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April 23, 2008

Hand Delivery

Hon. Stephanie Stumbo
Executive Director
Public Service Commission
211 Sower Boulevard
Frankfort, Kentucky 40602

Re: The Applications 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, PSC Case No. 2007-00455

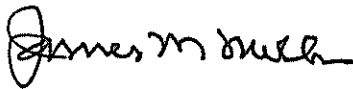
Dear Ms. Stumbo:

Enclosed for filing on behalf of Big Rivers Electric Corporation ("Big Rivers") are an original and ten copies of the following:

1. Rebuttal Testimony of Mark A. Bailey;
2. Rebuttal Testimony of C. William Blackburn;
3. Rebuttal Testimony of Michael H. Core.

I certify that a copy of this letter and the attachments have been served on the persons identified on the attached service list.

Sincerely yours,



James M. Miller

JMM/ej
Enclosures

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cc: Michael H. Core
David Spainhoward
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PSC CASE NO. 2007-00455

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401 Commerce Street, Suite 800
Nashville, TN 37219

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

2 **CASE NO. 2007-00455**

3 **REBUTTAL TESTIMONY OF**

4 **MARK A. BAILEY**

5
6 **Q. Please state your name and business address.**

7
8 **A. My name is Mark A. Bailey. My business address is 201 Third Street, P.O. Box**
9 **24, Henderson, Kentucky 42419-0024.**

10
11 **Q. Are you the same Mark A. Bailey who provided direct testimony in this**
12 **proceeding?**

13
14 **A. Yes**

15
16 **Q. What is the purpose of this rebuttal testimony?**

17
18 **A. I am testifying on behalf of Big Rivers Electric Corporation (“Big Rivers”) in**
19 **order to address certain issues and matters raised in the Direct Testimony of Mr.**
20 **David Brevitz on behalf of the Kentucky Attorney General filed in these**
21 **proceedings on April 3, 2008. I address each point separately below.**

1 **II. GENERATION DUE DILIGENCE**

2

3 **Q. Is it true, as Mr. Brevitz states, that the Smelters are the only party that has**
4 **completed a due diligence review?**

5

6 **A.** It is absolutely not true. Big Rivers has had an ongoing process and is
7 continuously reviewing the status of its generating assets.¹

8

9 **Q. Do you believe ongoing Big Rivers' due diligence efforts are sufficient to**
10 **include representative generation maintenance and operating expenses in the**
11 **financial model?**

12

13 **A.** Yes. Big Rivers believes that it already has included representative generation
14 maintenance expenses in its financial model as incorporated through its
15 Production Work Plan. Big Rivers has used a collaborative process with WKEC
16 to determine fixed O&M and capital needs, and has produced a Production Work
17 Plan resulting in a total capital and O&M budget for Big Rivers that is larger than
18 WKEC's.² Big Rivers relied on the knowledge and experience of the WKEC
19 employees that will become its employees on and after the date of closing in the
20 preparation of this Production Work Plan, as well as the knowledge and

¹ See Big Rivers Response to Attorney General's Initial Request for Information to Joint Applicants, Item 110, page 1.

² See Big Rivers Response to Attorney General's Supplemental Request for Information to Joint Applicants, Item 94, page 1. See also Big Rivers Responses to Attorney General's Supplemental Request for Information to Joint Applicants, Items 95-99 (discussing various issues relating to Production Work Plan and Stone & Webster Report).

1 experience of its current employees. Big Rivers does not expect that its final due
2 diligence review of the condition of the facilities significantly will change the
3 costs incorporated in the Production Work Plan underpinning the submitted
4 financial model.

5

6 **Q. Mr. Brevitz asserts that due diligence takes on greater importance due to the**
7 **absence of representations and warranties regarding the condition of the**
8 **generating plants and sites.³ Do you believe this to be the case?**

9

10 **A.** I both agree and disagree with Mr. Brevitz on this issue. I agree with Mr.
11 Brevitz's general conclusion that Big Rivers has an obligation to conduct a
12 thorough due diligence on the generating assets. Big Rivers has planned for and
13 is conducting this thorough due diligence. Big Rivers bargained for and obtained
14 in the Termination Agreement a lengthy set of conditions to closing regarding the
15 generation assets.⁴ Big Rivers' reliance on conditions to closing on these points
16 in lieu of representations and warranties is not unusual. Big Rivers has a process
17 underway to guarantee that information needed to satisfy each of these conditions
18 to closing is obtained and in hand as of the date of closing. But I disagree with
19 Mr. Brevitz's opinion that some sort of freeze-frame due diligence report needs to
20 be prepared and compiled in advance of closing. That opinion is simply not
21 supported by the circumstances or by the terms of the Termination Agreement.
22 At the closing, Big Rivers will determine according to Termination Agreement

³ Direct Testimony of David Brevitz, page 23, lines 18-22

⁴ Transaction Termination Agreement, section 10.3.

1 section 10.3(dd) that the generating plants are in all material respects in good
2 condition and state of repair, ordinary wear and tear excepted, consistent with
3 Prudent Utility Practice. Otherwise, Big Rivers will not close this Transaction
4 unless this condition is waived by Big Rivers.

5

6 **Q. Mr. Brevitz asserts that there is evidence that Big Rivers has expressed**
7 **concerns regarding recent years' maintenance and the condition of the**
8 **generating facilities.⁵ Does Big Rivers have concerns regarding these issues?**

9

10 **A.** Big Rivers' generation assets represent the foundation of Big Rivers' resource
11 portfolio now and for years to come. Maintaining these assets in proper operating
12 condition is a paramount concern for Big Rivers. Big Rivers has a long-standing
13 obligation to maintain reliability and to keep its assets in operation, and takes a
14 long-term view towards operations and maintenance obligations. During the
15 course of the lease transaction, Big Rivers has been vigilant in notifying WKEC
16 of any and all perceived operations and maintenance issues consistent with the
17 parties' contractual obligations under the ongoing lease transaction

18

19 Big Rivers recognizes that returning these assets to Big Rivers' control constitutes
20 an advantage of the Unwind Transaction, as it will permit Big Rivers to operate
21 and maintain the generation assets on a long-term, reliability-focused basis.

22

Contrary to Mr. Brevitz's suggestion, Big Rivers' interest in a long-term

⁵ Direct Testimony of David Brevitz, page 23, line 24 through page 25, line 14.

1 maintenance perspective does not mean that the assets themselves are not in good
2 operating condition at the moment.

3
4 **III. SMELTER ISSUES**

5
6 **A. SMELTER INFLUENCE ON BIG RIVERS**

7
8 **Q. Mr. Brevitz concludes that “the Smelters are entwined with BREC**
9 **management and have the ability for substantial influence on BREC**
10 **operating and financial matters in support of Smelter interests in lower**
11 **power rates.”⁶ Do you believe this is an accurate appraisal of the situation?**

12
13 **A.** While I fully appreciate the Smelters’ desire to have lower power rates, to the
14 extent Mr. Brevitz is relying on the Smelters’ position on the Coordinating
15 Committee established in the Coordination Agreement and on certain budget
16 review rights established by that agreement, I believe he completely
17 misunderstands the Smelters’ ability to effect changes in Big Rivers’ operations
18 and policies in a manner that forces adoption of policies that favor the Smelters to
19 the disadvantage of Big Rivers and its Members’ other retail customers.

20
21 **Q. Why do you believe that Mr. Brevitz exaggerates the Smelters’ ability to**
22 **control Big Rivers’ operations?**

23

⁶ Direct Testimony of David Brevitz, page 15, lines 18-20.

1 A. Big Rivers' management was extraordinarily sensitive in the negotiations to make
2 sure that the Smelters would not have any binding control or consent rights over
3 Big Rivers' decision-making. No single Member of Big Rivers has this right.
4 While Big Rivers will provide the Smelters with relevant operating information
5 which will enhance communication among the parties, the documents provide no
6 ability for the Smelters to control Big Rivers. Big Rivers ultimately is responsible
7 for managing all its operations.

8
9 I believe Mr. Brevitz is confusing the Smelters' greater access to operational
10 information with an actual ability to control Big Rivers. I believe it is entirely
11 reasonable and appropriate to provide the Smelters with a high degree of access to
12 information about Big Rivers' operations due to the nature of the TIER
13 Adjustment Charge exposure of the Smelters under their power contracts that are
14 part of the Unwind Transaction. Under the terms of the Smelter Agreements, the
15 Smelters take 100% first-dollar responsibility for all of Big Rivers' fixed-cost
16 increases within the bandwidth when Big Rivers fails to achieve the agreed upon
17 contractual TIER of 1.24.⁷ A right to advance information and an opportunity to
18 consult with and advise Big Rivers in these situations are entirely appropriate
19 given this cost responsibility and will help decrease the potential for disputes
20 down the road.⁸ But the rights granted by section 3.4 of the Coordination

⁷ See Direct Testimony of C. William Blackburn, page 51, line 18 through page 57, line 2.

⁸ See Big Rivers Response to Attorney General's Initial Request for Information to Joint Applicants, Item 73, page 1.

1 Agreement largely relate to a budget review process, and provide only advisory
2 rights.⁹

3

4 **Q. Please describe the Smelters' rights under section 3.4 of the Coordination**
5 **Agreement as they relate to budget review.**

6

7 A. These rights are discussed at greater length in my Direct Testimony.¹⁰ Big Rivers
8 will provide the Smelters pursuant to section 3.4(a) with the proposed budget 90
9 days prior to the end of each fiscal year. Pursuant to section 3.4(b), the Smelters
10 can request an independent expert to review that budget, and thereafter the
11 Smelters can present the results of that independent expert's review to the
12 Coordination Committee and/or the Big Rivers Board of Directors pursuant to
13 section 3.4(c) of that Agreement.¹¹ None of these rights compel Big Rivers to
14 adopt any Smelter recommendations or prevent Big Rivers' board from approving
15 the budget in the form presented by Big Rivers' management.

16

17 **Q. Do either the Smelters or the independent expert permitted by section 3.4(c)**
18 **of the Coordination Agreement have any veto rights over Big Rivers' final**
19 **budget?**

20

⁹ See Exhibit 20, Coordination Agreements between Big Rivers and Alcan Primary Products Corporation and between Big Rivers and Century Aluminum General Partnership of Kentucky ("Coordination Agreements").

¹⁰ Direct Testimony of Mark A. Bailey, page 26, lines 1-16.

¹¹ See Application Exhibit 20, Coordination Agreements.

1 A. No. Big Rivers' management will produce the final budget, which then will be
2 approved by Big Rivers' Board of Directors. The Smelters have no veto over the
3 inclusion of any cost in that budget and have no ability to require that the final
4 budget be changed

5

6 **Q. But doesn't this ability to present recommendations to the board on budget**
7 **issues offer the Smelters a greater ability to influence Big Rivers' rates at the**
8 **potential expense of Big Rivers' other customers?**

9

10 A. I do not think so. Big Rivers' three Member Distribution Cooperatives are Big
11 Rivers' customers and owners. They represent their interest and the interests of
12 their retail members, and they alone have the ability to control Big Rivers. Unlike
13 the Smelters, the Member Distribution Cooperatives each have representation on
14 Big Rivers' Board of Directors, which sets management policy for Big Rivers.
15 Accordingly, unlike the Smelters, the Member Distribution Cooperatives have a
16 say in the hiring and firing of Big Rivers' management. Mr. Brevitz, in his
17 concern that the Smelters will seek to advance short-term interests at the expense
18 of long-term interests, ignores this fact.¹² In my opinion, Big Rivers' Member
19 Distribution Cooperatives can be expected to take a long-term view and act to
20 counterbalance any pressure the Smelters potentially might assert to control short-
21 term costs by deferring expenses to the long-term. But the Member Distribution
22 Cooperatives also share the Smelters' interest in controlling costs of generation

¹² See Direct Testimony of David Brevitz, page 28, lines 20-21 ("The Smelters have both the incentive and the ability through participation on the Coordinating Committee to pressure BREC to avoid arrangements which might increase costs in the shorter term and defer costs to a later date.")

1 **Q. Do you believe the Smelters' ability to bring issues to the Board of Directors**
2 **to be a benefit of the proposed Unwind Transaction?**

3
4 A. Yes. I believe that providing Big Rivers' Board of Directors with additional
5 information regarding the Smelters' views regarding these issues is a definite
6 benefit of the Unwind Transaction. The better informed that the Board of
7 Directors is, the better it can make its decisions. In fact, Big Rivers looks forward
8 to the Smelters' participation on the committee and expects to receive
9 recommendations that have common benefit for the entire system.

10
11 **Q. Do the Smelters have any ability to bind Big Rivers' management through**
12 **the various issues to be discussed by the Coordinating Committee?**

13
14 A. No. As described in my Direct Testimony, the Coordinating Committee will
15 consist of representatives of the Members, the Smelters and Big Rivers and will
16 be used for "the purpose of reviewing, analyzing, and discussing information
17 relating to Big Rivers' operational and financial performance."¹³ Although this
18 Coordinating Committee will serve as a wide-ranging forum in which the
19 Smelters can raise their concerns over the matters listed in section 4.1 of the
20 Coordinating Committee and highlighted by Mr. Brevitz in his testimony, Big
21 Rivers is not required to act in any respect regarding the matters discussed. While
22 Big Rivers welcomes the input from the Smelters, Big Rivers was careful in the

¹³ Direct Testimony of Mark A. Bailey, Exhibit 5, page 25, lines 2-5.

1 negotiations to make clear that the Smelters would not have a consent, control or
2 other veto or “blocking” position.

3
4 Moreover, because the Members also are parties to the Coordinating Committee,
5 they can serve as a potential counterbalancing force to protect retail customers if
6 the Smelters were to advocate positions slated to further their own interest at the
7 expense of retail customers. Big Rivers views the Coordinating Committee as a
8 valuable resource and as an excellent forum for an exchange of views among Big
9 Rivers, the Smelters and the Member Distribution Cooperatives. But Big Rivers
10 retains the same degree of control over management decisions that it now has

11

12 **B. SMELTER ADVOCACY FOR LOWER RATES**

13

14 **Q. Do you agree with Mr. Brevitz’s conclusion that the Smelters’ interests are**
15 **not necessarily the same as Big Rivers’ interests and those of the Member**
16 **Distribution Cooperatives?¹⁴**

17

18 **A.** Yes, of course they are different. Big Rivers has a long history of serving the
19 Smelters and is quite familiar with the Smelters’ desire to obtain the lowest
20 possible rates due to the competitive environment in which they sell their output.
21 But Mr. Brevitz ignores the many ways in which the Smelters, Big Rivers’
22 Member Distribution Cooperatives, and Big Rivers all share the same concerns.

23

¹⁴ Direct Testimony of David Brevitz, page 28, lines 26-27.

1 First, the Smelters, the Member Distribution Cooperatives, and Big Rivers all
2 have a common interest in keeping the Smelters and their jobs in Western
3 Kentucky. Second, Mr. Brevitz ignores the Smelters' very real interest in keeping
4 Big Rivers' generating facilities in good operating condition. Whenever Big
5 Rivers' generating facilities are inoperative and additional power is needed to
6 meet system requirements, Big Rivers has to buy market power, often at higher
7 costs, thereby increasing the costs of both the Smelters and the Members. In
8 many circumstances under the Unwind Transaction, the Smelters would first bear
9 the additional costs. The Smelters thus share an interest in having both reliable
10 and low-cost power

11

12

IV. RISK MANAGEMENT

13

14 **Q. Mr. Brevitz describes the position of Director of Enterprise Risk**
15 **Management & Strategic Planning as “critically important” for Big Rivers’**
16 **future.¹⁵ Has Big Rivers selected an individual to fill this position?**

17

18 **A. Yes. Big Rivers has selected Mr. Albert M. Yockey III to fill this position. Mr.**
19 **Yockey will have the title of Vice President of Big Rivers. Big Rivers attaches**
20 **Mr. Yockey’s resume as MAB Rebuttal Exhibit-1.**

21

22 **Q. Does that conclude your testimony?**

23

¹⁵ Direct Testimony of David Brevitz, page 45, lines 21-24.

1 A. Yes.

VERIFICATION

I verify, state, and affirm that the foregoing testimony is true and correct to the best of my knowledge and belief..

Mark A. Bailey

Mark A. Bailey

COMMONWEALTH OF KENTUCKY)
COUNTY OF HENDERSON)

Subscribed and sworn to before me by Mark A. Bailey on this the 23rd day of April, 2008.

Mary E. Johnson

Notary Public, Ky, State at Large
My Commission Expires: 7/29/11

ALBERT M. YOCKEY
955 Pebble Creek Drive
Henderson, KY 42420
atyockey@urassociation.com
614-214-1168

OBJECTIVE

Achieve an upper level management position in the electric utility industry to fully use my experience and background.

QUALIFICATIONS

Manager of Strategic Transmission Issues with 30+ years of progressive experience in utility management and engineering disciplines including regulatory activities, system planning, energy assessment and capacity planning, system operations, system protection, and generation. This experience is coupled with graduate education in engineering and law in addition to various management and personal development courses. Major strengths include strong communication and interpersonal skills, and appreciation for teamwork.

EXPERIENCE

Big Rivers Electric Corporation, Henderson, Kentucky

Vice President Enterprise Risk Management & Strategic Planning 2008—Present

This position reports to the Executive Vice President and Chief Operating Officer and it is responsible for coordinating the development and implementation of the Enterprise Risk Management policies and Strategic Plans for Big Rivers Electric Corporation.

American Electric Power Service Corporation, Columbus, Ohio

Manager of Transmission Reliability Compliance 2006—2008

This position reports to the Vice President of Transmission and was responsible for coordinating the review of NERC Reliability Compliance activities to ensure compliance and prepare the company for the NERC Readiness Evaluation and the RFC Compliance Audit in April and May of 2007 respectively. During this time this position facilitated the establishment of a Corporate Management Executive team to deal with major issues of NERC Compliance and Risk Management.

Manager of Transmission Strategic Issues and Reliability Compliance 2005—2006

This position reports to the Senior Vice President of Transmission and is responsible for the Transmission Division responsibilities noted below. In addition, this role coordinates the preparation of AEP regarding the mandatory NERC Reliability Standards and penalties for noncompliance related to the business units. This includes facilities and operations in portions of eleven states which are part of the Reliability *First* Corporation, the Southwest Power Pool, and the Electric Reliability Council of Texas.

Manager of Transmission Strategic Issues 2000—2005

This position reports to the Vice President of Transmission and is responsible for the Transmission Division regulatory/legislative strategy development and coordination. These responsibilities include managing multiple state and federal requirements, strategic positioning, interfacing as needed with

commission and staff, facilitating communication among AEP business units internal and external to transmission, as well as internal and external to AEP in the regulatory/legislative arenas.

Senior Engineer in Area Transmission Planning 1985—2000

The Senior Engineer in the Area Transmission Planning Section of the System Planning Department has a responsibility for: ensuring reliable operation of transmissions facilities under normal and facility outage conditions, identifying future system requirements, and justifying needed changes to management. These responsibilities and the changing utility environment necessitated interaction with personnel in various departments, internal and external customers, other utilities, and regulatory agencies.

Pennsylvania Power & Light Company, Allentown, Pennsylvania

Project Engineer in Energy Assessment and Capacity Planning 1981—1985

As a Project Engineer in this Section of the System Planning Department the duties included: economic evaluation of co-generation and alternative energy projects, assessment of various energy and demand management options on customer revenue requirements, and review of potential capacity and energy sales to other utilities.

Pennsylvania Power & Light Company, Allentown, Pennsylvania

Project Engineer in the Electrical Section of System Planning 1977—1981

As a Project Engineer in this Section of the System Planning Department the duties included: computer simulation of electrical systems, economic analysis of alternative expansion plans, development of five year and long range plans for system reinforcements, preparation of letters and reports detailing decisions, and the impact of expansion plans on system reliability, capital requirements, and customer facilities.

Engineer in the Relay Section of the System Operating Department 1972—1977

I was a Relay Engineer in the System Operating Department until promoted to Project Engineer in 1976. The responsibilities in this position included: maintaining system protection and coordination by adhering to operating principles and practices, calculation of short circuit duties, and coordination studies to determine and specify protection requirements from generating station to customer point-of-contact facilities.

West Penn Power Company, Greensburg, Pennsylvania Summers of 1968 to 1971

Employed two summers as a laborer and one summer as an Engineering Aide at the West Penn Power Company Springdale Power Station. These positions provided a basic appreciation of power plants.

DEGREES

Capital University - J.D. (94) Lehigh University - M.S.E.E. (79) University of Pittsburgh - B.S.E.E. (72)

OTHER EDUCATION

American Electric Power Service Corporation Courses

Management Development Program Leader-Basics of Supervision Accident Investigation Training Basics of Supervision Department Interview Training Effective Writing for Executives

Pennsylvania Power & Light Company Courses

Kepner Tregoe (structured decision making) Supervisory Growth Workshop Burger Writing
Advanced Management Seminar Assertiveness Training Managing Personal Growth

Personal Development Courses

Technical Persons in Leadership Roles Negotiating With People How to Deal With Difficult People

CERTIFICATION

Licensed Attorney in the State of Ohio (1994)

Registered Professional Engineer in the Commonwealth of Pennsylvania (1976)

Honor Societies: Sigma Tau (1970) Eta Kappa Nu (1970) Phi Eta Sigma (1969)

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

2 **CASE NO. 2007-00455**

3 **REBUTTAL TESTIMONY OF**

4 **C. WILLIAM BLACKBURN**

5
6 **Q. Please state your name and business address.**

7
8 **A. My name is C. William Blackburn. My business address is 201 Third Street, P.O.**
9 **Box 24, Henderson, Kentucky 42419-0024.**

10
11 **Q. Are you the same C. William Blackburn who provided direct testimony in**
12 **this proceeding?**

13
14 **A. Yes.**

15
16 **Q. What is the purpose of this rebuttal testimony?**

17
18 **A. I am testifying on behalf of Big Rivers Electric Corporation (“Big Rivers”) in**
19 **order to address certain issues and matters raised in the Direct Testimony of Mr.**
20 **David Brevitz on behalf of the Kentucky Attorney General filed in these**
21 **proceedings on April 3, 2008. I address each point separately below.**

1 I. COMPLETENESS OF APPLICATION

2
3 **Q. Mr. Brevitz concludes that the Application and supporting documents are**
4 **incomplete in multiple areas. Do you agree with this conclusion?**

5
6 **A.** As witnessed by the Commission's April 16, 2008 order rejecting the First
7 Amendment and Supplement to Application on the grounds that Big Rivers did
8 not supply copies of all trust deeds and mortgages, I recognize that Mr. Brevitz is
9 in part correct in concluding that Big Rivers' Application was incomplete at the
10 time he submitted his testimony. Big Rivers will timely correct the deficiencies
11 noted by the Commission in that order so that all necessary information will be
12 before the Commission. However, I disagree with the relevance of certain of the
13 additional issues Mr. Brevitz claims make the Application incomplete. Although
14 I address some of the areas identified by Mr. Brevitz in further detail below (with
15 certain other areas addressed in the Rebuttal Testimony of Mark A. Bailey and in
16 the Rebuttal Testimony of Michael H. Core), I want to state at the outset that Big
17 Rivers believes that it is continuing to follow in good faith the approach originally
18 identified at the time it filed this Application and later repeated in its data
19 responses.¹ To the extent Mr. Brevitz is suggesting that Big Rivers is somehow
20 trying to get this Commission to approve this transaction without seeing all of the
21 documentation, I strongly disagree. Big Rivers has provided all documentation as
22 it has become available. Given the numerous moving pieces in this Application

¹ See Big Rivers Response to Attorney General's Supplemental Request for Information to Joint Applicants, Item 77, page 1; Item 79, page 1; Item 107, page 1.

1 and transaction it simply was not possible to submit all of that information by
2 December 28, 2007, or even by the date of Mr. Brevitz's testimony. However,
3 Big Rivers has acted dutifully to supplement the Application as and when new
4 information and documentation has been completed, and it will continue to do so.

5

6 **Q. Mr. Brevitz concludes that the Commission could “reasonably hold this**
7 **proceeding in abeyance until these matters have been accomplished and**
8 **addressed through additional discovery and analysis presented before this**
9 **Commission.”² Do you believe further delay would be appropriate?**

10

11 **A.** No. As discussed in the responses below, Big Rivers believes that it has supplied
12 sufficient information for the Commission and interested parties to make an
13 informed decision on the matters that are properly subject to their review. Any
14 additional delay in this proceeding could risk the delicately-crafted balance
15 among the numerous parties to the Unwind Transaction. Big Rivers has adhered
16 to the position first expressed when it filed its Application, and none of the issues
17 identified by Mr. Brevitz serves as a sufficient justification for additional delay

18

19 **A. REQUIRED CONSENTS FOR THE TRANSACTION**

20

21 **Q. Do you disagree with Mr. Brevitz's view that the absence of existing creditor**
22 **consents renders this Application incomplete?**

23

² Direct Testimony of David Brevitz, pages 47-48.

1 **A.** Yes. Mr. Brevitz was correct in noting that Big Rivers had not yet submitted the
2 form of consents of its existing creditors to the proposed issuance at the time he
3 filed his testimony. Big Rivers filed a form of those consents, which are
4 incorporated into the proposed evidences of indebtedness, on April 23, 2008.
5 Those evidences of indebtedness will obviously not be executed until the date of
6 closing of the Unwind Transaction, and their execution is a condition to closing.
7 The Commission needs to review the form and terms of these documents, but
8 such documents are not executed until the closing. Big Rivers will provide copies
9 of these executed documents in a compliance filing after closing of the Unwind
10 Transaction.

11

12 **Q.** **Has Big Rivers filed a revised Financial Model reflecting the impact of**
13 **deferring capital markets financing to prepay the RUS New Note and**
14 **adjusting the interest rate on the Pollution Control Bonds from 3.6% to**
15 **5.0%?**

16

17 **A.** In connection with the submission of substantially complete forms of the existing
18 creditors' consents and the new evidences of indebtedness, Big Rivers filed a new
19 run of the Unwind Financial Model on April 23, 2008. Thus, the Commission
20 and all parties now have sufficient information to assess the financial effect of the
21 proposed evidences of indebtedness on the submitted transaction.

22

23

1 **B. CREDIT RATING INFORMATION**

2

3 **Q. Is Big Rivers' Application incomplete, as Mr. Brevitz asserts, because Big**
4 **Rivers has yet to obtain an investment grade credit rating?**

5

6 **A.** No, I do not agree that Big Rivers' proposed timing for obtaining an investment
7 grade credit rating in any way renders Big Rivers' Application deficient or
8 incomplete. Once again Mr. Brevitz confuses a closing condition with a
9 jurisdictional filing requirement.

10

11 **Q. Why isn't Big Rivers' prior receipt of an investment grade credit rating**
12 **required for Commission consideration of this Application?**

13

14 **A.** There are both practical considerations and legal reasons why Big Rivers does not
15 need to obtain an investment grade credit rating on or before the date of hearing.
16 From a practical standpoint, it would be highly irregular and unorthodox for Big
17 Rivers to seek and obtain an investment grade credit rating this far in advance of
18 the proposed date of closing. Big Rivers' financial advisors tell us it is considered
19 beneficial and necessary for an investment grade credit rating to be issued near
20 the date of closing in order to keep that rating as fresh as possible to satisfy
21 creditors. While at different times Big Rivers considered approaching the rating
22 agencies earlier on a preliminary basis, Big Rivers did not contemplate obtaining

1 a final rating until shortly before the closing, again in consultation with its
2 advisors.

3
4 From the standpoint of the Termination Agreement, receipt of an investment
5 grade credit rating is simply a Big Rivers condition to closing.³ It is also a
6 requirement in the agreements between Big Rivers and certain of its creditors.

7 The Commission is not required to make a finding regarding whether Big Rivers
8 has or does not have an investment grade credit rating. The Commission's role is
9 to assess the proposed issuance under the standards of KRS 278.300(3).

10 Accordingly, the Commission can make receipt of an investment grade rating a
11 condition of its own approval as well. If Big Rivers is unable to obtain this
12 investment grade credit rating after Commission approval of this Application, Big
13 Rivers simply will not close the Unwind Transaction.

14
15 **Q. Do you agree with Mr. Brevitz that the lack of a credit rating at this time**
16 **“places a burden on the Commission and parties to make multiple**
17 **assessments of this transaction at various stages”?**

18
19 **A.** No. Again, receipt of the credit rating is merely a condition to closing. There
20 should be no need for either the Commission or the other parties to revisit this
21 issue once the requested approval of the Application has been obtained.

22
23 **Q. When does Big Rivers intend to obtain the investment grade credit rating?**

³ See Transaction Termination Agreement, section 10.3(u).

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A. Big Rivers believes that the process to obtain an evaluation of its credit rating will take approximately six to eight weeks. Big Rivers currently contemplates commencing this process on May 14, 2008 so that it can be completed in advance of the proposed closing date of the Unwind Transaction.

C. FINANCING AGREEMENTS

Q. Has Big Rivers addressed Mr. Brevitz’s concerns that “there are no specific debt issue or specific creditor agreements” that have been filed to date?

A. Yes. At the time Mr. Brevitz prepared his testimony, he correctly noted that Big Rivers had filed two agreements associated with the \$100 million in lines of credit/revolving credit arrangements Big Rivers requires for its post-closing operations.⁴ Big Rivers subsequently has filed the remaining evidences of indebtedness and other documentation necessary for the Commission to approve the financing arrangements. Specifically, Big Rivers filed motions on March 31, 2008, April 11, 2008, and April 23, 2008 to Amend and Supplement its Application to incorporate a new Indenture and to add the other documents listed on the attached CWB Rebuttal Exhibit-1, and to give a complete description of those documents. Accordingly, the Commission now has, prior to a hearing, all of the documents necessary for it to act on the issuance proposed in this proceeding

⁴ See Direct Testimony of David Brevitz, page 5 n.4.

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Q. Has Big Rivers altered the financing for which it is now seeking approval from that described in the December 28, 2007 Application?

A. Yes. In my original testimony included in the Application, Exhibit 10, page 127, I noted that Big Rivers intended to prepay a total of \$440 million in RUS debt (GAAP basis), of which \$176 million would be taken from cash on hand at closing (*net of capital markets transaction costs, accrued interest, and adjustments for GAAP accounting*) and an additional \$264 million which would be paid through a new debt issuance in the capital markets. However, I stressed in my testimony that Big Rivers did not intend to make a final decision on the composition of its debt (capital markets vs. RUS) until the closing of the Unwind Transaction.⁵ Broader events in U.S. financial markets discussed at length by Mr. Brevitz in his testimony have now led Big Rivers to adopt a financing approach featuring only a \$200 million RUS debt repayment at the Unwind Transaction Closing. Big Rivers previously discussed this alternative in its response to item 5 to the Attorney General’s initial request for information, thus leading Mr. Brevitz to deem it the “alternative” financing arrangement.⁶ In fact, this is “the” Big Rivers financing arrangement.

Q. Does Big Rivers’ financing plan prevent it from obtaining an investment grade credit rating?

⁵ Direct Testimony of C. William Blackburn, Exhibit 10, page 128, lines 3-9.
⁶ Response to Attorney General’s Initial Request for Information to Joint Applicants, Item 5, page 1.

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A. Not at all. The indenture and the intercreditor agreement changes still are a feature of the proposed financing plan, and the composition of the financing should not have any bearing on whether Big Rivers is able to obtain an investment grade credit rating.

Q. Mr. Brevitz questions whether financial impacts of the financing plan will be acceptable to the Smelters and the rating agencies.⁷ Is this an issue which the Commission needs to address?

A. No, it is not. Big Rivers is not requesting the Commission to find the revised financing plan to be acceptable to either the Smelters or the rating agencies. As Mr. Brevitz notes, the Smelters have as a condition to closing an ability to terminate their participation in the deal if the financing plan would materially affect the calculation of the TIER adjustment.⁸ There is no need for the Commission to speculate on this point: if applicable, the Smelters will either exercise these rights or not, and closing will or will not occur.

It is worth noting that Mr. Brevitz is incorrect in stating that the Smelters have a right to terminate their participation in the transaction in the event the actual interest cost is more than 15 basis points in excess of estimated costs.⁹ That pre-closing right applied not to the estimates included in the Financial Model, as Mr.

⁷ Direct Testimony of David Brevitz, page 37, lines 8-27.
⁸ *Id.* at lines 12-27
⁹ Direct Testimony of David Brevitz, page 37, lines 12-27.

1 Brevitz suggests, but instead to the calculation of the time period with respect to
2 which the Smelters can exercise their right to terminate their contract prior to
3 closing. Big Rivers simply has to give the Smelters an additional 24 hours to
4 review whether to terminate the contract if Big Rivers' actual interest cost would
5 be 15 basis points higher than prior projections shown the Smelters.¹⁰ But the fact
6 that Big Rivers will not be issuing capital markets debt at the closing renders this
7 provision moot. Similarly, Mr. Brevitz's concerns regarding the rating agencies
8 on this interest rate issue are also misplaced. The financial rating agencies will
9 either grant Big Rivers an investment grade credit rating based on these new
10 financial arrangements or they will not. Commission review on this point is not
11 necessary.

12

13 **Q. Mr. Brevitz characterizes Big Rivers' financing plan as involving a larger**
14 **capital markets debt offering at some indefinite point in the future. Does Big**
15 **Rivers still contemplate issuing additional capital markets debt to repay**
16 **further amounts of RUS debt?**

17

18 **A.** Yes, to the extent available capital markets debt can be obtained at an interest rate
19 less than the current RUS interest rate, Big Rivers would still prefer to refinance
20 an additional amount of RUS debt, and has committed to the RUS to make a
21 capital markets refinancing of \$200 million prior to January 1, 2016. Although
22 this future capital markets debt issuance remains a goal, it is not a component of

¹⁰ See Retail Agreement between Smelters and Kenergy, section 7.2.4(c).

1 the approval now sought. Big Rivers will choose what it believes to be the best
2 time at which to make this refinancing.

3

4 **Q. Does Big Rivers request that the Commission now approve these potential
5 future issuances of capital markets debt as part of this proceeding?**

6

7 **A.** No. Any future debt issuances seeking to expand Big Rivers' capital markets debt
8 would be the subject of separate, future Big Rivers applications to the
9 Commission.

10

11 **Q. Mr. Brevitz speculates that Big Rivers is exposed to interest rate risks and
12 that future credit spreads will remain wide.¹¹ Does this in any way alter the
13 approvals Big Rivers now seeks?**

14

15 **A.** No. Again, Big Rivers is not at this time seeking approval for any future debt
16 refinancings even though one or more are still contemplated. If credit spreads
17 remain wide, Big Rivers will be limited in its ability to obtain alternate capital
18 markets financing. That is a known risk, but the revised financial model
19 submitted by Big Rivers on April 23, 2008 reflects the risks of deferring capital
20 markets financing as I described above. And it is accurate that Big Rivers, to the
21 extent it has variable interest rates on its existing debt, remains exposed to interest
22 rate risks. This is the case whether or not the Unwind Transaction closes. Big
23 Rivers' existing pollution control bonds are subject to this risk for example. On

¹¹ Direct Testimony of David Brevitz, page 38, line 4 – page 41, line 32.

1 balance, even though credit spreads may remain wider than in recent years,
2 interest rates have fallen. Big Rivers will need to manage its interest rate risk the
3 same as it will manage other financial risks going forward. Big Rivers
4 contemplates managing interest rate risk as part of its Risk Management Program.
5 The advantage of the Unwind Transaction is that it enables Big Rivers to manage
6 its interest rate risks through refinancing opportunities that are not available to
7 Big Rivers under its existing financial arrangements.

8
9 **Q. In paragraph 18 of its Application, Big Rivers describes a lease financing**
10 **agreement previously approved by the Commission in 2000 as the “defeased”**
11 **sale/leaseback, and Big Rivers defines that lease as the “Defeased Lease.”**
12 **Can you further explain that terminology?**

13
14 **A.** The use of the term “Defeased Lease” is technically imprecise. Big Rivers has
15 made investments that it owns and controls which were intended to (1) in part,
16 provide collateral to secure the obligations of Big Rivers under the lease and (2)
17 provide economically to Big Rivers a stream of cash flows, via an investment
18 return, that matches the scheduled obligations of Big Rivers under the lease.
19 Those investments consist of investment contracts and deposits issued by highly
20 rated issuers and are expected to provide cash flow funds to Big Rivers that
21 permit Big Rivers to pay its scheduled obligations under the lease. Big Rivers has
22 remained fully liable to pay its lease obligations and will be required to bear fully

1 the economic burden of those obligations if the investments owned and controlled
2 by Big Rivers default or in any way fail to perform in full.

3
4 This type of arrangement is often referred to as “economic” defeasance, as fully
5 distinguished from “legal” defeasance, where the obligation in question is
6 discharged fully by the delivery of legal/beneficial ownership of a financial
7 instrument to the creditor in full legal discharge and payment of that obligation.
8 By contrast, economic defeasance by an obligor of an obligation essentially
9 represents an economic hedge investment made by the obligor and owned and
10 controlled by the obligor and, if pledged to the creditor, constitutes collateral
11 support for the obligation in question. The Defeased Lease is an economically
12 defeased lease, not a legally defeased lease. A more accurate term to use to refer
13 to one of these leases would be “Leveraged Lease.”

14

15 **II. FINANCIAL MODEL**

16

17 **Q. Mr. Brevitz notes that E.ON’s payments to the Smelters are not reflected in**
18 **Big Rivers’ financial model.¹² Why didn’t Big Rivers include these payments**
19 **in the model?**

20

21 **A. Big Rivers did not receive these payments, and E.ON’s agreement to make certain**
22 **payments to the Smelters has no financial effect on Big Rivers’ costs. These**
23 **payments do not come from Big Rivers’ funds, and Big Rivers had no part in the**

¹² Direct Testimony of David Brevitz, page 27, lines 11-12.

1 negotiation of these payments. Indeed, we do not even know the circumstances
2 under which the payments were made. Accordingly, there is no need to model
3 these third-party payments in the Financial Model, which estimates only Big
4 Rivers' costs.

5
6 **Q. Mr. Brevitz at page 30 of his testimony and Exhibit DB-2 asserts that one**
7 **economic consequence of both Smelters departing Big Rivers' system in 2011**
8 **could be an eighteen percent increase in rates to Big Rivers' remaining**
9 **customers. Would remaining Members be required to absorb these costs as**
10 **Mr. Brevitz claims?**

11
12 **A.** Absolutely not. The actual economic impact to remaining customers under this
13 scenario would be much, much lower. Mr. Brevitz's testimony concerns Big
14 Rivers' modeling of a single scenario, Scenario Two (a) responsive to
15 Commission Staff's First Data Request Item 10, in which both Smelters depart the
16 system at the earliest possible date permitted by their contracts (2011) and where
17 market electricity prices are depressed 10% relative to those included in the base
18 financial model. In concluding that remaining customers will be required to
19 absorb an up to 18% rate increase from the Smelters' departure in this price-
20 depressed scenario, Mr. Brevitz ignores the 4 page numerical summary
21 accompanying Big Rivers' response to Commission Staff 10. Line 28 of page 4
22 of that numerical summary shows that \$311 million in Excess Margins are
23 generated under this scenario due to the replacement of Smelter revenue with off-

1 system sales and reduced production costs, prior to consideration of any
2 reductions in contributions by remaining customers via rebates, rate reductions, or
3 member distributions.

4
5 Mr. Brevitz completely ignores this \$311 million in Excess Margins in his
6 calculations in Exhibit DB-2. The model output responsive to Scenario Two (a)
7 specifically did not stipulate a specific disposition of these Excess Margins, thus
8 making it appear that the rate increase to the remaining Members would need to
9 be much larger than actually would be the case. In actuality, these Excess
10 Margins accumulate as additional cash balances that can be deployed by Big
11 Rivers for purposes benefiting the Members. Benefiting from these Excess
12 Margins, Big Rivers could stipulate a new rebate mechanism, reduce rates to
13 Members, or use these Excess Margins to reduce debt. Thus, the remaining
14 Members simply would not be required to absorb an economic burden of the
15 magnitude Mr. Brevitz asserts.

16
17 Big Rivers' response to Commission Staff's First Data Request Item 10 shows
18 that the net of 1) Member rate increases and 2) Excess Margins accumulated for
19 the Members' benefit over the period 2011-2023 would amount to \$31 million.
20 This amount represents an increment of only approximately 1% over the total
21 Member revenue contributions in the Base Case Financial Model. Alternatively,
22 were Excess Margins to be rebated on a current-year basis, incremental Member
23 rates would increase by only 3% of the weighted average Member rates in the

1 Base Case Financial Model (the difference being attributable to interest earnings
2 on cash balances)

3

4 Moreover, the scenario Mr. Brevitz is examining is a pessimistic one in which
5 modeled market rates for electricity are 10% lower than projected in the Financial
6 Model. Results would be different were this analysis to use the projected market
7 electricity prices without this 10% depression; instead of \$311 million, the Excess
8 Margins amounts would be much higher. Mr. Brevitz thus greatly overstates the
9 financial effects on remaining Members of a departure by both Smelters under
10 this already pessimistic scenario.

11

12 **Q. Do you agree with Mr. Brevitz's statement that Big Rivers uses a**
13 **"Conventional TIER" in its financial modeling and contracting with the**
14 **Smelters?¹³**

15

16 **A.** This is not the case. In its contracts with the Smelters, Big Rivers uses a
17 "Contract TIER" as the determining factor triggering TIER Adjustment
18 Charges.¹⁴ Unlike a "Conventional TIER," "Contract TIER" is defined on an
19 after-tax basis. In addition, per agreement of the parties, the Smelter Agreements
20 exclude a number of factors from the determination and calculation of "Contract
21 TIER." Thus, under Base Case assumptions, the corresponding "Conventional
22 TIER" is slightly higher than the calculated "Contract TIER."

¹³ Direct Testimony of David Brevitz, page 33, lines 1-17.

¹⁴ Direct Testimony of C. William Blackburn, page 51, line 18 through page 57, line 2.

1 **Q. Mr. Brevitz asserts that “the TIER adjustment payments from the Smelters**
2 **is capped and limited, such that the remaining ‘uncapped’ costs of achieving**
3 **a certain tier level will fall back to remaining customers other than the**
4 **Smelters.”¹⁵ Is he correct that all of these financial effects will fall on**
5 **Members and not the Smelters?**

6
7 **A.** No, he is not. While the Smelters have an upper bound on the amount that they
8 are required to pay as part of the TIER Adjustment Payment, it is not the case that
9 the terms of the Smelter Agreements prohibit a portion of these “uncapped” costs
10 from later being recovered from the Smelters. If the Smelters’ maximum TIER
11 Adjustment Payment would be inadequate to achieve target contract TIER, Big
12 Rivers would have the option to seek an increase in Member Base Rates. Because
13 the Smelter Base Rates are explicitly tied to the applicable Large Industrial
14 Customer rate, an increase in Member Base Rates would correspondingly increase
15 Smelter Base Rates. Thus, the brunt of this financial effect will not fall on the
16 Members; the Smelters will pay their proportionate share as well, which would be
17 roughly 60% of each dollar of revenue increase via base rates.

18
19 **Q. Mr. Brevetz claims that the Smelter benefits are front-loaded because the**
20 **Smelters need only pay \$86 million of the calculated \$327 million in present**
21 **value if they depart the system by 2012. Do you agree that this is a front-**
22 **loading of benefits?**

¹⁵ Direct Testimony of David Brevitz, page 34, lines 12-14.

1 **A.** Assuming a June 30, 2008 closing date, if the Smelters terminate their service
2 from Big Rivers at the end of 2012 they will have provided revenue benefits for
3 approximately 4 and one-half years of the total transaction term of 15 and one-
4 half years (June 2008 through December 2023). Four and one-half years is
5 approximately 29% of this total transaction term. The \$86 million calculated by
6 Mr. Brevet amounts to approximately 26% of the total present value being
7 provided during this period. While this calculation does indicate that more of the
8 benefits fall in the early years, it is not a dramatic difference. Twenty-nine
9 percent of \$327 million would be approximately \$95 million, as contrasted to the
10 \$86 million in present value being provided. I do not believe this is an excessive
11 front-loading or in any way out of balance given the opportunities presented by
12 the Unwind Transaction (including offering below-market rates to the Smelters in
13 later years).

14

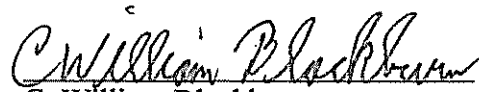
15 **Q.** **Does that conclude your testimony?**

16

17 **A.** **Yes.**

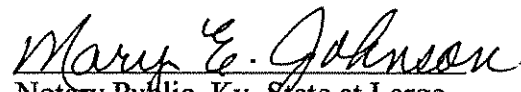
VERIFICATION

I verify, state, and affirm that the foregoing testimony is true and correct to the best of my knowledge and belief.


C. William Blackburn

COMMONWEALTH OF KENTUCKY)
COUNTY OF HENDERSON)

Subscribed and sworn to before me by C. William Blackburn on this the 23rd day of April, 2008.


Notary Public, Ky, State at Large
My Commission Expires: 7/29/11

CWB Rebuttal Exhibit 1

LIST OF FINANCING-RELATED DOCUMENTS

Exhibits to Unwind Transaction Application

Exhibit 45, Revolving Line of Credit Agreement dated as of _____, 2008, between Big Rivers Electric Corporation and National Rural Utilities Cooperative Finance Corporation

Exhibit 46, 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

Exhibit 49, Indenture dated as of _____, 2008, between Big Rivers Electric Corporation, Grantor to [Name of Trustee], Trustee, First Mortgage Obligations,

Exhibit 50, 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.

See Exhibit 50, 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

See Exhibit 50, 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

Exhibit 51, 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

See Exhibit 51, 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

See Exhibit 51, 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

Exhibit 52, Ambac Credit Products Secured Note (PBR-1), dated as of _____, 2008, from Big Rivers Electric Corporation to Ambac Credit Products, LLC

See Exhibit 52, Ambac Credit Products Secured Note (PBR-2), dated as of _____, 2008, from Big Rivers Electric Corporation to Ambac Credit Products, LLC

See Exhibit 52, Ambac Credit Products Secured Note (PBR-3), dated as of _____, 2008, from Big Rivers Electric Corporation to Ambac Credit Products, LLC

Exhibit 53, PCB Series 2001A Note dated as of _____, 2008, from Big Rivers Electric Corporation to the County of Ohio, Kentucky

Exhibit 54, Ambac Municipal Bond Insurance Policy Series 1983 Note dated as of _____, 2008, from Big Rivers Electric Corporation to Ambac Assurance Corporation and Ambac Credit Products, LLC

Exhibit 55, 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

Exhibit 56, 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; (e) Dexia Credit Local, New York Branch; (f) U.S. Bank Trust National Association, as trustee under the Trust Indenture dated as of August 1, 2001 (g) PBR-1 Statutory Trust; (h) PBR-2 Statutory Trust; (i) PBR-3 Statutory Trust; (j) FBR-1 Statutory Trust; (k) FBR-2 Statutory Trust; (l) PBR-1 OP Statutory Trust; (m) PBR-2 OP Statutory Trust; (n) PBR-3 OP Statutory Trust; (o) FBR-1 OP Statutory Trust; (p) FBR-2 OP Statutory Trust; (q) Bluegrass Leasing; (r) Bank of America Leasing Corporation; (s) AME Investments, LLC; (t) CoBank, ACB; and (u) Ambac Credit Products, LLC

Exhibit 57, 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; (e) Dexia Credit Local, New York Branch; (f) U.S. Bank Trust National Association, as trustee under the Trust Indenture dated as of August 1, 2001 (g) PBR-1 Statutory Trust; (h) PBR-2 Statutory Trust;

(i) PBR-3 Statutory Trust; (j) FBR-1 Statutory Trust; (k) FBR-2 Statutory Trust; and (v) Ambac Credit Products, LLC

Exhibit 58, 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,

Exhibit 59, Amended and Restated Funding Agreement Pledge Agreement (PBR-1) dated as of _____, 2008, among Big Rivers Leasing, LLC, Ambac Credit Products, LLC and _____, as Indenture Trustee

See Exhibit 59, Amended and Restated Funding Agreement Pledge Agreement (PBR-2) dated as of _____, 2008, among Big Rivers Leasing, LLC, Ambac Credit Products, LLC and _____, as Indenture Trustee

See Exhibit 59, Amended and Restated Funding Agreement Pledge Agreement (PBR-3) dated as of _____, 2008, among Big Rivers Leasing, LLC, Ambac Credit Products, LLC and _____, as Indenture Trustee

Exhibit 60, Amended and Restated Payment Agreement Pledge Agreement (PBR-1) dated as of _____, 2008 Among Big Rivers Leasing LLC, PBR-1 Statutory Trust, acting through U.S. Bank National Association, not in its individual capacity, but solely as Trustee, Ambac Credit Products, LLC, and _____, as Indenture Trustee

See Exhibit 60, Amended and Restated Payment Agreement Pledge Agreement (PBR-2) dated as of _____, 2008 Among Big Rivers Leasing LLC, PBR-2 Statutory Trust, acting through U.S. Bank National Association, not in its individual capacity, but solely as Trustee, Ambac Credit Products, LLC, and _____, as Indenture Trustee

See Exhibit 60, Amended and Restated Payment Agreement Pledge Agreement (PBR-3) dated as of _____, 2008 Among Big Rivers Leasing LLC, PBR-3 Statutory Trust, acting through U.S. Bank National Association, not in its individual capacity, but solely as Trustee, Ambac Credit Products, LLC, and _____, as Indenture Trustee

Exhibit 61, Amended and Restated Government Securities Pledge Agreement (PBR-1) dated as of _____, 2008 among Big Rivers Leasing LLC, Ambac Credit Products, LLC, _____, as Indenture Trustee, PBR-1 Statutory Trust, acting through U.S. Bank, National Association, not in its individual capacity but solely as trustee, and U.S. Bank, National Association, as

Government Securities Collateral Agent and as Government Securities Intermediary

See Exhibit 61, Amended and Restated Government Securities Pledge Agreement (PBR-2) dated as of _____, 2008 among Big Rivers Leasing LLC, Ambac Credit Products, LLC, _____, as Indenture Trustee, PBR-2 Statutory Trust, acting through U.S. Bank, National Association, not in its individual capacity but solely as trustee, and U.S. Bank, National Association, as Government Securities Collateral Agent and as Government Securities Intermediary

See Exhibit 61, Amended and Restated Government Securities Pledge Agreement (PBR-3) dated as of _____, 2008 among Big Rivers Leasing LLC, Ambac Credit Products, LLC, _____, as Indenture Trustee, PBR-3 Statutory Trust, acting through U.S. Bank, National Association, not in its individual capacity but solely as trustee, and U.S. Bank, National Association, as Government Securities Collateral Agent and as Government Securities Intermediary

Exhibit 62, Partial Termination of Funding Agreement Pledge Agreement (PBR-1) dated as of _____, 2008, by and among Big Rivers Leasing LLC, The United States of America, acting through the Administrator of the Rural Utilities Service, National Rural Utilities Cooperative Finance Corporation, PBR-1 Statutory Trust, PBR-2 Statutory Trust, PBR-3 Statutory Trust, Ambac Credit Products, LLC and Ambac Assurance Corporation

See Exhibit 62, Partial Termination of Funding Agreement Pledge Agreement (PBR-2) dated as of _____, 2008, by and among Big Rivers Leasing LLC, The United States of America, acting through the Administrator of the Rural Utilities Service, National Rural Utilities Cooperative Finance Corporation, PBR-1 Statutory Trust, PBR-2 Statutory Trust, PBR-3 Statutory Trust, Ambac Credit Products, LLC and Ambac Assurance Corporation

See Exhibit 62, Partial Termination of Funding Agreement Pledge Agreement (PBR-3) dated as of _____, 2008, by and among Big Rivers Leasing LLC, The United States of America, acting through the Administrator of the Rural Utilities Service, National Rural Utilities Cooperative Finance Corporation, PBR-1 Statutory Trust, PBR-2 Statutory Trust, PBR-3 Statutory Trust, Ambac Credit Products, LLC and Ambac Assurance Corporation

Exhibit 63, Partial Termination of Payment Agreement Pledge Agreement (PBR-1) dated _____, 2008, among Big Rivers Leasing LLC; The United States of America, acting through the Administrator of the Rural Utilities Service; National Rural Utilities Cooperative Finance Corporation; Ambac Assurance

Corporation; PBR-1 Statutory Trust; PBR-2 Statutory Trust; PBR-3 Statutory Trust; and Ambac Credit Products, LLC

See Exhibit 63, Partial Termination of Payment Agreement Pledge Agreement (PBR-2) dated _____, 2008, among Big Rivers Leasing LLC; The United States of America, acting through the Administrator of the Rural Utilities Service; National Rural Utilities Cooperative Finance Corporation; Ambac Assurance Corporation; PBR-1 Statutory Trust; PBR-2 Statutory Trust; PBR-3 Statutory Trust; and Ambac Credit Products, LLC

See Exhibit 63, Partial Termination of Payment Agreement Pledge Agreement (PBR-3) dated _____, 2008, among Big Rivers Leasing LLC; The United States of America, acting through the Administrator of the Rural Utilities Service; National Rural Utilities Cooperative Finance Corporation; Ambac Assurance Corporation; PBR-1 Statutory Trust; PBR-2 Statutory Trust; PBR-3 Statutory Trust; and Ambac Credit Products, LLC

Exhibit 64, Partial Termination of Government Securities Pledge Agreement (PBR-1) dated as of _____, 2008, by and among Big Rivers Leasing, LLC, The United States of America acting through the Administrator of the Rural Utilities Service, National Rural Utilities Cooperative Finance Corporation, PBR-1 Statutory Trust, PBR-2 Statutory Trust, PBR-3 Statutory Trust, Ambac Credit Products, LLC and Ambac Assurance Corporation

See Exhibit 64, Partial Termination of Government Securities Pledge Agreement (PBR-2) dated as of _____, 2008, by and among Big Rivers Leasing, LLC, The United States of America acting through the Administrator of the Rural Utilities Service, National Rural Utilities Cooperative Finance Corporation, PBR-1 Statutory Trust, PBR-2 Statutory Trust, PBR-3 Statutory Trust, Ambac Credit Products, LLC and Ambac Assurance Corporation

See Exhibit 64, Partial Termination of Government Securities Pledge Agreement (PBR-3) dated as of _____, 2008, by and among Big Rivers Leasing, LLC, The United States of America acting through the Administrator of the Rural Utilities Service, National Rural Utilities Cooperative Finance Corporation, PBR-1 Statutory Trust, PBR-2 Statutory Trust, PBR-3 Statutory Trust, Ambac Credit Products, LLC and Ambac Assurance Corporation

Exhibit 65, 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

Exhibit 66, Letter Agreement dated as of _____, 2008, among Big Rivers Electric Corporation, Ambac Assurance Corporation and Ambac Credit Products, LLC

Exhibit 67, Letter Agreement dated as of _____, 2008, between Big Rivers Electric Corporation and Bank of America Leasing Corporation

Exhibit 68, 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; (e) Dexia Credit Local, New York Branch; (f) U.S. Bank Trust National Association, as trustee under the Trust Indenture dated as of August 1, 2001 (g) PBR-1 Statutory Trust; (h) PBR-2 Statutory Trust; (i) PBR-3 Statutory Trust; (j) PBR-1 OP Statutory Trust; (k) PBR-2 OP Statutory Trust; (l) PBR-3 OP Statutory Trust; (m) Bluegrass Leasing; (n) Bank of America Leasing Corporation; (o) AME Investments, LLC; (p) CoBank, ACB; (q) AME Asset Funding, LLC; and (r) Ambac Credit Products, LLC

Exhibit 69, 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

See Exhibit 69, 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

See Exhibit 69, 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

Exhibit 70, 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

See Exhibit 70, 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

See Exhibit 70, 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

Exhibit 71, First Amendment to ISDA Master Agreement (PBR-1) dated as of _____, 2008, between Ambac Credit Products, LLC, and PBR-1 Statutory Trust

See Exhibit 71, First Amendment to ISDA Master Agreement (PBR-2) dated as of _____, 2008, between Ambac Credit Products, LLC, and PBR-2 Statutory Trust

See Exhibit 71, First Amendment to ISDA Master Agreement (PBR-3) dated as of _____, 2008, between Ambac Credit Products, LLC, and PBR-3 Statutory Trust

Exhibit 72, Amended and Consolidated Loan Contract Dated as of _____, 2008, between Big Rivers Electric Corporation and United States of America

Exhibit 73, RUS 2008 Promissory Note, Series A, dated as of _____, 2008, between Big Rivers Electric Corporation and United States of America

Exhibit 74, RUS 2008 Promissory Note, Series B, dated as of _____, 2008, between Big Rivers Electric Corporation and United States of America

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

2 **CASE NO. 2007-00455**

3 **REBUTTAL TESTIMONY OF**

4 **MICHAEL H. CORE**

5
6 **Q. Please state your name and business address.**

7
8 **A. My name is Michael H. Core. My business address is 201 Third Street, P.O. Box**
9 **24, Henderson, Kentucky 42419-0024.**

10
11 **Q. Are you the same Michael H. Core who provided direct testimony in this**
12 **proceeding?**

13
14 **A. Yes.**

15
16 **Q. What is the purpose of this rebuttal testimony?**

17
18 **A. I am testifying on behalf of Big Rivers Electric Corporation (“Big Rivers”) in**
19 **order to address certain issues and matters raised in the Direct Testimony of Mr.**
20 **David Brevitz on behalf of the Kentucky Attorney General filed in these**
21 **proceedings on April 3, 2008. I address each point separately below.**

1 I. STANDARD OF REVIEW

2
3 **Q. Mr. Brevitz states that the applicable standard of review is that set out in**
4 **KRS 278.300(3). In your opinion is this the applicable standard?**

5
6 **A.** While I am not a lawyer, I do agree that this is the applicable standard with
7 respect to the Commission’s review of the evidences of indebtedness Big Rivers
8 proposes to issue.

9
10 **Q. Does Mr. Brevitz correctly apply this standard to this case on page 4 of his**
11 **testimony?**

12
13 **A.** Again, while I am not a lawyer, my reading of KRS 278.300(3) leads me to
14 conclude that Mr. Brevitz misstates this standard in his summary of it on page 4
15 of his direct testimony. Specifically, he errs in two significant respects. First, he
16 mischaracterizes the standard when he suggests that “[t]he Commission must find
17 the proposed issue to be necessary for the proper performance by the utility of its
18 service to the public.”¹ I read the plain language of KRS 278.300(3) as stating
19 that the Commission must find the proposed issue or assumption to be “necessary
20 *or appropriate for or consistent with* the proper performance by the utility of its
21 service to the public”² Thus, a proposed issue need not be *necessary* for the
22 proper performance of service to the public so long as it is *appropriate for or*

¹ Direct Testimony of David Brevitz, page 4, lines 5-6.

² KRS 278.300(3) (emphasis added).

1 *consistent with* the proper performance of that service to the public. To find
2 otherwise would severely limit a utility’s ability to exercise its discretion to make
3 issuances for legitimate and reasonable purposes which may be beneficial but not
4 explicitly necessary at the time they are to be made.

5
6 Second, Mr. Brevitz again misstates the standard to the same effect when he states
7 that “[t]he Commission must find that the proposed issue is reasonably necessary
8 for the utility to perform its service to the public.”³ I read KRS 278.300(3) simply
9 to require that the proposed issue must be found to be “reasonably necessary and
10 appropriate” for the utility’s asserted “purposes and uses of the proposed issue
11 and the proceeds thereof” In other words, the Commission needs to
12 determine that the issue is reasonably tailored for the uses to which it will be put.
13 Mr. Brevitz interprets the reference to “for such purpose” in the last clause of
14 KRS 278.300(3) as applying to the preceding clause’s reference to “performance
15 by the utility of its service to the public,” but that would simply restate the
16 preceding clause.

17

18 **II. CONSENT FROM THE CITY OF HENDERSON**

19

20 **Q. Do you agree with Mr. Brevitz’s assertion that Applicants’ failure to obtain**
21 **an approval or release from Henderson Municipal Power & Light**
22 **(“HMP&L”) renders this Application incomplete?**

23

³ Direct Testimony of David Brevitz, page 4, lines 9-10.

1 A. I do not.

2

3 **Q. Has an agreement with HMP&L been reached?**

4

5 A. No it has not. An agreement with HMP&L is a condition to closing of the
6 transaction.⁴ The Commission can make obtaining the consent of HMP&L a
7 condition of its approval.

8

9 **Q. What if amendments to the Station Two Agreements are necessary to
10 memorialize any agreement with HMP&L?**

11

12 A. In that case, Big Rivers will request approval for amendments to any documents
13 that require Commission approval -- if and when any such amendments are
14 executed. An order approving such amendments would be entered at least 33
15 days before the closing of the Unwind Transaction.

16

17 **Q. What if no amendments to the Station Two Agreements are required in
18 obtaining HMP&L's consent to the Unwind Transaction?**

19

20 A. In the event that no amendments to the Station Two Agreements are required in
21 obtaining HMP&L's consent to the Unwind Transaction, Big Rivers requests that
22 the Commission authorize Big Rivers to consent to the termination of the Station

⁴ See Transaction Termination Agreement, section 10.3(o).

1 Two Agreement as of the closing of the Unwind Transaction so long as the terms
2 of the termination have no material impact on the Unwind Transaction Model.

3
4 **Q. What is the status of the negotiations with HMP&L?**

5
6 **A.** Big Rivers made a proposal to HMP&L that Big Rivers thought would satisfy
7 HMP&L's concerns, but HMP&L rejected that proposal. Big Rivers is still
8 exploring resolution of the concerns of HMP&L.

9
10 **III. COMPLETION OF GENERATION DUE DILIGENCE**

11
12 **Q. Is Mr. Brevitz correct in asserting that Big Rivers' Application is incomplete**
13 **because Big Rivers has not completed and provided the Commission with a**
14 **generation due diligence report on the generating facilities?**

15
16 **A** He is not. No such report is necessary or contemplated in the form assumed by
17 Mr. Brevitz. Again, Mr. Brevitz appears to be conflating conditions to closing
18 into Commission approval requirements. Under the Unwind Transaction
19 documents, Big Rivers bargained for and obtained a number of conditions to
20 closing relating to the status of the generating facilities.⁵ These were for the
21 protection of Big Rivers. But completion of a separate "due diligence report" and

⁵ Section 10.3 of the Transaction Termination Agreement sets forth specific closing conditions, of which a number concern the generating assets. These closing conditions are discussed in part in Big Rivers' Response to the Attorney General's Supplemental Request for Information to Joint Applicants, Item 88, page 1.

1 submission of that report to the Commission was not contemplated by the parties,
2 and is not a component of the Commission's legal standard for analysis of this
3 transaction.

4

5 **Q. Does Big Rivers intend to prepare a single comprehensive due diligence**
6 **report on the generating facilities?**

7

8 **A.** Not in advance of closing, and not in the form Mr. Brevitz is apparently
9 suggesting. Big Rivers already has a process in place under which it has been and
10 is assessing the condition of the generating facilities that are to be returned to its
11 control and operation after the date of closing.⁶ These efforts are necessary in
12 order for Big Rivers to determine that its conditions to closing relating to the
13 facilities are satisfied.⁷ And Big Rivers has a variety of processes underway to
14 ensure that each of the closing conditions set forth in the Termination Agreement
15 relating to the generating facilities will be met. But those processes do not
16 contemplate creation of a single generation due diligence report of the kind
17 discussed by Mr. Brevitz.⁸ However, Big Rivers is willing to consolidate the
18 results of these processes into a memorandum on closing conditions compliance,
19 which can be provided to the Commission and interested parties shortly after the
20 closing, should the Commission desire such a memorandum. This memorandum

⁶ See Big Rivers Response to Attorney General's Supplemental Request for Information to Joint Applicants, Item 88, page 1.

⁷ See Big Rivers Response to Attorney General's Initial Request for Information to Joint Applicants, Item 109, page 1 & Item 110, page 1.

⁸ See Big Rivers Response to Attorney General's Supplemental Request for Information to Joint Applicants, Item 88, page 1, lines 23-24.

1 factually would recount Big Rivers' efforts with respect to each closing condition,
2 and would describe the disposition of each condition. By this means, Big Rivers'
3 closing condition evaluation of its generating units would be available to the
4 Commission and all parties.

5
6 **Q. Would it be practical for Big Rivers to complete and submit for Commission**
7 **review a single generation due diligence report now prior to the hearing?**

8
9 **A.** No, it would not be practical. To begin with, this is not a situation in which an
10 unaffiliated third-party is acquiring generating facility assets in a vacuum. These
11 units formerly were subject to Big Rivers' operation and control from their
12 construction through 1998; Big Rivers thus already is quite familiar with issues
13 surrounding their operation and maintenance. Moreover, Big Rivers has remained
14 the owner of these assets and has monitored the condition of these units over the
15 past ten years to remain apprised regarding the manner of their operation by
16 WKEC. The due diligence that will occur in the final three months before closing
17 is the culmination of a rather intense due diligence process provided for in
18 connection with the closing conditions contained in Section 10.3 of the
19 Termination Agreement, Application Exhibit 3, pages 61-69.

20
21 **IV. SMELTER ISSUES**
22

1 **Q. Mr. Brevitz appears to suggest that Big Rivers made a mistake in permitting**
2 **the Smelters full rights to appear before the Commission to contest Big**
3 **Rivers' future rates.⁹ Do you believe it was appropriate to preserve the**
4 **Smelters' ability to protect their interests before the Commission?**

5
6 **A. Yes I do. Under the terms of our agreements with the Smelters, they have the**
7 **same rights as any other retail customers on the system to appear before the**
8 **Commission to protect their rights. We did not propose to restrict the free**
9 **exercise of those rights. At bottom, Big Rivers will have an obligation to present**
10 **and defend legitimate cost-based rates in future rate cases, and Big Rivers accepts**
11 **this responsibility with full knowledge that others may question the**
12 **appropriateness of those costs.**

13
14 **Q. Do you agree with Mr. Brevitz's suggestion that the Smelters pressured Big**
15 **Rivers to reduce depreciation rates, thereby shifting plant recovery to**
16 **periods after the Smelters may have terminated their service from the**
17 **Member Distribution Cooperatives and Big Rivers?¹⁰**

18
19 **A. Big Rivers, its Members, and the Smelters agreed as part of the negotiation of the**
20 **Unwind Transaction that the depreciation rates adopted would have a significant**
21 **effect on the economics of the transaction for each party. As part of these**
22 **negotiations, Big Rivers agreed through 2016 that it would not affirmatively seek**

⁹ Direct Testimony of David Brevitz, page 14, lines 14-17; page 43, lines 7-9.

¹⁰ Direct Testimony of David Brevitz, page 29, lines 1-18.

1 an increase in depreciation rates beyond those depreciation rates agreed by the
2 parties prior to finalization of the Financial Model.¹¹ Big Rivers incorporated a
3 number of depreciation assumptions in earlier drafts of the Financial Model over
4 the course of the negotiation of the Unwind Transaction, and while these
5 negotiated depreciation rates in the filed Financial Model were lower than those
6 used at certain other times, as referenced in the December 2007 e-mail from Mr.
7 Gaines cited by Mr. Brevitz,¹² they nevertheless were originally proposed for use
8 by Big Rivers.

9
10 Importantly, Big Rivers was careful to include specific exceptions to the covenant
11 to make sure its depreciation rates were able to change if necessary. With
12 depreciation rates, there is always a tension between shorter recovery periods and
13 the desire of all customers for lower rates. On balance, Big Rivers believes the
14 depreciation rates adopted are reasonable, within a range of acceptable
15 alternatives, and constitute an increase in depreciation rates over the status quo
16

17 V. RECOMMENDATIONS/CONDITIONS

18
19 **Q. Mr. Brevitz incorporates a number of requested conditions in his**
20 **recommendations regarding this transaction. Could you comment generally**
21 **regarding these conditions?**
22

¹¹ See Big Rivers Response to Commission Staff First Data Request, Item 19.

¹² Direct Testimony of David Brevitz, page 29, lines 7-13.

1 A. Mr. Brevitz recommends a whole host of conditions be imposed on Big Rivers,
2 many of which would require Big Rivers to make numerous reports and/or notices
3 to the Attorney General and/or the Commission. Although I discuss each of these
4 conditions below in greater depth, I believe there are certain common defects
5 running throughout them. First, Mr. Brevitz is unclear as to whether he intends
6 these reporting and notice requirements to be pre-closing or post-closing
7 requirements. Some of these conditions could make sense from a pre-closing
8 standpoint, but are objectionable if extended post-closing. Second, a number of
9 Mr. Brevitz's proposed conditions appear to replicate already existing legal
10 requirements. There is simply no reason to establish parallel notice and reporting
11 conditions in those instances. Third, many of Mr. Brevitz's conditions go to the
12 very heart of Big Rivers' independent operation and business judgment such as to
13 vitiate that independence. Big Rivers does not believe the Attorney General and
14 the Commission should micromanage Big Rivers' daily operations to the extent
15 that these conditions would require.

16

17 **Q. Mr. Brevitz recommends that the Commission require that unfavorable**
18 **changes to base case results produced by pending unresolved matters be**
19 **funded by E.ON and/or the Smelters. Does Big Rivers support this**
20 **recommendation?**

21

22 A. No. This transaction has been delicately crafted to balance all parties' interests.
23 If Mr. Brevitz's recommendation were to be followed, efforts by the Commission

1 to shift responsibility for certain costs in a non-consensual fashion could lead to
2 the termination of the deal. Further, I am unsure what source of authority would
3 allow the Commission to enter such an order. As Big Rivers has noted earlier, in
4 the event that there are changes to the contracts with HMP&L or in the contracts
5 with the Smelters, Big Rivers will need to independently file those agreements
6 with the Commission, at which time the Commission can consider those matters
7 based on the accommodations reached by the parties. Moreover, Mr. Brevitz's
8 reliance on the underlying model would put the cart before the horse; the model is
9 to serve as evidence of the reasonableness of the contracts encompassing the
10 Unwind Transaction. It was never the intent of the parties for the model to serve
11 as the ultimate terms of the transaction.

12

13 **Q. Mr. Brevitz recommends that Big Rivers not be permitted to waive any**
14 **conditions to closing without Commission approval. Would this be an**
15 **appropriate condition?**

16

17 **A.** Big Rivers does not support this proposed condition. Big Rivers seeks approval
18 of the Termination Agreement and other agreements that give Big Rivers the right
19 to exercise those closing conditions or not. The Commission must be satisfied
20 that the applicable party should be permitted to employ its own independent
21 business judgment whether or not to exercise the right not to close if a condition
22 is not satisfied. Moreover, there are numerous conditions to closing and a wide
23 variety of circumstances in which individual conditions to closing may not be

1 satisfied. In most situations, final satisfaction of conditions to closing are not
2 examined until the date of closing, and the party holding the right to exercise that
3 condition as a bar to closing must take all relevant factors into consideration at
4 that time. Often a condition to closing can be waived and economically satisfied
5 by the counterparty to reflect the situation at that time. Requiring a Commission
6 approval for each and every condition to closing before Big Rivers can elect to
7 waive any one of them would not be practicable, and indeed would make closing
8 impossible to achieve. There simply would not be time to obtain Commission
9 approval on the date of closing – which is when such issues normally arise.

10
11 **Q. Mr. Brevitz recommends that Big Rivers provide a final due diligence report**
12 **on the generation assets reconciling the results of that report with the**
13 **existing production work plan and a corresponding revised run of the**
14 **financial model. Does Big Rivers believe this is practical?**

15
16 **A.** Big Rivers believes this is neither practical nor reasonable. Big Rivers believes
17 that the individual components of its Production Work Plan should not be subject
18 to ongoing review and micromanagement by the Commission. Nor does Big
19 Rivers believe that the Financial Model should be used for purposes other than
20 that for which it was originally designed: providing a realistic estimate of the
21 financial effect of this transaction on Big Rivers' operations. However, Big
22 Rivers has no objection to providing the Commission with a post-closing
23 memorandum describing the disposition of the various conditions to closing. By

1 this means the Commission and all parties will become aware of the factual
2 disposition of each condition. Big Rivers already has a process in place to ensure
3 that the factual analyses required by each condition will be met, and
4 documentation of that process after the date of closing should not create an undue
5 burden on Big Rivers' management.

6
7 **Q. Do you similarly object to Mr. Brevitz's proposal to make mandatory Big
8 Rivers' proposed comprehensive risk management plan?**

9
10 **A.** I do. Big Rivers seeks permission in this case to resume independent
11 management of its assets. Making the risk management plan Big Rivers already
12 has proposed to adopt mandatory and subject to ongoing Commission review is
13 not consistent with independent operation of these assets. Similarly, requiring
14 Big Rivers to file comprehensive reports on the operation of its risk management
15 prior to any proposal to increase rates constitutes an overly burdensome amount
16 of oversight over Big Rivers' operations. Any request to increase rates will stand
17 or fall on its own merits.

18
19 **Q. Is Mr. Brevitz's proposal to make available to the Commission all minutes
20 and documents from Coordinating Committee meetings practical?**

21
22 **A.** I do not think it would be. These meetings are supposed to serve as a
23 freewheeling forum for the exchange of information between the Smelters, the

1 Members and Big Rivers. If the meetings and documents are discoverable, I
2 believe there would be a chilling effect on the conduct and operation of those
3 meetings.

4

5 **Q. Mr. Brevitz further recommends that Big Rivers report on the nature of, and**
6 **expected cost of compliance with, any changed environmental regulations.¹³**
7 **Do you endorse this approach?**

8

9 **A.** I am somewhat at a loss in trying to understand what added benefit would result
10 from this recommendation. Big Rivers already will have on file an environmental
11 compliance plan when changes in environmental regulations occur. If Big Rivers
12 needs to change its costs to comply with new environmental regulations, Big
13 Rivers will need to amend that environmental compliance plan, triggering
14 Commission review. Moreover, in the past, when sweeping environmental
15 regulatory changes have occurred, the Commission often has initiated its own
16 proceedings into the matters. Therefore, I see no need for an independent
17 reporting requirement on this issue.

18

19 **Q. Do you also object to Mr. Brevitz's proposed condition to have the**
20 **Commission independently review Big Rivers' annual budgets through 2013?**

21

22 **A.** I strongly disagree with this proposed condition. Big Rivers' budgets will be
23 reviewed by Big Rivers, the Big Rivers Board of Directors, Big Rivers' Member

¹³ Direct Testimony of David Brevitz, page 51, lines 26-30.

1 Distribution Cooperatives, the Smelters, and, where applicable, the independent
2 auditor permitted under the terms of the Coordination Agreement. Adding the
3 Commission and another independent expert into the mix is simply not needed
4 and would be overly intrusive. Moreover, the budget is an estimate of future
5 costs. There is simply no justification for this expansion of oversight. Further, I
6 am unsure what the remedy would be if the Commission disagreed with a
7 proposed budget. Would the Commission initiate a proceeding to decide what
8 Big Rivers should and should not include in its budget? Big Rivers does not
9 believe the Commission should micromanage its independent operations in this
10 respect. To the extent Big Rivers has costs that emerge from its budget process
11 which it seeks to recover in rates, the Commission will have a chance to review
12 those costs at the appropriate time. No further examination is needed or
13 warranted.

14
15 **Q. Should the Commission accept Mr. Brevitz's recommended condition that**
16 **Big Rivers be required to employ the same level of workforce or obtain**
17 **Commission approval to depart from that level?**

18
19 **A.** Again, I cannot agree with the expansiveness of Mr. Brevitz's recommendation
20 that the Commission insert itself so closely into Big Rivers' future operations
21 Carried to an extreme, this condition would require Big Rivers to notify the
22 Commission and justify any personnel decision that results in either a downward
23 or upward adjustment in employment, regardless of the reasons. In addition to

1 excessive micromanagement of Big Rivers' operations, this requested condition
2 amounts to a requirement that Big Rivers abandon a lowest-cost approach to
3 operations. There is simply no basis for imposing this requirement.
4

5 **Q. Should Big Rivers be required to negotiate in good faith with the IBEW**
6 **during any collective bargaining agreements as Mr. Brevitz recommends?**
7

8 **A.** Federal labor law already requires Big Rivers to negotiate in good faith with the
9 designated collective bargaining representatives of its employees. This proposed
10 condition would be superfluous. Moreover, the Commission has no authority to
11 enforce labor laws.
12

13 **Q. Should Big Rivers be required to advise the Commission and the Attorney**
14 **General of material changes to its financing arrangements?**
15

16 **A.** Existing law already requires notice of this sort. The Commission must approve
17 changes in Big Rivers' financing arrangements, and Big Rivers will notify the
18 Attorney General of any such filings.
19

20 **Q. Should Big Rivers be required to advise the Commission regarding changes**
21 **to RUS criteria for the financing of new power plants and take certain**
22 **follow-up actions relating thereto?**
23

1 **A.** Big Rivers is not proposing to make any financing of new coal-fired power plants,
2 and if it ever does propose to finance a power plant, the Commission will be
3 heavily involved in reviewing that decision. Moreover, Big Rivers believes that
4 the RUS no longer is financing new coal-fired power plants under any
5 circumstances. Accordingly, Big Rivers sees no relevance in incorporating this
6 condition as part of approval of this transaction.

7
8 **Q.** **Should Big Rivers be required to notify the Commission of any changes to**
9 **Smelter contracts?**

10
11 **A.** Big Rivers serves the Smelters under special contracts with its Member Kenergy
12 that are the equivalent of tariffs. Any changes to these contracts already are
13 required by law to be filed with and approved by the Commission. There is thus
14 no reason to incorporate this condition.

15
16 **Q.** **Should Big Rivers be required to notify the Commission of any changes to**
17 **contracts with HMP&L?**

18
19 **A.** Big Rivers' agreements with HMP&L already are subject to the Commission's
20 jurisdiction and approval. Any changes to these agreements already are required
21 to be filed with the Commission. There is thus no reason to incorporate this
22 condition.

23

1 **Q. Should Big Rivers be required to notify the Commission of material changes**
2 **to its labor agreements?**

3
4 **A.** I do not believe this requirement is warranted. The Commission has no
5 jurisdiction to hear issues regarding collective bargaining agreements. The
6 financial effects of a labor agreement are part of a normal rate case inquiry.

7
8 **Q. Is Mr. Brevitz similarly mistaken in recommending that Big Rivers be**
9 **required to advise the Commission and the Attorney General of any material**
10 **events that in any way could impact Big Rivers' ability to wheel excess power**
11 **to other markets?**

12
13 **A.** Yes, he is. It is highly impracticable, if not impossible, for Big Rivers to comply
14 with this broad reporting requirement. For example, the availability of
15 transmission on Big Rivers' transmission system and those of third-party utilities'
16 systems varies from hour to hour and minute by minute depending on a host of
17 variables. Big Rivers' ability to wheel excess power will depend on the
18 availability of transmission to be reserved. There is simply no way to advise the
19 Commission of all of these changes.

20
21 **Q. Do you also disagree with Mr. Brevitz's proposal to require Big Rivers to**
22 **advise the Commission of any material changes in its generating units or**
23 **their operation not included in Big Rivers' Production Work Plan?**

1

2 **A.** Yes. Again, this condition would be unduly burdensome and would present the
3 Commission with information with no clear posture in which to act. There is no
4 justification for requiring Big Rivers to supply this low a granularity of detail to
5 the Commission regarding the operation of the generating units.

6


7 **Q. Does that conclude your testimony?**

8

9 **A.** Yes

VERIFICATION

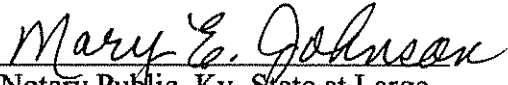
I verify, state, and affirm that the foregoing testimony is true and correct to the best of my knowledge and belief.



Michael H. Core

COMMONWEALTH OF KENTUCKY)
COUNTY OF HENDERSON)

Subscribed and sworn to before me by Michael H. Core on this the 23rd day of April, 2008.



Notary Public, Ky, State at Large
My Commission Expires: 7/29/11