, the Attorney General presented witnesses Mark Bailey and Robert Berry with those “concerns,” chiefly in the form of photographs accompanying a report prepared for HMP&L by Exothermic Engineering. Mr. Bailey responded that he is satisfied with the current condition of the plants²⁸⁴ and lacks a “high opinion” of the Exothermic Engineering report because, among other things, it is the product of a brief external online inspection.²⁸⁵ In order to determine how the plants will perform, Mr. Bailey explained that “you need to see what’s inside the turbine, and what’s inside the boiler, and the fans, and the ductwork.”²⁸⁶ Otherwise, “[a]ll you’re looking at basically is cosmetics.”²⁸⁷

Mr. Berry, in turn, cited his 27 years’ association with the plants at issue,²⁸⁸ stated his satisfaction with plant condition,²⁸⁹ and provided the actual facts behind the photographs that purported to demonstrate problems. As Mr. Berry explained, the photographs showed only the “typical things that you’re going to see in a power plant. Every time an issue arises, you don’t just automatically take a unit off-line and go fix it. If you did, industrial customers would probably not like that well. It would interrupt their power.”²⁹⁰ One such photograph, for example, purported to show a rope holding up a piece of conduit – but the rope was actually supporting a “red rubber hose that sometimes is used for maintenance or temporary services at the station and you tie those up overhead. You don’t leave those laying in the aisleways.”²⁹¹

²⁸³ There is, very simply, no reason for Henderson to delay closing due to plant condition because Henderson retains after the closing, under the Station Two Agreement, certain contractual remedies for any *actual* plant condition problems. Thompson Testimony, Tr. Dec. 2, 2008 at pp. 210-211.

²⁸⁴ Bailey Testimony, Tr. Dec. 2, 2008 at p. 80.

²⁸⁵ Bailey Testimony, Tr. Dec. 2, 2008 at p. 81, l. 4-10.

²⁸⁶ Bailey Testimony, Tr. Dec. 2, 2008 at p. 81, l. 6-11.

²⁸⁷ Bailey Testimony, Tr. Dec. 2, 2008 at p. 81, l. 22-23.

²⁸⁸ Berry Testimony, Tr. Dec. 2, 2008 at p. 182, l. 18.

²⁸⁹ Berry Testimony, Tr. Dec. 2, 2008 at p. 176, l. 14-19.

²⁹⁰ Berry Testimony, Tr. Dec. 2, 2008 at pp. 182-183.

²⁹¹ Berry Testimony, Tr. Dec. 2, 2008 at p. 178, l. 5-9.

Another photograph, purporting to demonstrate that duct tape was being used improperly, actually showed a “pull connection” on which the “pull box cover was missing” and which was “next to the wet bottom area of the boiler.”²⁹² Because replacements take a “few days to receive,” in the interim, “you wrap it in plastic and duct tape so it doesn’t get water and moisture into those electrical connections.”²⁹³ In fact, Mr. Berry had reviewed the entire set of 2,300 photographs apparently thought by the Attorney General’s witness to be significant, and noted that many were duplicate pictures of the same item.²⁹⁴ A full 700 of the “conditions” photographed had already been repaired at the time of the hearing, and many “were already on the WKE work order list” at the time the report was made -- “[i]t was just waiting for an outage to accomplish those tasks.”²⁹⁵

Mr. Berry categorically denied that safety issues are ignored, explaining that safety items “are corrected any time they are brought to the attention of management.”²⁹⁶ Furthermore, Mr. Berry testified that “the Sebree facility, which includes Station Two, has gone over 1.7 million man-hours without a lost time accident. It’s received the Governor’s Safety Award on four different occasions for its outstanding safety performance.”²⁹⁷ Mr. Berry remains confident that the power plants will perform as modeled, noting “I’m the one that’s going to be responsible for that and I take those responsibilities very seriously. I would not set myself up for failure.”²⁹⁸

There is no reason to believe that Big Rivers would set itself up for failure either; and it has not done so. Big Rivers is thoroughly familiar with issues concerning the plants.²⁹⁹ Big Rivers already owns these assets, has monitored their condition over the past ten years, and has

²⁹² Berry Testimony, Tr. Dec. 2, 2008 at p. 178, l. 11-14.

²⁹³ Berry Testimony, Tr. Dec. 2, 2008 at p. 178, l. 14-17.

²⁹⁴ Berry Testimony, Tr. Dec. 2, 2008 at p. 183, l. 24-25.

²⁹⁵ Berry Testimony, Tr. Dec. 2, 2008 at p. 183, l. 1-3.

²⁹⁶ Berry Testimony, Tr. Dec. 2, 2008 at p. 187, l. 21-24.

²⁹⁷ Berry Testimony, Tr. Dec. 2, 2008 at p. 187, l. 3-7.

²⁹⁸ Berry Testimony, Tr. Dec. 2, 2008 at p. 185, l. 20-22.

²⁹⁹ Rebuttal Testimony of Ralph Bowling at 3.

remained apprised of the manner of their operation.³⁰⁰ Maintaining its generating assets in proper operating condition has been a paramount concern for Big Rivers throughout the term of the 1998 Transactions.³⁰¹ Big Rivers takes a long-term view of operations and maintenance obligations due in part to its knowledge that under the 1998 Transactions the generating units will revert to Big Rivers' control in 2023.³⁰² Big Rivers has been performing its due diligence all along, and will continue to perform its due diligence up until the time of the closing.³⁰³

Moreover, Big Rivers and the E.ON Entities have worked together on issues identified during the due diligence process.³⁰⁴ For example, Big Rivers filed a document listing the actions that WKEC has taken or actions that are planned in response to the Stanley Consultants report dated April 2007 entitled "Analysis of WKE Outages."³⁰⁵ In addition, Big Rivers engaged Stanley Consultants, Inc. ("Stanley") in 2000 to conduct annual reviews of the generating plants, including physical inspection, review of plant inspection reports, and review of plant operating and performance data.³⁰⁶ Since 2005, Big Rivers has had a full-time employee whose duties include visiting each generating plant weekly to monitor its condition and WKEC performance of its obligations under the existing transaction.³⁰⁷

After the Termination Agreement was signed in March of 2007, Big Rivers added more Stanley employees, assigning one person full-time to each of the generating plant sites.³⁰⁸ These persons monitor the condition of the generating plants and will ensure that Big Rivers'

³⁰⁰ Big Rivers' Response to Item 12 of the Commission Staff's Second Supplemental Data Request.

³⁰¹ Rebuttal Testimony of Mark A. Bailey at 4.

³⁰² Rebuttal Testimony of Mark A. Bailey at 4.

³⁰³ See Rebuttal Testimony of Mark A. Bailey at 2-5; Big Rivers' Response to Item 109 of the Attorney General's Initial Request for Information; Big Rivers' Response to Item 51 of the Commission Staff's Initial Request for Information.

³⁰⁴ Rebuttal Testimony of Mark A. Bailey at 3.

³⁰⁵ Big Rivers' June 24, 2008, Updated Response to Item 88 of the Attorney General's Supplemental Request for Information.

³⁰⁶ Big Rivers' May 30, 2008, Updated Response to Item 88 of the Attorney General's Supplemental Request for Information.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

management can determine on the date of closing whether, in Big Rivers' judgment, each plant is in good condition and state of repair, ordinary wear and tear excepted, consistent with Prudent Utility Practice.³⁰⁹ Big Rivers is not required to close unless the units are in good condition.³¹⁰ The WKEC employees now operating and maintaining these assets will be Big Rivers' employees post-closing and will perform in the same capacity.³¹¹

With reference to the Station Two facilities, HMP&L has filed with the Commission a letter containing certain allegations concerning plant condition.³¹² Those allegations are, however, poorly supported, highly inaccurate, based on erroneous reports, and refuted by the plants' actual performance.³¹³ There is simply no credible evidence in the record, for example, that damage has resulted from the firing of coal and petroleum coke.³¹⁴ In fact, Mr. Bowling reports that conditions alleged to have resulted from petroleum coke were in fact identified in 1997, *before* WKEC operated the plants, and were reported at that time *by the same author* as having been caused by the poor design of low NO_x burners.³¹⁵ To cite another example, cost estimates for repairs offered by HMP&L are clearly in error: they assume that when a problem is found with one piece of equipment, a complete repair or replacement of every such item in the plant must be necessary; and they ignore already-budgeted amounts to conduct necessary repairs, thereby effectively double-counting such costs.³¹⁶

A succession of experts has assured the Commission that plant condition is not an issue that should affect the Commission's decision in this case. The sole witness suggesting the

³⁰⁹ *Id.*

³¹⁰ Big Rivers' Response to Item 109 of the Attorney General's Initial Request for Information; Big Rivers' Response to Item 51 of the Commission Staff's Initial Request for Information.

³¹¹ Big Rivers' Response to Item 12 of the Commission Staff's Second Supplemental Data Request.

³¹² Letter from HMP&L Counsel to Stephanie Stumbo dated October 29, 2008.

³¹³ Letter from Ralph Bowling, Vice President, Power Production, E ON U.S., to Stephanie Stumbo, dated November 10, 2008 ("Bowling Letter")

³¹⁴ Bowling Letter, at 1-3.

³¹⁵ Bowling Letter, at 3.

³¹⁶ Bowling Letter, at 6-9.

contrary, Mr. Brevitz, has admitted that he cannot dispute the conclusions of these experts,³¹⁷ and that he lacks the professional expertise to evaluate Big Rivers' work plan and related budgets.³¹⁸ The Unwind Transaction should be approved without any concern regarding the conditions of the units.

D. The Attorney General's Recommendations Should Be Rejected.

The Attorney General's witness has testified that he does not *oppose* the transaction, and yet, he cannot *recommend* it.³¹⁹ The rationale offered for this refusal to "recommend," however, is inadequate. At the hearing, Mr. Brevitz could not respond to questions of why an order approving the Unwind Transaction could not simply be conditioned upon the occurrence of key events (such as Henderson consent on terms that do not affect the financial model and Big Rivers' receipt of an investment grade credit rating).³²⁰ Indeed, he acknowledged that the standard of review he has applied to his analysis of the entire Unwind Transaction is the standard of KRS 278.300, which is applicable only to issuances of evidences of indebtedness.³²¹

Mr. Brevitz also admits that he has made no effort to determine the conditions that would result for Big Rivers, its Members and the Smelters if the application is rejected.³²² It was, he said, "not the point" of his testimony to compare the reasonably foreseeable results of the Unwind Transactions with the reasonably foreseeable results from continuation of the 1998 Transactions.³²³ Put another way, under the Attorney General's approach, the consequences of not approving the Unwind Transaction are immaterial to deciding whether it should be approved.

³¹⁷ Brevitz Testimony, Tr. Dec. 3, 2008, at p. 252, l. 5-14.

³¹⁸ Brevitz Testimony, Tr. Dec. 3, 2008 at p. 205, l. 17-19.

³¹⁹ Brevitz Testimony, Tr. Dec. 3, 2008 at pp. 278-279 and Tr. Dec. 3, 2008 at p. 239, l. 7-10. ("A. As stated in my Supplemental Testimony, we cannot at this time recommend approval of the transaction. Q. But you're not opposing the transaction? A. That's correct").

³²⁰ See, e.g., Brevitz Testimony, Tr. Dec. 3, 2008, at pp. 220-222, 245-246.

³²¹ *Id.* at pp. 242-243.

³²² *Id.* at pp. 234-237, 268-270.

³²³ *Id.* at p. 270, l. 18-19.

Applying this rationale, Mr. Brevitz does not even attempt to compare rates under the Unwind Transaction with rates that would exist if the Unwind Transaction does not take place.³²⁴

Any objective analysis must compare the likely consequences to the public interest if the Unwind is approved with the likely consequences if the Unwind is not approved. When that comparison is made based upon the evidence in the record the balance of the issues strongly favors the Unwind Transaction. For example, Joint Applicants have shown that if the Unwind Transaction does not occur, Big Rivers will be forced to request an approximate 20 – 25% rate increase, approximately \$25 million, immediately to restore its cash reserve, now depleted as a result of (1) the PMCC buyout, and (2) Big Rivers' inability to borrow money under its current circumstances.³²⁵ This is an immediate issue. In fact, unless the Unwind Transaction closing date is assured by the end of January, Big Rivers will give notice to the Commission of that rate increase proposal.³²⁶ If the Unwind Transaction is approved, however, no base rate increase is projected to be needed until 2017,³²⁷ although costs under the variable riders, such as the FAC, are projected to rise.

³²⁴ Q. Well, what difference does it make if you're comparing something against nothing? Don't you have to look at what the alternative would be?

A. We looked at what the impact of the proposed transaction would be...

Q. But if you're not comparing it to what the rates would otherwise be, what good is this?

A. The good is that it provides our position as to the concerns with regard to what the transaction does for rural residential rates...

Q. If the alternative was much worse than the Unwind, wouldn't it make the Unwind a good deal?

A. Again, we – perhaps, but that was not the point of the testimony that we submitted. The point of the testimony that we submitted was to analyze the transaction as proposed and whether or not we could recommend approval of the transaction.

Q. Compared to nothing?

A. Compared to what the rates show.

Brevitz Testimony, Tr. Dec. 3, 2008 at pp. 269-270.

³²⁵ Blackburn Testimony, Tr. Dec. 3, 2008 at p. 23, l. 13-25 (notice will be filed with the Commission at the end of January 2009; cash is immediately necessary because Big Rivers cannot borrow under its current condition); *id.* at 142, l. 2 (estimating amount of increase to be \$25 million).

³²⁶ Blackburn Testimony, Tr. Dec. 3, 2008 at p. 23.

³²⁷ Blackburn Testimony, Tr. Dec. 3, 2008 at p. 48, l. 8-14.

When asked about the effect the immediately-needed rate increase would have if the Unwind Transaction does not occur, Mr. Brevitz offered only the erroneous assertion that such a rate increase would be “Unwind related as well...Big Rivers spent its cash to accomplish the lease buyout and, as a result, is now here before the Commission claiming that it needs to increase rates to regenerate cash.”³²⁸ As the Commission is aware, the lease buyout was necessitated by the Ambac downgrade, not by anything related to the Unwind Transaction.

Next, Mr. Brevitz offered a chart purporting to show the percentage increase in retail rates if the Unwind Transaction takes place; but the chart *misstates the current rate*. Mr. Brevitz begins his comparison of current to future rates by showing the current rate *minus* the MDA credit, which was discontinued in August of 2008.³²⁹ Thus, the increased percentage he projects is exaggerated. In addition, Mr. Brevitz ignored the significant contributions the E.ON Entities will make to Big Rivers and the Smelters to offset certain cost increases if the Unwind Transaction closes.³³⁰

Mr. Brevitz was also unable to give a reasonable answer when asked how his current refusal to recommend the Unwind Transaction squares with the Attorney General’s response to a Commission Staff data request for the Attorney General’s opinion as to the legality of certain rate-making treatments requested in this docket.³³¹ In that data response, the Attorney General declared that the Commission is a “creature of statute;” that it “must have a statutory basis...to approve each specific rate-making treatments [sic] listed;” and that “there is no express statutory authority for any of the items in the list.”³³² Nevertheless, “the Attorney General believes that Commission approval of this package of mechanisms falls within the narrow-judicially-

³²⁸ Brevitz Testimony, Tr. Dec. 3, 2008 at p. 271, l. 3-7.

³²⁹ Brevitz Testimony, Tr. Dec. 3, 2008 at pp. 267-268.

³³⁰ See Hearing Exhibit Big Rivers Redirect 5.

³³¹ Attorney General’s April 17, 2008, Responses to the Requests for Information of the Commission Staff, Item 1.

³³² *Id*

recognized limit of Commission authority by implication” because “there is evidence of a clear threat to the continuation of utility service at reasonable rates,” including the potential for Big Rivers to be “obliterated through bankruptcy.”³³³

It is, of course, clear that the Attorney General’s current position to not recommend the Unwind Transaction conflicts with his concern that bankruptcy is likely to occur without the Unwind Transaction.³³⁴ When asked whether he agreed that, “without this Unwind, it’s highly doubtful that Big Rivers could once again become a viable utility,” Mr. Brevitz’s response was “yes.”³³⁵ He then asserted that “my testimony does not say that we do not support the Unwind,” but added that “[w]e cannot recommend approval of the proposed transaction at this time.”³³⁶

In short, neither the Attorney General nor Mr. Brevitz³³⁷ has offered the Commission any meaningful recommendation at all, taking a middle position critical of some aspects of the Unwind Transaction, but refusing to choose between the alternatives that actually exist. The Commission, however, must evaluate the Unwind Transaction as opposed to the alternative, and it must do so on the best evidence available to it. That evidence has been presented by Joint Applicants. The Attorney General’s recommendation against approval should be rejected.

Mr. Brevitz’s original testimony filed April 3, 2008, concluded with a recommendation that the Unwind Transaction be approved, subject to seventeen conditions. While Mr. Brevitz’s conditions were largely impractical, unacceptable or illegal, Big Rivers did respond with a series

³³³ *Id*

³³⁴ It should be noted here that Joint Applicants do not share the Attorney General’s restricted view of the Commission’s authority, and do not believe that either a specific procedural statute – or the threat of catastrophe – must exist before the Commission may do what is necessary to establish just and reasonable rates for utilities operating in the Commonwealth.

³³⁵ Brevitz Testimony, Tr. Dec. 3, 2008 at p. 278, l. 3-10.

³³⁶ Brevitz Testimony, Tr. Dec. 3, 2008 at p. 278, l. 14-25.

³³⁷ At the hearing there was some question as to the extent to which Mr. Brevitz actually speaks for the Attorney General in this proceeding. Assistant Attorney General Howard said “he is our witness insofar as our financial analysis” but the Attorney General “reserves the right to add or subtract” from Mr. Brevitz’s “opinion as to what the AG ought to do or ought not to do.” Tr. Dec. 3, 2008 at p. 218.

of drafts of Settlement Concepts in which it addressed, in good faith, the concerns inherent in the conditions demanded by Mr. Brevitz. The last iteration of those Settlement Concepts was e-mailed to counsel for each party on June 19, 2008, and discussed at the informal conference in this matter held June 20, 2008.

Mark Bailey stated at the hearing that Big Rivers continues to be willing to accept the conditions offered in the Settlement Concepts of June 19, 2008. The Commission should note, however, that Item 10, related to Big Rivers' approach at that time to achieving resolution of the Henderson issues, has been superseded by the filing in the October Motion to Amend of proposed contracts with Henderson as Exhibit 87.

In addition, in Item 17 of the draft Settlement Concepts of June 19, 2008 Big Rivers commits that it will file for a general rate adjustment within three years after a final order approving the Unwind Transaction is issued. Because the latest iteration of the Unwind Financial Model forecasts no need for revenues from a general rate adjustment prior to 2017, Big Rivers suggests that Item 17 now be read to commit Big Rivers to return to the Commission within three years following the date of the final order in this matter for a general review of the operation of the company and its tariffs under the Unwind Transaction.

During the hearing Mr. Blackburn was asked by Commission Staff if he would commit to filing, within seven days of the closing, a summary report describing whether each Termination Agreement closing condition was met or waived. Mr. Blackburn agreed, and that commitment may be added to the Settlement Concepts.³³⁸

The IBEW Local 1701 ("IBEW"), which represents the WKEC bargaining unit employees working at the Big Rivers generating units, urges adoption of Brevitz's condition 9.³³⁹

³³⁸ Blackburn Testimony, Tr. Dec. 3, 2008 at p. 113, l. 4-9.

³³⁹ Brief on Behalf of the Union, filed December 22, 2008, at 4.

The IBEW candidly refers to that condition as the “job preservation condition.”³⁴⁰ This position is consistent with the IBEW’s persistent efforts to negotiate job preservation with Big Rivers through cross examination of Mark Bailey at the hearing in this matter.³⁴¹

Brevitz’s condition 9 turns regulation on its head by requiring Big Rivers to maintain *at least* the current level of workforce unless it can demonstrate the imprudence of doing so.³⁴² The obvious implication of this condition is that the Commission has and should exercise jurisdiction to review the prudence of every workforce reduction, but remain indifferent to increases in the workforce. Big Rivers reasonably offered in its Settlement Concept 13 that it “would commit to continue to employ in the conduct of its business the level of workforce required to safely and professionally operate its facilities.”³⁴³ The Big Rivers proposal is both consistent with the Commission’s jurisdiction, and representative of the expectations the Commission and Big Rivers’ Members should have of Big Rivers. Moreover, there is no showing of the extraordinary circumstances required to justify any examination of staffing levels.³⁴⁴

E. The Tariff Changes Proposed by Big Rivers are Fair, Just and Reasonable

Big Rivers’ tariff revisions proposed herein should be approved as fair, just and reasonable.³⁴⁵ Big Rivers’ proposed tariff is attached as Exhibit 83 to its October Motion to

³⁴⁰ *Id.* at 3.

³⁴¹ Bailey Testimony, Tr., Dec. 2, 2008 at pp. 120-137.

³⁴² Direct Testimony of David Brevitz at 52.

³⁴³ Big Rivers’ Draft Settlement Concepts, attached to the Commission Staff’s July 8, 2008, Memorandum summarizing the June 19, 2008, Informal Conference.

³⁴⁴ See Order dated June 30, 2008, in *In the Matter of: NiSource Inc.*, PSC Case No. 2000-00129 (“Absent extraordinary circumstances, it is not the Commission’s function to establish staffing levels for a utility”).

³⁴⁵ Application ¶ 71.

Amend, except that a revision to proposed Tariff Sheet No. 70 was filed as Exhibit 107 to the November 24, 2008, Motion to Amend and Supplement Application.³⁴⁶ The proposed new tariff eliminates all references to the Smelters and the various E.ON Entities that are no longer relevant or appropriate,³⁴⁷ but it leaves Big Rivers' existing basic tariff demand and energy rates to Big Rivers' Members unchanged from those approved by the Commission in 1998 in Case No. 98-267.³⁴⁸ Big Rivers proposes that these rates, as adjusted by certain riders discussed below, be maintained.³⁴⁹ These rates have already been found to be fair, just and reasonable. Further, no general review of Big Rivers' rates should take place immediately, as many of the costs of operating a reintegrated system can only be estimated after Big Rivers resumes full control of the system.³⁵⁰ Big Rivers now anticipates that no general rate increase is necessary until 2017.³⁵¹

Even though Big Rivers proposes to retain existing base rates for the time being, it does propose a number of individual tariff riders and provisions that are incremental to the base tariff demand and energy rates. These riders are all integral components of the negotiated Unwind Transaction, reflecting carefully negotiated allocations of risk on issues such as future fuel and environmental compliance costs and carefully negotiated credits to track provisions of the transaction. They are all necessary and appropriate to accommodate Big Rivers' resumption of control over the generation assets. These riders include a FAC, an Environmental Surcharge, an Unwind Surcredit, a Member Rate Stability Mechanism, and a Rebate Adjustment. Big Rivers

³⁴⁶ A comparison of that proposed tariff against the tariff that Big Rivers initially proposed in this proceeding and filed as Exhibit 23 to the Application is attached as Exhibit 84 to the October Motion to Amend. A comparison of revised Tariff Sheet No. 70 against the corresponding sheet filed in Exhibit 84 is attached as Exhibit 108 to the November 24, 2008, Motion to Amend and Supplement Application. A comparison of the initially proposed tariff and Big Rivers' existing tariff is attached as Exhibit 24 to the Application. The existing tariff is attached as Exhibit 22 to the Application

³⁴⁷ Application ¶ 39. These changes reflect the fact that Big Rivers will now be generating its own electricity and that the Smelters will now be served by special contracts rather than as tariff customers. Direct Testimony of David A. Spainhoward, Application, Exhibit 18, at 12.

³⁴⁸ Application ¶ 72.

³⁴⁹ *Id.*

³⁵⁰ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 103.

³⁵¹ Blackburn Testimony, Tr. Dec. 3, 2008 at p. 29, l. 5-8.

previously proposed to extend its Member Discount Adjustment rider, but has now withdrawn that request because it expired by its own terms on August 31, 2008.

F. The Fuel Adjustment Clause is Fair, Just and Reasonable, and Should Be Approved.

Big Rivers' proposed tariff implements a FAC to adjust Big Rivers' rates for the incremental change in the cost to Big Rivers of fossil fuels consumed, along with other items allowed by 807 KAR 5:056.³⁵² Sheet Nos. 73 through 75 of the proposed tariff incorporate the FAC, which would be applicable as a mandatory rider to all wholesale sales by Big Rivers to its Members (including Base Energy Sales to the Smelters under their special contract).³⁵³ The FAC will not apply to off-system sales or to Supplemental and Backup sales to the Smelters.³⁵⁴ The FAC is a necessary rate mechanism to achieve the financial results required to accomplish the Unwind Transaction, and Big Rivers' rates would not produce sufficient revenues without it.³⁵⁵

Under the 1998 Transactions, the rates charged Big Rivers by the E.ON Entities are not subject to adjustment for changes in fuel costs except under extraordinary circumstances.³⁵⁶ Therefore, it has not been necessary for Big Rivers to have a FAC to adjust for those costs.³⁵⁷ But when Big Rivers resumes operational control of the generation units, changes in fuel costs will have a significant effect on Big Rivers' cost of service.³⁵⁸ For obvious reasons, FAC mechanisms are viewed favorably in the investment community; therefore, use of a FAC is

³⁵² Application ¶ 73.

³⁵³ Application Exhibit 23; Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 89; Direct Testimony of William Steven Seelye, Application, Exhibit 25, at 12.

³⁵⁴ Direct Testimony of William Steven Seelye, Application, Exhibit 25, at 12.

³⁵⁵ Application ¶ 73.

³⁵⁶ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 91; Direct Testimony of William Steven Seelye, Application, Exhibit 25, at 4.

³⁵⁷ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 91; Direct Testimony of William Steven Seelye, Application, Exhibit 25, at 4.

³⁵⁸ Direct Testimony of William Steven Seelye, Application, Exhibit 25, at 5; Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 90-91.

critical to permitting Big Rivers to restructure its debt under favorable terms and conditions.³⁵⁹ Thus, it is fair, just and reasonable for Big Rivers to implement a FAC to recover its legitimate costs of operation in the same manner as other utilities in Kentucky.³⁶⁰

Big Rivers initially proposed to use a negotiated base fuel cost. However, in response to questions raised by Commission staff, Big Rivers will now use WKEC's actual, historical costs for the first two months of the FAC, and the latest iteration of the tariff reflects this change.³⁶¹ Even though subsequent fuel prices have exceeded this projected base fuel cost level, the Member Rate Stability Mechanism and other credit mechanisms proposed in this proceeding are designed to help offset the FAC through an Economic Reserve account, which is discussed below.³⁶² In addition, Big Rivers, the E.ON Entities, and the Smelters separately negotiated a financial solution to rising fuel costs to preserve the negotiated economics in the financial model. That solution increases the E.ON Entities' termination payment by \$152 million,³⁶³ \$82 million of which will be added to the Big Rivers Economic Reserve account to offset the FAC for non-Smelter Members.³⁶⁴ Thus, Member non-Smelter load will not experience the full effect of FAC changes.

G. Big Rivers' Environmental Surcharge, Already Conditionally Approved by the Commission, Should Be Implemented.

Big Rivers' proposed tariff includes an Environmental Surcharge. By Order dated June 25, 2008, in *In the Matter of: The Application of Big Rivers Electric Corporation for Approval of Environmental Compliance Plan and Environmental Surcharge Tariff*, PSC Case No. 2007-00460, the Commission approved the surcharge, along with a proposed Environmental

³⁵⁹ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 90-91.

³⁶⁰ Direct Testimony of William Steven Seelye, Application, Exhibit 25, at 3.

³⁶¹ Big Rivers' May 30, 2008, Updated Response to Item 47 of the Commission Staff's Initial Information Request.

³⁶² October Motion to Amend ¶ 19.

³⁶³ See Big Rivers Electric Corporation's May 30, 2008, Supplemental Response to the Commission Staff's Initial Request, Item 45.

³⁶⁴ *Id.*

Compliance Plan. However, the tariff is conditioned upon the Commission's approval of the Unwind Transaction.

H. The Unwind Surcredit is Reasonable and Should Be Approved.

Big Rivers' proposed tariff incorporates an Unwind Surcredit rider, which will reduce amounts due for service to Big Rivers' non-Smelter Member load.³⁶⁵ Big Rivers proposes the Unwind Surcredit pursuant to KRS 278.455(1).³⁶⁶ The Unwind Surcredit flows to Member non-Smelter load certain fixed monthly payments the Smelters agreed to make pursuant to Sections 4.11.1, 4.11.2, and 4.11.3 of the wholesale Smelter Agreements.³⁶⁷ These amounts, referred to as Smelter Surcharges, consist of fixed and variable amounts that will apply as a credit to fuel charges payable by Big Rivers' non-Smelter Member load.³⁶⁸

The Unwind Surcredit is a per kWh credit calculated by dividing (a) the estimated payments Big Rivers would receive from the Smelter Surcharge during an upcoming calendar year by (b) the Member non-Smelter sales, including sales made under the Monthly Delivery Point Rate to Members and the Big Rivers Industrial Customer Rate, in the corresponding calendar year.³⁶⁹ The Unwind Surcredit also incorporates adjustments for over- or under-crediting of Smelter Surcharge amounts.³⁷⁰ These adjustments are similar to Gas Supply Cost adjustments used by gas distribution companies in Kentucky.³⁷¹ Because the adjustments are less volatile than those applicable to gas costs, however, Big Rivers proposes that its adjustments be made annually rather than quarterly.³⁷²

³⁶⁵ Application ¶ 80; Application Exhibit 23, Sheet Nos. 78 and 79.

³⁶⁶ Direct Testimony of William Steven Seelye, Application, Exhibit 25, at 24.

³⁶⁷ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 57-58, 95.

³⁶⁸ Application ¶ 47.

³⁶⁹ Direct Testimony of William Steven Seelye, Application, Exhibit 25, at 24.

³⁷⁰ *Id.*

³⁷¹ *Id.*

³⁷² Direct Testimony of William Steven Seelye, Application, Exhibit 25, at 24.

The proposed Unwind Surcredit is a fundamental component of the financial deal with the Smelters and is a necessary mechanism to transfer the benefits of the Smelter Surcharge to Big Rivers' non-Smelter Members. These amounts represent a significant economic benefit provided by the Smelters as an inducement for Big Rivers to resume providing service to Kenergy on their behalf. Accordingly, it should be approved as fair, just and reasonable.

I. The Member Rate Stability Mechanism is Reasonable and Should Be Approved.

Big Rivers' proposed tariff includes a Member Rate Stability Mechanism ("MRSM"),³⁷³ which will operate as follows: On the closing date of the Unwind Transaction, Big Rivers will establish an Economic Reserve of approximately \$157 million, which will be used as a partial offset to the FAC and Environmental Surcharge.³⁷⁴ As originally proposed, the MRSM would have drawn upon the Economic Reserve to completely offset the monthly impacts of the FAC and the Environmental Surcharge on the Members' non-Smelter bills, net of the credits received under the Unwind Surcredit and Rebate Adjustment.³⁷⁵ That proposal essentially left the non-Smelter Member rates unchanged until exhaustion of the Economic Reserve, but it also resulted in a rather dramatic modeled rate increase in 2013 upon exhaustion.³⁷⁶

As a result, the proposal has been revised so that the MRSM will be used to graduate or "feather" the drawdown of the Economic Reserve over a longer period.³⁷⁷ The feathering will result in a *partial offset of FAC and Environmental Surcharge cost increases each year under the Unwind Financial Model until the Economic Reserve is exhausted, and a gradual (rather than*

³⁷³ Application ¶ 78; Application, Exhibit 23, Sheet Nos. 76 through 77.

³⁷⁴ Direct Testimony of William Steven Seelye, Application, Exhibit 25, at 27; June Motion to Amend ¶ 1; October Motion to Amend ¶ 19.

³⁷⁵ June Motion to Amend ¶ 1.

³⁷⁶ October Motion to Amend ¶ 19.

³⁷⁷ *Id.*; Supplemental Direct Testimony of William Steven Seelye, October Motion to Amend, Exhibit 103, at 3-10.

dramatic) increase in rates between 2009 and 2013.³⁷⁸ The Economic Reserve is now projected not to be fully drawn down until 2013.³⁷⁹ The impact of this feathering or gradualism approach is shown on Exhibit WSS-17 to the Supplemental Direct Testimony of William Steven Seelye, October Motion to Amend, Exhibit 103.

J. The Proposed Rebate Adjustment is Reasonable and Should Be Approved.

The proposed rebate adjustment mechanism provides a vehicle by which, pursuant to the procedure further described below, certain rebates may be made to the Members upon Commission approval.³⁸⁰ Under the Smelter Wholesale Contracts, the Smelters have committed to pay 100% of Big Rivers' increases in expenses (with certain exceptions and limitations) through a TIER Adjustment Charge to support a 1.24 TIER, subject to the TIER Adjustment Charge caps described in the Smelter Agreements.³⁸¹ Under certain circumstances, the TIER Adjustment Charge in a given fiscal year can be zero and Big Rivers' TIER can still exceed 1.24. Under the terms of Wholesale Smelter Contracts, the Smelters are entitled to receive an energy allocated share of this Excess TIER Amount as a rebate.³⁸²

No corresponding contractual provision mandates that Big Rivers rebate to its Member non-Smelter customers the portion of the Excess TIER Amount not rebated to the Smelters.³⁸³ To the extent Big Rivers' Board of Directors opts to grant such a rebate to the non-Smelter

³⁷⁸ October Motion to Amend ¶ 19; Third Supplemental Direct Testimony of C. William Blackburn, October Motion to Amend, Exhibit 78, at 57. The impact of this feathering or gradualism approach is shown on Exhibit WSS-17 to the Supplemental Direct Testimony of William Steven Seelye, October Motion to Amend, Exhibit 103.

³⁷⁹ Third Supplemental Direct Testimony of C. William Blackburn, October Motion to Amend, Exhibit 78, at 57.

³⁸⁰ Application ¶ 76.

³⁸¹ Application ¶ 76; Direct Testimony of C. William Blackburn, Application, Exhibit 10 at 51-56.

³⁸² Application ¶ 76; Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 98-99.

³⁸³ Application ¶ 76; Direct Testimony of William Steven Seelye, Application, Exhibit 25, at 25; Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 99.

Member Load, Big Rivers would seek Commission approval for the amount of that rebate.³⁸⁴

The proposal would reasonably avoid the requirement that Big Rivers file a new tariff each time it determines that a rebate of this nature is advisable.³⁸⁵

It should be emphasized that approval of the Rebate Adjustment tariff in this case does not presuppose Commission approval of a specific, future rebate request.³⁸⁶ Because the effect of the Rebate Mechanism is to reduce rates to Big Rivers' Members, Big Rivers requests that the Commission find this tariff change to be fair, just and reasonable under the provisions of KRS 278.455(1).

K. The Member Discount Adjustment Rider Should Be Removed From Big Rivers' Tariff.

Big Rivers initially requested approval of an extension of its Member Discount Adjustment ("MDA") tariff rider.³⁸⁷ The MDA was incorporated into member rates in 2000 and was originally designed to return \$3.68 million in annual debt service interest savings resulting from Big Rivers' prepayment of RUS debt.³⁸⁸ Due to events that have occurred during the course of this proceeding, including the changes to the original plan to prepay the Rural Utilities Service, Big Rivers allowed the MDA to expire by its own terms on August 31, 2008, and asks approval to remove the expired MDA from the tariff.³⁸⁹

³⁸⁴ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 99-100. In operation, rebates would be implemented as lump-sum credits to the power bills of Member non-Smelter load during a single month of the year. Direct Testimony of William Steven Seelye, Application, Exhibit 25, at 25. The total rebate amount would be allocated to individual members on the basis of total annual base rate revenues received and would apply to all of Big Rivers' non-Smelter Member tariff rates.

³⁸⁵ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 99.

³⁸⁶ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 99-100.

³⁸⁷ Application ¶ 64; Application, Exhibit 23, Sheet No. 67.

³⁸⁸ Application ¶ 74; Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 100-101.

³⁸⁹ Third Supplemental Direct Testimony of C. William Blackburn, October Motion to Amend, Exhibit 78, at 31.

L. Big Rivers' Decision to Retain Rate Schedule 10 in Its Tariff is Reasonable.

Big Rivers' decision to retain Rate Schedule 10 in its tariff post-Unwind Transaction is necessary and appropriate for Big Rivers to preserve the ability to negotiate the terms for large demands of power, rather than having to surrender its limited, low-cost power reserves to the first person who demands service.³⁹⁰ This is a particular risk where an existing large power user is located in a Member's service territory, but is currently being served by a higher-cost, non-jurisdictional provider, such as a municipal or TVA. That entity could be in a position to switch suppliers on short notice, with an immediate demand for a significant amount of power.

The typical economic development project load might give Big Rivers and its Members more time to plan for the new load requirements. But the ability of Big Rivers to require negotiation of those arrangements is critical,³⁹¹ at least until Big Rivers can get the Unwind Transaction in place and assess its generating resources through the integrated resource planning process.

Rate Schedule 10 is also the vehicle for Big Rivers' voluntary real-time pricing program.³⁹² Elimination of Rate Schedule 10 would automatically eliminate that program, which was only approved this year in Case No. 2007-00164.

The implication of some of the cross-examination of Big Rivers' witnesses regarding Rate Schedule 10 is that Big Rivers holds the seemingly inconsistent positions that Rate Schedule 10 is a restriction on economic development in the existing transaction, yet wants to retain it. However, there are no inconsistencies when the utility of Rate Schedule 10 is considered in the context of the entire Unwind Transaction. In the Unwind Transaction, Big

³⁹⁰ Blackburn Testimony, Tr. Dec. 3, 2008, at pp. 105, 117.

³⁹¹ Core Testimony, Tr. Dec. 2, 2008 at pp. 60-62.

³⁹² Supplemental Testimony of David A. Spainhoward, Exhibit 99, October Motion to Amend, at 14.

Rivers will have the right, but not the obligation, to restrict the amount of its remaining capacity that gets dedicated to any one load.³⁹³ Because it obtains the ability to borrow money long term in the Unwind Transaction, Big Rivers will be in a position to add generating resources that may be required to respond to economic development needs in the most economical manner. In fact, Big Rivers has forecasted 75 MW of economic development-type growth over the period covered by the Unwind Financial Model.³⁹⁴ Rate Schedule 10 is fair, just and reasonable, and will remain so after the closing of the Unwind Transaction.

M. The Costs of the Phase 2 Transmission Project are Appropriately Included in Member Rates.

The costs of the transmission line authorized by the Commission in its Order dated October 30, 2007, in PSC Case No. 2007-00177 (the “Phase 2 Transmission Line”) are appropriately includible in Big Rivers’ rates to its Members. The Commission approved the transmission line to enable Big Rivers to transmit the energy dedicated to the Smelter load to its border should the Smelters cease operations.³⁹⁵ However, the issue of rate treatment of the costs of constructing, operating, and maintaining the line was left open.³⁹⁶

Charging these costs to the Members is appropriate because, absent Big Rivers’ ability to move substantial power to the system border, the loss of a Smelter load would cause all system costs to fall on the Members.³⁹⁷ In addition, the risk mitigation offered by the transmission line benefits the non-Smelter Members because it indicates to the credit rating agencies that Big Rivers can continue to operate even if it loses the Smelters’ load.³⁹⁸ The Phase 2 Transmission

³⁹³ Core Testimony, Tr. Dec. 2, 2008 at pp. 62-63.

³⁹⁴ Blackburn Testimony, Tr. Dec. 3, 2008 at p. 117, l. 8-9.

³⁹⁵ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 109-110.

³⁹⁶ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 109-110.

³⁹⁷ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 110; Alcan and Century Response to Item 2 of the Commission Staff’s Initial Data Request.

³⁹⁸ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 110; Direct Testimony of Burns E. Mercer, Application, Exhibit 26.

Line is accordingly a necessary component of achieving Big Rivers' financial rating, which will permit future borrowings beneficial to the Members.

N. The Proposed Changes to Big Rivers' Open Access Transmission Tariff are Reasonable and Should Be Approved.

Big Rivers requests approval of a new Open Access Transmission Tariff ("OATT").³⁹⁹ The OATT revisions are necessary in order to reflect changes to the Federal Energy Regulatory Commission's ("FERC") *pro forma* OATT⁴⁰⁰ and to incorporate rates for generation-based ancillary services and new transmission rates reflecting Big Rivers' costs instead of those of WKEC in connection with Big Rivers' resumption of control over the generating units in the Unwind Transaction.⁴⁰¹ In Case No. 98-267, the Commission asserted jurisdiction over Big Rivers' transmission rates "to the extent that FERC has not asserted jurisdiction over Big Rivers' OATT."⁴⁰² In addition, the Commission must approve modifications to documents it has previously approved.⁴⁰³ Accordingly, Commission approval of the revised OATT is sought here on that basis.

The changes to the existing OATT fall into three categories: (1) changes to reflect FERC changes to the *pro forma* OATT; (2) changes to remove references to the E.ON Entities in general, and to WKEC as the provider of ancillary services specifically; and (3) changes to the Big Rivers transmission rates to reflect transmission and ancillary services rates on a consistent cost derivation basis based on Big Rivers' operation of the generation assets. As demonstrated in

³⁹⁹ The proposed OATT is attached as Exhibit 85 to the October Motion to Amend.

⁴⁰⁰ October Motion to Amend ¶ 26.

⁴⁰¹ Direct Testimony of Ralph L. Luciani, Application, Exhibit 35, at 4-6.

⁴⁰² *The 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*, PSC Case No. 98-267 (Final Order dated July 14, 1998), page 19.

⁴⁰³ See *In the Matter of Big Rivers Electric Corporation*, PSC Case No. 99-460, Order dated November 24, 1999, page 10.

the testimony of David A. Spainhoward⁴⁰⁴ and Ralph L. Luciani,⁴⁰⁵ these various changes are fair, just, reasonable and should be approved.

IV. The Commission Should Approve Certain Proposed Accounting Treatment, Including the Establishment of the Proposed Regulatory Accounts.

A. The Economic Reserve Regulatory Account Should Be Approved.

Big Rivers requests Commission approval of the creation of an Economic Reserve regulatory account, which will hold certain funds received from the E.ON Entities at closing until they are later refunded to Big Rivers' Members.⁴⁰⁶ Originally, Big Rivers proposed that the Economic Reserve be funded with at least \$75 million.⁴⁰⁷ However, as a result of an increase in actual fuel costs over those originally incorporated in the financial model, Big Rivers negotiated an \$82 million addition to the E.ON Entities' termination payment to Big Rivers.⁴⁰⁸ Big Rivers has committed to apply this additional amount to the Economic Reserve, which will bring the reserve to at least \$157 million.⁴⁰⁹

The Economic Reserve will be held by Big Rivers but segregated from other funds held by Big Rivers, and interest accrued on these funds will be credited to the Economic Reserve.⁴¹⁰ Big Rivers asks that the Economic Reserve be accounted for as a regulatory liability and that the funds placed into the Economic Reserve account by Big Rivers at closing be excluded from income in 2008.⁴¹¹ The Economic Reserve will be used to fund the MRSM until the Economic

⁴⁰⁴ See Direct Testimony of David A. Spainhoward, Application, Exhibit 18, at 21-22; Supplemental Direct Testimony of David A. Spainhoward, October Motion to Amend, Exhibit 99, at 15-20.

⁴⁰⁵ See Direct Testimony of Ralph L. Luciani, Application, Exhibit 35, at 1-5.

⁴⁰⁶ Application ¶ 77.

⁴⁰⁷ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 77.

⁴⁰⁸ Second Supplemental Testimony of C. William Blackburn, June Motion to Amend, Exhibit 7, at 3-4.

⁴⁰⁹ *Id.*

⁴¹⁰ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 78.

⁴¹¹ *Id.*

Reserve is depleted.⁴¹² Any withdrawals from the Economic Reserve to fund the MRSM will be debited as a regulatory liability and credited in the same amount directly to Member revenue.⁴¹³

In function, the Economic Reserve “is a pre-funding of a portion of the potential FAC and Environmental Surcharge rate increases that the non-Smelter members otherwise would be required to pay, and serves to hold Member rates at their current levels for as long as possible.”⁴¹⁴ Big Rivers’ Members support the creation of the Economic Reserve because it cushions the effects of increased fuel and environmental costs.⁴¹⁵ Therefore, segregation of these funds at closing to be reserved for the benefit of the non-Smelter Members is an integral component of the Unwind Transaction. The Economic Reserve account is fair, just and reasonable, and should be approved by the Commission.

B. The Proposed Transition Reserve Account Should Be Approved.

Big Rivers also seeks approval of the establishment of a Transition Reserve Account,⁴¹⁶ to be created from the consideration Big Rivers will receive from the E.ON Entities at closing, in order to protect Big Rivers against a Smelter shutdown.⁴¹⁷ This protection is necessary because post-closing the Smelters loads will account for approximately 56% of Big Rivers’ Member demand.⁴¹⁸ Big Rivers prepared a sensitivity analysis establishing that the \$35 million amount is sufficient to protect Big Rivers’ financial integrity even in the event of a three-year downturn in wholesale market prices concurrent with a Smelter shutdown.⁴¹⁹ The Transition Reserve

⁴¹² *Id.* at 79.

⁴¹³ *Id.* at 78.

⁴¹⁴ *Id.* at 79; *see also* Direct Testimony of Michael H. Core, Application, Exhibit 14, at 13 (the Economic Reserve will be used in the initial years to dampen any rate increase impacts for the non-Smelter Members).

⁴¹⁵ *See* Direct Testimony of Burns E. Mercer, Application, Exhibit 26, at 8.

⁴¹⁶ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 76.

⁴¹⁷ *Id.* at 85.

⁴¹⁸ *Id.*

⁴¹⁹ *Id.* at 86.

Account is thus a mitigation measure that is necessary for Big Rivers to obtain an investment grade rating, and therefore is integral to the Unwind Transaction.⁴²⁰

C. The Proposed Purchased Power Regulatory Accounts Should Be Approved.

Big Rivers will, from time to time, incur costs associated with purchasing power from third parties when it is providing indirect service to the Smelters and the non-Smelter Members.⁴²¹ Under the Smelter Agreements, the Smelters will be charged for the portion of Big Rivers' purchased power costs attributable to service to the Smelters via the Non-FAC PPA mechanism.⁴²² However, Big Rivers does not have authority to charge the non-Smelter Members for the portion of its purchased power costs attributable to service to the non-Smelter Members, and Big Rivers is not seeking such authority at this time.⁴²³ Instead of applying the Non-FAC PPA to non-Smelter sales and billing any charges or credits to Members, Big Rivers is seeking the Commission's approval to establish two regulatory accounts (a deferred asset and a deferred liability) that would fully account for any charges or credits that would have otherwise been billed to the Members through the application of the Non-FAC PPA to non-Smelter sales.⁴²⁴

Specifically, Big Rivers proposes to establish a regulatory asset (deferred liability) which would be used to accrue any Non-FAC PPA amounts that are applicable to non-Smelter sales.⁴²⁵ In a general rate case, the regulatory asset balance would be amortized over a period of approximately three years and included as an expense for purposes of determining test-year

⁴²⁰ *Id.* at 86.

⁴²¹ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 80.

⁴²² *Id.* at 81.

⁴²³ *Id.*

⁴²⁴ *Id.*

⁴²⁵ *Id.*

requirements.⁴²⁶ Once rates are implemented from the rate case, the amortization authorized by the Commission would be charged to expense with a corresponding credit to the regulatory asset to draw down the amount accrued to the regulatory asset up to the end of the test year, but any Non-FAC PPA charges otherwise applicable to non-Smelter sales after the end of the test-year would continue to being added to the regulatory asset.⁴²⁷ In other words, the regulatory asset will continue to account for all Non-FAC PPA charges that would have otherwise been charged to non-Smelter sales after considering the amortization of the value of the deferred asset as of the end of the test year used to determine revenue requirements in a general rate case.⁴²⁸

Similarly, Big Rivers would establish a regulatory liability (deferred asset) which would be used to accrue any Non-FAC PPA amounts that would have otherwise been credited to non-Smelter sales.⁴²⁹ In a general rate case, the regulatory liability balance as of the end of a test year would then be amortized over a period of years and included as a reduction to expenses for purposes of determining revenue requirements for the rate case.⁴³⁰ Once rates are implemented from the rate case, the amortization authorized by the Commission would be charged to the regulatory liability to draw down the amount accrued to the regulatory liability up to the end of the test year, but any Non-FAC PPA credits otherwise applicable to non-Smelter sales after the end of the test year would continue to be credited to the regulatory liability.⁴³¹ Thus, the regulatory liability will continue to account for all Non-FAC PPA credits that would have otherwise been credited to Members for non-Smelter sales after consideration of the amortization of the value of the deferred liability at the end of the test year used to set rates.⁴³²

⁴²⁶ *Id.*

⁴²⁷ *Id.* at 82.

⁴²⁸ *Id.*

⁴²⁹ *Id.*

⁴³⁰ *Id.*

⁴³¹ *Id.*

⁴³² *Id.* at 83

Commission Staff has inquired at informal conferences in this matter and in Commission Staff's First Data Request, Item 43c, whether the parties would object to charging the Non-FAC PPA to non-Smelter sales rather than establishing regulatory asset and regulatory liability accounts, as discussed above. As noted in Big Rivers' response to Item 43c, Big Rivers has no objection to that approach. Big Rivers would note that if that approach is implemented by the Commission, the Members' retail tariffs may need to be adjusted to properly flow-through those costs.

D. The Proposed Accounting Relating to Termination Agreement Provisions Should Be Approved.

The Termination Agreement provides for a number of transfers and other issues that require separate accounting consideration.⁴³³ Exhibit CWB-14 to Mr. Blackburn's Third Supplemental Direct Testimony summarizes the various Termination Agreement provisions requiring accounting treatment, as well as Big Rivers' proposed journal entries related to them.⁴³⁴ Big Rivers will account for and capitalize the assets received from the E.ON Entities after closing as specified in Schedule 3.15 to the Smelter Coordination Agreements.⁴³⁵ The proposed accounting treatment is reasonable and should be approved.

E. The Proposed Accounting Treatment Relating to The Bank of America Termination Agreement and PMCC Termination Agreement Should Be Approved.

Big Rivers intends to currently expense all costs associated with the termination of the leveraged leases that it entered into in 2000 with affiliates of PMCC and Bank of America

⁴³³ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 71.

⁴³⁴ Exhibit CWB-14 to the Third Supplemental Direct Testimony of C. William Blackburn, October Motion to Amend, Exhibit 78.

⁴³⁵ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 74-75.

Leasing Corporation (“Bank of America”) (the “Leveraged Leases”).⁴³⁶ As of September 30, 2008, Big Rivers has recorded a net loss on its books of approximately \$77 million to reflect the amounts received in 2000 from entering into the Leveraged Leases and the buyout expenses.⁴³⁷ Big Rivers proposes to expense as a loss the amounts expended to terminate the Leveraged Leases.⁴³⁸ Therefore, Big will record a net loss at the end of 2008 of \$16.1 million as a result of the proposed accounting treatment. This is a just and reasonable accounting of the buyouts.⁴³⁹ Big Rivers has also requested RUS approval of this accounting treatment.⁴⁴⁰ The proposed accounting treatment relating to the buyouts of the PMCC and Bank of America Leveraged Leases are reflected in Exhibit CWB-11 attached to the Third Supplemental Direct Testimony of C. William Blackburn.⁴⁴¹

V. Big Rivers Should be Authorized to Issue the Evidences of Indebtedness Identified in the Application.

Big Rivers proposes to issue in connection with the closing of the Unwind Transaction, two \$50 million unsecured revolving credit agreements, an Indenture to replace the existing RUS mortgage (the Third Restated Mortgage),⁴⁴² and a series of other documents to move creditors from the RUS mortgage to the Indenture. The abundant evidence in this case supports a conclusion that issuance of these evidences of indebtedness more than meets the statutory standards of KRS 278.300(3).

⁴³⁶ Third Supplemental Direct Testimony of C. William Blackburn, October Motion to Amend, Exhibit 78, at 14. The Leveraged Leases were approved in *In the Matter of Big Rivers Electric Corporation's Application for Approval of a Leveraged Lease of Three Generating Units*, PSC Case No. 99-450.

⁴³⁷ *Id.*

⁴³⁸ *Id.*

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*

⁴⁴¹ October Motion to Amend, Exhibit 78.

⁴⁴² Third Amended and Restated Mortgage and Security Agreement dated as of August 1, 2001 (“Third Restated Mortgage”), filed in Appendix A to the Application.

Big Rivers' current credit arrangements make it all but impossible to obtain any additional financing.⁴⁴³ Virtually all of Big Rivers' existing property is pledged under its existing Third Restated Mortgage, and Big Rivers has no expectation that RUS would be willing to advance more funds under it.⁴⁴⁴ Moreover, Big Rivers is prohibited by the mortgage from securing additional debt without the approval of each of its senior creditors.⁴⁴⁵ The existing financing arrangements (including the Third Restated Mortgage and an Existing Intercreditor Agreement⁴⁴⁶) are not economically viable in the context of the expanded capital requirements expected following the Unwind Transaction.⁴⁴⁷ If the Unwind Transaction does not occur, Big Rivers will continue in its present status, with its negative equity, and therefore unable to borrow unless the RUS agrees to subordinate its first mortgage – which RUS refuses to do.⁴⁴⁸

Accordingly, Big Rivers will remain obligated under such onerous financing instruments as :

- An \$83,300,000 pollution control bond issue with an interest rate of 18% (because these bonds are guaranteed by Ambac, and because Ambac has been downgraded, the bonds are now at the default rate),⁴⁴⁹
- The ARVP Note to the RUS, in the current amount of \$100 million, which requires one third of Big Rivers' off-system sales margins in early payments, though interest on the note is zero;⁴⁵⁰ and
- A short-term, unsecured loan from PMCC, in the amount of \$12.38 million, to be paid *in full* by December 31, 2009.⁴⁵¹

The financing arrangements that Big Rivers proposes in this proceeding will permit restructuring of these onerous obligations, even as they restore Big Rivers' ability to access

⁴⁴³ See April 23, 2008, Third Amendment and Supplement to Application ¶ 13; Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 113-114.

⁴⁴⁴ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 113-114.

⁴⁴⁵ *Id.* at 114.

⁴⁴⁶ Third Amended and Restated Subordination, Nondisturbance, Attornment and Intercreditor Agreement dated as of August 1, 2001 (the "Existing Intercreditor Agreement"), filed in Appendix A to the Application.

⁴⁴⁷ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 117.

⁴⁴⁸ Blackburn Testimony, Tr. Dec. 3, 2008 at p. 85, l. 3-12.

⁴⁴⁹ Blackburn Testimony, Tr. Dec. 3, 2008 at pp. 83-84.

⁴⁵⁰ Blackburn Testimony, Tr. Dec. 3, 2008 at pp. 128-129.

⁴⁵¹ Affidavit of C. William Blackburn, October Motion to Amend, Exhibit 92, at 33; Third Supplemental Direct Testimony of C. William Blackburn, October Motion to Amend, Exhibit 78, at 10

capital to finance any system additions and power purchases and to make other arrangements to meet growth associated with economic development.⁴⁵² The particular instruments for which Big Rivers seeks approval are set forth below. Big Rivers has also filed a number of other financing documents in this matter, some of which are no longer necessary, and the rest of which were filed to give the Commission and other parties a complete picture of Big Rivers' financial condition post-closing.

The financing documents Big Rivers will enter into if the Unwind Transaction closes, but which do not require Commission approval, include the Amended and Consolidated Loan Contract with RUS,⁴⁵³ the RUS 2008 Promissory Note, Series A,⁴⁵⁴ and the RUS 2008 Promissory Note, Series B.⁴⁵⁵ Those three documents do not require Commission approval pursuant to KRS 278.300(10) because they are subject to the RUS' supervision or control. A listing of the financing documents that are no longer necessary is filed as Exhibit 93 to the October Motion to Amend. Big Rivers has identified documents that it does not believe require Commission approval, but if the Commission disagrees, Big Rivers asks that approval of each such document be granted.

Big Rivers' financing has become significantly simpler since this case was filed largely as a result of the recent termination of the Leveraged Leases. Big Rivers does not propose to issue any new public debt at this time.⁴⁵⁶ Instead, Big Rivers will prepay approximately \$140.2 million of its RUS debt at the closing of the Unwind Transaction while the remaining RUS debt

⁴⁵² Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 117; Third Amendment and Supplement to Application ¶ 14.

⁴⁵³ Filed as Exhibit 72 to the April 23, 2008, Third Amendment and Supplement to Application.

⁴⁵⁴ Filed as Exhibit 73 to the April 23, 2008, Third Amendment and Supplement to Application.

⁴⁵⁵ Filed as Exhibit 74 to the April 23, 2008, Third Amendment and Supplement to Application.

⁴⁵⁶ Third Amendment and Supplement to Application ¶ 15.

will be restructured. Big Rivers expects to pay an additional \$60 million to the RUS in or before 2012 and an additional \$200 million by no later than January 2016.⁴⁵⁷

Big Rivers will enter into a revolving line of credit agreement with National Rural Utilities Cooperative Finance Corporation (“CFC”) and a revolving credit agreement with CoBank ACB (“CoBank”). These are the only proposed financing documents under which Big Rivers may incur additional debt without further Commission approvals, and they are necessary to ensure that Big Rivers has the financial resources to operate its assets after the closing of the Unwind Transaction.⁴⁵⁸ The remaining financing documents are related to removing the E.ON Entities and Bank of America as parties to agreements to which they will no longer be party; establishing *pari passu* priority among Big Rivers’ principal creditors; replacing references to the Third Restated Mortgage with references to the Indenture; and releasing parties from documents which are terminated as a part of the Unwind Transaction.⁴⁵⁹ For the reasons stated, the proposed issuances of evidences of indebtedness are for a lawful object within the corporate purposes of Big Rivers, are necessary or appropriate for or consistent with the proper performance by Big Rivers of its service to the public and will not impair its ability to perform that service, and should be approved.⁴⁶⁰

A. Issuance of the Revolving Line of Credit Agreement Between Big Rivers and National Rural Utilities Cooperative Finance Corporation Should Be Authorized.

Big Rivers seeks the Commission’s approval to enter into the Revolving Line of Credit Agreement (the “CFC Agreement”) with CFC, the most recent version of which is filed as an attachment to Item 1 of Big Rivers’ December 12, 2008, Responses to Information Requested at

⁴⁵⁷ *Id.*; October Motion to Amend ¶ 10; Third Supplemental Direct Testimony of C. William Blackburn, October Motion to Amend, Exhibit 78, at 13.

⁴⁵⁸ Third Amendment and Supplement to Application ¶ 15.

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.* ¶ 17; Supplemental Testimony of C. William Blackburn, April 23, 2008, Third Amendment and Supplement to Application, Exhibit 77.

the December 2, 2008, Hearing, and certain terms of which are included in the cover letter and term sheet filed as Exhibit 109 to the November 24, 2008, Motion to Amend and Supplement Application. The CFC Agreement establishes an unsecured line of credit of up to \$50 million (the “CFC Line of Credit”), which will be used to provide funds for Big Rivers’ capital expenditures, for general corporate use by Big Rivers, and for the issuance of letters of credit by CFC.⁴⁶¹ The CFC Line of Credit will provide essential financial resources to enable Big Rivers to operate its assets after closing.⁴⁶²

The initial fees and expenses associated with creation of the agreement will be paid out of funds at closing.⁴⁶³ Ongoing fees have been included in the Unwind Financial Model.⁴⁶⁴ Because no borrowings under the CFC Agreement are scheduled, no interest expenses related to that agreement have been incorporated into the Unwind Financial Model.⁴⁶⁵ The agreement will have no impact on Big Rivers’ rates and charges for wholesale service.⁴⁶⁶ Also, Big Rivers’ financial advisor, Mark Glotfelty of Goldman Sachs, indicated that the terms of the CFC Agreement are extremely favorable compared to other, similar agreements he has been seeing in the market.⁴⁶⁷ The CFC Agreement is necessary and appropriate for Big Rivers to perform its obligations to its Members and the public.⁴⁶⁸

⁴⁶¹ First Amendment and Supplement to Application ¶ 13.

⁴⁶² *Id.* ¶ 11.

⁴⁶³ First Amendment and Supplement to Application ¶ 15.

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.* ¶ 15; Supplemental Testimony of C. William Blackburn, April 23, 2008, Third Amendment and Supplement to Application, Exhibit 77, at 15.

⁴⁶⁶ First Amendment and Supplement to Application ¶ 15.

⁴⁶⁷ Blackburn Testimony, Tr. Dec. 3, 2008 at p. 138, l. 3-9.

⁴⁶⁸ First Amendment and Supplement to Application ¶ 11.

B. Issuance of the Revolving Credit Agreement Between Big Rivers and CoBank ACB, Including the Note Between Big Rivers and CoBank ACB, Should Be Authorized.

Big Rivers seeks the Commission's approval to enter into the Revolving Credit Agreement with CoBank (the "CoBank Agreement"), the most recent version of which is attached as Exhibit 110 to the November 24, 2008, Motion to Amend and Supplement to Application. Pursuant to the agreement, CoBank will provide unsecured loans of up to an aggregate of \$50 million to Big Rivers for up to a three-year period commencing on the closing date.⁴⁶⁹ Big Rivers intends to use the loans for general corporate purposes and as interim financing of capital expenditures.⁴⁷⁰

The initial fees and expenses associated with the creation of the agreement will be paid out of funds at closing.⁴⁷¹ Ongoing fees have been included in the Unwind Financial Model.⁴⁷² Because no borrowings under the CoBank Agreement are scheduled, no interest expenses related to that agreement have been incorporated into the Unwind Financial Model.⁴⁷³ The agreement will have no impact on Big Rivers' rates and charges for wholesale service.⁴⁷⁴ As with the CFC Agreement, Big Rivers' financial advisor indicated that the terms of the CoBank Agreement are extremely favorable compared to other, similar agreements he has been seeing in the market.⁴⁷⁵ The CoBank Agreement is necessary and appropriate for Big Rivers to perform its obligations to its Members and the public.⁴⁷⁶

⁴⁶⁹ First Amendment and Supplement to Application ¶ 14.

⁴⁷⁰ *Id.* ¶ 14.

⁴⁷¹ First Amendment and Supplement to Application ¶ 15.

⁴⁷² *Id.*

⁴⁷³ *Id.* ¶ 15; Supplemental Testimony of C. William Blackburn, April 23, 2008, Third Amendment and Supplement to Application, Exhibit 77, at 15.

⁴⁷⁴ First Amendment and Supplement to Application ¶ 15.

⁴⁷⁵ Blackburn Testimony, Tr. Dec. 3, 2008 at p. 138, l. 3-9.

⁴⁷⁶ First Amendment and Supplement to Application ¶ 11.

C. Issuance of the PCB Series 2001A Note Should Be Authorized.

Big Rivers seeks approval to enter into the PCB Series 2001A Note from Big Rivers to the County of Ohio, Kentucky (“Ohio County”), attached as Exhibit 53 to the April 11, 2008, Second Amendment and Supplement to Application. This note will replace an existing note to Ohio County that was issued in consideration of Ohio County’s issuance of certain pollution control bonds.⁴⁷⁷ The terms, amount, and interest rate of the new note are essentially the same as those in the note that it replaces.⁴⁷⁸ The new note, however, is secured by the Indenture whereas the old note was secured by the Third Restated Mortgage.⁴⁷⁹

D. Issuance of the Ambac Municipal Bond Insurance, Policy Series 1983 Note, Should Be Authorized.

Big Rivers seeks approval to enter into the Ambac Municipal Bond Insurance Policy Series 1983 Note from Big Rivers to Ambac attached as Exhibit 54 to the April 11, 2008, Second Amendment and Supplement to Application. This note replaces an existing note issued and approved in connection with the Leveraged Leases.⁴⁸⁰ It establishes the terms for reimbursement of any amounts Ambac must pay under another agreement by which Ambac guaranteed the repayment of certain pollution control bonds issued by Ohio County.⁴⁸¹ The terms, amount and interest rate of the new note are essentially the same as those of the note that it replaces.⁴⁸² The new note, however, will be secured by the Indenture whereas the old note is secured by the Third Restated Mortgage.⁴⁸³

⁴⁷⁷ Second Amendment and Supplement to Application ¶ 10.

⁴⁷⁸ *Id.*; Supplemental Testimony of C. William Blackburn, April 23, 2008, Third Amendment and Supplement to Application, Exhibit 77, at 15.

⁴⁷⁹ Second Amendment and Supplement to Application ¶ 10; Supplemental Testimony of C. William Blackburn, April 23, 2008, Third Amendment and Supplement to Application, Exhibit 77, at 15.

⁴⁸⁰ Second Amendment and Supplement to Application ¶ 11.

⁴⁸¹ Second Amendment and Supplement to Application ¶ 11.

⁴⁸² *Id.*; Supplemental Testimony of C. William Blackburn, April 23, 2008, Third Amendment and Supplement to Application, Exhibit 77, at 15.

⁴⁸³ Second Amendment and Supplement to Application ¶ 11; Supplemental Testimony of C. William Blackburn, April 23, 2008, Third Amendment and Supplement to Application, Exhibit 77, at 15.

E. Issuance of the Standby Bond Purchase Agreement Note (Series 1983 Bonds) Should Be Authorized.

Big Rivers seeks approval to enter into the Standby Bond Purchase Agreement Note Series 1983 Bonds from Big Rivers to Dexia Credit Local (“Dexia”) attached as Exhibit 55 to the April 11, 2008, Motion to Amend and Supplement Application. This note replaces an existing note to Dexia issued and approved in connection with the Leveraged Lease for the repayment of unpaid principal and interest when due on certain pollution control bonds issued by Ohio County and purchased and held by Dexia.⁴⁸⁴ The terms, amount and interest rate of the new note are essentially the same as those of the note that it replaces.⁴⁸⁵ The new note, however, is secured by the Indenture whereas the old note is secured by the Third Restated Mortgage.⁴⁸⁶

F. Issuance of the Termination of the Third Amended and Restated Subordination, Nondisturbance, Attornment and Intercreditor Agreement Should Be Authorized.

Big Rivers seeks approval to enter into the Termination of Third Amended and Restated Subordination Nondisturbance Attornment and Intercreditor Agreement attached as Exhibit 56 to the April 11, 2008, Second Amendment and Supplement to Application. This agreement is a short-form document that is intended to facilitate the termination and release of the existing Intercreditor Agreement on file in various counties of Kentucky pursuant to the Creditor Consent, Termination and Release Agreement, which is discussed below.⁴⁸⁷

G. Issuance of the Termination of the Third Restated Mortgage and Security Agreement Should Be Authorized.

Big Rivers seeks approval to enter into the Termination of the Third Restated Mortgage and Security Agreement attached as Exhibit 57 to the April 11, 2008, Second Amendment and

⁴⁸⁴ Second Amendment and Supplement to Application ¶ 12.

⁴⁸⁵ *Id.*; Supplemental Testimony of C. William Blackburn, April 23, 2008, Third Amendment and Supplement to Application, Exhibit 77, at 15.

⁴⁸⁶ Second Amendment and Supplement to Application ¶ 12; Supplemental Testimony of C. William Blackburn, April 23, 2008, Third Amendment and Supplement to Application, Exhibit 77, at 15.

⁴⁸⁷ Second Amendment and Supplement to Application ¶ 13.

Supplement to Application. This agreement is intended to facilitate the termination and release of the existing Third Restated Mortgage on file in various counties of Kentucky pursuant to the Creditor Consent, Termination and Release Agreement, which is discussed below.⁴⁸⁸

H. Issuance of the Creditor Consent, Termination and Release Agreement Should Be Authorized.

Big Rivers seeks approval to enter into the Creditor Consent, Termination and Release Agreement attached as Exhibit 96 to the October Motion to Amend. This agreement terminates the Third Restated Mortgage and the Existing Intercreditor Agreement.⁴⁸⁹ Under this agreement, Big Rivers' principal creditors give the consents necessary for the termination of the lease transaction into which Big Rivers and the E.ON Entities entered in 1998.⁴⁹⁰

I. Issuance of the Letter Agreements Regarding "Funding of Certain Amounts to be Paid to the Bank of America" and "Payment Regarding the Buy-Out of the Bank of America" Should Be Authorized.

Big Rivers entered into two agreements regarding the funding of the buyouts of the Bank of America Leveraged Leases.⁴⁹¹ Those two agreements, the "Funding of Certain Amounts to be Paid to the Bank of America" and the "Payment Regarding the Buy-Out of the Bank of America," are attached as Exhibit 95 to the October Motion to Amend. Under the terms of those agreements, if the Unwind Transaction closes, Big Rivers and the Smelters will each reimburse the E.ON Entities \$1 million.⁴⁹² Big Rivers seeks approval of these funding agreements because they contain contingencies tied to the approval and closing of the Unwind Transaction.⁴⁹³

⁴⁸⁸ Second Amendment and Supplement to Application ¶ 14.

⁴⁸⁹ April 23, 2008, Third Amendment and Supplement to Application ¶ 5.

⁴⁹⁰ April 23, 2008, Third Amendment and Supplement to Application ¶ 5.

⁴⁹¹ October Motion to Amend ¶¶ 9, 11. The funding of the buyout of the PMCC Leveraged Leases is governed by the Third Amendment to the Termination Agreement.

⁴⁹² *Id.* ¶ 11.

⁴⁹³ *Id.*

J. Issuance of the Indenture Should Be Authorized.

Big Rivers seeks approval to enter into the Indenture attached as Exhibit 96 to the October Motion to Amend. The Indenture will replace the Third Restated Mortgage and will permit Big Rivers to issue additional debt secured by the Indenture (rather than the Third Restated Mortgage⁴⁹⁴) on a *pari passu* basis with Big Rivers' existing senior creditors without obtaining their approval.⁴⁹⁵ The Indenture will use a lien and security interest in favor of an institutional trustee rather than in favor of each individual creditor as mortgagee.⁴⁹⁶

Similar to the Third Restated Mortgage, the Indenture creates a lien and security interest on most of Big Rivers' real and personal property, with certain exceptions.⁴⁹⁷ The largest exception is cash.⁴⁹⁸ Other exceptions include contracts other than those relating to the ownership or operation of certain facilities, significant power purchase agreements and stock in subsidiaries.⁴⁹⁹ These differences in the property subject to the lien and security interest of the Indenture will provide Big Rivers with operating and financial flexibility that it now lacks.⁵⁰⁰

The Third Restated Mortgage subjects Big Rivers to the oversight of its senior secured creditors. Any one of these creditors can veto issuance of additional debt, thus hobbling Big Rivers' ability to meet any future capital requirements.⁵⁰¹ The Indenture frees Big Rivers of this pervasive control.⁵⁰² Big Rivers will be able, for the first time in years, to operate, meet its obligations, and invest in the future without engaging in the cumbersome, expensive, and time-

⁴⁹⁴ Third Restated Mortgage, filed in Appendix A to the Application.

⁴⁹⁵ Direct Testimony of C. William Blackburn, Application, Exhibit 10, at 118-123; Third Amendment and Supplement to Application ¶ 15.

⁴⁹⁶ Second Amendment and Supplement to Application ¶ 1.

⁴⁹⁷ Second Amendment and Supplement to Application ¶ 1.

⁴⁹⁸ Second Amendment and Supplement to Application ¶ 1.

⁴⁹⁹ Second Amendment and Supplement to Application ¶ 1.

⁵⁰⁰ Second Amendment and Supplement to Application ¶ 1.

⁵⁰¹ Second Amendment and Supplement to Application ¶ 2.

⁵⁰² Second Amendment and Supplement to Application ¶ 4.

consuming process of gaining creditor consents.⁵⁰³ Big Rivers, its Members, its customers, and its region will reap the benefits.

VI. The Commission Should Approve the Termination of Certain Commitments and Proceedings That Will Be Rendered Obsolete by the Unwind Transaction.

Certain of the commitments and requirements pertaining to the Joint Applicants, as described below, will be rendered obsolete when the 1998 Transactions are terminated. The Commission should explicitly terminate those commitments and requirements in its Final Order in this case, such termination to be effective at closing.

A. Certain Merger Commitments of E.ON AG, PowerGen plc, E.ON U.S. LLC (fka LG&E Energy Corp.), Louisville Gas and Electric Company, and Kentucky Utilities Company Will Be Rendered Irrelevant After the Unwind, and the Commission Should So Recognize in Its Order.

In previous merger cases,⁵⁰⁴ the E.ON Parties made certain merger commitments concerning their relationship to Big Rivers under the 1998 Transactions that were accepted by the Commission. These commitments will no longer be necessary or relevant after the Commission approves the Unwind Transaction.⁵⁰⁵ Consequently, the E.ON Parties request that, in its final Order in this matter, the Commission remove merger commitments numbered 5, 6, and 9 in the Order dated May 15, 2000 in the Powergen Merger Case, and merger commitments numbered 40, 41, and 44 in the Order dated August 6, 2001 in the E.ON Merger Case.

⁵⁰³ Second Amendment and Supplement to Application ¶ 4.

⁵⁰⁴ *In the Matter of: Joint Application of E.ON AG, Powergen plc, LG&E Energy Corp., Louisville Gas and Electric Company, and Kentucky Utilities Company for Approval of an Acquisition*, PSC Case No. 2001-00104 (the "E.ON Merger Case"), and *In the Matter of: Joint Application of PowerGen plc and LG&E Energy Corp., Louisville Gas and Electric Company and Kentucky Utilities Company for Approval of Merger*, PSC Case No. 2000-095 (the "Powergen Merger Case").

⁵⁰⁵ Testimony of Paul W. Thompson, Application, Exhibit 15, at 17.

B. Big Rivers' Current Integrated Resource Plan Proceeding Should Be Terminated and a New Plan Should Be Filed by November 2010.

The current Commission case concerning Big Rivers' Integrated Resource Plan ("IRP"), filed with the Commission on November 29, 2005 in PSC Case No. 2005-00485, and currently held in abeyance at Big Rivers' request,⁵⁰⁶ should be terminated. The material changes that the Unwind Transaction will make in Big Rivers' circumstances will render the current IRP and the record in Case No. 2005-00485 obsolete.⁵⁰⁷ The 2005 IRP is not based on circumstances in which Big Rivers operates its generation units.⁵⁰⁸ Big Rivers is scheduled to conduct a new load forecast in 2009, which will form the basis for the development of its next IRP.⁵⁰⁹ Big Rivers commits to filing its next IRP, with the Commission's approval, no later than November 2010.⁵¹⁰ Postponing the next IRP filing until 2010 will allow the IRP to be based on relevant, updated information.

C. Big Rivers Should Be Relieved of Certain Reporting Requirements Ordered by the Commission in Case Nos. 97-204 and 98-267.

Big Rivers requests that the Commission relieve it of the reporting and other requirements imposed by the Commission in connection with the 1998 Transactions in Orders dated April 30, 1998, in PSC Case No. 97-204, and July 14, 1998, in PSC Case No. 98-267. In those Orders, which are attached as Exhibit 6 to the Application, the Commission required Big Rivers to adopt a 50/50 sharing methodology for the reporting and recovery of unforeseen changes in transmission costs due to the Smelters' load; required Big Rivers annually to file and update its 1998 lease transaction financial model; required Big Rivers to file a report of its arbitrage sales and other sales every six months (which requirement was later incorporated into

⁵⁰⁶ Direct Testimony of David A. Spainhoward, Application, Exhibit 18, at 28.

⁵⁰⁷ *Id.* at 29.

⁵⁰⁸ *Id.*

⁵⁰⁹ *Id.*

⁵¹⁰ *Id.* at 28.

the annual filing of the financial model); and required Big Rivers to file an annual report describing the previous year's plant maintenance as well as major maintenance projects scheduled for the future year.⁵¹¹ These reporting requirements relate only to the circumstances involved in the 1998 Transactions and will have no further relevance upon approval of the Unwind Transaction.⁵¹²

VII. The Commission Should Grant the Joint Applicants' Pending Motions.

The Joint Applicants have filed the following motions that are still pending before the Commission, and the Joint Applicants request that the Commission grant these motions for the reasons stated in the motions:

- a. Big Rivers' March 31, 2008, Petition for Confidential Treatment (relating to First Amendment and Supplement to Application) – denied by letter dated 6/17/08 (subject to rehearing)
- b. Big Rivers' April 23, 2008, Petition for Confidential Treatment (relating to Third Amendment and Supplement to Application) – denied by letter dated 6/17/08 (subject to rehearing)
- c. E.ON's May 2, 2008, Petition for Confidential Treatment (relating to E.ON's Supplemental Responses to PSC Initial Data Request)
- d. Big Rivers' July 3, 2008, Motion for Rehearing and Petition for Confidential Treatment - rehearing granted by order dated 7/22/08, but rehearing still pending
- e. E.ON's November 7, 2008, Petition for Confidential Treatment (relating to E.ON's November 7, 2008, responses to the Attorney General's Supplemental Request for Information)
- f. Big Rivers' November 24, 2008, Motion to Amend and Supplement Application
- g. Big Rivers' November 24, 2008, Petition for Confidential Treatment (relating to November 24 Motion to Amend and Supplement Application)
- h. Big Rivers' November 29, 2008, Petition for Confidential Treatment (relating to chart of changes in revolving line of credit agreements requested at informal conference)

⁵¹¹ *Id.* at 30.

⁵¹² *Id.* at 31.

- i. E.ON's December 1, 2008, Petition for Confidential Treatment (relating to E.ON's updated response to Item 83 of the Attorney General's Initial Request for Information)
- j. Big Rivers' December 12, 2008, Petition for Confidential Treatment (relating to Big Rivers' responses to information requested at the December 2, 2008, hearing)

Additionally, with regard to the CFC Agreement and the CoBank Agreement (which are involved in Big Rivers' March 31 Petition for Confidential Treatment, July 3 Motion for Rehearing and Petition for Confidential Treatment, November 24 Petition for Confidential Treatment, November 29 Petition for Confidential Treatment, and December 12 Petition for Confidential Treatment), C. William Blackburn reinforced at the hearing how public disclosure of the terms of those agreements would harm Big Rivers. Mr. Blackburn stated that, based on his experience as Big Rivers' Chief Financial Officer, the best procedure to employ regarding the sharing of information when trying to negotiate agreements like the CFC and CoBank agreements is to keep the information confidential.⁵¹³

He explained that upon expiration of those agreements (one of which has a term of only 3 years), Big Rivers will have to go to the open market to secure another line of credit.⁵¹⁴ If the terms of the CFC and CoBank agreements are publicly disclosed, then the lenders Big Rivers is negotiating with at that time will have an unfair advantage because they will know what Big Rivers had agreed to previously.⁵¹⁵ Mr. Blackburn's views are borne out by the fact that Big Rivers was able to negotiate even more favorable terms in the CFC Agreement during the hearing in this matter, which may not have been possible had the CFC and CoBank agreements been publicly disclosed.⁵¹⁶

⁵¹³ Blackburn Testimony, Tr. Dec. 3, 2008 at pp. 138-139.

⁵¹⁴ Blackburn Testimony, Tr. Dec. 3, 2008 at pp. 87-88.

⁵¹⁵ *Id.*

⁵¹⁶ Big Rivers' December 12, 2008, Petition for Confidential Treatment ¶ 5.

Although Big Rivers was able to negotiate favorable terms in the CFC and CoBank agreements, if the terms of those agreements are publicly disclosed, potential lenders will be able to use those terms against Big Rivers.⁵¹⁷ For example, it will be difficult for Big Rivers to negotiate a lower rate in the future because once a lender knows a particular rate Big Rivers is willing to accept, any lower rate offers will just disappear.⁵¹⁸ Thus, public disclosure of the confidential terms of the CFC and CoBank agreements will lead to higher costs to Big Rivers, and Big Rivers will be competitively disadvantaged as a result.⁵¹⁹

CONCLUSION

The uneconomic contracts that have motivated E.ON to offer the very favorable terms for unwinding the 1998 Transactions, the Smelters' need for a stable source of power, and the desire of Big Rivers to resume its full mission as a generation and transmission cooperative, with the unanimous support of its Members, have combined to produce the terms and conditions of the transactions presented to the Commission in this case. The terms on which the 1998 Transactions will expire on their own in 2023 will be dramatically more unfavorable than the Unwind Transaction terms. Indeed, by the time these agreements expire, many of the opportunities presented here may be unachievable. The Smelters may be gone. Certainly the consideration offered by E.ON to Big Rivers, and the consequent benefits to Big Rivers' Members and their customers, will not be available.

The Attorney General in his initial testimony filed in this case recommended conditional approval, and his witness testified at hearing that the Attorney General still does not oppose the transaction. His concerns have been fully addressed, as described in this brief.

⁵¹⁷ Blackburn Testimony, Tr. Dec. 3, 2008 at p. 90.

⁵¹⁸ *Id.*

⁵¹⁹ See Big Rivers' July 3, 2008, Motion for Rehearing.

The public interest will be very well served by approval of the Unwind Transaction and related agreements, financing, and tariff modifications as proposed herein. As time is of the essence, the Joint Applicants respectfully request that the Commission enter its Order granting the approvals requested herein, as listed on Appendix B hereto, no later than January 23, 2009, so that the thirty-three day appeal period may expire and allow closing by Thursday, February 26, 2009.

Dated this the 31st day of December, 2008.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Post-Hearing Brief was served via U.S. mail, first-class, postage prepaid, this 31st day of December 2008, upon the following persons:

C. William Blackburn
Big Rivers Electric Corporation
201 Third Street
P. O. Box 24
Henderson, KY 42420

Michael L. Kurtz
Boehm, Kurtz & Lowry
36 East Seventh Street
Suite 1510
Cincinnati, OH 45202

David Brown
Stites & Harbison, PLLC
1800 Providian Center
400 West Market Street
Louisville, KY 40202

James M. Miller
Sullivan, Mountjoy, Stainback & Miller, PSC
100 St. Ann Street
P.O. Box 727
Owensboro, KY 42302-0727

Dennis G. Howard II
Assistant Attorney General
Office of the Attorney General
Office of Rate Intervention
1024 Capital Center Drive, Suite 200
Frankfort, KY 40601-8204


Douglas L. Beresford
George F. Hobday, Jr.
Hogan & Hartson, LLP
555 Thirteenth Street, N.W.
Washington, DC 20004-1109

John N. Hughes
Attorney at Law
124 West Todd Street
Frankfort, KY 40601

Melissa D. Yates
Denton & Keuler, LLP
555 Jefferson Street
P. O. Box 929
Paducah, KY 42002-0929

Frank N. King, Jr.
Dorsey, King, Gray, Norment & Hopgood
318 Second Street
Henderson, KY 42420

Don C. Meade
Priddy Cutler Miller & Meade
800 Republic Building
429 West Muhammad Ali Blvd.
Louisville, KY 40202


Counsel for E.ON U.S. LLC,
Western Kentucky Energy Corp.
and LG&E Energy Marketing, Inc.

APPENDIX A

Comparison of Unwind Transaction to Continued Operations Without the Unwind Transaction

<u>Issue</u>	<u>No Unwind</u>	<u>Unwind</u>
Big Rivers Balance Sheet	-11% Equity before PMMC Buyout.	26% Equity.
Payments to Big Rivers	Big Rivers will continue to operate under the 1998 Transactions without payments from E.ON or others other than the lease payments through the scheduled contractual termination in 2023, and the Monthly Margin Payments through the scheduled smelter contractual terminations in 2010 and 2011.	Big Rivers will receive approximately \$755.9 million in total benefits from E.ON, including \$453 million in cash (includes Bank of America and PMCC lease buyout, and is subject to final inventory calculations), and the potential \$327.9 million in benefits from the Smelters.
PMCC Lease Buyout Costs	Big Rivers will remain fully liable for the \$120 million cost of the PMCC lease buyout which has significantly reduced Big Rivers' cash position, and will require immediate rate relief.	E.ON will pay Big Rivers for one-half of the PMCC lease buyout costs (\$60.9 million) (in addition to \$387.7 million cash from E.ON).
Ability to Borrow Funds	RUS mortgage remains in effect making any new loans unsecured unless RUS agrees to subordinate, which is highly unlikely; RUS refusal to extend additional loan amounts to Big Rivers remains in place; Big Rivers' ability to borrow additional funds is severely constrained by these conditions, which will put Big Rivers at potential risk if significant cash requirements arise.	Big Rivers will have an investment grade credit rating; new indenture will permit borrowings that are not subordinated to RUS loan; Big Rivers will be able to access capital markets when and as prudent to flexibly meet changing requirements including any significant new costs. (Example: Big Rivers will be able to refinance its high interest pollution control bonds.)

Issue

No Unwind

Unwind

Smelter Operations

Smelter contracts with E.ON will expire in 2010 and 2011; E.ON will then sell new excess capacity and energy to highest bidder; Smelters, if they remain in operation, can be expected to seek any available Big Rivers capacity and energy, likely leading to litigation over their continued rights to such capacity; Smelters could shut down if power prices too high.

Smelters have agreed to a new power supply arrangement at costs below market price that they project will enable them to continue to operate their respective facilities; Smelters will remain significant economic contributors in western Kentucky (estimated to be 5,000 jobs with \$193 million in payroll and \$16.7 million in state and local tax receipts).

Smelter Rates

Not served by Big Rivers today other than occasional Tier 3 sales.

Prices to Smelters are not fixed; the Smelters generally pay Big Rivers' Large Industrial Customer Rate plus an adder of \$0.25 per MWh, Smelters pay same fuel and environmental variable cost increases as non-smelter customers; Smelters also support a Tier of 1.24 and, unlike non-Smelter customers, agree to a purchased power adjustment charge in the event Big Rivers has forced outage purchase power costs (amounts attributable to non-Smelter customers go into regulatory accounts); and the Smelters agree to pay other monthly surcharges. Together these benefits amount to approximately \$327.9 million in present value terms above the Large Industrial Customer rate if the Smelters remain in operation.

<u>Issue</u>	<u>No Unwind</u>	<u>Unwind</u>
Non-Smelter Rates	Big Rivers will need to increase rates to rebuild its cash position due to \$120 million cash outlay to buy out PMCC lease; rate increase amount remains preliminary but may be in magnitude of 20-25% over existing base rates, depending upon whether excess capacity is sold as arbitrage or provided to Smelters.	Base rates will remain unchanged until 2017 except to the extent variable fuel and environmental costs increase, and even then the \$157 million economic reserve will cushion the effects of some portion of those costs using a rate gradualism approach. Rate effects will differ using projected variable costs (which may themselves be more or less), but Unwind rates with expected fuel and environmental costs may be as much as 7% lower over near term than would be case without Unwind using modeled variable costs if 200 MW sold to Smelters.
Power Supply Power Sales	Big Rivers' poor credit rating limits counterparties' willingness to trade with Big Rivers and requires Big Rivers to secure transactions with its limited cash amounts on hand.	Investment grade credit rating will permit Big Rivers to transact with a larger variety of power sellers and buyers and will reduce or eliminate need to use Big Rivers' cash to collateralize these power purchases and sales.
Economic Development	Big Rivers has limited to no available excess capacity, new customers are served only at market rates under Rate Schedule 10 and Big Rivers' credit rating both discourages new industry and limits Big Rivers' ability to buy market power or build generation to serve it.	More financially secure Big Rivers will alleviate new customer concerns about rate stability; to the extent Big Rivers needs to purchase power to provide service under Rate Schedule 10 it will have the credit rating to do so; 75 MW of economic development growth already built in model; Big Rivers will have ability to buy power or finance new construction.

<u>Issue</u>	<u>No Unwind</u>	<u>Unwind</u>
Power Plant Operation	E.ON will continue to operate the leased generation assets and Henderson's Station Two until 2023, subject to strict view of contractual requirements and prudent utility practice; disputes with Big Rivers and Henderson are likely; Big Rivers will continue to owe amounts for its share of new capital expenditures at the generating units, and for its share of operating and maintenance costs for certain new environmental control upgrades, and may find it difficult to obtain funds to finance them due to low level of cash and inability to borrow.	Big Rivers will operate its assets and Station Two and will have full control over when and how to operate and maintain the units consistent with its independent evaluation of Big Rivers' long-term interests (in the case of Station Two, subject to Henderson's contractual rights of oversight and control); better Big Rivers' cash and financing position makes financing required capital expenditures much more manageable.
Residual Value Payment	Under the Lease Agreements, Big Rivers is required to make a Residual Value Payment to E.ON upon the expiration of the lease term in order to compensate it for the remaining value of E.ON's share of capital expenditures when the generating units are returned to Big Rivers' control, estimated at \$377 million in 2023.	Waiver of Residual Value Payment is part of consideration (a benefit present valued at \$141.4 million as of year-end 2008).
Existing Contract Disputes Between Big Rivers and E.ON	E.ON and Big Rivers agreed to table all existing contractual disputes while pursuing the unwind; these disputes will now need to be resolved, perhaps through litigation.	All existing contractual disputes under the lease transaction are resolved.

Issue

No Unwind

Unwind

ARVP Note

Big Rivers will continue to be required to sweep certain cash proceeds (including one-third of the arbitrage margins) into paying down this zero interest rate loan from the RUS.

Big Rivers no longer required to use its cash to pay down ARVP; cash can be used for other purposes, including paying down debt at higher interest rates; ARVP balloon payment still due in 2023

Environmental Cost Exposure

If there is a CO₂ tax, Big Rivers will pay that tax on the MWh it purchases from E.ON; if a cap-and-trade program is implemented, Big Rivers will be responsible for a lesser amount although litigation with E.ON over their respective obligations under such a system could ensue.

If there is a CO₂ tax, Big Rivers will pay that tax on all the MWh now that it has control over all the MWh; Big Rivers will be responsible for all costs of a cap and trade approach. The Smelters would share in the costs of either a CO₂ tax or a cap-and-trade regime.

City of Henderson Dispute

Henderson and HMP&L retain legal right to pursue any contractual claims against Big Rivers or E.ON, with E.ON providing certain indemnification protections for Big Rivers if those claims arose from conduct of E.ON in violation of the agreements with Henderson; payments to HMP&L for Excess Energy remain at \$1.50/MWh and no additional payments made by E.ON.

HMP&L receives \$2.50/MWh for Excess Energy from Big Rivers and approximately \$4 million in commitments from E.ON. Certain issues with Henderson and HMP&L must be resolved prior to close. E.ON will allow Henderson to preserve and bring post-unwind various claims contemplated in the 1998 agreements as surviving their expiration (originally scheduled for 2023), and E.ON will provide indemnification protections for Big Rivers if those surviving Henderson or HMP&L claims are brought against Big Rivers post-unwind.

APPENDIX B

**Schedule of Approvals Requested by Applicants
PSC Case No. 2007-00455**

APPROVAL REQUESTED	LOCATION WHERE RELIEF REQUESTED	LOCATION OF DOCUMENT(S)
<p>1. Approval of Transaction Termination Agreement (including all related documents and transactions and termination of all the agreements from the 1998 Transactions as contemplated in the Termination Agreement); Approval of the First Amendment to Transaction Termination Agreement; Approval of Letter Agreement; Approval of Second Amendment to Transaction Termination Agreement; Approval of Third Amendment to Transaction Termination Agreement</p>	<p>Application ¶¶ 58, 63; Big Rivers' June 11, 2008, Motion to Amend and Supplement Application; Big Rivers' October 9, 2008, Motion to Amend and Supplement Application ¶ 20</p>	<p>Application, Exhibit 3 (Transaction Termination Agreement; First Amendment to Transaction Termination Agreement); Application, Exhibit 3A (Letter Agreement); Big Rivers' June 11, 2008, Motion to Amend and Supplement Application, Exhibit 1 (Second Amendment to Transaction Termination Agreement); Big Rivers' October 9, 2008, Motion to Amend and Supplement Application, Exhibit 80 (Third Amendment to Transaction Termination Agreement); Big Rivers' February 14, 2008, Response to Item 3 of the Commission Staff's First Data Request (Attachments to Transaction Termination Agreement)</p>
<p>2. Approval of change in control of generating units from WKEC to Big Rivers (if required) (including findings that (i) Big Rivers will have the financial, technical, and managerial ability to provide reasonable service to its Members, and (ii) the proposed change in control is made in accordance with law, for a proper purpose, and is consistent with the public interest)</p>	<p>Application ¶ 57</p>	
<p>3. Approval of Generation Dispatch Support Services Agreement</p>	<p>Application ¶ 32</p>	<p>Application, Exhibit 16</p>
<p>4. Approval of Information Technology Support Services Agreement (if the Commission disagrees that approval is not required)</p>	<p>Application ¶ 32</p>	<p>Application, Exhibit 17</p>

<p>5. Approval of Station Two Agreements and Amendments</p> <p>a. Second Amendatory Agreement</p> <p>b. Amendments to 1970 Station Two Power Sales Contract</p> <p>c. Station Two Termination and Release Agreement</p> <p>d. Station Two G&A Allocation Agreement</p> <p>e. Agreement for Assignment of Responsibility for Complying with Reliability Standards</p>	<p>Application ¶¶ 33, 58; Big Rivers' October 9, 2008, Motion to Amend and Supplement Application ¶¶ 27-29</p>	<p>Big Rivers' October 9, 2008, Motion to Amend and Supplement Application, Exhibit 87</p>
<p>6. Approval of Alcan Wholesale Agreement, Retail Agreement, Lockbox Agreement, and Guaranty</p>	<p>Application ¶¶ 38, 70, 84; Big Rivers' June 11, 2008, Motion to Amend and Supplement Application; Big Rivers' October 9, 2008, Motion to Amend and Supplement Application ¶¶ 21-22</p>	<p>Exhibit 81 to Big Rivers' October 9, 2008, Motion to Amend and Supplement Application; Exhibit A to the Wholesale and Retail Agreements is attached as Exhibit 113 to Big Rivers' November 24, 2008, Motion to Amend and Supplement Application</p>
<p>7. Approval of Century Wholesale Agreement, Retail Agreement, Lockbox Agreement, and Guaranty</p>	<p>Application ¶¶ 38, 70, 84; Big Rivers' June 11, 2008 Motion to Amend and Supplement Application; Big Rivers' October 9, 2008, Motion to Amend and Supplement Application ¶¶ 21-22</p>	<p>Exhibit 81 to Big Rivers' October 9, 2008, Motion to Amend and Supplement Application; Exhibit A to the Wholesale and Retail Agreements is attached as Exhibit 113 to Big Rivers' November 24, 2008, Motion to Amend and Supplement Application</p>
<p>8. Approval of Smelter Coordination Agreements (if PSC disagrees that they do not require approval)</p>	<p>Application ¶ 83; Big Rivers' June 11, 2008, Motion to Amend and Supplement Application; Big Rivers' October 9, 2008, Motion to Amend and Supplement Application</p>	<p>Exhibit 111 to Big Rivers' November 24, 2008, Motion to Amend and Supplement Application</p>
<p>9. Termination of existing wholesale power contracts between Big Rivers and Kenergy regarding Tier 3 Service to the Smelters</p>	<p>Application ¶ 85</p>	<p>Application, Appendix E</p>
<p>10. Establishment of Smelter FAC Reserve regulatory account</p>	<p>Request Withdrawn</p>	
<p>11. Approval of Amendments to Big Rivers' Member Wholesale Power Contracts</p>	<p>Application ¶¶ 68, 70, 81</p>	<p>Application, Exhibit 27</p>

<p>12. Establishment of regulatory accounts (the Economic Reserve and regulatory accounts (a deferred asset and deferred liability) to accrue any positive or negative PPA adjustments attributable to Member non-Smelter energy usage)</p>	<p>Application ¶¶ 70, 78</p>	
<p>13. Approval of Tariff revisions (including Rebate Adjustment, Fuel Adjustment Clause, Unwind Surcredit, and Member Rate Stability Mechanism) (and findings that Big Rivers' existing rates combined with the proposed changes are fair, just and reasonable, and that after the closing of the Unwind Transaction, Big Rivers' existing rates without the proposed changes would not be fair, just and reasonable)</p>	<p>Application ¶¶ 68, 70, 73, 76; Big Rivers' October 9, 2008, Motion to Amend and Supplement Application ¶¶ 23-25</p> <p>Note: Request for extension of Member Discount Adjustment withdrawn, and Environmental Surcharge was approved in PSC Case No. 2007-00460</p>	<p>Big Rivers' October 9, 2008, Motion to Amend and Supplement Application, Exhibit 83; Revised Sheet No. 70 is attached as Exhibit 107 to Big Rivers' November 24, 2008, Motion to Amend and Supplement Application</p>
<p>14. Approval of Revisions to Big Rivers' Open Access Transmission Tariff (OATT) (and finding that OATT revisions are fair, just and reasonable)</p>	<p>Application ¶¶ 70, 86; Big Rivers' January 30, 2008, Motion to Amend and Supplement Application; Big Rivers' October 9, 2008, Motion to Amend and Supplement Application ¶ 26</p>	<p>Big Rivers' October 9, 2008, Motion to Amend and Supplement Application, Exhibit 85</p>
<p>15. Termination and Rescheduling of IRP case</p>	<p>Application, Exhibit 18</p>	
<p>16. Termination of certain reporting requirements for Big Rivers imposed in Case Nos. 97-204 and 98-267</p>	<p>Application ¶ 87</p>	
<p>17. E.ON's requests that the PSC find that the Termination Agreement and associated transaction documents are for a proper purpose and are consistent with the public interest, and that the PSC approve the Unwind Transaction in its entirety for purposes of KRS 278.218</p>	<p>Application ¶ 88</p>	
<p>18. Termination of certain commitments for the E.ON Entities imposed by the August 6, 2007, Order in Case No. 2001-104</p>	<p>Application ¶ 89</p>	

<p>19 Order (i) authorizing issuance of certain financing agreements, (ii) stating the purpose of the evidences of indebtedness, and (iii) finding that the evidences of indebtedness are for some lawful object within the corporate purposes of Big Rivers, are necessary or appropriate for or consistent with the proper performance by Big Rivers of its services to the public, will not impair its ability to perform that service, and are reasonably necessary and appropriate for that service</p>	<p>Big Rivers' First Amendment and Supplement to Application; Big Rivers' Second Amendment and Supplement to Application; Big Rivers' Third Amendment and Supplement to Application; Big Rivers' October 9, 2008, Motion to Amend and Supplement Application</p>	<p>See financing agreements listed below</p>
<p>20. Approval of any financing documents filed and listed by Big Rivers as not requiring PSC approval if PSC finds that the document needs approval</p>	<p>Big Rivers' First Amendment and Supplement to Application; Big Rivers' Second Amendment and Supplement to Application; Big Rivers' Third Amendment and Supplement to Application; Big Rivers' October 9, 2008, Motion to Amend and Supplement Application</p>	<p>Big Rivers' First Amendment and Supplement to Application; Big Rivers' Second Amendment and Supplement to Application; Big Rivers' Third Amendment and Supplement to Application; Big Rivers' October 9, 2008, Motion to Amend and Supplement Application</p>
<p>21. Revolving Line of Credit Agreement dated as of _____, 2008, between Big Rivers Electric Corporation and National Rural Utilities Cooperative Finance Corporation</p>	<p>Big Rivers' First Amendment and Supplement to Application ¶¶ 11, 13</p>	<p>Item 1 of Big Rivers' December 12, 2008, Responses to Information Requested at December 2, 2008, Hearing; certain terms are supplied by the cover letter and term sheet filed as Exhibit 109 to Big Rivers' November 24, 2008, Motion to Amend and Supplement Application</p>
<p>22. Revolving Credit Agreement dated as of _____, 2008, by and between Big Rivers Electric Corporation and CoBank ACB, including note dated as of _____, 2008, by and between Big Rivers Electric Corporation and CoBank ACB</p>	<p>Big Rivers' First Amendment and Supplement to Application ¶¶ 11, 14</p>	<p>Big Rivers' November 24, 2008, Motion to Amend and Supplement Application, Exhibit 110</p>
<p>23. Facility Lessor (D) Secured Note (PBR-1), dated as of _____, 2008, from Big Rivers Electric Corporation to PBR-1 Statutory Trust, a Connecticut statutory trust acting through U. S. Bank National Association, as Trustee</p>	<p>Request Withdrawn</p>	<p>Big Rivers' Second Amendment and Supplement to Application, Exhibit 50</p>

<p>24. Facility Lessor (D) Secured Note (PBR-2), dated as of _____, 2008, from Big Rivers Electric Corporation to PBR-2 Statutory Trust, a Connecticut statutory trust acting through U. S. Bank National Association, as Trustee</p>	<p>Request Withdrawn</p>	<p>See Big Rivers' Second Amendment and Supplement to Application, Exhibit 50</p>
<p>25. Facility Lessor (D) Secured Note (PBR-3), dated as of _____, 2008, from Big Rivers Electric Corporation to PBR-3 Statutory Trust, a Connecticut statutory trust acting through U. S. Bank National Association, as Trustee</p>	<p>Request Withdrawn</p>	<p>See Big Rivers' Second Amendment and Supplement to Application, Exhibit 50</p>
<p>26. Facility Lessor (E) Secured Note (PBR-1), dated as of _____, 2008, from Big Rivers Electric Corporation to PBR-1 Statutory Trust, a Connecticut statutory trust acting through U. S. Bank National Association, as Trustee</p>	<p>Request Withdrawn</p>	<p>Big Rivers' Second Amendment and Supplement to Application, Exhibit 51</p>
<p>27. Facility Lessor (E) Secured Note (PBR-2), dated as of _____, 2008, from Big Rivers Electric Corporation to PBR-2 Statutory Trust, a Connecticut statutory trust acting through U. S. Bank National Association, as Trustee</p>	<p>Request Withdrawn</p>	<p>See Big Rivers' Second Amendment and Supplement to Application, Exhibit 51</p>
<p>28. Facility Lessor (E) Secured Note (PBR-3), dated as of _____, 2008, from Big Rivers Electric Corporation to PBR-3 Statutory Trust, a Connecticut statutory trust acting through U. S. Bank National Association, as Trustee</p>	<p>Request Withdrawn</p>	<p>See Big Rivers' Second Amendment and Supplement to Application, Exhibit 51</p>
<p>29. Ambac Credit Products Secured Note (PBR-1), dated as of _____, 2008, from Big Rivers Electric Corporation to Ambac Credit Products, LLC</p>	<p>Request Withdrawn</p>	<p>Big Rivers' Second Amendment and Supplement to Application, Exhibit 52</p>
<p>30. Ambac Credit Products Secured Note (PBR-2), dated as of _____, 2008, from Big Rivers Electric Corporation to Ambac Credit Products, LLC</p>	<p>Request Withdrawn</p>	<p>See Big Rivers' Second Amendment and Supplement to Application, Exhibit 52</p>

31. Ambac Credit Products Secured Note (PBR-3), dated as of _____, 2008, from Big Rivers Electric Corporation to Ambac Credit Products, LLC	Request Withdrawn	See Big Rivers' Second Amendment and Supplement to Application, Exhibit 52
32. PCB Series 2001A Note dated as of _____, 2008, from Big Rivers Electric Corporation to the County of Ohio, Kentucky	Big Rivers' Second Amendment and Supplement to Application ¶ 10	Big Rivers' Second Amendment and Supplement to Application, Exhibit 53
33. Ambac Municipal Bond Insurance, Policy Series 1983 Note dated as of _____, 2008, from Big Rivers Electric Corporation to Ambac Assurance Corporation	Big Rivers' Second Amendment and Supplement to Application ¶ 11	Big Rivers' Second Amendment and Supplement to Application, Exhibit 54
34. Standby Bond Purchase Agreement Note (Series 1983 Bonds), dated as of _____, 2008, from Big Rivers Electric Corporation to Dexia Credit Local, acting by and through its New York Branch	Big Rivers' Second Amendment and Supplement to Application ¶ 12	Big Rivers' Second Amendment and Supplement to Application, Exhibit 55
35. Termination of Third Amended and Restated Subordination, Nondisturbance, Attornment and Intercreditor Agreement dated as of _____, 2008, among (a) Big Rivers Electric Corporation; (b) LG&E Energy Marketing Inc., and Western Kentucky Energy Corp.; (c) The United States of America, acting through the Administrator of the Rural Utilities Service; (d) Ambac Assurance Corporation; (e) National Rural Utilities Cooperative Finance Corporation; (f) Dexia Credit Local, New York Branch; (g) U.S. Bank Trust National Association, as trustee under the Trust Indenture dated as of August 1, 2001 (h) PBR-1 Statutory Trust; (i) PBR-2 Statutory Trust; (j) PBR-3 Statutory Trust; (k) FBR-1 Statutory Trust; (l) FBR-2 Statutory Trust; (m) PBR-1 OP Statutory Trust; (n) PBR-2 OP Statutory Trust; (o) PBR-3 OP Statutory Trust; (p) FBR-1 OP Statutory Trust; (q) FBR-2 OP Statutory Trust; (r) Bluegrass	Big Rivers' Second Amendment and Supplement to Application ¶ 13	Big Rivers' Second Amendment and Supplement to Application, Exhibit 56

<p>Leasing; (s) Bank of America Leasing Corporation; (t) AME Investments, LLC; (u) CoBank, ACB; and (v) Ambac Credit Products, LLC</p>		
<p>36. Termination of Third Restated Mortgage and Security Agreement dated _____, 2008, among (a) Big Rivers Electric Corporation; (b) The United States of America, acting through the Administrator of the Rural Utilities Service; (d) Ambac Assurance Corporation; (e) National Rural Utilities Cooperative Finance Corporation; (f) Dexia Credit Local, New York Branch; (g) U.S. Bank Trust National Association, as trustee under the Trust Indenture dated as of August 1, 2001 (h) PBR-1 Statutory Trust; (i) PBR-2 Statutory Trust; (j) PBR-3 Statutory Trust; (k) FBR-1 Statutory Trust; (l) FBR-2 Statutory Trust; and (m) Ambac Credit Products, LLC</p>	<p>Big Rivers' Second Amendment and Supplement to Application ¶ 14</p>	<p>Big Rivers' Second Amendment and Supplement to Application, Exhibit 57</p>
<p>37. Amended and Restated Stock Pledge Agreement dated as of _____, 2008, made by Big Rivers Electric Corporation, as Pledgor, in favor of US Bank National Association, as Collateral Agent, as Pledgee, for the benefit of Ambac Credit Products, LLC, PBR-1 Statutory trust, PBR-2 Statutory trust, PBR-3 Statutory trust, FBR-1 Statutory trust, FBR-2 Statutory trust, in each case acting through U.S. Bank National Association, not in its individual capacity, but solely as the respective Trustee, and _____, as the Indenture Trustee, as the respective Secured Parties, and Ambac Assurance Corporation</p>	<p>Request Withdrawn</p>	<p>Big Rivers' Second Amendment and Supplement to Application, Exhibit 58</p>

<p>38. Intercreditor Agreement dated _____, 2008, among Big Rivers Electric Corporation; The United States of America, acting through the Administrator of the Rural Utilities Service; Ambac Assurance Corporation; PBR-1 Statutory Trust; PBR-2 Statutory Trust; PBR-3 Statutory Trust; FBR-1 Statutory Trust; FBR-2 Statutory Trust; PBR-1 OP Statutory Trust; PBR-2 OP Statutory Trust; PBR-3 OP Statutory Trust; FBR-1 OP Statutory Trust; FBR-2 OP Statutory Trust; Bluegrass Leasing; Bank of America Leasing Corporation; AME Investments, LLC; CoBank, ACB; AME Asset Funding, LLC; and Ambac Credit Products, LLC</p>	<p>Request Withdrawn</p>	<p>Big Rivers' Third Amendment and Supplement to Application, Exhibit 65</p>
<p>39. Ambac Letter Agreement</p>	<p>Request Withdrawn</p>	<p>Big Rivers' Third Amendment and Supplement to Application, Exhibit 66</p>
<p>40. Bank of America Letter Agreement</p>	<p>Request Withdrawn</p>	<p>Big Rivers' Third Amendment and Supplement to Application, Exhibit 67</p>
<p>41. Creditor Consent, Termination and Release Agreement dated as of _____, 2008, by and among (a) Big Rivers Electric Corporation; (b) E.ON U.S. LLC, LG&E Energy Marketing Inc., and Western Kentucky Energy Corp.; (c) The United States of America, acting through the Administrator of the Rural Utilities Service; (d) Ambac Assurance Corporation; (e) National Rural Utilities Cooperative Finance Corporation; (f) Dexia Credit Local, New York Branch; (g) U.S. Bank Trust National Association, as trustee under the Trust Indenture dated as of August 1, 2001 (h) PBR-1 Statutory Trust; (i) PBR-2 Statutory Trust; (j) PBR-3 Statutory Trust; (k) PBR-1 OP</p>	<p>Big Rivers' Third Amendment and Supplement to Application ¶ 5; Big Rivers' October 9, 2008, Motion to Amend and Supplement Application ¶ 13</p>	<p>Big Rivers' October 9, 2008, Motion to Amend and Supplement Application, Exhibit 96</p>

<p>Statutory Trust; (l) PBR-2 OP Statutory Trust; (m) PBR-3 OP Statutory Trust; (n) Bluegrass Leasing; (o) Bank of America Leasing Corporation; (p) AME Investments, LLC; (q) CoBank, ACB; (r) AME Asset Funding, LLC; and (s) Ambac Credit Products, LLC</p>		
<p>42. First Amendment to ISDA Master Agreement (PBR-1) (Big Rivers Swap) dated as of _____, 2008, by and between Ambac Credit Products, LLC, and Big Rivers Electric Corporation</p>	Request Withdrawn	Big Rivers' Third Amendment and Supplement to Application, Exhibit 69
<p>43. First Amendment to ISDA Master Agreement (PBR-2) (Big Rivers Swap) dated as of _____, 2008, by and between Ambac Credit Products, LLC, and Big Rivers Electric Corporation</p>	Request Withdrawn	See Big Rivers' Third Amendment and Supplement to Application, Exhibit 69
<p>44. First Amendment to ISDA Master Agreement (PBR-3) (Big Rivers Swap) dated as of _____, 2008, by and between Ambac Credit Products, LLC, and Big Rivers Electric Corporation</p>	Request Withdrawn	See Big Rivers' Third Amendment and Supplement to Application, Exhibit 69
<p>45. Escrow Agreement (PBR-1) dated as of _____, 2008, by and between Bluegrass Leasing, and [an E.ON U.S., LLC Cayman affiliate] and [_____] , Escrow Agent, Big Rivers Electric Corporation, PBR-1 Statutory Trust, PBR-1 OP Statutory Trust, State Street Bank and Trust Company of Connecticut, Trustee, AME Investments, LLC, CoBank, ACB, Ambac Credit Products, LLC, and Ambac Assurance Corporation</p>	Request Withdrawn	Big Rivers' Third Amendment and Supplement to Application, Exhibit 70

<p>46. Escrow Agreement (PBR-2) dated as of _____, 2008, by and between Bluegrass Leasing, and [an E.ON U.S., LLC Cayman affiliate] and [_____], Escrow Agent, Big Rivers Electric Corporation, PBR-2 Statutory Trust, PBR-2 OP Statutory Trust, State Street Bank and Trust Company of Connecticut, Trustee, AME Investments, LLC, CoBank, ACB, Ambac Credit Products, LLC, and Ambac Assurance Corporation</p>	<p>Request Withdrawn</p>	<p>See Big Rivers' Third Amendment and Supplement to Application, Exhibit 70</p>
<p>47. Escrow Agreement (PBR-3) dated as of _____, 2008, by and between Bluegrass Leasing, and [an E.ON U.S., LLC Cayman affiliate] and [_____], Escrow Agent, Big Rivers Electric Corporation, PBR-3 Statutory Trust, PBR-3 OP Statutory Trust, State Street Bank and Trust Company of Connecticut, Trustee, AME Investments, LLC, CoBank, ACB, Ambac Credit Products, LLC, and Ambac Assurance Corporation</p>	<p>Request Withdrawn</p>	<p>See Big Rivers' Third Amendment and Supplement to Application, Exhibit 70</p>
<p>48. Omnibus Termination Agreement (Bank of America Termination Agreement)</p>	<p>Request Withdrawn</p>	<p>Big Rivers' June 11, 2008, Motion to Amend and Supplement Application, Exhibit 4</p>
<p>49. Letter Agreement (Bank of America Cost Share Agreement)</p>	<p>Request Withdrawn</p>	<p>Big Rivers' June 11, 2008, Motion to Amend and Supplement Application, Exhibit 5</p>
<p>50. Amendment of Operating and Support Agreement (Wilson Operating Agreement)</p>	<p>Approval granted by order dated 7/30/08</p>	<p>Big Rivers' June 11, 2008 Motion to Amend and Supplement Application, Exhibit 6</p>
<p>51. Letter Agreements regarding "Funding of Certain Amounts to be Paid to the Bank of America" and "Payment Regarding the Buy-Out of the Bank of America"</p>	<p>Big Rivers' October 9, 2008, Motion to Amend and Supplement Application ¶¶ 11</p>	<p>Big Rivers' October 9, 2008, Motion to Amend and Supplement Application, Exhibit 95</p>

52. Approval of accounting treatment relating to Bank of America Termination Agreement and PMCC Termination Agreement	Big Rivers' October 9, 2008, Motion to Amend and Supplement Application ¶ 12	
53. Indenture dated as of _____, 2008, from Big Rivers Electric Corporation, Grantor to [Name of Trustee]	Big Rivers' Second Amendment and Supplement to Application ¶¶ 1-5; Big Rivers' October 9, 2008, Motion to Amend and Supplement Application ¶ 13	Big Rivers' October 9, 2008, Motion to Amend and Supplement Application, Exhibit 96
54. All other relief that Big Rivers or E.ON is entitled to	Application	
55. Approval to establish Transition Reserve regulatory account	Application, Exhibit 10, at 76	
56. Approval for certain accounting entries relating to the Termination Agreement	Application, Exhibit 10, at 71; Application, Exhibit 10, Exhibit CWB-1	
57. Approval for payment to the Smelters by Big Rivers at closing in connection with the removal of the Smelter FAC Reserve	Big Rivers' October 9, 2008, Motion to Amend and Supplement Application, Exhibit 78, at 50	

Note: The following motions filed by Big Rivers and/or E.ON are pending:

1. Big Rivers' March 31, 2008, Petition for Confidential Treatment (relating to First Amendment and Supplement to Application) – denied by letter dated 6/17/08 (subject to rehearing)
2. Big Rivers' April 23, 2008, Petition for Confidential Treatment (relating to Third Amendment and Supplement to Application) – denied by letter dated 6/17/08 (subject to rehearing)
3. E.ON's May 2, 2008, Petition for Confidential Treatment (relating to E.ON's Supplemental Responses to PSC Initial Data Request)
4. Big Rivers' July 3, 2008, Motion for Rehearing and Petition for Confidential Treatment (rehearing granted by order dated 7/22/08, but still pending)
5. E.ON's November 7, 2008, Petition for Confidential Treatment (relating to E.ON's November 7, 2008, responses to AG's Supplemental Request for Information)
6. Big Rivers' November 24, 2008, Motion to Amend and Supplement Application
7. Big Rivers' November 24, 2008, Petition for Confidential Treatment (relating to November 24 Motion to Amend and Supplement Application)
8. Big Rivers' November 29, 2008, Petition for Confidential Treatment (relating to chart of changes in revolving line of credit agreements requested at informal conference)
9. E.ON's December 1, 2008, Petition for Confidential Treatment (relating to E.ON's updated response to Item 83 of the Attorney General's Initial Request for Information)
10. Big Rivers' December 12, 2008, Petition for Confidential Treatment (relating to Big Rivers' responses to information requested at the December 2, 2008, hearing)

APPENDIX C

Glossary of Terms

- 1998 Transactions** - Refers to certain lease and related agreements that arose in connection with Big Rivers' bankruptcy plan of reorganization that were approved by the Commission in Case Numbers 97-204 and 98-267. The agreements involved the lease of Big Rivers' generating facilities to the E.ON Entities; the assignment to the E.ON Entities of Big Rivers' contractual rights and obligations with regard to Station Two; and certain power purchases and sales and transmission services agreements between Big Rivers and the E.ON Entities.
- Ambac** - Refers to the Ambac Assurance Corporation.
- Amendment to Station Two Contract** - Proposed amendment to 1970 Station Two Contract between Big Rivers and Henderson, filed as Exhibit 87(b) to the October 9, 2008, Motion to Amend and Supplement Application.
- Alcan** - Refers to Alcan Primary Products Corporation which is one of the two Smelter loads served by Kenergy, a Big Rivers member.
- Approvals Table** - List of approvals that the Joint Applicants are seeking and that is attached as Appendix B to the brief.
- Bank of America** - Refers to the Bank of America Leasing Corporation.
- Big Rivers** - Refers to Big Rivers Electric Corporation, Jackson Purchase Energy Corporation, Kenergy Corp. and Meade County Rural Electric Cooperative Corporation are all members of Big Rivers.
- Bowling Letter** - Letter from Ralph Bowling, Vice President, Power Production, E.ON U.S., to Stephanie Stumbo, dated November 10, 2008.
- Century** - Refers to Century Aluminum of Kentucky General Partnership, which is one of two of the Smelter loads served by Kenergy, a Big Rivers member.
- CFC** - National Rural Utilities Cooperative Finance Corporation.
- CFC Agreement** - Revolving Line of Credit Agreement between Big Rivers and CFC.
- CFC Line of Credit** - The line of credit established by the CFC Agreement.
- CoBank** - Refers to CoBank ACB.

CoBank Agreement	- Refers to the Revolving Credit Agreement between Big Rivers and CoBank.
Commission	- Refers to the Kentucky Public Service Commission.
Dexia	- Refers to Dexia Credit Local.
E.ON	- Refers to E.ON U.S. LLC.
E.ON Entities	- Refers to E.ON U.S., LLC, Western Kentucky Energy Corp. and LG&E Energy Marketing Inc.
E.ON Merger Case	- PSC Case No. 2001-00104.
Existing Intercreditor Agreement	- The Third Amended and Restated Subordination, Nondisturbance, Attornment and Intercreditor Agreement dated as of August 1, 2001.
FAC	- Refers to the Fuel Adjustment Clause, which is a standard cost adjustment clause used by utilities in Kentucky.
FERC	- Refers to the Federal Energy Regulatory Commission.
Henderson	- Refers to the City of Henderson, Kentucky, a party to the Station Two Contracts and the Station Two Agreement.
HMP&L	- Refers to Henderson Municipal Power & Light, a party to the Station Two Contracts and the Station Two Agreement.
Kenergy	- Refers to Kenergy Corp., an electric distribution cooperative and Big Rivers member.
IRP	- Refers to Big Rivers' <i>Integrated Resource Plan</i> .
June Motion to Amend	- Refers to Big Rivers' June 11, 2008 Motion to Amend and Supplement Application.
Joint Applicants	- Big Rivers Electric Corporation, E.ON U.S. LLC, Western Kentucky Energy Corp., and LG&E Energy Marketing, Inc., collectively.
LEM	- Refers to LG&E Energy Marketing Inc.
Leveraged Leases	- The leveraged leases Big Rivers entered into in 2000 with affiliates of Bank of America and PMCC.

Market Energy	- Additional quantities of energy and related services.
MDA	- Big Rivers' Member Discount Adjustment tariff
Members	- Refers to Big Rivers' members: Jackson Purchase Energy Corporation, Kenergy Corp. and Meade County Rural Electric Cooperative Corporation.
MRSM	- Refers to the Member Rate Stability Mechanism.
Non-FAC PPA	- Refers to the non-FAC Purchase Power Adjustment that is contained in the Smelter Agreements.
OATT	- Refers to Big Rivers' Open Access Transmission Tariff.
October Motion to Amend	- Applicants' October 9, 2008 Motion to Amend and Supplement Application.
Ohio County	- Refers to Ohio County, Kentucky.
Phase 2 Transmission Line	- The transmission line authorized by the Commission in its Order dated October 30, 2007, in PSC Case No. 2007-00177.
PMCC	- Refers to the Philip Morris Capital Corporation
Powergen Merger Case	- PSC Case No. 2000-095.
RUS	- Refers to the Rural Utilities Service.
Smelter Agreements	- The Smelter Agreements include a wholesale agreement between Big Rivers and Kenergy for each Smelter; a retail agreement between Kenergy and each Smelter; a Coordination Agreement between Big Rivers and each Smelter; a Security and Lock Box Agreement among Big Rivers, Kenergy, Old National Bank and each Smelter; and a guaranty from each Smelter.
Smelters	- Collectively, refers to Alcan Primary Products Corporation and Century Aluminum of Kentucky General Partnership.
Stanley	- Refers to Stanley Consultants.
Station Two Agreement	- The 1998 agreement among Big Rivers, the E.ON Entities, Henderson, and HMP&L relating to Station Two, as amended.

- Station Two Contracts** - The agreements, dating back to 1970, among Big Rivers, Henderson, and HMP&L relating to Station Two.
- Termination Agreement** - The Transaction Termination Agreement dated March 26, 2007 between Big Rivers and the E.ON Entities, a First Amendment to the Termination Agreement, a December 4, 2007 Letter Agreement amending the Termination Agreement, a Second Amendment to the Termination Agreement, and a Third Amendment to the Termination Agreement.
- Termination Payment** - The payment that the E.ON Entities will make to Big Rivers at the closing of the Unwind Transaction under the terms of the Termination Agreement.
- Third Amendment to the Termination Agreement** - Reflects the resolution of various issues identified in the course of due diligence, an update of Exhibit S to the Termination Agreement and an increase in the termination payment that the E.ON Entities will make to Big Rivers at closing (among other provisions).
- Third Restated Mortgage** - The Amended and Restated Mortgage and Security Agreement dated as of August 1, 2001.
- TVA** - Refers to the Tennessee Valley Authority.
- Tr.** - Refers to the Transcript of Hearing.
- Unwind Transaction** - Termination of the 1998 Transactions on the terms and conditions proposed in this case. The Termination Agreement is the document that memorializes the agreements between Big Rivers and the E.ON Entities that make up the Unwind Transaction.
- WKEC** - Refers to Western Kentucky Energy Corp., the E.ON entity that leases the generating units from Big Rivers and operates Henderson's Station Two under the 1998 Transactions.