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July 25, 2013

VIA FEDERAL EXPRESS

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

Re: In the Matter of Application of Big Rivers Electric Corporation for a General Adjustment in Rates; Case No. 2012-00535.

Dear Mr. Derouen:

Enclosed is one (1) original and ten (10) copies of Big Rivers Electric Corporation's Post-Hearing Brief in the above-referenced matter.

Thank you, and please return a file-stamped copy in the enclosed, postage paid envelope.

Sincerely,

Edward T. Depp

ETD/lb
Enclosures

cc: Mark A. Bailey
Billie J. Richert

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF BIG RIVERS)
ELECTRIC CORPORATION FOR A) Case No. 2012-00535
GENERAL ADJUSTMENT IN RATES)
)

POST-HEARING BRIEF OF
BIG RIVERS ELECTRIC CORPORATION

July 26, 2013

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1 COMMONWEALTH OF KENTUCKY
2
3 BEFORE THE PUBLIC SERVICE COMMISSION
4

5 In the Matter of:
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8 APPLICATION OF BIG RIVERS)
9 ELECTRIC CORPORATION FOR A) Case No. 2012-00535
10 GENERAL ADJUSTMENT IN RATES)
11)
12
13

14 POST-HEARING BRIEF OF BIG RIVERS ELECTRIC CORPORATION

15 Comes Big Rivers Electric Corporation (“Big Rivers”), by counsel, and for its
16 post-hearing brief before the Kentucky Public Service Commission of the
17 Commonwealth of Kentucky (the “Commission”) states as follows:

18 I. Introduction.

19 Big Rivers filed this rate application principally to recover some, but not all,
20 of the revenue loss it will suffer because Century Aluminum of Kentucky General
21 Partnership (“Century”) is unilaterally terminating its retail electric service
22 agreement for its Hawesville, Kentucky aluminum smelter (the “Hawesville
23 Smelter”) on August 20, 2013.¹ This revenue loss cannot currently be recovered in
24 its entirety by selling the electricity currently used by Century into the wholesale
25 market because wholesale market prices of electricity are lower than the rate
26 Century pays, and much lower than anyone anticipated when the “Unwind

¹ See Section V.

1 Transaction”—by which Big Rivers took back operational responsibility of its
2 generating fleet—closed in July of 2009.²

3 Big Rivers, the Commission, and every party to the Unwind Transaction case
4 carefully considered the risks inherent in Big Rivers resuming its role as wholesale
5 power supplier³ for the two aluminum smelters⁴ on the Big Rivers system. The
6 Commission and the parties recognized that the Smelters’ continued operation was
7 important to the economy of Western Kentucky.⁵ In the interest of preserving the
8 economic benefits of the Smelters’ continued operation, most parties supported the
9 Unwind Transaction and the new Smelter contracts, and the Commission approved
10 them.⁶

11 During the six years of negotiations and planning that preceded the Unwind
12 Transaction closing, Big Rivers’ management team diligently focused on mitigating
13 the risk of serving the Smelters.⁷ It obtained an important amendment to Kentucky
14 statutes. It constructed transmission line upgrades and additions to enable it to sell
15 the power that would become available if the Smelters terminated their contracts.
16 In addition, Big Rivers established a \$35 million “Transition Reserve” as part of the

² See Sections IV.C, V-VII. The Unwind Transaction was approved by the Commission. *See generally In the Matter of the Applications of Big Rivers Elec. Corp. for: (1) Approval of Wholesale Tariff Additions for Big Rivers Elec. Corp., (2) Approval of Transactions, (3) Approval to Issue Evidences of Indebtedness, and (4) 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, Order, P.S.C. Case No. 2007-00455 (March 6, 2009) (the “Unwind Order”).*

³ See Section IV.B.

⁴ The two aluminum smelters are Century’s Hawesville Smelter and a smelter in Sebree, Kentucky (the “Sebree Smelter”) that Century recently purchased from Alcan Primary Products Corporation (“Alcan”) (the Hawesville Smelter and the Sebree Smelter are referred to herein individually as a “Smelter” and collectively as the “Smelters”).

⁵ See Section IV.B.

⁶ See Section IV.B.

⁷ See Section IV.B.

1 Unwind Transaction to provide liquidity as a hedge against the revenue loss that
2 could occur if one or both Smelters ceased operations. And, despite the Smelter load
3 concentration, Big Rivers obtained investment-grade credit ratings from the three
4 primary ratings agencies.⁸

5 But within a year after the Unwind Transaction closing, and despite pricing
6 power to the Smelters below the levels projected during the Unwind Transaction,
7 the Smelters began pressing for rate and other economic concessions that they said
8 were necessary for their operations to survive.⁹ As a result, Big Rivers accelerated
9 planning for how Big Rivers would respond if the Smelters did not survive. This
10 planning resulted in a formal plan—the Load Concentration Analysis and
11 Mitigation Plan¹⁰ (the “Mitigation Plan”)—for addressing the loss of one or both
12 Smelters.¹¹

13 Even in this caustic atmosphere of uncertainty and depressed wholesale
14 market prices, Big Rivers’ management team maintained the reliability of its
15 generating units (even while strategically deferring maintenance), cut costs of
16 operations, joined and integrated into a regional transmission organization,

⁸ See Section IV.B.

⁹ See Section IV.C.D.

¹⁰ The Mitigation Plan was submitted under petition for confidential treatment to the Commission in Big Rivers' 2012 Environmental Compliance Plan case. See *In the Matter of: Application of Big Rivers Electric Corporation for Approval of its 2012 Environmental Compliance Plan, for Approval of its Amended Environmental Cost Recovery Surcharge Tariff, for Certificates of Public Convenience and Necessity, and for Authority to Establish a Regulatory Account* (“2012 ECP Case”), Big Rivers’ Response to Item 44(b) of KIUC's Second Request for Information, P.S.C. Case No. 2012-00063 (June 22, 2012).

¹¹ See Section IV.C-E.

1 refinanced pollution control bonds, refinanced long-term debt at lower interest
2 rates, and maintained its three investment-grade credit ratings.¹²

3 Unfortunately, the “worst-case scenario” envisioned in the Unwind
4 Transaction came to pass. On August 20, 2012, Century served notice of
5 termination of its retail service agreement.¹³ Alcan followed suit on January 31,
6 2013 (after this proceeding was underway).¹⁴ Big Rivers’ management cannot
7 control the Smelters’ decisions to terminate their contracts, or energy prices in the
8 wholesale market, but Big Rivers’ management can and did prudently plan for this
9 day.

10 Consequently, upon Century’s notice of termination, Big Rivers immediately
11 began implementing its Mitigation Plan to increase revenues and decrease costs.¹⁵
12 It filed this rate case, seeking only enough revenue to ensure that it can continue to
13 operate after Century’s effective termination on August 20, 2013.¹⁶ It is reducing
14 its costs of production by planning to idle a power plant.¹⁷ It is pursuing power
15 sales opportunities, especially in the long-term market, and it has responded to
16 many requests for power sales proposals from utilities in and out of Kentucky.¹⁸ It
17 has initiated discussions with multiple entities exploring the possible sale of power

¹² See Section IV.C.

¹³ See Section IV.F.

¹⁴ See Section IV.H.2.

¹⁵ See Section IV.F.

¹⁶ See Section V.

¹⁷ See Sections VI, VIII, XI.D.

¹⁸ See Sections VI, XVII.E.

1 plants.¹⁹ It is, in short, pursuing every conceivable practical opportunity for
2 mitigating the impact of Century's contract termination.²⁰

3 Unfortunately, Big Rivers' efforts have been adversely affected by the climate
4 of uncertainty precipitated by the Smelters' termination notices and the proposals
5 in this case suggesting that Big Rivers seek concessions from its creditors. Big
6 Rivers' management team developed its Mitigation Plan over many years, and the
7 plan is reasonably certain to succeed.²¹ However, until the General Assembly
8 adjourned at the end of March of 2013, Big Rivers was limited in its ability to
9 commit to any mitigation opportunities because it was at risk of being forced to
10 operate all of its generation assets to serve the Smelters from its system at market-
11 based rates. Big Rivers needs its proposed rates to go into effect on August 20, 2013
12 in order to have a reasonable opportunity to continue implementing that plan.²²

13 This uncertainty has already directly impacted Big Rivers, its member
14 systems, Jackson Purchase Energy Corporation, Kenergy Corp. ("Kenergy"), and
15 Meade County Rural Electric Cooperative Corporation (collectively, the "Members"),
16 and their member-customers. Following the Alcan notice of termination, Big Rivers
17 promptly lost its investment grade credit ratings. Big Rivers' attempt to further
18 refinance its pollution control bonds became fruitless. Big Rivers also could not
19 complete negotiations to amend its \$50,000,000 revolving credit agreement with
20 CoBank ACB ("CoBank") so that the Century contract termination would not

¹⁹ See Section VI.

²⁰ See Section VI.

²¹ See Section VI.

²² See Section V-VI.

1 constitute an event of default and, as a result, Big Rivers was forced to terminate
2 that credit agreement.

3 Yet, despite this adversity, Big Rivers' management team negotiated deals to
4 benefit its Members and help offset the impact of Century's contract termination.²³
5 Big Rivers paid off the pollution control bonds with cash and obtained Commission
6 approval to repurpose the Transition Reserve and other funds to replace that cash.²⁴
7 It obtained the agreement of National Rural Utilities Cooperative Finance
8 Corporation ("CFC") to amend its revolving credit agreement to eliminate the
9 Century termination as an event of default, and to extend the term of the
10 agreement, although on more restrictive terms than the prior agreement.²⁵ CFC
11 also tentatively committed to a bridge loan of \$60 million for environmental
12 compliance projects, subject to an order in this case that is acceptable to CFC.²⁶
13 And in the meantime, Big Rivers' management, Kenergy and Century negotiated
14 and filed for the Commission's approval²⁷ a series of agreements that will enable
15 Century's smelting operations to be served with electricity priced at market-based
16 rates.²⁸ During the month of May, Big Rivers also negotiated the arrangements
17 required for Century to acquire, and presumably continue the smelting operations
18 of, the Alcan Sebree Smelter.

²³ See Sections IV.G, VII.B.

²⁴ See Sections IV.G, XI.G.

²⁵ See Sections IV.G, VII.B.

²⁶ See Sections IV.G, VII.B.

²⁷ These agreements were filed in *In the Matter of Joint Application of Kenergy Corp. and Big Rivers Electric Corporation for Approval of Contracts and for a Declaratory Order*, Case No. 2013-00221 (the "Century Transaction Case").

²⁸ See Sections IV.H.1, X.

1 Three of the intervenors in this rate case ask the Commission to disregard
2 these positive accomplishments and deny Big Rivers' management team the
3 opportunity to manage the Smelter departures, and instead, force Big Rivers into a
4 predicament that will almost certainly lead to bankruptcy.²⁹ These intervenors
5 (Kentucky Industrial Utility Customers, Inc. ("KIUC"), Ben Taylor and the Sierra
6 Club ("Sierra Club"), and the Office of the Attorney General (the "Attorney
7 General") (collectively, the "Opposing Intervenors")) present various "options" for
8 significantly decreasing Big Rivers' revenue request³⁰ but the likely effect of each is
9 the same: bankruptcy.³¹ And these Opposing Intervenors, who demand such a high
10 degree of analytical and forecasting rigor of Big Rivers, have performed no analysis
11 of the impact of bankruptcy on Big Rivers, its Members, Big Rivers' financial
12 viability, the economic development of Kentucky, or, ultimately, the rates paid by
13 residents and businesses in Western Kentucky.³²

14 Yet, we know from history that denying rate relief sufficient for Big Rivers to
15 satisfy its loan obligations could lead to dire consequences, not just for Big Rivers
16 but also for other utilities throughout the Commonwealth.³³ The widespread
17 danger of the Opposing Intervenors' proposals cannot be overstated. In 1987, after
18 the Commission denied a rate increase proposed by Big Rivers, the Rural
19 Electrification Administration ("REA") "suspended all loan and loan guarantee

²⁹ See Section VII.A.

³⁰ See Section XVII.

³¹ See Section VII.A.

³² See Section VII.C.

³³ See Section VII.C.

1 approvals and advances on loans and loan guarantees already approved to all
2 electric and telephone borrowers in Kentucky.”³⁴ The REA indicated that “we are
3 all surprised and disappointed at this action of the Commission,” and it requested
4 the Commissioners’ presence in Washington, D.C. “to discuss this matter and
5 attempt to arrive at a satisfactory resolution assuring repayment of loans to
6 Kentucky borrowers.”³⁵ The Opposing Intervenors’ proposals are but an invitation
7 to repeat this dark moment in history. Big Rivers’ continued financial integrity is
8 in the best interests of Western Kentucky and the Commonwealth as a whole. The
9 Commission should not risk widespread damage by pursuing the Opposing
10 Intervenors’ proposals, particularly because the speculative benefits of those
11 proposals are unsupported by any evidence in the record.³⁶

12 There is also no evidence in the record to support the Opposing Intervenors’
13 uninformed hope that there might be time to extract unspecified concessions from
14 Big Rivers’ lenders between the issuance of an order materially adverse to Big
15 Rivers in this case and the time when Big Rivers would need to file bankruptcy.³⁷
16 On the contrary, the evidence in the record is that Big Rivers’ creditors are not
17 likely to agree to concessions or a coerced debt restructuring.³⁸ Even if the creditors
18 were willing to offer tens of millions of dollars of concessions per year, an adverse

³⁴ April 9, 1987 Letter from Harold V. Hunter, Administrator, Rural Electrification Association to Hon. Richard D. Heman, Jr., Chairman, Kentucky Public Service Commission (the “Embargo Letter”), a true and accurate copy of which is attached hereto as Exhibit 1 (suspending all loan guarantee approvals and advances to Kentucky utilities). This same letter was also attached to Big Rivers’ Response to Post-Hearing Request for Information Item No. 14 (July 12, 2013).

³⁵ *Id.*

³⁶ *See* Sections V-VII.

³⁷ *See* Section VII.B.

³⁸ *See* Section VII.B.

1 order in this case would launch an immediate and rapidly-cascading series of events
2 that would eliminate any reasonable opportunity for that to occur.³⁹ There would
3 simply not be enough time to even conduct such negotiations before Big Rivers was
4 forced into bankruptcy.⁴⁰

5 For many years, Big Rivers' management team has skillfully, prudently, and
6 relentlessly managed Big Rivers' affairs under difficult circumstances, and it has
7 developed and implemented a thorough and well-researched plan to respond to the
8 smelter contract terminations.⁴¹ It seeks rate support in this case to allow it an
9 opportunity to manage this latest challenge.⁴² There is no evidence in the record on
10 which the Commission can rely to find that the adoption of any Opposing Intervenor
11 position would result in rates that are fair, just, and reasonable because the
12 Opposing Intervenor have made no attempt to address the rates that would
13 ultimately result from a financially-ruinous order in this case.⁴³

14 Big Rivers' management team is vigorously pursuing a sound plan to
15 mitigate the adverse rate impact of the Smelter contract terminations over a
16 reasonable period of time.⁴⁴ Big Rivers' management team recognizes and regrets
17 the burden its rate request places on its Members in the immediate future. But it is
18 convinced, and has shown, that pursuing its Mitigation Plan—developed over the
19 course of several years and consistent with considerations arising in the Unwind

³⁹ See Section VII.B.

⁴⁰ See Section VII.B.

⁴¹ See Sections IV.A-G, VI.

⁴² See Sections V-VI.

⁴³ See Sections VII.B-C, XVII.

⁴⁴ See Sections IV.E, VI.

1 Transaction—provides more certainty and will be more advantageous than the
2 reckless alternatives advocated by the Opposing Intervenors.⁴⁵ Without the rate
3 relief requested, the resolution of this significant challenge—one that has long-term
4 implications for Big Rivers’ Members and their member-owners—will be placed in
5 the hands of outside parties with different and conflicting interests.

6 For these reasons, Big Rivers respectfully requests that the Commission
7 grant it a reasonable opportunity to implement its Mitigation Plan.

8 **II. Summary of Big Rivers’ Requests for Relief.**

9 Big Rivers requests⁴⁶ that the Commission issue an order:

- 10 1. Approving the tariff revisions and associated rate adjustments described in
11 Tabs 8 and 9 of Big Rivers’ Application, as adjusted by the revised exhibits
12 attached to the Rebuttal Testimony of Mr. John Wolfram, Big Rivers’ rate
13 consultant;⁴⁷
- 14 2. Approving Big Rivers’ 2012 depreciation study and granting authority to
15 implement the depreciated rates contained in that study on the first day of
16 the month, either coincident with or following the effective date of the new
17 tariff rates in this case as ordered by the Commission;
- 18 3. Approving the costs Big Rivers incurs in this case and granting authority to
19 establish a regulatory asset and amortize those costs over 36 months;

⁴⁵ See Sections IV.E, V-VII, XVII.

⁴⁶ See Big Rivers Electric Corporation’s Application for a General Adjustment in Rates, P.S.C. Case No. 2012-00535 (the “Application”), p.7 (Jan. 15, 2013).

⁴⁷ See Rebuttal Testimony of John Wolfram (“Wolfram Rebuttal Testimony”) (June 24, 2013) (attaching revised exhibits).

1 4. Granting authority to establish a regulatory asset and amortize certain
2 severance costs over a period of 60 months;

3 5. Denying all adjustments proposed by the Attorney General, KIUC, and
4 Sierra Club;⁴⁸ and

5 6. Denying the Attorney General's request for additional reporting and
6 monitoring requirements.⁴⁹

7 III. Legal Standard.

8 Kentucky law permits Big Rivers to “receive fair, just and reasonable rates
9 for the services rendered or to be rendered by it to any person.”⁵⁰ As Kentucky
10 courts have explained, “there is no litmus test for establishing fair, just and
11 reasonable rates, and there is no single prescribed method for accomplishing that
12 goal.”⁵¹ Rather, in order to “fairly balance the conflicting interests of the producer
13 of electricity and the consumer,”⁵² Kentucky follows the rule set forth by the U.S.
14 Supreme Court in *Federal Power Commission v. Hope Natural Gas Company*, 320
15 U.S. 591 (1944). *Hope* made clear that, “[u]nder the statutory standard of ‘just and
16 reasonable’ it is the result reached not the method employed which is controlling.”⁵³

⁴⁸ See Section XVII.

⁴⁹ See Section XVII.D

⁵⁰ KRS 278.030(1).

⁵¹ *Kentucky Indus. Util. Customers, Inc. v. Kentucky Utils. Co.*, 983 S.W.2d 493 (Ky. 1998). See also *National-Southwire Aluminum Co. v. Big Rivers Electric Corp.*, 785 S.W.2d 503 (Ky. Ct. App. 1990).

⁵² *National-Southwire*, 785 S.W.2d at 510.

⁵³ *Hope*, 320 U.S. at 602. This results-oriented approach has been reaffirmed several times. See, e.g., *Fed. Power Comm'n v. Memphis Light, Gas & Water Division*, 411 U.S. 458, 474 (1973) (“under *Hope Natural Gas* rates are ‘just and reasonable’ only if consumer interests are protected and if the financial health of the pipeline in our economic system remains strong”); *Colorado Interstate Gas Co. v. Fed. Power Comm'n*, 324 U.S. 581, 605 (1945) (adopting and applying “end result” test); *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) (ratemaker must ensure that individual components of ratemaking decision “do not together produce arbitrary or unreasonable consequences”).

1 The *Hope* doctrine gives the Commission “broad discretion in [the] factors to
2 be considered in rate-making.”⁵⁴ Contrary to the arguments advanced by many
3 ratepayers over the years, the Commission “is simply not shackled to a mechanical
4 application of the used and useful standard.”⁵⁵ Instead, the Commission may
5 consider a utility’s “history and development,” “debt retirement,” “operating cost,”
6 and need to maintain “excess capacity in order to insure continuation of adequate
7 service during periods of high demand and some potential for future growth and
8 expansion.”⁵⁶ The Commission may also consider whether the utility’s “expansion
9 investments were prudently or imprudently made,” and “whether a particular
10 utility is investor owned or a cooperative operation.”⁵⁷ This final consideration is
11 perhaps because, as explained by Mr. Mark A. Bailey, Big Rivers’ Chief Executive
12 Officer, a cooperative’s “ratepayers are [its] shareholders.”⁵⁸ Consequently, the not-
13 for-profit corporate structure of an electric cooperative reinforces its objective “to
14 safely deliver reliable wholesale electric energy at the lowest cost consistent with
15 sound business practices and prudent management of the business”⁵⁹

16 In light of the constitutional requirement for non-confiscatory rates, the *Hope*
17 Court also identified “the financial integrity of the company whose rates are being
18 regulated” as one of the major factors to be considered in ratemaking.⁶⁰ Indeed, the

⁵⁴ *National-Southwire*, 785 S.W.2d at 512-13.

⁵⁵ *National-Southwire*, 785 S.W.2d at 512.

⁵⁶ *National-Southwire*, 785 S.W.2d at 512.

⁵⁷ *National-Southwire*, 785 S.W.2d at 512.

⁵⁸ Rebuttal Testimony of Mark A. Bailey (“Bailey Rebuttal Testimony”), p. 4:7-8 (June 24, 2013).

⁵⁹ Bailey Rebuttal Testimony at p. 4:9-11. *See also* Testimony of Mark A. Bailey at Final Hearing (“Bailey Hearing Testimony”), July 1, 2013, Tr. 16:22’22”.

⁶⁰ *Hope*, 320 U.S. at 603.

1 Commission has recently argued that “[r]emaining financially viable would appear
2 to be the very purpose of having ‘fair, just, and reasonable rates.’”⁶¹ The United
3 States Supreme Court has also suggested that rates “threatening [a utility’s]
4 ‘financial integrity’” are considered to be “so unjust as to be confiscatory.”⁶²
5 Confiscatory rates are an unconstitutional taking under the Fifth Amendment.⁶³

6 In other words, a utility’s rates must provide “enough revenue not only for
7 operating expenses but also for the capital costs of the business.”⁶⁴ This substantive
8 consideration of a utility’s “financial integrity” has been repeatedly reaffirmed.⁶⁵ Its
9 roots lie in the longstanding principle that a “return should be reasonably sufficient
10 to assure confidence in the financial soundness of the utility, and should be
11 adequate, under efficient and economical management, to maintain its credit and

⁶¹ Reply Brief for the Kentucky Public Service Commission, Ky. Supreme Court Case No. 2009-SC-000134 (Dec. 15, 2009). *See PSC v. Commonwealth ex rel. Conway*, 324 S.W.3d 373 (Ky. 2010) (remanding to trial court with directions to reinstate the PSC orders at issue).

⁶² *Verizon Communs., Inc. v. Fed. Commun. Comm’n*, 535 U.S. 467, 524 (2002) (quoting *Duquesne Light Co.*, 488 U.S. at 307, 312).

⁶³ *Duquesne Light Co.*, 488 U.S. at 307-8 (“The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so ‘unjust’ as to be confiscatory.”) (citing *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 597 (1896) (A rate is too low if it is “so unjust as to destroy the value of [the] property for all the purposes for which it was acquired,” and in so doing “practically deprive[s] the owner of property without due process of law”). *See also Fed. Power Comm’n v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942) (“By long standing usage in the field of rate regulation, the ‘lowest reasonable rate’ is one which is not confiscatory in the constitutional sense.”).

⁶⁴ *Hope*, 320 U.S. at 603.

⁶⁵ *See, e.g., Permian Basin*, 390 U.S. at 792 (factfinder “must determine” if rate will allow utility to “maintain financial integrity” and “attract necessary capital”); *Jersey Central Power & Light Co. v. Fed. Energy Regulatory Comm’n* (“*Jersey Central III*”), 810 F.2d 1168, 1175 (D.C. Cir. 1987) (superseded by statute in the context of the Telecommunications Act) (*Hope* makes clear that utilities have “an interest in maintaining access to capital markets, the ability to pay dividends, and general financial integrity” that must be considered in ratemaking even if the utility “is not clearly headed for bankruptcy”). In *Jersey III*, the court distinguished a previous decision on the grounds that the party in the previous case “never alleged that its financial integrity and its ability to maintain access to capital markets depends upon the rate it was requesting. *Id.* at 1172 (distinguishing *NEPCO Municipal Rate Comm’n v. FERC*, 668 F.2d 1327 (D.C. Cir. 1981), *cert. denied sub nom. New England Power Co. v. FERC*, 457 U.S. 1117 (1982)).

1 enable it to raise the money necessary for the proper discharge of its public
2 duties.”⁶⁶ Consequently, when setting rates that are fair, just, and reasonable, the
3 Commission must ensure that the resulting rates will, among other things, “enable
4 the utility to operate successfully, to maintain its financial integrity, [and] to attract
5 capital.”⁶⁷ For the reasons stated below, the rates Big Rivers proposes in this case
6 are fair, just, and reasonable and should be approved by the Commission.

7 Finally, under the Commission’s regulations, any application for an increase
8 in rates must be supported by a “test period” that demonstrates the expenses
9 justifying the proposed rates. The regulations provide that an applicant may
10 provide either a “twelve (12) month historical test period that may include
11 adjustments for known and measurable changes” or a “fully forecasted test
12 period.”⁶⁸ As the Commission has recognized, “[b]udgeting a forecasted test period
13 is an inexact science.”⁶⁹ An applicant in a “future test-period” case therefore may
14 carry its burden by providing the Commission with at least “some assurance that
15 the expense will be incurred.”⁷⁰

⁶⁶ *Bluefield Waterworks v. Public Serv. Comm’n of W. Va.*, 262 U.S. 679 (1923).

⁶⁷ *Commonwealth ex rel Stephens v. South Central Bell Telephone Co.*, 545 S.W.2d 927, 930-31 (Ky. 1976); *National-Southwire*, 785 S.W.2d at 512.

⁶⁸ 807 KAR 5:001(16)(a)(1)-(2).

⁶⁹ *In the Matter of Application of Kentucky-American Water Co. to Increase Its Rates*, Order, P.S.C. Case No. 97-034, *32 (Sep. 30, 1997).

⁷⁰ *In the Matter of Alternative Rate Filing Adjustment for Delaplain Disposal Co.*, Order, P.S.C. Case No. 2010-00349, *19 (June 29, 2011).

1 IV. Factual Background.

2 A. Big Rivers Has a Long History With the Smelters.

3 The precarious financial condition of the aluminum smelting industry has
4 complicated Big Rivers' operations and ratemaking proceedings for decades.⁷¹

5 When the aluminum Smelters decided to locate their facilities in the certified
6 territory of Big Rivers' distribution cooperatives, the distribution cooperatives had a
7 legal obligation to provide them with retail electric service, and Big Rivers had a
8 corresponding legal obligation to acquire the capacity resources to generate the
9 necessary power.⁷²

10 To the best of Big Rivers' knowledge, Big Rivers is the only generation and
11 transmission utility in the country serving two aluminum smelters.⁷³ Aluminum
12 smelting is a highly energy-intensive industry; the cost of electricity amounts to
13 approximately one third of total production costs.⁷⁴ The Hawesville Smelter alone
14 currently accounts for approximately 40% of the internal load on Big Rivers'
15 system.⁷⁵ Aluminum is a global commodity that is sold at a price based on
16 worldwide supply and demand, and the Smelters contend they have no ability to
17 influence the price at which they sell the aluminum they produce.⁷⁶ Thus, for many

⁷¹ Bailey Rebuttal Testimony at p. 6:11-16 (describing the "unusual and often countervailing pressures" associated with "the fluctuating nature of the aluminum and wholesale electricity markets").

⁷² Rebuttal Testimony of Robert W. Berry ("Berry Rebuttal Testimony"), p. 24:18-22 (June 24, 2013).

⁷³ Bailey Rebuttal Testimony at p. 5:11-12.

⁷⁴ *In the Matter of: Application of Big Rivers for a General Adjustment in Rates* (the "2011 Rate Case"), Order, P.S.C. Case No. 2011-00036, *38 (Nov. 17, 2011) (the "2011 Rate Case Order").

⁷⁵ Direct Testimony of Mark A. Bailey, Application, Tab 63 ("Bailey Direct Testimony"), p. 8:8-10 (Jan. 15, 2013).

⁷⁶ 2011 Rate Case Order at *38.

1 years, Big Rivers has been in a unique situation in which the majority of its load is
2 concentrated in two customers that are members of the same volatile industry.⁷⁷

3 As early as 1984, the Smelters opposed Big Rivers' rate increases on the
4 grounds that such increases could force them to shut down.⁷⁸ The Commission has
5 long acknowledged the ratemaking complications triggered by "the fortunes of [Big
6 Rivers'] major customers, the aluminum companies,"⁷⁹ at one point describing a
7 recession in the aluminum industry as putting Big Rivers in a "nightmarish
8 position."⁸⁰ These complications are exacerbated by the unpredictability of the
9 aluminum market, as the Commission previously described when noting that
10 "aluminum prices took an unexpectedly deep and prolonged drop" in 1982 to 1983,
11 "returned to normal" by late 1983, then "again sharply declined in 1984."⁸¹

12 As a result of these unique circumstances, Big Rivers has worked closely with
13 the Commission and the Smelters for decades to develop a ratemaking approach
14 that permits Big Rivers sufficient revenue to remain financially viable while also
15 not forcing the Smelters out of business, thereby helping to safeguard regional
16 energy independence as well as the regional economy.

⁷⁷ See, e.g., *In the Matter of Big Rivers Elec. Corp.'s Notice of Changes in Rates and Tariffs for Wholesale Elec. Service and of a Financial Workout Plan* (the "1986 Rate Case"), P.S.C. Case No. 9613, Order, *44 (March 17, 1987) (the "9613 Order") (in which the Commission recognized Big Rivers' historical "disturbing lack of load diversity and Big Rivers' dependence upon a sluggish aluminum industry").

⁷⁸ 9613 Order at *8.

⁷⁹ 9613 Order at *36.

⁸⁰ 9613 Order at *14.

⁸¹ 9613 Order at *7-8.

1 One of the central drivers in these long-running ratemaking efforts has been
2 the Smelters' vacillating interest in alternative electric rates.⁸² In 1985, the
3 Commission began encouraging Big Rivers and the Smelters to negotiate a Smelter
4 rate based on the prevailing market price of aluminum on the theory that this
5 approach would help protect the Smelters from fluctuations in both the wholesale
6 energy market and the aluminum market.⁸³ The Commission continued
7 encouraging a market-based approach in a 1987 ratemaking order,⁸⁴ and that same
8 year approved a "workout plan" that implemented rates for the Smelters "that vary
9 with the market price of aluminum."⁸⁵ In 1990, however, one of the Smelters filed a
10 complaint seeking further insulation, asserting that because of an ongoing boom in
11 the aluminum market it was paying electric rates that were unfairly high.⁸⁶ In that
12 case, the Commission ultimately accepted a settlement that added a balancing
13 account to the rate mechanism that had the effect of reducing the Smelters' rates.⁸⁷

14 In 1998, as part of the lease of Big Rivers' generation assets to certain third
15 party companies, LG&E Energy Marketing ("LEM") agreed to provide 70% of the

⁸² Bailey Rebuttal Testimony at p. 7:7-9 ("History has shown that the smelters have both vacillated between desiring generation service from Big Rivers or the wholesale markets"), p. 7:14-16.

⁸³ *In the Matter of Big Rivers Elec. Corp.'s Notice of Changes in Its Rates for Electricity Sold to Member Cooperatives*, Order, P.S.C. Case No. 9163 (May 6, 1985). Around the same time, the Commission established a statewide electric utility docket, explaining that Big Rivers' circumstances with the smelters were "an important element" in motivating that proceeding. *See An Inquiry Into Kentucky's Present and Future Electric Needs and the Alternatives for Meeting Those Needs*, Order, Admin. Case No. 308, (Oct. 6, 1986); 9613 Order at *14.

⁸⁴ 9613 Order at *44 (ordering Big Rivers and the smelters to "negotiate a flexible rate plan that recognizes the cyclical nature of the [aluminum] industry").

⁸⁵ *In the Matter of An Investigation of Big Rivers Elec. Corp.'s Rates for Wholesale Elec. Service*, Order, P.S.C. Case No. 9885, *32 (Aug. 10, 1987).

⁸⁶ *See In the Matter of National-Southwire Alum. Co. v. Big Rivers Elec. Corp. et al.*, Complaint, P.S.C. Case No. 89-376.

⁸⁷ *See National-Southwire Alum. Co.*, Order, P.S.C. Case No. 89-376 (March 23, 1990).

1 Smelters' loads "at fixed prices in fixed quantities."⁸⁸ The other 30% were provided
2 by Kenergy from the wholesale market at market-based prices.⁸⁹ Upon the expected
3 expiration of the LEM contracts, however, the Smelters would be forced to meet
4 100% of their load requirement "by market power purchases."⁹⁰ As time passed,
5 "market power purchases [became] priced significantly higher than the Smelters'
6 contract prices," and the Smelters once again began to seek insulation from the
7 wholesale energy market even further into the future.⁹¹ This desire was one of the
8 principal drivers leading to the Unwind Transaction, discussed below, in which Big
9 Rivers, the Commission, and the Smelters worked together to provide the Smelters
10 "with a long-term supply of power priced at below market prices."⁹²

11 As evidenced by Century's recent termination of its retail electric service
12 agreement established in the Unwind Transaction, however, the Smelters' desires
13 to be insulated from the wholesale energy market did not last.

14 **B. The Unwind Transaction.**

15 In 1998, Big Rivers leased its generation assets to affiliates or subsidiaries of
16 the company that later became E.ON U.S., LLC ("E.ON"), and E.ON agreed to sell
17 fixed-priced power to Big Rivers.⁹³ In 2009, the Commission, Big Rivers, Kenergy,
18 the Smelters, and E.ON worked closely together to arrange an "Unwind

⁸⁸ Unwind Order at *6 (March 6, 2009).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at *14.

⁹² *Id.* at *15.

⁹³ *Id.* at *4-6 (March 6, 2009) (these leased assets included the power plants Big Rivers operated for Henderson Municipal Power and Light). *See also* Direct Testimony of Albert M. Yockey, Application, Tab 65 ("Yockey Direct Testimony"), p. 13:13-17 (Jan. 15, 2013).

1 Transaction” by which Big Rivers took back operational responsibility of its
2 generating fleet and E.ON contributed significant funds to Big Rivers and the
3 Smelters.⁹⁴ As noted above, another principal goal of the Unwind Transaction was
4 to insulate the Smelters from the wholesale energy market, just as the Smelters
5 desired, in order to help safeguard the economy of Western Kentucky.⁹⁵ The
6 Attorney General, KIUC, and the Smelters all participated in the proceeding to
7 review and approve the Unwind Transaction.⁹⁶

8 The Commission, like Big Rivers, reasonably anticipated that the Unwind
9 Transaction “will produce very significant benefits for Big Rivers, the Smelters, and
10 non-Smelter customers”⁹⁷ Specifically, E.ON’s financial contribution to Big
11 Rivers addressed Big Rivers’ inability to borrow money on a long-term secured
12 basis⁹⁸ by improving Big Rivers’ equity and credit rating and increasing its access to
13 capital markets.⁹⁹ In addition, Big Rivers regained control of its generating fleet,¹⁰⁰
14 a development the Commission “applaud[ed]”¹⁰¹ The Unwind Transaction also
15 established a series of special contracts (the “Smelter Agreements”) pursuant to

⁹⁴ See Unwind Order at *6-9.

⁹⁵ Big Rivers’ Response to Item 58 of Commission Staff’s First Request for Information (“PSC 1-58”) (Jan. 29, 2013) (“At the time of the Unwind, the smelters wanted to be a Big Rivers customer to avoid wholesale market prices”); Unwind Order at *14-18.

⁹⁶ Unwind Order at *2-3.

⁹⁷ *Id.* at *22.

⁹⁸ Direct Testimony of Billie J. Richert, Application, Tab 64 (“Richert Direct Testimony”), p. 26:8-11 (Jan. 15, 2013) (“The risk to Big Rivers resulting from an inability to borrow money on a long-term secured basis is one of the principal reasons Big Rivers pursued the Unwind Transaction.”).

⁹⁹ Unwind Order at *22.

¹⁰⁰ Yockey Direct Testimony at p. 13:18-19.

¹⁰¹ *In the Matter of: Application of Big Rivers for a General Adjustment in Rates*, Order, P.S.C. Case No. 2009-00040, *1-2 (Aug. 14, 2009) (in which the Commission “applauds Big Rivers’ successful efforts to regain operating control of its generating facilities”).

1 which Big Rivers and Kenergy would provide energy to the Smelters “at prices
2 below those in the market.”¹⁰²

3 The Smelter Agreements were carefully negotiated in an intensely
4 collaborative process—they were not simply rubberstamped by the stakeholders or
5 the Commission.¹⁰³ In part, that caution was motivated by the unavoidable risks
6 that accompanied Big Rivers’ provision of service to the Smelters, which were
7 known to be financially vulnerable to market forces in their own industry.¹⁰⁴ These
8 risks were not lost on the Commission, which stated in the Unwind Order that “it
9 has proceeded very cautiously and deliberately in this case and has developed an
10 extensive evidentiary record to support the findings and conclusions herein.”¹⁰⁵

11 After approximately a year and a half of review and continued negotiations,
12 the Commission approved the Unwind Transaction and the Smelters Agreements
13 subject to certain conditions, including requiring E.ON to fund a Rural Economic
14 Reserve fund to benefit the Rural customer class.¹⁰⁶ In the final Unwind Order,
15 however, the Commission acknowledged that it “cannot predict the future economic
16 viability of the Smelters,” while stating that it believed the Smelter Agreements
17 “should provide a reasonable opportunity for the Smelters to continue operating in
18 Kentucky for the long term and to preserve the jobs and tax base which support the

¹⁰² Unwind Order at *22; Direct Testimony of John Wolfram, Application, Tab 73 (“Wolfram Direct Testimony”), p. 6:5-10 (Jan. 15, 2013).

¹⁰³ Wolfram Direct Testimony at p. 7:8-12; Berry Rebuttal Testimony, p. 20:21-24. *See also* Berry Rebuttal Testimony at pp. 20:21-21:1 (“The Unwind Transaction was not merely a private bargain struck between interested parties.”).

¹⁰⁴ *See, e.g.*, Unwind Order at *18 (“world aluminum prices may cause the Smelters to close”).

¹⁰⁵ Unwind Order at *18.

¹⁰⁶ Unwind Order at *45, Appendix 2, ¶ 2. *See also* Wolfram Direct Testimony at p. 6:8-10.

1 economy of western Kentucky.”¹⁰⁷ In the “worst-case scenario,” the Commission
2 acknowledged, the Smelters might permanently close their operations “but only
3 upon one year’s advance notice and not before January 1, 2011.”¹⁰⁸

4 Big Rivers of course sought to protect its Members from this possible “worst-
5 case scenario” and worked with the other parties to include measures in the
6 Unwind Transaction to increase that protection.¹⁰⁹ For example, the Unwind
7 Transaction established three “reserve” accounts,¹¹⁰ including the Rural Economic
8 Reserve fund discussed above and a Transition Reserve account intended to help
9 provide a short-term financial cushion in the event of a smelter closure.¹¹¹ Big
10 Rivers also committed to completing major transmission system upgrades to
11 increase its ability to export energy in the event of the closure of one or both
12 Smelters, thereby demonstrating an understanding among the stakeholders that if
13 the Smelters closed, Big Rivers’ response should include a plan to market its
14 available generating capacity.¹¹²

¹⁰⁷ Unwind Order *18.

¹⁰⁸ Unwind Order *18.

¹⁰⁹ Berry Rebuttal Testimony at p. 22:1-19.

¹¹⁰ Richert Direct Testimony at pp. 37:20-38:18 (describing the three reserve accounts); Wolfram Direct Testimony at p. 35:3-13 (explaining Economic Reserve); Wolfram Direct Testimony at p. 36:7-12 (explaining Rural Economic Reserve).

¹¹¹ Berry Rebuttal Testimony at pp. 22:20-23:8.

¹¹² See Direct Testimony of David G. Crockett, Application, Tab 67 (“Crockett Direct Testimony”), pp. 8:15-9:10 (Jan. 15, 2013). See also *In the Matter of Application of Big Rivers Elec. Corp. for a Certificate of Public Convenience and Necessity to Construct a 161 KV Transmission Line in Ohio County, Kentucky* (the “2007 CPCN Case”), Order, P.S.C. Case No. 2007-00177, *10 (Oct. 30, 2007) (“2007 CPCN Order”) (in which the Commission found that “Big Rivers has presented substantial evidence that the need for the ability to export 850 MW of excess generating capacity, in the event the smelters terminate their prospective service contracts with Big Rivers, requires the construction of the proposed transmission line” (emphasis added)).

1 Despite these safeguards, Big Rivers, like the Commission,¹¹³ could not and
2 did not offer any guarantees to eliminate the risk of a possible smelter closure.¹¹⁴
3 Several parties, including Big Rivers' Members on behalf of all of their retail
4 customers, were actively involved in the negotiations and made an informed
5 decision to support the Unwind Transaction despite the recognized risks associated
6 with Big Rivers providing service to the Smelters.¹¹⁵

7 Unfortunately, as seen in this proceeding, the "worst-case scenario" has come
8 to pass. Even so, the Unwind Transaction has provided and continues to provide
9 significant benefits to Big Rivers' Members and their member-owners. All of Big
10 Rivers' Members benefitted from substantially improved equity, as well as avoiding
11 potentially significant problems that could have arisen at the termination of E.ON's
12 lease.¹¹⁶ Similarly, the Unwind Transaction restored Big Rivers' control over its
13 generation assets and helped restore its ongoing financial viability, to the benefit of
14 all Members, all their member-owners, and the region as a whole.¹¹⁷

¹¹³ Unwind Order at *15 ("it would not be possible to guarantee the future financial health of the Smelters").

¹¹⁴ Berry Rebuttal Testimony at p. 22:1-19.

¹¹⁵ Berry Rebuttal Testimony at p. 21:1-9 (discussing involvement and support of KIUC and Big Rivers' Members). *See also* Wolfram Direct Testimony at p. 7:8-12 (the parties "fully recognized the risks and benefits associated with Big Rivers providing service to the Smelters and the risks and benefits of the Smelters receiving service from Big Rivers.").

¹¹⁶ Berry Rebuttal Testimony at p. 21:12-16. *See also* Unwind Order at *22-23 (discussing the possible "major disputes" between Big Rivers and E.ON due to the structure of the leases).

¹¹⁷ Berry Rebuttal Testimony at p. 21:16-20; Bailey Rebuttal Testimony at p. 6:17-19 ("Providing low-cost electricity is important to economic development; likewise, supporting economic development is important to safeguarding the ability to provide low-cost electricity.").

1 C. Big Rivers Responds to a Downturn in Market Conditions Following
2 the Unwind Transaction.

3 When the Unwind Transaction negotiations were underway, it was a seller's
4 market for wholesale power, and the Smelters wanted to receive service from Big
5 Rivers to avoid exposure to wholesale market prices.¹¹⁸ The parties to the Unwind
6 Transaction reasonably expected that trend to continue, and Big Rivers reasonably
7 believed it would have viable options for the off-system sale of its available energy
8 in the future.¹¹⁹ However, the recession significantly impacted electricity
9 consumption throughout the nation, causing a drastic and unpredicted downturn in
10 wholesale energy market prices and, consequently, Big Rivers' off-system sales
11 revenues.¹²⁰ Because Big Rivers—as a generation and transmission utility—
12 historically derives its margins almost entirely from off-system sales, the depressed
13 wholesale market had a significant impact on Big Rivers' finances.¹²¹

14 In the face of these deteriorating market conditions, Big Rivers remained
15 vigilant and took extraordinary financial and operational measures to weather the
16 storm. Although it reduced expenses in 2010, 2011, and 2012, “these reductions
17 were insufficient, leaving maintenance as the only remaining area where expense
18 reductions of the magnitude required could be made.”¹²² Big Rivers, accordingly,
19 began strategically reducing the scope of and delaying certain outages and

¹¹⁸ See note 99.

¹¹⁹ Big Rivers' Response to PSC 1-58.

¹²⁰ *Id.*; Direct Testimony of Robert W. Berry, Application, Tab 66 (“Berry Direct Testimony”), p. 8:18-22 (Jan. 15, 2013); Bailey Rebuttal Testimony at p. 8:2-4 (“[N]o one foresaw that the prices for wholesale electricity would dip so low or that the market downturn would last as long as it has”).

¹²¹ Berry Direct Testimony at p. 14:5-6.

¹²² Berry Direct Testimony at pp. 11:17-12:1.

1 maintenance in order to protect its financial integrity during those hard times.
2 Even during this period, however, Big Rivers' plant performance did not suffer, nor
3 did Big Rivers ever jeopardize the safety or quality of its service to its Members.¹²³
4 In fact, it is a testament to Big Rivers' careful planning that Big Rivers' generating
5 fleet has been very reliable since the Unwind Transaction and has consistently
6 performed in the top quartile according to numerous industry-standard
7 performance metrics.¹²⁴ Selective outage and maintenance deferrals, however, were
8 not a long-term solution to the continuing depressed off-system sales market,¹²⁵ and
9 so, Big Rivers sought rate relief in Case No. 2011-00036 (the "2011 Rate Case").¹²⁶

10 The Commission granted Big Rivers partial rate relief in that case, approving
11 an annual revenue increase that was approximately 33% less than Big Rivers'
12 request of \$39.3 million.¹²⁷ On rehearing, the Commission granted an additional \$1
13 million in annual revenues.¹²⁸ Even so, Big Rivers was left with an annual revenue
14 deficiency of more than \$10 million and was forced to pursue additional cost-cutting
15 measures and to further defer certain maintenance.¹²⁹

¹²³ Berry Rebuttal Testimony at pp. 25:18-26:18.

¹²⁴ Berry Direct Testimony at pp. 6:16-7:13 ("Overall, the Big River generating fleet . . . has consistently performed in the top quartile in [Equivalent Forced Outage Rate], [Equivalent Availability Factor], and [Net Capacity Factor].").

¹²⁵ Bailey Direct Testimony at p. 8:1-4.

¹²⁶ In filing the 2011 Rate Case, Big Rivers fulfilled its Unwind Transaction commitments to file with the Commission for a general review of its financial operations and tariffs, and to provide a new depreciation study and an analysis of Big Rivers' financial condition and rates assuming the depreciation study's results were implemented. *See* Unwind Order at Appendix A.

¹²⁷ Berry Rebuttal Testimony at p. 11:3-6.

¹²⁸ 2011 Rate Case, Order, P.S.C. Case No. 2011-00036, *25 (Jan. 29, 2013) (the "2011 Rate Case Rehearing Order").

¹²⁹ Berry Direct Testimony at pp. 11:7-12:1.

1 D. Big Rivers Negotiates with the Smelters.

2 During the 2011 Rate Case, the Smelters warned that, based upon forecasts
3 of aluminum prices and electricity rates, they needed rate relief to provide an
4 opportunity to implement a plan to assure their long-term viability. Shortly after
5 the conclusion of the initial rate case hearing, the Smelters opened discussions with
6 state officials about obtaining economic support from the state for their operations,
7 and eventually included Big Rivers in the talks.¹³⁰ When no relief was offered by
8 state officials, all eyes turned to Big Rivers and Kenergy, and at a meeting on June
9 20, 2012, the Smelters presented Big Rivers and its Members with a joint proposal
10 from Century and Alcan.¹³¹ The Smelters' proposed solution would have burdened
11 non-Smelter retail customers with rates substantially higher than the estimated
12 rates that would be required if both Smelters ceased operations, and imposed other
13 onerous conditions on Big Rivers.¹³² Big Rivers made an alternative proposal by
14 letter dated June 22, 2012 that would have provided the Smelters with the
15 maximum amount of rate relief Big Rivers could reasonably offer given its
16 contractual and regulatory obligations; this proposal also contained a commitment
17 to continue working toward a long-term solution with the Smelters.¹³³ The
18 Smelters rejected this proposal. On August 20, 2012, Century gave notice that it
19 was terminating its retail agreement.

¹³⁰ See Attachment for Big Rivers' Response to Item 171 of the Attorney General's Initial Request for Information ("AG 1-171"), pp. 2-3 (Feb. 28, 2013) (February 29, 2012 letter describing meetings about power pricing on January 25 and February 7); Attachment for Big Rivers' Response to AG 1-172, pp. 1-3 (March 1, 2012 letter describing meetings about power pricing on January 25 and February 7).

¹³¹ See *id.* at pp. 6-15.

¹³² See *id.* at p. 6.

¹³³ See Attachment for Big Rivers' Response to AG 1-171, pp. 7-8.

1 In November of 2012, Alcan proposed a different deal, pursuant to which it
2 would purchase power at \$43/MWh.¹³⁴ While this was an alluring price point, Big
3 Rivers again considered the overall effects of all terms of the proposal on the other
4 rate classes and determined that it would not be in the best interest of all of its
5 Members or their member-owners to accept the offer.¹³⁵ Big Rivers' rejection of the
6 offer took into account the 2011 Rate Case Order in which the Commission
7 indicated its desire to move toward cost-of-service-based rates and remove cross-
8 subsidization between rate classes.¹³⁶ Big Rivers' board and management
9 recognized that while a \$43/MWh power sale to one or both Smelters might result in
10 lower short-term rates, entering into such a transaction would place an undue
11 burden and risk on Big Rivers' Members' other member-owners. Undertaking a
12 guaranteed price contract with the Smelters that was not based on cost-of-service
13 would result in a permanent unfair subsidization of for-profit corporations on the
14 backs of other commercial and residential customers. Century had not joined in the
15 Alcan proposal in any event.

16 Ultimately, while the Smelters made certain offers that may have seemed
17 attractive on their face, those offers contained structural flaws that would have
18 imposed unfair burdens on Big Rivers' Members and their member-owners and
19 were, consequently, unworkable. Big Rivers considered these offers, evaluated

¹³⁴ Berry Hearing Testimony, July 2, 2013, Tr. 15:12'20".

¹³⁵ Berry Hearing Testimony, July 2, 2013, Tr. 15:13'00" (explaining that Alcan's proposal would have: (i) motivated other customers to make similar demands; (ii) increased Member rates; (iii) undermined mitigation efforts that required available generation capacity; and (iv) amounted to "a permanent subsidy" of Alcan).

¹³⁶ 2011 Rate Case Order at *30 (explaining that "moving to cost-of-service-based rates is a goal").

1 them in good faith, and determined that none of the offers provided an appropriate
2 solution under the circumstances.

3 **E. Big Rivers Formalizes Its Strategy to Address a Possible Smelter**
4 **Contract Termination.**

5 As a result of the statements the Smelters were making about their
6 continued viability, Big Rivers' management felt it prudent to formalize its existing
7 strategy to address the increasingly likely possibility that one or both of the
8 Smelters would terminate their retail electric service contracts. This strategy
9 became the Mitigation Plan, which provides that, in the event of a Smelter contract
10 termination: (i) Big Rivers would file a rate case to address the resulting revenue
11 deficiency; (ii) if necessary, Big Rivers would make operational changes to reduce
12 costs to ensure any rate increases are kept to a minimum; and (iii) Big Rivers would
13 build upon the risk mitigation measures taken in the Unwind Transaction by
14 seeking to find replacement load or increase off-system sales. The Mitigation Plan
15 is discussed in more detail in Section VI, below.

16 **F. Century Unilaterally Terminates the 2009 Retail Agreement.**

17 Despite its efforts to obtain legislative and other support and despite the
18 ongoing negotiations with Big Rivers to find a solution, on August 20, 2012, Century
19 provided notice that it was terminating its 2009 retail electric service agreement
20 with Kenergy ("2009 Retail Agreement") effective August 20, 2013.¹³⁷ In that

¹³⁷ See Attachment for Big Rivers' Response to AG 1-9 (Aug. 20, 2012 Letter from J. Hoerner to G. Starheim (the "Notice of Termination")). See also Berry Rebuttal Testimony at p. 4:17-18, p. 25:5-12; 2009 Retail Agreement, § 7.3.1 (permitting Century to terminate the agreement early based on its "representation and warranty that it has made a business judgment in good faith to terminate and

1 notice, Century's President and CEO stated: "I represent and warrant that Century
2 Aluminum Company has made a business judgment in good faith to terminate and
3 cease all aluminum smelting at the Hawesville smelter and has no current
4 intention of recommencing smelting operations at the Hawesville smelter."¹³⁸

5 In response to Century's termination notice, Big Rivers began implementing
6 its Mitigation Plan by immediately investigating operational changes to reduce
7 costs, by beginning discussions with other parties to find replacement load, and by
8 filing this proceeding on January 15, 2013.¹³⁹ This proceeding was carefully timed
9 to ensure that Big Rivers' proposed rates will become effective on or about August
10 20, 2013, the effective termination date of Century's 2009 Retail Agreement.¹⁴⁰

11 **G. Big Rivers Negotiates with Its Creditors.**

12 In light of the Smelters' contract terminations, Big Rivers negotiated with its
13 creditors to refinance millions of dollars of debt to improve its financial situation
14 and benefit its Members during these difficult times.¹⁴¹ Through these
15 refinancings, Big Rivers was able to extend maturity dates,¹⁴² lower interest

cease all aluminum smelting at the Hawesville Smelter and has no current intention of recommencing smelting operations at the Hawesville Smelter.").

¹³⁸ See Notice of Termination.

¹³⁹ See Berry Direct Testimony at p. 19:6-18. See also, e.g., Bailey Rebuttal Testimony at p. 10:6-8 ("we have implemented our Mitigation Plan to help reduce the adverse financial consequences for our members of the Hawesville Smelter's departure").

¹⁴⁰ Wolfram Direct Testimony at pp. 6:21-7:2.

¹⁴¹ See *In the Matter of: Application of Big Rivers Electric Corporation for Approval to Issue Evidences of Indebtedness*, Order, P.S.C. Case No. 2012-00119 (May 25, 2012); *In the Matter of Application of Big Rivers Elec. Corp. for Approval to Issue Evidences of Indebtedness* (the "2012 Refinancing Case"), Order, P.S.C. Case No. 2012-00492 (March 26, 2013) (the "2012 Refinancing Case Order").

¹⁴² 2012 Refinancing Case Order at *5 ("The transactions described herein would increase Big Rivers' liabilities by \$139,381,389 while, at the same time, would reduce Big Rivers' annual interest expense by \$1,421,349 for nine years and extend the length of its financings by 11 years").

1 rates,¹⁴³ and reduce the number of events of default.¹⁴⁴ Similarly, Big Rivers filed
2 an additional application¹⁴⁵ on March 28, 2013 for approval to amend its CFC
3 revolver to extend the maturity date, collateralize the loan, and establish fewer
4 events of default.¹⁴⁶ The Commission granted approval of this application by Order
5 dated July 15, 2013.¹⁴⁷

6 H. Events Since the Filing of This Proceeding.

7 1. The Century Transaction.

8 Following Century's contract termination notice, "Big Rivers worked
9 diligently with Kenergy and Century to negotiate an arrangement that would
10 preserve the economic benefit of an operational Hawesville Smelter" and protect the
11 regional economy.¹⁴⁸ After months of negotiations, the parties reached a solution
12 that: (i) allows Century to purchase electricity at market-based prices and continue
13 smelting operations at the Hawesville Smelter after the termination of the 2009
14 Retail Agreement; and (ii) avoids imposing additional costs on Big Rivers' Members
15 beyond those necessitated by Century's contract termination. The details of this
16 "Century Transaction," though discussed briefly in Section X, are not the subject of

¹⁴³ 2012 Refinancing Case Order at *4 ("The financings are expected to be at an all-in interest rate that is below the rate of the existing RUS Note").

¹⁴⁴ 2012 Refinancing Case Order at *6 ("The revised Section 9.06 [of the CoBank Secured Credit Agreement], which will be included in the executed version of the CoBank Secured Credit Agreement, clarifies that it is not an Event of Default if a Smelter contract expires by its own terms or is terminated pursuant to a notice of Smelter plant closure").

¹⁴⁵ *In the Matter of: Application of Big Rivers Electric Corporation for Approval to Issue Evidences of Indebtedness*, Application, P.S.C. Case No. 2013-00125 (the "2013 Refinancing Case").

¹⁴⁶ See 2013 Refinancing Case, Order, *3-4 (July 15, 2013) (the "2013 Refinancing Case Order").

¹⁴⁷ 2013 Refinancing Case Order.

¹⁴⁸ Bailey Rebuttal Testimony at p. 7:2-4.

1 this case and do not change the rate relief Big Rivers needs in this case.¹⁴⁹ Big
2 Rivers and Kenergy have filed a separate proceeding, Case No. 2013-00221, seeking
3 the Commission's approval of the Century Transaction.¹⁵⁰

4 **2. Alcan Unilaterally Terminates the 2009 Retail Agreement.**

5 After Big Rivers filed its Application in this proceeding, Alcan exercised its
6 right to terminate its 2009 Retail Agreement. Alcan provided its contract
7 termination notice for the Sebree Smelter on January 31, 2013. In light of Alcan's
8 termination notice, Big Rivers filed a separate rate case, Case No. 2013-00199, to
9 address Alcan's contract termination (the "Alcan Rate Case"). The Alcan Rate Case
10 was carefully timed to ensure that Big Rivers' rates proposed in that case will
11 become effective on or about January 31, 2014, the effective termination date of the
12 2009 Retail Agreement for the Sebree Smelter (which, although owned by Alcan at
13 the time of the notice of termination, has subsequently been purchased by Century).
14 The Alcan contract is discussed further in Section IX; but, like the Century
15 Transaction, the Alcan contract termination does not change the amount of the rate
16 adjustment that Big Rivers needs in this proceeding. As discussed in Section V, Big
17 Rivers requires its proposed rates to go into effect on August 20, 2013, the effective
18 date of Century's contract termination, to address the substantial reduction in
19 revenue that will occur on that date as a result of that termination.

¹⁴⁹ See Berry Rebuttal Testimony at pp. 19:17-20:6.

¹⁵⁰ See Century Transaction Case.

1 V. Big Rivers' Proposed Rates Are Fair, Just, and Reasonable.

2 Big Rivers is proposing a rate adjustment to offset a revenue deficiency of
3 \$68,614,632.¹⁵¹ As explained in more detail below, this rate adjustment is intended
4 to fully address the financial impact of Century's unilateral contract termination¹⁵²
5 as well as other major drivers of Big Rivers' current revenue deficiency, including
6 reduced off-system sales and depreciation rates recommended by the depreciation
7 study required by the Commission as part of this proceeding.¹⁵³ Big Rivers
8 calculated its proposed rate adjustment to ensure that it seeks only the bare
9 minimum to enable it to continue to prudently maintain its generating fleet, meet
10 its debt service, and fund an appropriately reduced scale of operations in light of
11 Century's termination, while still safely delivering reliable, wholesale electrical
12 energy.¹⁵⁴ As part of its effort to seek only the bare minimum, Big Rivers has
13 reduced its expenses even more since the Commission's review of expenses in the
14 2011 Rate Case in order to "help[] ensure that the rate adjustment in this
15 proceeding seeks only to account for lost revenues, not increased expenses."¹⁵⁵ Big
16 Rivers carefully timed its application in this matter to ensure that its proposed

¹⁵¹ See Wolfram Rebuttal Testimony at p. 25, Table 1.

¹⁵² Wolfram Direct Testimony at pp. 6:21-7:2; Bailey Rebuttal Testimony at p. 5:20-22; Berry Rebuttal Testimony at p. 8:17-19 ("The rate increase in this case is intended to address Big Rivers' immediate, critical financial needs that must be met to allow Big Rivers the opportunity to pursue the Mitigation Plan."), p. 17:9-12 ("Big Rivers is relying on the ratemaking process to ensure that it can continue to provide safe, reliable and efficient energy services to its members at fair and reasonable rates.").

¹⁵³ Bailey Direct Testimony at pp. 7:16-8:21.

¹⁵⁴ Bailey Rebuttal Testimony at p. 4:3-13; Bailey Direct Testimony at p. 8:6-7.

¹⁵⁵ Bailey Rebuttal Testimony at p. 10:1-8.

1 rates will become effective on or about August 20, 2013, the effective termination
2 date of Century's 2009 Retail Agreement.¹⁵⁶

3 The proposed rate adjustment was determined through a sound process that
4 began with the development of Big Rivers' budget and culminated in a Cost of
5 Service Study for the rate design. Both the budget and the Cost of Service Study
6 are built on Big Rivers' financial model. This process, the financial model, the
7 budget, and the Cost of Service Study are reasonable and reliable and produce rates
8 that are fair, just, and reasonable. As such, the Commission should grant the
9 proposed rate relief.

10 Big Rivers is keenly aware of the difficulties imposed by any rate increase,
11 and it does not wish to increase rates any more than necessary.¹⁵⁷ As explained by
12 Mr. Bailey, Big Rivers has "asked for the bare minimum possible to meet [its] debt
13 service and continue funding an appropriately-reduced scale of operations in light of
14 Century's unilateral contract termination."¹⁵⁸ If the requested rate adjustment is
15 granted, Big Rivers' financial integrity will not depend on a reversal of fortune in
16 off-system sales or the success of finding replacement load.¹⁵⁹ However, as
17 explained in more detail below, Big Rivers' management has prudently planned and
18 prepared for the possible termination of the Smelter contracts for years, beginning
19 with the negotiations in the Unwind Transaction. Now that the "worst case

¹⁵⁶ Wolfram Direct Testimony at pp. 6:21-7:2.

¹⁵⁷ Bailey Hearing Testimony, July 1, 2013, Tr. 11:02'25".

¹⁵⁸ Bailey Rebuttal Testimony at p. 3:5-7. *See also* Bailey Direct Testimony at p. 9:1-8. As discussed in Sections V and VII, Big Rivers' proposed rates in this case are the bare minimum necessary to address Century's contract termination. The financial impact of Alcan's contract termination will be addressed in the Alcan Rate Case.

¹⁵⁹ Bailey Rebuttal Testimony at p. 11:6-10.

1 scenario” has come to pass with the Century contract termination, Big Rivers is
2 implementing its Mitigation Plan in an effort to provide rate relief to its Members
3 and their member-owners. The Mitigation Plan is discussed in more detail in
4 Section VI, below.

5 Big Rivers has a reasonable, long-term plan to address the net revenue loss
6 from the Century contract termination. It starts by temporarily scaling back
7 operations to reduce costs and by seeking to increase revenues by filing this rate
8 proceeding. Century provided approximately \$205 million in revenues to Big Rivers
9 in 2012.¹⁶⁰ By idling a plant to reduce costs, as discussed in Section VI, Big Rivers
10 has reduced the revenue deficiency attributable to the Century contract termination
11 to only \$63 million. Big Rivers designed this rate case to recover that amount, in
12 addition to amounts required for the other drivers discussed above. With the cost
13 savings from plant idling and the revenue increase sought in the case, Big Rivers
14 will be able to withstand the full net revenue impact of the Century contract
15 termination, without Big Rivers’ financial health being dependent on the prospects
16 of immediately finding replacement load or increasing off-system sales.

17 This also gives Big Rivers a reasonable opportunity to pursue the remaining
18 steps of the Mitigation Plan, which are to find ways to mitigate the rate increase
19 sought in this proceeding through actions such as entering into long-term power
20 sales contracts, potentially selling a power plant, and exploring other options with

¹⁶⁰ See Attachment for Big Rivers’ Response to Item No. 24 of KIUC’s Second Request for Information, pp. 15-26 (March 28, 2013) (listing monthly amounts billed to Century); “2012 SMELTER BILLING.xlsx”, Attachment for Big Rivers’ Response to AG 1-128, Tab “Total”, Row 28, Column T (February 28, 2013).

1 its idled power plants. Big Rivers is confident the remaining steps of the Mitigation
2 Plan will produce successes. Big Rivers is committed to achieving those successes,
3 and those successes will benefit the Members and their member-owners.

4 The Opposing Intervenors, on the other hand, offer no sound plan to address
5 the situation that Century's unilateral contract termination has visited upon Big
6 Rivers, its Members, and their member-owners. Instead of finding a long-term and
7 balanced approach to stabilize the situation, the Opposing Intervenors short-
8 sightedly propose that the Commission deny most or all of the requested rate relief.
9 This would topple "the first 'domino' that . . . could push Big Rivers into
10 bankruptcy,"¹⁶¹ with all the disruption, risk, and uncertainty bankruptcy naturally
11 creates. Among other consequences, Big Rivers' revenues would be diverted to a
12 lockbox; it would be cut off from its remaining line of credit; and creditors would
13 reject Big Rivers' requests to finance capital and maintenance investments needed
14 to continue operations. Big Rivers would not survive that scenario. Accordingly,
15 the Opposing Intervenors' proposal would contravene the Supreme Court's caution
16 that rates "threatening [a utility's] 'financial integrity'" may be "so unjust as to be
17 confiscatory"¹⁶² and, consequently, constitute an unconstitutional taking.¹⁶³ The
18 Opposing Intervenors propose that the Commission ignore the prudent investments
19 Big Rivers' Members and their member-owners have made in Big Rivers and its
20 generating facilities over decades. They also propose to put Big Rivers' fate at risk

¹⁶¹ Bailey Rebuttal Testimony at p. 6:2-3.

¹⁶² *Verizon Communs., Inc.*, 535 U.S. at 524.

¹⁶³ *Duquesne Light Co.*, 488 U.S. at 307-8.

1 in a daredevil game of “chicken” with creditors—wagering that those creditors will
2 grant tens of millions of dollars per year in concessions rather than force Big Rivers
3 into bankruptcy.

4 Thus, the Commission is unfortunately presented with a stark choice: either
5 (i) grant Big Rivers’ proposed rates, or (ii) risk pushing Big Rivers into
6 bankruptcy.¹⁶⁴ In light of this stark choice, Big Rivers urges the Commission to
7 exercise “regulatory patience” by approving Big Rivers’ proposed rates and giving it
8 time to execute its Mitigation Plan to realize benefits for its Members.¹⁶⁵ By
9 exercising regulatory patience, the Commission can “evaluate [Big Rivers’] rate
10 request not just on the basis of the current factual circumstances, but also on the
11 basis of the long-running historical context and reasonable future opportunities for
12 Big Rivers and its members.”¹⁶⁶ This approach is consistent with the Commission’s
13 prior methods for addressing Big Rivers’ rates, and it allows for the full
14 consideration of the various factors identified by the courts for determining whether
15 rates are fair, just, and reasonable. In the end, regulatory patience provides the
16 best and most certain path forward from this difficult situation. Big Rivers’
17 Mitigation Plan, including this rate request, presents the best possible long-term
18 solution for Big Rivers’ Members and their member-owners.

¹⁶⁴ Bailey Rebuttal Testimony at pp. 4:19-20 (“the Commission faces a stark choice in this case between: (i) granting the relief requested by Big Rivers; and (ii) the bankruptcy advocated by the intervenors”).

¹⁶⁵ Bailey Rebuttal Testimony at p. 5:5-7.

¹⁶⁶ Bailey Rebuttal Testimony at p. 6:7-10.

1 This approach stands in stark contrast to the Opposing Intervenors'
2 suggestions that the Commission push Big Rivers into bankruptcy through
3 “regulatory abandonment.” This concept of regulatory abandonment—that is,
4 “abruptly changing regulatory course the first moment an assumption from the
5 Unwind proceeding (Case No. 2007-00455) proves inaccurate”¹⁶⁷—is echoed in
6 Supreme Court dicta suggesting that a “shift in methodologies” by a state
7 regulatory agency can constitute a due process violation.¹⁶⁸ The positions of the
8 Opposing Intervenors, as well as the consequences of those proposals, are discussed
9 in more detail in Sections VII and XVII, below.

10 In short, the law demands what Big Rivers requests: regulatory patience.
11 Approval of Big Rivers’ proposed rates is necessary to avoid destroying Big Rivers’
12 ongoing financial viability.¹⁶⁹ Big Rivers has implemented its thoughtfully-
13 developed Mitigation Plan to reduce the adverse financial impact of Century’s
14 contract termination, and the successes of that plan will benefit Big Rivers’
15 Members and their member-owners for years to come. Big Rivers’ management
16 team remains committed to the Mitigation Plan, and it respectfully requests that
17 the Commission afford it an opportunity to carry it out. This was perhaps best
18 explained by Mr. Bailey in response to KIUC questioning at the hearing:

¹⁶⁷ Bailey Rebuttal Testimony at pp. 7:22-8:1.

¹⁶⁸ See *Duquesne Light Co.*, 488 U.S. 299 (“The risks a utility faces are in large part defined by the rate methodology Consequently, a State’s decision to arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others would raise serious constitutional questions.”).

¹⁶⁹ Bailey Direct Testimony at p. 9:1-8.

1 “We’re asking for regulatory patience. Given my nearly
2 40 years in this business, we know that markets cycle.
3 We also know that there are factors in play that could
4 drive the price on the wholesale market beyond where
5 we’ve seen in the past, and if and when that happens,
6 there’s opportunity here for the rates to return to the
7 levels they are. If we go down the path you’re suggesting,
8 there’s no opportunity to operate that Mitigation Plan.
9 You’re basically giving it up. You’re even basically
10 putting at risk the reserves and the cash we already have
11”¹⁷⁰

12 For these reasons, and as explained more fully below, Big Rivers’ proposed
13 rates are fair, just, and reasonable, and the Commission should approve them.¹⁷¹

14 VI. **Big Rivers’ Mitigation Plan Should Be Given Time to Provide the Expected**
15 **Benefits to Big Rivers’ Members and Their Member-Owners.**

16 As described above, Big Rivers’ proposed rates are based on the minimum
17 amount of rate adjustment necessary—given Century’s contract termination—to
18 prudently maintain its generating fleet, meet its debt service, and fund an
19 appropriately reduced scale of operations while still safely delivering reliable,
20 wholesale electrical energy.¹⁷² In designing its rates and planning for its operations
21 for after Century’s termination, Big Rivers planned for long-term success and
22 developed an operational strategy likely to produce long-term benefits to its
23 Members and their member-owners. “[H]istory has proven that short term thinking
24 in the power generation business can have disastrous effects on utilities and
25 ratepayers alike.”¹⁷³ As Mr. Bailey similarly explained, Big Rivers “cannot—as the

¹⁷⁰ Bailey Hearing Testimony, July 1, 2013, Tr. 13:18’16”.

¹⁷¹ Bailey Direct Testimony at pp. 9:8-10:12.

¹⁷² Bailey Rebuttal Testimony at p. 4:3-13, p. 9:8-21; Bailey Direct Testimony at p. 8:6-7.

¹⁷³ Rebuttal Testimony of William K. Snyder (“Snyder Rebuttal Testimony”), pp. 13:20-14:2 (June 24, 2013). *See also id.* at p. 6:1-4 (“a company facing economic challenges should develop a plan to

1 intervenors do—judge [its] business based upon isolated snapshots of a brief period
2 in a much longer timeframe.”¹⁷⁴

3 To address the long-term interests of its Members, Big Rivers researched and
4 developed its Mitigation Plan over the past several years to help mitigate the
5 adverse financial consequences of a potential Smelter closure. Now that Century
6 has given notice of the termination of its contract, Big Rivers is implementing the
7 Mitigation Plan not only to increase revenues to address its immediate financial
8 needs, but also to reduce the long-term impact of this rate case on its Members.¹⁷⁵

9 Longstanding ratemaking principles support the “regulatory patience”
10 approach. Kentucky courts have held that it is appropriate for the Commission to
11 consider factors such as “the history and development of the utility” and the utility’s
12 “potential for growth and expansion” when setting rates.¹⁷⁶ In light of Big Rivers’
13 unique circumstances, as discussed in Section IV.A, Mr. Bailey has similarly
14 requested “the Commission to evaluate [Big Rivers’] rate request not just on the
15 basis of the current factual circumstances, but also on the basis of the long-running

maximize revenues, minimize expenses and adjust its operations and asset utilization to fit the short and long term goals of the plan”).

¹⁷⁴ Bailey Rebuttal Testimony at p. 10:17-22 (“The electric utility business is by necessity long-term focused. Asset decisions must be made with a long-term view.”).

¹⁷⁵ See Bailey Rebuttal Testimony at p. 10:6-8 (“we have implemented our Mitigation Plan to help reduce the adverse financial consequences for our members of the Hawesville Smelter’s departure”); Berry Rebuttal Testimony at p. 8:17-19 (“The rate increase in this case is intended to address Big Rivers’ immediate, critical financial needs that must be met to allow Big Rivers the opportunity to pursue the Mitigation Plan.”).

¹⁷⁶ *National-Southwire*, 785 S.W.2d at 512-13.

1 historical context and reasonable future opportunities for Big Rivers and its
2 members.”¹⁷⁷

3 In the present case, the reasonableness of Big Rivers’ Mitigation Plan,
4 including the rate adjustment proposed in this proceeding, is supported by both the
5 history of Big Rivers and the potential for growth enabled by Big Rivers’ available
6 generation capacity. Accordingly, the Commission should approve Big Rivers’
7 proposed rates and allow it a reasonable opportunity to completely implement its
8 Mitigation Plan for the benefit of its Members and their member-owners.¹⁷⁸

9 The “history and development”¹⁷⁹ of Big Rivers supports the conclusion that
10 the Commission should exercise regulatory patience and allow Big Rivers a
11 reasonable opportunity to implement its Mitigation Plan. Big Rivers’ generating
12 fleet was built decades ago in direct response to its legal obligations to generate
13 wholesale energy so that Kenergy, one of its Members, could serve the Smelters.¹⁸⁰
14 Big Rivers’ investment in its generation assets was recognized as prudent and
15 authorized by the Commission through the issuance of certificates of public
16 convenience and necessity.¹⁸¹ These power plants have long been useful to Big
17 Rivers’ Members and their member-owners, including the Smelters, and they are a

¹⁷⁷ Bailey Rebuttal Testimony at p. 6:7-10.

¹⁷⁸ Bailey Rebuttal Testimony at p. 7:4-5; Berry Rebuttal Testimony at p. 8:21-22 (Big Rivers should be given “a reasonable opportunity to pursue its Mitigation Plan”); Bailey Rebuttal Testimony at p. 7:20-21 (“the Commission should evaluate all of these factors and allow the historical value of Big Rivers’ prudent investments in its generating assets to develop over time, without abruptly changing regulatory course”).

¹⁷⁹ *National-Southwire*, 785 S.W.2d at 512-13 (Commission should consider “history and development of utility and its property”).

¹⁸⁰ Berry Rebuttal Testimony at p. 24:18-23.

¹⁸¹ Bailey Rebuttal Testimony at p. 7:17-18 (“Our generation investments were made many years ago and were prudent when they were incurred.”); Berry Rebuttal Testimony at pp. 24:20-25:2, p. 6:3 (“The Coleman Station was a prudent investment when it was built”).

1 key part of Big Rivers' Mitigation Plan going forward.¹⁸² The Commission should
2 not force Big Rivers to abandon these investments and forgo all of the prospective
3 opportunity to benefit from valuable assets in the future.

4 Commission precedent supports this proposition. As an initial matter, Big
5 Rivers' Mitigation Plan and continued use of its power plants comports with the
6 Commission's Unwind Order, which recognized the value and opportunity inherent
7 in Big Rivers' generation assets even in the absence of the Smelters. In that
8 Unwind Order, the Commission anticipated that part of the appropriate response to
9 a smelter closure would be an increase in Big Rivers' market sales, just as Big
10 Rivers now proposes.¹⁸³ The Commission approved an expansion to Big Rivers'
11 transmission system in 2007 for the express purpose of "plan[ning] to mitigate the
12 risk of losing the revenue from the smelters in the event both smelters cease
13 smelting operations."¹⁸⁴ Big Rivers' generating fleet is, of course, necessary to
14 pursue that strategy. For these reasons, "the history and development of [Big
15 Rivers] and its property"¹⁸⁵ strongly support Big Rivers' proposal that it should be
16 enabled to implement its Mitigation Plan by recovering its proposed rates.

¹⁸² Bailey Rebuttal Testimony at p. 7:6-7, p. 7:14-16.

¹⁸³ Crockett Direct Testimony at pp. 8:15-9:10 (discussing Unwind Order's requirement of transmission system capacity upgrades in order to improve Big Rivers' ability to export power in the event of a smelter closure).

¹⁸⁴ 2007 CPCN Case Order at *11-12 (also noting the Smelters' support for the project because "they want to be sure that Big Rivers will have the capability to sell any power that the smelters do not take in order to mitigate their obligations in the event they are unable to take the power").

¹⁸⁵ *National-Southwire*, 785 S.W.2d at 513.

1 Big Rivers' "potential for growth and expansion"¹⁸⁶ similarly indicates that
2 the Commission should exercise regulatory patience and allow a reasonable
3 opportunity for Big Rivers' Mitigation Plan to succeed. Despite the Opposing
4 Intervenors' attempts to compare the current situation with one in which a utility
5 constructs generating facilities that are not needed to provide utility service, Big
6 Rivers is not proposing to construct new generating facilities. Its existing facilities
7 have been providing utility service for the benefit of its Members for decades. The
8 question now is what to do with the capacity from those prudent investments that
9 will be made available by the Century contract termination. For the continued
10 benefit of its Members, and in line with the Commission's expectations set forth as
11 part of the Unwind Transaction, Big Rivers has approached this question of
12 available generation capacity as a unique opportunity to benefit its Members.¹⁸⁷ As
13 explained by Mr. Robert W. Berry, Big Rivers' Chief Operating Officer, "the
14 Coleman Station's generation capacity is not simply 'excess' as the intervenors
15 dismissively describe it. It is a valuable asset that Big Rivers is actively marketing
16 for the benefit of Big Rivers' members."¹⁸⁸

17 The "solution" proposed by the Opposing Intervenors is to abandon the
18 available capacity. Sierra Club, for example, advocates Big Rivers retiring its

¹⁸⁶ *National-Southwire*, 785 S.W.2d at 512-13 (identifying this as a factor the Commission should consider for ratemaking purposes).

¹⁸⁷ Berry Rebuttal Testimony at p. 6: 9-10 (the "generation capacity of the Coleman Station provides Big Rivers with an opportunity for growth"). *See also* Bailey Hearing Testimony, July 1, 2013, Tr. 11:40'07" (available capacity is not "excess," it is a "key element of our rate mitigation plan. If we don't have the opportunity to utilize that [capacity], we won't have the ability to lower the rates in the future.").

¹⁸⁸ Berry Rebuttal Testimony at p. 6:14-16.

1 plants or selling them for whatever price they can bring, based solely on the
2 possibility that future environmental regulations could make Big Rivers' units
3 unprofitable in the future. However, Sierra Club ignores the fact that Big Rivers'
4 units are currently low cost compared to others in the market (clearing the market
5 90% of the time); Sierra Club filed no studies supporting its position that Big Rivers'
6 market position will change in the future; and Sierra Club does not take into the
7 effect future environmental regulations would have on other generators with which
8 Big River competes in the market. Sierra Club's position asking the Commission to
9 force Big Rivers to retire its units or sell them at a "fire sale" would not only be
10 wasteful, it would cause harm to Big Rivers by eliminating the equity on which Big
11 Rivers depends and the collateral on which Big Rivers' creditors depend. . Thus,
12 and in light of the comparatively minimal cost of idling valuable generating plants,
13 it is not reasonable to abandon Big Rivers' plants on Sierra Club's dangerous
14 speculation.¹⁸⁹

15 Big Rivers' assessment of the value of its generating fleet is not blind
16 optimism. It is the result of significant time and energy invested in researching
17 options and markets to develop its Mitigation Plan.¹⁹⁰ Big Rivers has identified
18 numerous opportunities in the medium- and long-term markets and has in fact
19 pursued numerous requests for proposal to provide power to other utilities, both in

¹⁸⁹ This is discussed more fully in Section XVII.E.

¹⁹⁰ Berry Rebuttal Testimony at p. 10:3-6.

1 Kentucky and in other states.¹⁹¹ Despite the Opposing Intervenors' naivety with
2 regard to the power market, medium- and long-term firm power sales contracts will
3 obviously command a premium over current, day-ahead and hourly prices.¹⁹²
4 Similarly, Big Rivers reasonably anticipates an eventual increase in off-system
5 sales revenue, as indicated by its research on the likely effects of MATS compliance
6 on older coal-fired generation in the region, as well as the likely trajectory of the
7 cost of coal generation relative to the costs of natural gas generation.¹⁹³

8 Big Rivers has also explored and continues to actively explore the possibility
9 of selling certain generation assets. It is currently engaged in discussions with
10 multiple entities about the possible sale of the Wilson Station or the Coleman
11 Station, and it has set a price on both plants. None of the potential counterparties
12 to these proposed transactions have refused the offers currently on the table.¹⁹⁴ As
13 explained by Mr. Berry, Big Rivers would only sell a power plant "if that would
14 provide greater benefit to the members than idling the plant."¹⁹⁵ In other words,
15 Big Rivers would consider an offer to purchase one of its plants if that offer would
16 not result in a loss of equity (a critical part of Big Rivers' necessary access to the

¹⁹¹ Berry Rebuttal Testimony at p. 10:3-11, pp. 10:15-16:1; Berry Hearing Testimony, July 2, 2013, Tr. 14:37'37".

¹⁹² Berry Rebuttal Testimony at pp. 10:12-11:23.

¹⁹³ Supplemental Rebuttal Testimony of Robert W. Berry ("Berry Supplemental Rebuttal Testimony"), p. 9:3-14 (June 29, 2013); Berry Hearing Testimony, July 2, 2013, Tr. 14:38'30" (discussing expectations that other utilities will idle generation assets in 2016 in response to MATS compliance requirements, thus increasing demand for Big Rivers' generation capacity); Snyder Hearing Testimony, July 2, 2013, Tr. 11:55'25" (discussing effect of relative costs on expected off-system sales revenues); Snyder Rebuttal Testimony at p. 23, Exhibit B (Slide 9 from the Federal Energy Regulatory Commission's Summer 2013 Energy Market and Reliability Assessment, dated May 16, 2013 (*available at* <http://www.ferc.gov/market-oversight/reports-analyses/mkt-views/2013/05-16-13.pdf>)). *See also* Snyder Rebuttal Testimony at pp. 13:14-14:2.

¹⁹⁴ Berry Hearing Testimony, July 2, 2013, Tr. 16:33'07".

¹⁹⁵ Berry Supplemental Rebuttal Testimony at p. 5:14-16.

1 capital markets)¹⁹⁶ and if the price paid for the plant was high enough to fairly
2 compensate Big Rivers' Members, taking into account the anticipated ongoing
3 financial benefits from sales of available generation capacity. For this reason, Big
4 Rivers' willingness to consider selling generation assets is complementary to its
5 ongoing efforts to market available capacity because they are both efforts aimed at
6 providing the maximum possible benefit to Big Rivers' Members, whatever form
7 that benefit takes.

8 In addition to the cost savings and potential revenue increases resulting from
9 the possible idling or sale of a power plant, Big Rivers also expects to increase
10 revenues by marketing its available generation capacity in order to increase off-
11 system sales.¹⁹⁷ Big Rivers has invested significant time and energy into
12 researching the market and developing its off-system sales plan.¹⁹⁸ Based on this
13 research, Big Rivers reasonably anticipates that increased off-system sales will
14 benefit its Members and their member-owners when wholesale electricity prices
15 have recovered from their current slump, expected to occur around 2019.¹⁹⁹ This
16 anticipated 2019 market recovery is not mere conjecture—it is based on Big Rivers'
17 analysis of the effect of MATS compliance costs, which it reasonably expects will
18 force multiple retirements of older coal-fired plants, reducing total generation

¹⁹⁶ Richert Hearing Testimony, July 2, 2013, Tr. 11:26'30" (explaining that sale of a plant "at a loss . . . would impact our equity"); Richert Hearing Testimony, July 2, 2013, Tr. 11:28'25" (change in Big Rivers' equity would affect CFC bridge financing).

¹⁹⁷ Berry Direct Testimony at pp. 19:19-20:4.

¹⁹⁸ Berry Rebuttal Testimony at p. 10:3-6.

¹⁹⁹ Berry Direct Testimony at pp. 19:20-20:4; Berry Supplemental Rebuttal Testimony at p. 9:3-14.

1 capacity in the region and causing market prices to climb.²⁰⁰ In addition, FERC
2 predicts that the cost of natural gas for power generation is likely to increase
3 relative to coal.²⁰¹ As a direct result of those predicted developments, coal-powered
4 generation will become even more competitive on the wider market and Big Rivers
5 reasonably anticipates that its off-system sales opportunities will increase.²⁰²

6 Big Rivers' off-system sales strategy is not a knee-jerk reaction to Century's
7 contract termination. In fact, the strategy was developed in part as a result of the
8 Unwind Transaction approved by the Commission, which required Big Rivers to
9 complete major transmission system upgrades to increase its ability to export
10 energy in the event of a smelter closure.²⁰³ In the 2007 CPCN order permitting
11 those transmission system upgrades, the Commission held that "Big Rivers has
12 presented substantial evidence that the need for the ability to export 850 MW of
13 excess generating capacity, in the event the smelters terminate their prospective
14 service contracts with Big Rivers, requires the construction of the proposed
15 transmission line."²⁰⁴ In that same order, the Commission recognized the potential
16 export of available power as part of Big Rivers' "plan to mitigate the risk of losing

²⁰⁰ Berry Supp. Rebuttal Testimony at p. 9:3-14.

²⁰¹ Snyder Rebuttal Testimony at p. 23, Exhibit B (Slide 9 from FERC's Summer 2013 Energy Market and Reliability Assessment, dated May 16, 2013 (*available at* <http://www.ferc.gov/market-oversight/reports-analyses/mkt-views/2013/05-16-13.pdf>)). *See also* Snyder Rebuttal Testimony at pp. 13:14-14:2.

²⁰² Snyder Hearing Testimony, July 2, 2013, Tr. 11:55'25".

²⁰³ Unwind Order, Appendix. A, p. 4, ¶ 22; Crockett Direct Testimony at pp. 8:15-9:10.

²⁰⁴ 2007 CPCN Order at *10 (emphasis added).

1 the revenue from the smelters in the event both smelters cease smelting
2 operations.”²⁰⁵ Big Rivers is simply enacting this long-planned responsive measure.
3 Big Rivers’ off-system sales strategy is also a result of in-depth research,
4 during which it identified significant opportunities in the context of medium- and
5 long-term purchase power agreements and all-requirements contracts.²⁰⁶ Big
6 Rivers is actively pursuing bilateral sales and wholesale power agreements to take
7 advantage of those opportunities.²⁰⁷ There is a demonstrated demand for such
8 agreements, as reflected in recent requests for proposal issued by numerous
9 Kentucky utilities including East Kentucky Power Cooperative, Duke Energy,
10 Louisville Gas & Electric/Kentucky Utilities Company, and American Electric
11 Power Company (Kentucky Power).²⁰⁸ In fact, Big Rivers has already responded to
12 multiple requests for proposal and initiated informal discussions with still other
13 potential counterparties.²⁰⁹ Big Rivers is also able to pursue interstate
14 opportunities due to its participation in Midcontinent Independent System
15 Operator, Inc. (“MISO”).²¹⁰ For these reasons, Big Rivers reasonably expects its off-
16 system sales business plan to yield beneficial results for its Members.²¹¹

²⁰⁵ 2007 CPCN Order at *11-12 (noting the Smelters’ support for the project because “they want to be sure that Big Rivers will have the capability to sell any power that the smelters do not take in order to mitigate their obligations in the event they are unable to take the power”).

²⁰⁶ Berry Rebuttal Testimony at p. 10:3-8, pp. 10:15-16:1.

²⁰⁷ Berry Direct Testimony at p. 20:9-21.

²⁰⁸ Berry Rebuttal Testimony at pp. 10:19-11:1; Berry Hearing Testimony, July 2, 2013, Tr. 14:37’57”.

²⁰⁹ Berry Rebuttal Testimony at p. 10:8-11.

²¹⁰ *Id.* at p. 11:1-4.

²¹¹ *Id.* at p. 10:3-6 (discussing Big Rivers’ “reasonable and attainable business plan to pursue off-system sales”).

1 As explained above, this rate proceeding—the first step in Big Rivers’
2 Mitigation Plan—along with the cost savings from idling a power plant fully
3 addresses Big Rivers’ revenue requirements in light of Century’s contract
4 termination.²¹² Each of the other steps of the Mitigation Plan, including selling
5 generation assets, marketing available capacity, and arranging long-term power
6 arrangements, will simply provide additional benefits to Big Rivers’ Members.²¹³

7 By implementing its Mitigation Plan, Big Rivers is not only addressing its
8 immediate critical needs but also setting forth reasonable and attainable plans to
9 mitigate the adverse impact of Century’s unilateral termination for the benefit of its
10 Members and their member-owners.²¹⁴ In this way, the Mitigation Plan lays
11 important groundwork for Big Rivers’ immediate critical revenue requirements, its
12 long-term viability, and its long-term ability to serve its Members.

²¹² *Id.* at p. 8:12-13 (“Big Rivers is not staking its long-term viability on the success of any element of the Mitigation Plan except this rate case.”); *id.* at p. 17:9-12 (“Big Rivers is relying on the ratemaking process to ensure that it can continue to provide safe, reliable and efficient energy services to its members at fair and reasonable rates.”); Bailey Rebuttal Testimony at pp. 11:8-12:18 (“The increase proposed in this case is sufficient to enable [Big Rivers] to withstand the departure of Century’s Hawesville Smelter and maintain relatively low electric rates, even without any further mitigation and even under the continued downturn in the wholesale power market.”).

²¹³ Berry Rebuttal Testimony at p. 8:11-19; Bailey Rebuttal Testimony at pp. 11:21-12:2 (“success of the Mitigation Plan will allow Big Rivers to begin sooner returning additional value to its members to help offset the cost of the proposed rate adjustment. The success of the Mitigation Plan represents purely potential benefit to our members and their ratepayers.”); Berry Hearing Testimony, July 2, 2013, Tr. 14:39’16” (“As we’re successful with the Mitigation Plan, [the ratepayers’] rates will come down . . .”).

²¹⁴ Berry Rebuttal Testimony at p. 11:21-23 (“Big Rivers’ Mitigation Plan has a reasonable opportunity to benefit its members when viewed in the broader perspective of the market’s medium- and long-term horizons.”); Bailey Rebuttal Testimony at p. 11:10 (“let me be clear that the Mitigation Plan is reasonably certain to succeed”).

1 Despite Big Rivers’ significant research and careful development of its
2 Mitigation Plan, the Opposing Intervenors criticize it as overly optimistic.²¹⁵ Yet,
3 the Opposing Intervenors neither substantiate their criticisms nor offer any
4 practical alternative approaches.²¹⁶

5 For example, the Opposing Intervenors suggest that Big Rivers’ off-system
6 sales will not have a meaningful financial effect.²¹⁷ However, they do not
7 substantiate that assertion, nor do they substantiate their claims that Big Rivers’
8 research is inaccurate. Those failures are particularly glaring in light of the
9 demonstrated demand for electricity in Kentucky, as evidenced by the fact that
10 numerous Kentucky utilities have issued requests for proposals in recent months to
11 which Big Rivers has responded.²¹⁸ The Opposing Intervenors’ more specific
12 criticisms—such as the assertion that the MISO capacity surplus invalidates Big
13 Rivers’ off-system sales plan—hinge on their overly narrow view of the relevant
14 markets that fails to account for Big Rivers’ numerous medium- and long-term
15 contract opportunities; MISO does not enter into these kinds of long-term

²¹⁵ See, e.g., Direct Testimony of Frank Ackerman (“Ackerman Direct Testimony”), pp. 23-27 (May 24, 2013); Direct Testimony of David Brevitz (“Brevitz Direct Testimony”), pp. 21-29 (May 24, 2013); Direct Testimony of Lane Kollen (“Kollen Direct Testimony”), pp. 66:11-73:8 (May 24, 2013).

²¹⁶ Berry Rebuttal Testimony at p. 8:11-17 (neither Mr. Kollen nor Mr. Ackerman “prepared any analysis or study on the issue” of off-system sales revenues, and both “rely, instead, on assumptions, outdated information, unsupported speculation, and an unreasonably constructed view of the off-system market potentially available to Big Rivers”). See also Bailey Rebuttal Testimony at pp. 1:1-12:18 (Opposing Intervenors “have provided precious little factual basis for any challenge to Big Rivers’ detailed and lengthy study on this subject”); KIUC’s Response to Item No. 9 of Big Rivers’ First Request for Information (indicating that KIUC has not compared Big Rivers’ Members’ rates to all electric utilities); Sierra Club’s Response to Item No. 2 of Big Rivers’ First Request for Information (offering no independent study from Mr. Ackerman, and nothing more than a one-paragraph mitigation plan).

²¹⁷ See, e.g., Kollen Direct Testimony at pp. 66:11-73:8; Ackerman Direct Testimony at pp. 7:1-9:9.

²¹⁸ Berry Rebuttal Testimony at pp. 8:9-10:23.

1 agreements.²¹⁹ Additionally, even though MISO has greater than 20% reserve
2 margins for summer 2013, Big Rivers is still consistently selling into MISO.²²⁰
3 Simply put, the Opposing Intervenors offer nothing to challenge the reasonableness
4 of Big Rivers' Mitigation Plan as a whole, most likely because they cannot. Instead,
5 the natural consequence of their proposals is to force Big Rivers into the disruptive,
6 expensive, and uncertain realm of bankruptcy (which would be disastrous, as
7 discussed in Section VII.C) and the forced retirement of still-useful generation
8 assets (which would be wasteful, harmful, and short-sighted, as discussed in Section
9 XVII.E).

10 The Opposing Intervenors' criticisms seem to derive mostly from their
11 ostensibly willful misunderstanding of Big Rivers' Mitigation Plan. Most notably,
12 contrary to the Opposing Intervenors' repeated assertions about Big Rivers
13 "gambling" on its Mitigation Plan,²²¹ Big Rivers is not relying on any portion of the
14 Mitigation Plan except ratemaking for its long-term viability.²²² As explained by
15 Mr. Berry, other successes of the Mitigation Plan "will simply be an added benefit to
16 Big Rivers' members in the future."²²³

17 Based on all of the above, a consideration of the "potential for future growth
18 and expansion," like the consideration of Big Rivers' "history and development,"²²⁴

²¹⁹ See Berry Rebuttal Testimony at pp. 8:9-10:23.

²²⁰ Berry Hearing Testimony, July 3, 2013, Tr. 16:43'05".

²²¹ See, e.g., Kollen Direct Testimony at pp. 66:23-67:4; Ackerman Direct Testimony at p. 29:14-15.

²²² Bailey Rebuttal Testimony at pp. 11:8-12:18.

²²³ Berry Rebuttal Testimony at p. 7:9-16.

²²⁴ *National-Southwire*, 785 S.W.2d at 512.

1 strongly supports Big Rivers' proposal that it should be enabled to implement its
2 Mitigation Plan by recovering its proposed rates.

3 Conversely, the Opposing Intervenors advocate regulatory abandonment
4 through a denial or material reduction of Big Rivers' proposed rates. This approach,
5 however, disregards "the history and development of [Big Rivers] and its
6 property."²²⁵ Big Rivers' generation assets were prudently constructed and
7 approved by the Commission; therefore Big Rivers should be permitted to recover
8 all costs associated with those prudent investments, and the Members and their
9 member-owners should be permitted an opportunity to continue to benefit from
10 those prudent investments.²²⁶ Furthermore, withdrawing regulatory support for
11 those assets would contradict the approach contemplated by the Commission itself
12 in the Unwind Order, which required Big Rivers to increase its transmission
13 capacity specifically for the purposes of marketing available capacity in the event of
14 a Smelter closure. Such an abrupt shift in methodologies²²⁷ would constitute a
15 violation of Big Rivers' due process rights.²²⁸

16 This sort of regulatory abandonment would also disregard Big Rivers'
17 reasonable and well-supported Mitigation Plan that demonstrates a "potential for

²²⁵ *National-Southwire*, 785 S.W.2d at 513 (quoting KRS 278.290(1)).

²²⁶ Bailey Rebuttal Testimony at p. 7:17-18 ("Our generation investments were made many years ago and were prudent when they were incurred."); Berry Rebuttal Testimony at pp. 24:20-25:2, p. 6:3 ("The Coleman Station was a prudent investment when it was built").

²²⁷ Bailey Rebuttal Testimony at p. 8:4-6 ("Disallowing the rate relief sought by Big Rivers would constitute a significant and abrupt change of course with respect to how the Commission evaluates the usefulness of Big Rivers' generating assets.").

²²⁸ See *Duquesne Light Co.*, 488 U.S. 299 ("a State's decision to arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others would raise serious constitutional questions").

1 future growth and expansion.”²²⁹ Indeed, adoption of the Opposing Intervenors’
2 recommendations would effectively punish Big Rivers for maintaining its prudently-
3 constructed generation assets for the benefit of its Members simply because
4 wholesale market prices and global aluminum prices beyond Big Rivers’ control
5 have suffered unprecedented downturns in the short-term.²³⁰ This denial would
6 topple “the first ‘domino’ that . . . could push Big Rivers into bankruptcy,”²³¹ in
7 contravention of the Supreme Court’s caution that rates “threatening [a utility’s]
8 ‘financial integrity’” may be “so unjust as to be confiscatory”²³² and, consequently,
9 an unconstitutional taking.²³³

10 Simply put, in addition to advocating that the Commission embrace an
11 unconstitutionally abrupt change in regulatory course regarding cost-recovery for
12 Big Rivers’ generating fleet, the Opposing Intervenors’ path of regulatory
13 abandonment would undermine Big Rivers’ Mitigation Plan and accomplish nothing
14 but depriving Big Rivers’ Members of the benefit of Big Rivers’ generating fleet.²³⁴

15 The Commission should instead do as Mr. Bailey requests: “exercise
16 regulatory patience and give Big Rivers time to execute its [Mitigation Plan] to

²²⁹ *National-Southwire*, 785 S.W.2d at 512.

²³⁰ Bailey Rebuttal Testimony at p. 8:1-4.

²³¹ Bailey Rebuttal Testimony at p. 6:2-3.

²³² *Verizon Communs., Inc.*, 535 U.S. at 524.

²³³ *Duquesne Light Co.*, 488 U.S. at 307-8.

²³⁴ Bailey Rebuttal Testimony at p. 8:6-9 (regulatory abandonment “would also deprive Big Rivers and its members of the present and future hedge value these assets provide and jeopardize Big Rivers’ financial viability”). As discussed in Section VII.C, the bankruptcy likely to result from this approach would harm not just Big Rivers, but also its Members, their ratepayers, and the entire region.

1 realize benefits for [its] members.”²³⁵ This approach is consistent with the
2 Commission’s prior approval, as recently as the 2011 Rate Case, of Big Rivers’
3 recovering costs associated with its generating fleet,²³⁶ and therefore avoids a
4 significant and abrupt change of course²³⁷ that could constitute a due process
5 violation.²³⁸ It would also account for the broad spectrum of ratemaking factors
6 enunciated by the Kentucky courts and the Supreme Court, including “the history
7 and development of [Big Rivers] and its property,” the “potential for future growth
8 and expansion,” and Big Rivers’ ongoing “financial integrity.”²³⁹ Moreover, from a
9 practical standpoint, enabling Big Rivers’ ability to implement its Mitigation Plan is
10 the best way of ensuring the best possible long-term outcome for Big Rivers’
11 Members, their member-owners, and Western Kentucky.

12 The choice here is clear. Based on the history of the Unwind Transaction, as
13 well as Big Rivers’ cautious research and analysis, Big Rivers developed a
14 Mitigation Plan that is “reasonably certain to succeed”²⁴⁰ in benefitting its Members
15 and their member-owners.²⁴¹ Moreover, Big Rivers’ financial viability is not
16 dependent on the success of any element of the Mitigation Plan except this rate

²³⁵ Bailey Rebuttal Testimony at p. 5:5-7.

²³⁶ 2011 Rate Case Order at *3-5 (acknowledging Big Rivers’ off-system sales strategy as part of the plan established in the Unwind Transaction, and concurring with Big Rivers’ proposed rate base except for a minor adjustment to working capital).

²³⁷ Bailey Rebuttal Testimony at p. 4:6.

²³⁸ See *Duquesne Light Co.*, 488 U.S. 299.

²³⁹ *National-Southwire*, 785 S.W.2d at 512-13; *Hope*, 320 U.S. at 603.

²⁴⁰ Bailey Rebuttal Testimony at p. 11:10; Berry Rebuttal Testimony at p. 11:21-23 (“Big Rivers’ Mitigation Plan has a reasonable opportunity to benefit its members when viewed in the broader perspective of the market’s medium- and long-term horizons.”).

²⁴¹ Berry Rebuttal Testimony at p. 10:3-6.

1 proceeding.²⁴² Instead, as Mr. Bailey explains, “success of the Mitigation Plan will
2 allow Big Rivers to begin sooner returning additional value to its members to help
3 offset the cost of the proposed rate adjustment.”²⁴³

4 Given the specter of bankruptcy, there is no benefit to refusing Big Rivers a
5 reasonable opportunity to pursue its Mitigation Plan.²⁴⁴ Therefore, the Commission
6 should approve Big Rivers’ proposed rates as fair, just, and reasonable.

7 **VII. Denial of the Full Rate Relief, as Suggested by the Opposing Intervenors,**
8 **Will Likely Force Big Rivers to Cease Operations or File for Bankruptcy.**

9 As Mr. Bailey explained, “[w]e have asked for the bare minimum possible to
10 meet our debt service and continue funding an appropriately-reduced scale of
11 operations in light of Century’s unilateral contract termination.”²⁴⁵ Mr. Bailey’s
12 “bare minimum” assertion is not rhetoric; it is based on rigorous calculation and
13 forecasting.

14 The Commission has recognized that Big Rivers operates under “unique
15 circumstances” due to its contractual obligations.²⁴⁶ Big Rivers’ financial
16 performance is required to fall within an extremely narrow range, bounded by a
17 1.24 Contract TIER “Ceiling” (established by the Smelter Agreements and twice-

²⁴² Berry Rebuttal Testimony at p. 8:12-13 (“Big Rivers is not staking its long-term viability on the success of any element of the Mitigation Plan except this rate case.”); Bailey Rebuttal Testimony at pp. 11:8-12:18 (“The increase proposed in this case is sufficient to enable [Big Rivers] to withstand the departure of Century’s Hawesville Smelter and maintain relatively low electric rates, even without any further mitigation and even under the continued downturn in the wholesale power market.”).

²⁴³ Bailey Rebuttal Testimony at pp. 11:21-12:2 (further explaining that “[t]he success of the Mitigation Plan represents purely potential benefit to our members and their ratepayers”).

²⁴⁴ See Bailey Hearing Testimony, July 1, 2013, Tr. 13:18’16” (explaining that “there’s opportunity here,” and Opposing Intervenors’ proposals would simply be “giving it up”).

²⁴⁵ Bailey Rebuttal Testimony at p. 3:5-7. See also Bailey Direct Testimony at p. 9:1-8.

²⁴⁶ 2011 Rate Case Order at *8.

1 approved by the Commission²⁴⁷) and a 1.10 MFIR “Floor” (established by Big Rivers’
2 loan covenants).²⁴⁸ This 1.10 MFIR “floor” is a minimum performance requirement
3 under Big Rivers’ credit agreements.²⁴⁹ A failure to meet that requirement would
4 have severe and immediate adverse consequences.

5 In light of these unique restrictions, Big Rivers has carefully projected its
6 TIER and margins as part of its financial model in this case.²⁵⁰ Based on this
7 calculation, Big Rivers has determined that its full proposed rate adjustment is
8 necessary for it to meet its 1.24 Contract TIER and to ensure it can achieve the
9 minimum 1.10 MFIR.²⁵¹ In other words, Big Rivers’ proposed rates will allow it to
10 operate with narrow yet positive margins, as required by its loan covenants and
11 contractual obligations.²⁵²

12 The Attorney General proposes that Big Rivers’ rates be set based on the
13 minimum 1.10 MFIR. However, for the reasons expressed in the testimony of Ms.
14 Billie J. Richert, Big Rivers’ Vice President Accounting, Rates, and Chief Financial
15 Officer, setting rates based on the 1.10 MFIR would virtually guarantee that Big
16 Rivers would default on its loan agreements.²⁵³ Big Rivers needs rates based on a

²⁴⁷ See Unwind Order (approving Smelters Agreements with Contract TIER provision); 2011 Rate Case Order at 24 (“The Commission finds that a 1.24X TIER is a reasonable basis to determine Big Rivers’ revenue requirement”).

²⁴⁸ Big Rivers is required to collect rates reasonably expected to yield a 1.10 MFIR pursuant to the requirements of the First Mortgage Indenture to U.S. Bank National Association (the “Indenture”), the RUS Loan Contract, the CFC Revolver, the CFC Secured Loan Agreement, and the CoBank Revolver. See Richert Direct Testimony at p. 22:5-8, p. 29:3-6, p. 30:5-7, p. 31:9-10, p. 32:1-2.

²⁴⁹ Richert Direct Testimony at p. 9:20-22.

²⁵⁰ Direct Testimony of Travis A. Siewert, Application, Tab 72 (“Siewert Direct Testimony”), p. 13:5-8 (Jan. 15, 2013).

²⁵¹ Richert Direct Testimony at p. 9:8-12.

²⁵² See Siewert Direct Testimony at p. 14:5-15.

²⁵³ Rebuttal Testimony of Billie J. Richert (“Richert Rebuttal Testimony”), p. 10:1-19 (June 24, 2013).

1 1.24 Contract TIER. The Attorney General does not seem to understand that the
2 1.24 Contract TIER from the Alcan contract will still apply on August 20, 2013.²⁵⁴
3 Additionally, the Attorney General does not seem to comprehend that a 1.10 MFIR
4 and a 1.24 Contract TIER would produce very different results for Big Rivers.²⁵⁵

5 Because of that narrow margin, if Big Rivers' proposed rates are denied or
6 materially reduced, Big Rivers will almost certainly fail to achieve its 1.10 MFIR
7 minimum performance requirement, defaulting on numerous contractual
8 requirements and loan covenants, and triggering an accelerating cascade of events
9 that will force Big Rivers into Chapter 11.²⁵⁶

10 Establishing rates adequate to support contractual debt payments and a 1.10
11 MFIR is the "linchpin" of Big Rivers' RUS Corrective Plan.²⁵⁷ While KIUC and
12 Sierra Club readily point out that RUS is part of a government that does not
13 currently support coal, they fail to address RUS's much more prominent role as a
14 Big Rivers lender that is carefully monitoring its progress on the Corrective Plan. If
15 Big Rivers' proposed rates are denied, the most likely immediate result will be the
16 RUS exercising its right to divert Big Rivers' revenues to a lockbox. This action
17 would cut off the cash flow Big Rivers needs to satisfy all of its service and financial

²⁵⁴ *Id.*

²⁵⁵ See the Attorney General's Response to Item 11 of Big Rivers' First Request for Information to the Attorney General. See also Richert Rebuttal Testimony at p. 10:1-19.

²⁵⁶ Siewert Direct Testimony at p. 14:10-11 ("Big Rivers' financial situation absent the proposed rate increase is dire.").

²⁵⁷ See generally Unwind Order at *38 ("The Commission well recognizes that an investment grade credit rating for Big Rivers is a linchpin of the financial model.") The Mitigation Plan, designed in part to ensure Big Rivers' compliance with its contractual and loan requirements, is a key component of the RUS Corrective Plan. See Richert Hearing Testimony, July 2, 2013, Tr. 11:17'46" (explaining that the Corrective Action Plan makes reference to steps of the Mitigation Plan).

1 obligations,²⁵⁸ and it would cause irreparable financial damage from which Big
2 Rivers could not recover.

3 Furthermore, a denial of Big Rivers' proposed rates would signal a lack of
4 regulatory support and trigger other credit agreement defaults. This would, in
5 turn, likely cause other creditors and stakeholders, who are likely watching this
6 proceeding closely, to take swift actions to protect themselves, including the
7 following:

- 8 • Big Rivers would be prevented from accessing its remaining line of
9 credit since it could not do so under the credit agreement and the
10 required forms for any draw;²⁵⁹
- 11 • CFC and RUS would likely not approve Big Rivers' request to
12 finance the pollution control equipment it needs to continue
13 operating;²⁶⁰

²⁵⁸ Richert Direct Testimony at p. 29:10-19, Exhibit Richert-5. RUS would likely not release the lockbox outside of a Chapter 11 filing. Ms. Richert testified that while RUS is not currently directing revenues to the lockbox, RUS has made no comment as to when or if it would trigger the lockbox remedy. See Richert Hearing Testimony, July 2, 2013, Tr. 11:14'30" (indicating that RUS did not provide Big Rivers with any written documentation or notification regarding if or when the lockbox will be imposed).

²⁵⁹ See *In the Matter of: The Application of Big Rivers Elec. Corp. for Approval to Issue Evidences of Indebtedness*, Application, P.S.C. Case No. 2013-00125, pp. 53-54, p. 73 (March 28, 2013) (The proposed Amended and Restated Revolving Line of Credit Agreement between Big Rivers and CFC, in which Big Rivers certifies that "all of the representations and warranties contained in the Credit Agreement are true and correct on and as of the date hereof" and further represents that "[t]here has been no material adverse change in the business, assets, liabilities (actual or contingent), operations, condition (financial or otherwise) of the Borrower and its subsidiaries taken as a whole from that set forth in said financial statements except changes disclosed in writing to CFC prior to the date hereof.") Read together, these provisions provide that access to further credit under the agreement can only be obtained by certifying that there has been no material adverse change. If CFC deems denial of the proposed rates as a material adverse change, Big Rivers would be unable to make that certification and would thus be refused any additional requested draws on the line of credit.

²⁶⁰ See Bailey Rebuttal Testimony at p. 9:1-5; Richert Rebuttal Testimony at pp. 7:21-8:22. MATS compliance must be done now or a shutdown of plant operations in April 2015 is required. See 30 CFR 63.9984(b) (establishing April 16, 2015 MATS compliance deadline). These compliance costs, however, are not an issue for idled assets, which will only incur compliance costs upon restart. Berry Hearing Testimony, July 2, 2013, Tr. 16:21'30".

- 1 • Big Rivers would have to use its own cash to acquire and install
2 pollution control equipment it needs to continue operating its
3 generating fleet;
- 4 • Creditors would likely accelerate all amounts owed by Big Rivers
5 under certain credit agreements;²⁶¹
- 6 • Creditors would likely impose increased default interest rates;²⁶²
- 7 • The credit ratings agencies would likely take further severe
8 negative action against Big Rivers, thus undermining Big Rivers'
9 ability to access the credit market it needs for long-term viability;²⁶³
- 10 • Coal suppliers would likely demand the credit support that Big
11 Rivers has agreed to provide upon demand, likely to be a cash
12 deposit equal to deliveries during a billing cycle;
- 13 • MISO would likely demand credit support for Big Rivers'
14 obligations (estimated to be \$8 to \$10 million or more), which would
15 have to be in cash if Big Rivers is unable to retain or access the
16 CFC revolving credit facility;
- 17 • Vendors would likely place Big Rivers on "C.O.D." or "cash in
18 advance";
- 19 • If Big Rivers fails to achieve at least 1.10 MFIR, it will be unable to
20 issue Additional Obligations secured by the Indenture;²⁶⁴ and
- 21 • Prospective medium- and long-term buyers for power would likely
22 shun Big Rivers in favor of generation and transmission companies
23 viewed as more reliable, thus crippling Big Rivers' Mitigation Plan.

24 Each of these actions would have immediate and dire effects on Big Rivers'
25 ability to fulfill its existing obligations, its ability to obtain credit²⁶⁵ and, more

²⁶¹ Richert Direct Testimony at p. 30:16-21, p. 33:16-19.

²⁶² *Id.* at p. 30:16-21, p. 33:16-19.

²⁶³ See Moody's Investors Service, "Issuer Comment: Big Rivers Electric Corporation—Credit Opinion," (July 15, 2013), a true and accurate copy of which is attached hereto as Exhibit 2 (further downgrading the senior secured rating for Big Rivers' Ohio County Pollution Control Bonds to Ba2 from Ba1 following the hearing in this matter). This same document was also attached to Big Rivers' Updated Exhibit Richert-7 (July 24, 2013).

²⁶⁴ Richert Direct Testimony at p. 25:9-13.

²⁶⁵ *Id.* at pp. 25:18-26:2.

1 importantly, its liquidity—the cash flow that enables it to pay its bills, obtain the
2 fuel, supplies, and vendor support needed to operate, properly maintain its system,
3 and fulfill service obligations to its Members. Big Rivers’ cash and investments on
4 hand would rapidly evaporate to the minimum safe level of \$35 to \$40 million Ms.
5 Richert described. Big Rivers’ financial model projects that the Operating
6 Disbursements for the four months following the Century departure will average
7 \$32.41 million per month.²⁶⁶ With its revenues diverted to the lockbox—which is
8 likely to occur in response to any material reduction to Big Rivers’ proposed rates—
9 and unable to draw on its line of credit, Big Rivers’ cash and investments would
10 “burn down” to the bare minimum safe level in no more than eight to ten weeks.

11 The financial consequences of denying Big Rivers’ proposed rates would not,
12 however, be limited to Big Rivers or even Western Kentucky. They could spread to
13 every utility across the Commonwealth—a result that would be unthinkable had it
14 not happened in the past. In 1987, the Commission denied Big Rivers’ requested
15 increase in Case No. 9613.²⁶⁷ Almost immediately, the REA issued a letter to the
16 Commission to explain that “[f]rankly, we are all surprised and disappointed at this
17 action of the Commission”²⁶⁸ The letter also informed the Commission that, as
18 a direct result of the denial of Big Rivers’ proposed rates, the “REA and the RTB
19 will suspend all loan and loan guarantee approvals and advances on loans and loan
20 guarantees already approved to all electric and telephone borrowers in

²⁶⁶ See Financial Model, Electronic Attachment for Big Rivers’ Response to PSC 1-57.

²⁶⁷ See generally 9613 Order.

²⁶⁸ Embargo Letter, Ex. 1.

1 Kentucky.²⁶⁹ This reaction of REA in 1987 suggests the kind of reaction RUS, and
2 perhaps creditors of other Kentucky jurisdictional utilities, could have if forced
3 bankruptcy becomes an acceptable regulatory alternative to giving competent
4 utility management time to manage problems like those faced by Big Rivers.

5 For these reasons, the denial of Big Rivers' proposed rates would leave it with
6 insufficient revenue to meet its service obligations to its Members and its payment
7 obligations to its creditors.²⁷⁰ As a result, Big Rivers would quickly fall below its
8 contractual MFIR requirement, deplete its cash resources, have its revenues
9 "lockboxed," and be cut off from access to the capital it needs in order to continue
10 operations and protect its ongoing financial viability.²⁷¹ Out of liquidity, out of
11 credit, and out of options, Big Rivers would be forced into bankruptcy.

12 **A. The Recommendations of the Opposing Intervenors that the**
13 **Commission Deny Big Rivers' Requested Rate Relief Would Almost**
14 **Certainly Lead to Bankruptcy.**

15 To be clear, if the Opposing Intervenors' recommendations are adopted, Big
16 Rivers will experience negative margins and will fail to meet its MFIR
17 requirements.²⁷² As described in Section VII.B, Big Rivers would quickly exhaust
18 its liquidity reserves, lose access to credit, and find itself facing reorganization or
19 liquidation.

²⁶⁹ *Id.* (emphasis added).

²⁷⁰ Bailey Rebuttal Testimony at p. 5:8-14.

²⁷¹ *Id.* at p. 5:8-14.

²⁷² Richert Rebuttal Testimony at pp. 5:22-6:2; *id.* at Exhibit Richert Rebuttal-1; *id.* at p. 10:1-19 (noting that the 1.10 MFIR that the Intervenors suggest using to calculate the revenue requirement is inappropriate because that number is the absolute minimum that Big Rivers must achieve).

1 The Attorney General protests that it does not state a recommendation that
2 Big Rivers file for bankruptcy,²⁷³ but in the same breath remarkably claims that Big
3 Rivers has a revenue surplus and seeks to exclude all incremental revenues from
4 Big Rivers' request.²⁷⁴ Regardless of how the Attorney General characterizes its
5 goals and regardless of whether it actually uses the word "bankruptcy," the end
6 result of its proposals is undeniable: financial catastrophe and bankruptcy. From a
7 more general perspective, the Opposing Intervenors ask the Commission to reject or
8 reduce Big Rivers' proposed rates to intentionally undermine Big Rivers' financial
9 viability on the unfounded hope that creditors will make additional generous
10 concessions (which, as discussed in Section VII.B, below, they will not) or that a Big
11 Rivers reorganization or liquidation will somehow benefit Big Rivers' Members,
12 their member-owners, or the region (which, as discussed in Section VII.C, it will
13 not). KIUC witness Lane Kollen made this goal clear at the final hearing when he
14 proposed the extreme option of liquidation during his testimony.²⁷⁵ Thus, there can
15 be no doubt that the Opposing Intervenors propose to lead Big Rivers to
16 bankruptcy.

17 **B. The Commission Cannot Rely on Big Rivers' Creditors Granting**
18 **Concessions to Stave Off Bankruptcy.**

19 Despite the domino-like sequence of adverse events outlined above that
20 would result from a denial of Big Rivers' proposed rates, two intervenor witnesses
21 speculate that granting only partial relief would enable Big Rivers to negotiate a

²⁷³ Statement of Larry Cook, Assistant Attorney General, July 1, 2013, Tr. 11:43'55".

²⁷⁴ See Sections XVII.C, *infra*, discussing the Attorney General's proposed adjustments.

²⁷⁵ Kollen Hearing Testimony, July 3, 2013, Tr. 15:34'14".

1 debt forgiveness plan in which its lenders would make significant concessions to
2 eliminate the need for any further rate increase.²⁷⁶ This speculation is, to put it
3 mildly, unrealistic for several reasons.

4 Although the Opposing Intervenors devote a significant amount of their
5 attention to the theory that Big Rivers' lenders must be part of a solution, they
6 neglect to recognize that Big Rivers has already refinanced \$442 million in debt
7 with lenders,²⁷⁷ resulting in extended maturity dates,²⁷⁸ lower interest rates,²⁷⁹ and
8 fewer possible events of default.²⁸⁰ This refinancing will save Big Rivers' Members
9 and their member-owners millions of dollars each year in interest and other
10 charges. Just as importantly, the successful refinancing showed that Big Rivers
11 and its management team have earned the confidence of the lenders and the
12 Commission despite the significant uncertainties surrounding the Smelters' future
13 on Big Rivers' system.

14 Big Rivers' management team obtained this voluntary refinancing in the
15 appropriate way—by negotiating in good faith and timely seeking the Commission's
16 approval of all related transactions, not by making demands under the threat of
17 default, as the Opposing Intervenors would have the Commission force Big Rivers to

²⁷⁶ See, e.g., Kollen Direct Testimony, p. 77:8-9.

²⁷⁷ See *In the Matter of: Application of Big Rivers Electric Corporation for Approval to Issue Evidences of Indebtedness*, Order, P.S.C. Case No. 2012-00119 at *4 (May 25, 2012)

²⁷⁸ 2012 Refinancing Case Order at *5 (“The transactions described herein would increase Big Rivers’ liabilities by \$139,381,389 while, at the same time, would reduce Big Rivers’ annual interest expense by \$1,421,349 for nine years and extend the length of its financings by 11 years”).

²⁷⁹ *Id.* at *4 (“The financings are expected to be at an all-in interest rate that is below the rate of the existing RUS Note”).

²⁸⁰ *Id.* at *6 (“The revised Section 9.06 [of the CoBank Secured Credit Agreement], which will be included in the executed version of the CoBank Secured Credit Agreement, clarifies that it is not an Event of Default if a Smelter contract expires by its own terms or is terminated pursuant to a notice of Smelter plant closure”).

1 do. As testified to by Mr. William K. Snyder, Principal, Deloitte Financial Advisory
2 Services LLP, Big Rivers' lenders, RUS, CFC, and CoBank are particularly unlikely
3 to offer material concessions such as a write-down of principal debt obligations.²⁸¹
4 Even if they were willing to grant such concessions (which they are not), it is
5 unrealistic and unreasonable to expect them to grant concessions without any
6 adverse consequences to Big Rivers or other jurisdictional utilities in the
7 Commonwealth.

8 The Opposing Intervenors propose that the Commission should intentionally
9 undermine Big Rivers' financial integrity, thereby crippling its ability to meet its
10 service and financial obligations in the hope that this will incentivize Big Rivers'
11 lenders to negotiate and agree to massive debt forgiveness. The Opposing
12 Intervenors offer no substantiation for their hope, nor is their hope grounded in fact
13 or logic.

14 It is neither rational nor reasonable to assume that lenders owed hundreds of
15 millions of dollars would decline to enforce their rights, would stand aside to allow
16 Big Rivers to accumulate cash in a Chapter 11 case, and would agree to take
17 enormous losses on those outstanding loans, while at the same time agreeing to loan

²⁸¹ Snyder Rebuttal Testimony at pp. 5:23-6:12 ("Attempting to obtain concessions from creditors before addressing Big Rivers' revenue requirements [in this rate proceeding] would be counterproductive. Rational lenders will not participate in meaningful discussions before this step is completed."). *See also* Snyder Hearing Testimony, July 2, 2013, Tr. 12:02'30" (much of Big Rivers' debt is owed to cooperative lenders that "will be very, very, very hesitant to take a hit, you know, a write-down"); Snyder Hearing Testimony, July 2, 2013, Tr. 12:54'27" ("I've dealt with both [CFC and CoBank]. They are going to be very, very reluctant to write their loans down.").

1 Big Rivers hundreds of millions of additional dollars.²⁸² Furthermore, the loans by
2 Big Rivers' lenders are secured by substantially all of Big Rivers' assets, including
3 its generation and transmission facilities and its wholesale power contracts with its
4 Members. The loans are unconditional obligations of payment. Nothing in the loan
5 documents provides any debt reduction or excuse as a result of any change in
6 demand—even if a Smelter leaves Big Rivers' system—nor have the Opposing
7 Intervenors argued that any such debt relief provision exists.

8 Additionally, the Opposing Intervenors speak in terms of a months-long
9 window during which Big Rivers could attempt to extract massive debt payment
10 and principal reduction concessions. This suggested “workout opportunity window”
11 is illusory because Big Rivers' liquidity would fall precipitously from the rapid “burn
12 down” of cash after a materially adverse ruling.

13 As Mr. Snyder noted in response to Vice Chairman Gardner's questions, it
14 would take a team of experts approximately six to eight weeks²⁸³ just to complete an
15 assessment of the myriad issues relevant to a workout, including preliminary

²⁸² See Richert Rebuttal Testimony at pp. 7:19-8:2 (“It is not reasonable for Big Rivers to expect its creditors to negotiate additional borrowings while simultaneously making concessions on existing debt.”); Bailey Rebuttal Testimony at p. 9: 3-5 (“It is simply not rational to assume that Big Rivers' lenders would make concessions and loan additional funds to Big Rivers.”); Bailey Hearing Testimony, July 1, 2013, Tr. 13:16'11” (“if you go to a creditor and ask them to discount their loans to you, it's not rational to expect they'll loan you more money”).

²⁸³ Snyder Hearing Testimony, July 2, 2013, Tr. 12:46'45”. At only 40 hours per week, the four person team would work approximately 1,280 hours. At the blended rate of \$495 charged by Deloitte for its work in this proceeding, that preliminary work alone would cost approximately \$633,600 before any proposal was developed or negotiations began. (40 hours x 4 staff x 8 weeks x \$495/hr). See Deloitte Invoice (July 10, 2013), attached to Big Rivers' Sixth Updated Response to PSC 1-54 (July 24, 2013).

1 valuations, historic and projected cash flows, alternative capital structures, and a
2 business plan assessment.²⁸⁴

3 Once that analytical foundation for a multi-party workout negotiation was in
4 place, actual negotiations would likely take months longer. The four lender groups,
5 unions, vendors and suppliers, the Members, and their member-owners would all
6 have enormous interests at risk in such a process. There would inevitably be
7 lengthy delays while each lender and stakeholder group proceeded through its own
8 individual analysis and review process.²⁸⁵ As just one example, seeking permanent
9 financing from RUS for pollution control expenditures is expected to take
10 approximately three years.²⁸⁶

11 With a cash drain of averaging over \$32 million per month once the lockbox is
12 activated,²⁸⁷ Big Rivers would “run out of runway” before it could even hope to
13 formulate and negotiate a plan, much less submit a restructuring to the
14 Commission for consideration or approval. It is reckless to suggest (as the Opposing
15 Intervenors do) that these major restructuring decisions could be made and
16 implemented before Big Rivers runs out of cash, even if the creditors were eager to
17 quickly write down the debt—which, of course, they are not.

²⁸⁴ This analysis addresses only Big Rivers' side of the equation.

²⁸⁵ Since the impact of the decisions would extend well beyond these groups alone, its consideration will not be swift. The decisions would affect other regulated utilities in the Commonwealth as current (and prospective) lenders to those utilities would justifiably pause to see if the Commission might send another utility to Chapter 11 to deal with the problems it faces. It would also affect Big Rivers' ability borrow in the future as well as the cost of any such borrowing – if and when it was ever able to borrow in the future. Losses to cooperative lenders would necessarily be passed on to their members in the form of higher rates, fees and costs as they work to recoup the loss they suffered.

²⁸⁶ Richert Hearing Testimony, July 2, 2013, Tr. 10:37'27”.

²⁸⁷ See note 275.

1 It is beyond question that Big Rivers will need to borrow additional funds in
2 the near future to pay for ongoing capital improvements such as the environmental
3 upgrades necessary to continue operating certain components of its generating fleet.
4 The Commission should not take any actions that would cause the lenders to refuse
5 to provide additional funds or the consents needed to allow other lenders to advance
6 those funds as collateralized loans. Ironically, however, the Opposing Intervenors
7 apparently do not appreciate the fact that their proposal would ultimately provoke
8 the parties that control the funds Big Rivers must have to operate. That approach
9 would be recklessly imprudent, counterproductive for Big Rivers, and would result
10 in significant additional costs to Big Rivers' Members.

11 Additionally, the Opposing Intervenors, after enjoying the benefits of the
12 refinancing's lower interest rates, should not be allowed to now cause those same
13 lenders to suffer substantial losses on the refinancing that was made in good faith
14 and approved by the Commission after a full and complete hearing.

15 Instead of recognizing the legal rights that the lenders have as secured
16 creditors, the Opposing Intervenors want to immediately put the lenders at risk by
17 denying Big Rivers the revenue it needs to service their debt. Since the lenders are
18 unlikely—even (or perhaps especially) in the event of a Commission order denying
19 the requested rate relief—to voluntarily agree to the massive write-downs that the
20 Opposing Intervenors advocate, it is reasonable to assume that they would react to
21 such a threat by rejecting any request for additional loans and then aggressively
22 enforcing the lien rights set forth in the loan and collateral documents that the

1 Commission approved. This would include activating the lockbox and triggering a
2 liquidity crisis that would force Big Rivers into Chapter 11, or as Mr. Kollen
3 predicted over a year ago, liquidation.²⁸⁸

4 For these reasons, a denial of Big Rivers' proposed rates would almost
5 certainly lead to bankruptcy, as discussed above, not the creditor bail-out imagined
6 by the Opposing Intervenors. The threat of default will not incentivize Big Rivers'
7 lenders to negotiate even more concessions than they have already made. Instead,
8 it would only encourage them to quickly place Big Rivers into a liquidity crisis. At
9 that point, Big Rivers' only option would be to begin the very disruptive, expensive,
10 and unpredictable Chapter 11 process. The Opposing Intervenors' suggestion to the
11 contrary is baseless, disingenuous, and impracticable.

12 C. The Consequences of Bankruptcy.

13 As discussed above, denial of Big Rivers' proposed rates would almost
14 certainly lead to bankruptcy. Although the Opposing Intervenors go to great
15 lengths to appear to avoid advocating bankruptcy, their suggested course
16 encourages this result,²⁸⁹ and their characterization of bankruptcy as a simple
17 solution to Big Rivers' financial predicament belies reality.²⁹⁰

²⁸⁸ See Kollen Hearing Testimony, July 3, 2013, Tr. 15:02'56" (reading his prior testimony from Case No. 2012-00063 into the record, including his assertion that "if the rate increases are not approved, Big Rivers would face bankruptcy and perhaps liquidation").

²⁸⁹ Mr. Kollen, in testifying that the template in his mind was the Cajun Electric bankruptcy, confirmed that he envisions Big Rivers liquidating itself or its assets. Aside from ignoring the obvious problems that could be foisted upon the Members in such a liquidation, Mr. Kollen also conveniently neglects to account for the tens of millions of dollars of fees that would be incurred in a Chapter 11 case, or how those fees would be paid. Kollen Hearing Testimony, July 3, 2013, Tr. 15:34'35".

²⁹⁰ Richert Rebuttal Testimony at p. 6:5-6.

1 Bankruptcy is an extraordinarily disruptive and expensive process, replete
2 with risk and delay and with an uncertain outcome. Big Rivers' creditors would
3 likely respond by quickly limiting Big Rivers' ability to obtain the capital it needs to
4 continue operations. Creditors may also try to recover their debts by going after Big
5 Rivers' Economic Reserve and Rural Economic Reserves, which would prevent those
6 reserves from being used for their intended purposes.²⁹¹ Industries considering
7 locating in Big Rivers' service area would likely reconsider, limiting Big Rivers'
8 options to sell available generation capacity.²⁹² Even the Opposing Intervenors'
9 purely speculative hope for lower rates would be placed at risk. In short, Big Rivers
10 and the economy of Western Kentucky cannot afford to gamble on a bankruptcy
11 that offers nothing but the certainty of high expense and unnecessary risk.

12 A Chapter 11 filing does not assure lower rates. In fact, the only certain
13 outcomes of bankruptcy are negative for Big Rivers, its Members, and their
14 member-owners. Any Chapter 11 would be a long, disruptive, and expensive
15 process, the costs of which would be borne by Big Rivers, its Members, and,
16 ultimately, the retail member-owners. Big Rivers' 1996 bankruptcy was, at the
17 time, "the largest bankruptcy case ever filed in Kentucky and at the time was one of
18 the largest bankruptcy cases in the country."²⁹³ The fees and expenses of a Chapter

²⁹¹ Bailey Hearing Testimony, July 1, 2013, Tr. 13:18'16" (denying proposed rates would be "putting at risk the reserves and the cash we already have"). *See also* Snyder Rebuttal Testimony, p. 16:6-11 (creditors likely to "demand cash in advance terms," hindering Big Rivers' liquidity and cash availability), p. 16:15-17 ("It is reasonable to assume that the litigation would include the status and utilization of Big Rivers' reserve accounts and would be extensive, time-consuming and expensive litigation.").

²⁹² *See* Richert Rebuttal Testimony at p. 6:5-15.

²⁹³ *See In re Big Rivers Elec. Corp., Debtor*, 355 F.3d 415, 422 (6th Cir. 2004).

1 11 case today could be anywhere between \$30 million and \$90 million (or more), and
2 this would have to be paid out of Big Rivers' cash on hand or from cash flow.²⁹⁴ This
3 would be on top of the fees and expenses leading up to a Chapter 11 filing. In
4 addition to funding its own professionals, Big Rivers would have to pay the fees and
5 expenses of the professionals for the unsecured creditors' committee and would
6 likely have to bear the lenders' professional expenses as well.²⁹⁵ All of these costs
7 would be passed on to the retail member-owners.²⁹⁶ Instead of accumulating cash
8 (as Mr. Kollen theorizes), Big Rivers' expenses would dramatically increase.²⁹⁷ The
9 Opposing Intervenor neither mention nor attempt to estimate these costs.²⁹⁸

10 A Chapter 11 for Big Rivers would also likely take years²⁹⁹ to reach a
11 conclusion, further increasing the costs Big Rivers would bear.³⁰⁰ During this time,
12 Big Rivers' management team would be forced to divert significant time from
13 integral day-to-day operational matters to deal with secured creditors, the
14 unsecured creditors committee, and other parties in interest,³⁰¹ all to the great
15 detriment of Big Rivers' Members and their member-owners.³⁰² As a result, Big

²⁹⁴ Snyder Rebuttal Testimony at p. 6:20-22.

²⁹⁵ *Id.* at p. 7:6-9.

²⁹⁶ *Id.* at p. 7:12-15.

²⁹⁷ *Id.* at p. 14:21-23.

²⁹⁸ Richert Rebuttal Testimony at p. 7:7-10.

²⁹⁹ *See In re Big Rivers Elec. Corp., Debtor*, 355 F.3d 415 (6th Cir. 2004) (noting that Big Rivers petitioned for bankruptcy in September of 1996, emerged in June of 1997, and the ancillary litigation extended for years thereafter).

³⁰⁰ Snyder Rebuttal Testimony, Exhibit A.

³⁰¹ *Id.* at p. 9:19-21.

³⁰² Richert Rebuttal Testimony at p. 6:9-10 ("The process is disruptive and time-consuming, thus detracting from management's ability to run the business effectively.").

1 Rivers' flexibility to deal with critical issues would also be compromised, making it
2 far more difficult to resolve key issues facing the company.³⁰³

3 Furthermore, industries considering relocating to Big Rivers' service area,
4 expanding their energy needs, or otherwise purchasing power from Big Rivers,
5 would be reluctant to commit during this extended period of uncertainty. This
6 reluctance would hinder Big Rivers' ability to achieve the benefits of its Mitigation
7 Plan³⁰⁴ and would create a situation where the Commission and bankruptcy judge
8 would compete for control over the process.

9 It is also unclear how much regulatory authority the Commission would
10 maintain over Big Rivers in bankruptcy,³⁰⁵ especially since the Bankruptcy Code
11 provides the bankruptcy court with jurisdiction over the company's assets and its
12 operations.³⁰⁶ The overlapping jurisdiction between a bankruptcy court and a
13 regulatory body created extensive (and expensive) litigation in each of the Public
14 Service Company of New Hampshire, Cajun Electric and Pacific Gas & Electric
15 bankruptcy cases.

³⁰³ Snyder Rebuttal Testimony at p. 10:16-18.

³⁰⁴ See Richert Rebuttal Testimony at p. 6:5-15.

³⁰⁵ Richert Rebuttal Testimony at p. 6:12-13 (describing how the bankruptcy had the potential to "[dilute] the Commission's current control over issues that are of primary importance to Big Rivers and its Members"); Snyder Rebuttal Testimony at p. 7:12-16 (describing how the appointment of a trustee would result in "wholesale surrendering of control of the restructuring process to the bankruptcy court"). See also *In re Public Serv. Co.*, 108 B.R. 854, 892 (Bankr. D.N.H. 1989) (holding that the Bankruptcy Code preempts state law requiring regulatory approval of changes in corporate structure and transfers of assets).

³⁰⁶ Richert Rebuttal Testimony at p. 6:12-13 (describing how the bankruptcy had the potential to "[dilute] the Commission's current control over issues that are of primary importance to Big Rivers and its Members"); Snyder Rebuttal Testimony at p. 7:12-16 (describing how the appointment of a trustee would result in "wholesale surrendering of control of the restructuring process to the bankruptcy court"). See also *In re Public Serv. Co.*, 108 B.R. 854, 892 (Bankr. D.N.H. 1989) (holding that the Bankruptcy Code preempts state law requiring regulatory approval of changes in corporate structure and transfers of assets).

1 In fact, a Chapter 11 could very well end in the liquidation of Big Rivers—a
2 result advocated by Mr. Kollen when he refers to selling some or all of Big Rivers’
3 generating plants.³⁰⁷ Selling generating plants as part of a bankruptcy liquidation
4 would create additional fees and expenses that would necessarily be borne by the
5 Members and their member-owners.³⁰⁸ Moreover, selling long-life assets (like
6 generating plants) at the bottom of a market cycle based on short term economic
7 conditions assures losses that would be borne by Big Rivers, its Members, and its
8 lenders, without assuring that retail member-owners would ever realize lower rates.
9 This problem is further discussed in Section XVII.E.

10 The Opposing Intervenors do not even attempt to substantiate how the
11 significant risks of bankruptcy would benefit Big Rivers, its Members, their
12 member-owners, or the region. In fact, the Opposing Intervenors offer nothing more
13 than their musings about the possible results of bankruptcy. They offer little to no
14 perspective on the lengthy timeframes likely attendant to a bankruptcy of this
15 magnitude. They do not even begin to offer an alternate rate design.³⁰⁹ In short,
16 the Opposing Intervenors do not offer any workable alternative to be considered by
17 the Commission. They offer only criticism, speculation, and risk.

18 The Opposing Intervenors’ concept of Chapter 11 is stuck in the mid-1990’s,
19 but Chapter 11, Big Rivers, the economy, and the political climate are not the same
20 as they were during Big Rivers’ 1996 bankruptcy. Then, Big Rivers had very

³⁰⁷ Kollen Direct Testimony at p. 80:1 (suggesting “involuntary restructuring” as an option); Kollen Hearing Testimony, July 3, 2013, Tr. 15:34’14”.

³⁰⁸ Richert Rebuttal Testimony at p. 7:7-10.

³⁰⁹ Kollen Hearing Testimony, July 3, 2013, Tr. 15:06’20”.

1 unfavorable fuel contracts that could be rejected in Chapter 11.³¹⁰ Now, contracts
2 for commodities are treated differently in Chapter 11.³¹¹ Today, no “white knight”
3 awaits as it did in 1996,³¹² it is extremely unlikely that creditors will be paid in full
4 with interest as they were in 1996, and, in fact, the Opposing Intervenors advocate
5 a forced write down of creditors’ debts.³¹³ The Chapter 11 advocated by the
6 Opposing Intervenors would also be far more contentious, litigious, and expensive
7 (costing between \$30 million and \$90 million or more)³¹⁴ than Big Rivers’ 1996
8 bankruptcy. Furthermore, the U.S. Economy, with modest growth, is very different
9 than it was with the robust growth of the mid-1990’s.³¹⁵

10 In summary, gambling on the success of the bankruptcy process is the
11 antithesis of a prudent strategy. The only certainties of the process are that it will
12 be disruptive, time-consuming, risky, and expensive; a successful restructuring is
13 far from assured. Big Rivers’ proposed rates provide the best chance to avoid the

³¹⁰ *In re Big Rivers Elec. Corp.*, 233 B.R. 754, 756 (Bankr. W.D. Kentucky 1999) (“Green River was on the long end of the stick of Contract # 527, a long term coal contract that generated profit of \$2,000,000.00 PER MONTH for green River and, conversely, a 2 million per month cash loss for Big Rivers.”) (reversed on other grounds).

³¹¹ Section 907 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 made substantial revisions to 11 U.S.C. Sec. 546 regarding the rights of parties holding commodities and other contracts. See Public Law No. 109-8, 119 Stat. 23, April 20, 2005.

³¹² *In re Big Rivers Elec. Corp.*, 233 B.R. 726, 727 – 732 (Bankr. W.D. Kentucky 1998) (describing the agreement between PacifiCorp Kentucky Energy Company and Big Rivers that preceded the bankruptcy filing and also how that agreement was replaced by an agreement with LG & E Energy Corp.).

³¹³ Kollen Direct Testimony, p. 77:5-20.

³¹⁴ Snyder Rebuttal Testimony, pp. 6:18-7:16.

³¹⁵ The Bureau of Economic Analysis (U.S. Department of Commerce) reported the Gross Domestic Product percent change (<http://www.bea.gov/national/xls/gdplev.xls> at <http://www.bea.gov/national/index.htm>) for the fourth quarter of 2012 and first quarter of 2013 increased by 0.4% and 1.8%, respectively, based on Chained 2005 Dollars and 1.3% and 3.1%, respectively based on Current Dollars. By comparison, in the second and third quarters of 1997, the GDP increased by 6.1% and 5.1%, respectively based on Chained 2005 Dollars and 7.1% and 6.6%, respectively based on Current Dollars. Big Rivers’ plan of reorganization was confirmed in June 1997.

1 certain negative consequences of that scenario and to achieve a positive result in
2 these difficult circumstances.

3 **D. Confiscatory Rates, Like Those Proposed by the Opposing Intervenors,**
4 **Are Unlawful and Unconstitutional.**

5 As set forth in the subsections above, the denial or material reduction of Big
6 Rivers' proposed rates would undermine Big Rivers' financial viability by triggering
7 an accelerating cascade of adverse events, including the capture of Big Rivers'
8 revenues in a lockbox, that would force Big Rivers into bankruptcy. Because rates
9 "threatening [a utility's] 'financial integrity'" are "so unjust as to be confiscatory,"³¹⁶
10 this result would be unconstitutional and the Commission should reject the
11 Opposing Intervenors proposals.

12 A fair, just, and reasonable rate, by definition, is one that allows a utility to
13 operate.³¹⁷ The Supreme Court has suggested that rates "threatening [a utility's]
14 'financial integrity'" are considered to be "so unjust as to be confiscatory."³¹⁸
15 Confiscatory rates are an unconstitutional taking under the Fifth Amendment.³¹⁹

³¹⁶ *Verizon Communs., Inc.*, 535 U.S. at 524; *Duquesne Light Co.*, 488 U.S. at 307-8.

³¹⁷ *Hope*, 320 US at 603 (rates must provide "enough revenue not only for operating expenses but also for the capital costs of the business").

³¹⁸ *Verizon Communs., Inc.*, 535 U.S. at 524 (quoting *Duquesne Light Co.*, 488 U.S. at 307, 312).

³¹⁹ *Duquesne Light Co.*, 488 U.S. at 307-8 ("The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory.") (citing *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 597 (1896) (A rate is too low if it is "so unjust as to destroy the value of [the] property for all the purposes for which it was acquired," and in so doing "practically deprive[s] the owner of property without due process of law")). See also *FPC v. Natural Gas Pipeline Co.*, 315 U.S. at 585 ("By long standing usage in the field of rate regulation, the 'lowest reasonable rate' is one which is not confiscatory in the constitutional sense.").

1 The Commission staff itself has recently argued that “[r]emaining financially viable
2 would appear to be the very purpose of having ‘fair, just, and reasonable rates.’”³²⁰

3 This substantive consideration of a utility’s “financial integrity” has been
4 repeatedly reaffirmed,³²¹ and it has its roots in the longstanding principle that a
5 “return should be reasonably sufficient to assure confidence in the financial
6 soundness of the utility, and should be adequate, under efficient and economical
7 management, to maintain its credit and enable it to raise the money necessary for
8 the proper discharge of its public duties.”³²² Consequently, when setting rates that
9 are fair, just, and reasonable, the Commission must ensure that the resulting rates
10 will, among other things, “enable [Big Rivers] to operate successfully, to maintain
11 its financial integrity, [and] to attract capital.”³²³

12 As established above, denying or materially reducing the proposed rate
13 adjustment would not only threaten Big Rivers’ financial viability, it would destroy
14 it. Debt repayments would be accelerated. Access to credit would dry up. Physical
15 plant would deteriorate. Big Rivers would find itself walking, hat in hand, into
16 bankruptcy court, leading to enormous costs, possible liquidation, and great
17 uncertainty for the Members and their member-owners, including the potential for

³²⁰ Reply Brief for the Kentucky Public Service Commission, Ky. Supreme Court Case No. 2009-SC-000134 (Dec. 15, 2009).

³²¹ See, e.g., *Permian Basin Area Rate Cases*, 390 U.S. at 792 (factfinder “must determine” if rate will allow utility to “maintain financial integrity” and “attract necessary capital”); *Jersey Central III*, 810 F.2d at 1175 (*Hope* makes clear that utilities have “an interest in maintaining access to capital markets, the ability to pay dividends, and general financial integrity” that must be considered in ratemaking even if the utility “is not clearly headed for bankruptcy”).

³²² *Bluefield Waterworks*, 262 U.S. 679.

³²³ *Stephens v. South Central*, 545 S.W.2d at 930-31 (Ky. 1976); *National-Southwire*, 785 S.W.2d at 512.

1 higher rates. Under these circumstances, a materially adverse ruling will result in
2 rates that are not fair, just, and reasonable.

3 Because Big Rivers seeks the bare minimum adjustment necessary to
4 maintain its financial integrity, the Commission should find that its proposed rates
5 are fair, just, and reasonable.

6 **VIII. Big Rivers Appropriately Continues to Include the Remaining Fixed Costs of**
7 **the Coleman Station in Rates.**

8 As part of its Mitigation Plan, Big Rivers plans to temporarily idle the
9 Coleman Station to reduce expenses in response to the Century contract
10 termination because the fixed cost savings Big Rivers will achieve by idling the
11 generating station are currently greater than the margins Big Rivers can earn by
12 continuing to run the station and selling the power into the wholesale power
13 market. Instead of commending this reasoned decision, the Opposing Intervenors
14 latch on to this plan as the cornerstone of their arguments that Big Rivers' revenue
15 request should be denied or greatly reduced on the grounds that the capacity from a
16 temporarily idled generation station suddenly becomes "excess" such that it would
17 not be appropriate to include the fixed costs of the temporarily idled station in
18 rates.

19 However, it is appropriate to continue including the remaining fixed costs of
20 Coleman Station in Big Rivers' rates. The Coleman Station provides ongoing
21 benefits to Big Rivers' Members and their member-owners even if temporarily idled,
22 and it is a necessary part of Big Rivers' ongoing Mitigation Plan. As a result,
23 allowing Big Rivers to recover the Coleman Station's fixed costs—interest expense,

1 depreciation,³²⁴ property tax, and property insurance³²⁵—will result in fair, just,
2 and reasonable rates.

3 The Opposing Intervenors attempt to use Big Rivers' cost-reduction efforts to
4 justify the removal of all fixed costs associated with the Coleman Station on the
5 erroneous grounds that idled assets are no longer "used and useful."³²⁶ Those
6 arguments are incorrect, both as a matter of law and as a matter of fact.

7 Kentucky courts have soundly rejected the strict application of the historic
8 "used and useful" standard advocated by the Opposing Intervenors. In *National-*
9 *Southwire Aluminum Company v. Big Rivers Electric Corporation*, 785 S.W.2d 503
10 (1990), the Kentucky Court of Appeals held that the Commission "is simply not
11 shackled to a mechanical application of the used and useful standard."³²⁷ Instead,
12 the Commission follows the Supreme Court's *Hope* doctrine, pursuant to which "it is
13 the result reached not the method employed which is controlling."³²⁸ As explained
14 by the D.C. Circuit Court of Appeals, under the *Hope* doctrine "'used and useful'
15 ceased to have any constitutional significance It is now simply one of several
16 permissible tools of ratemaking, one that need not be, and is not, employed in every

³²⁴ See Section VIII.D.

³²⁵ Berry Rebuttal Testimony at p. 6:5-7.

³²⁶ Kollen Direct Testimony at pp. 24:8-10, pp. 31:15-32:11 ("just and reasonable rates should not include the costs of facilities that are not 'used and useful' in providing electric service"); Brevitz Direct Testimony at p. 34:4-7 ("These lost margins from the Century departure cover costs which are not appropriately assigned to other rural and large industrial consumers and which stem at least in part from plant which is no longer 'used or useful' in providing public utility service.").

³²⁷ This holding echoes the upheld Commission decision in the underlying Big Rivers rate case, in which the Commission stated that "it is under no statutory obligation to apply a used and useful standard exclusively, or any other single, rigid standard." 9613 Order at *36.

³²⁸ *Hope*, 320 U.S. at 602.

1 instance.”³²⁹ At least one Attorney General witness acknowledges that the
2 Commission could properly order that certain idled power plant “costs should be
3 recovered even [if it finds that] the facility will be neither used nor useful during the
4 forecasted test period”³³⁰

5 In accordance with Kentucky and federal law, the Commission should
6 consider numerous factors when determining whether to permit recovery of the
7 Coleman Station fixed costs: the history of and development of the utility and its
8 property,³³¹ the prudence of the investment,³³² and the effect on Big Rivers’
9 financial viability.³³³ In addition to these factors, the Commission should consider
10 that, for ratemaking purposes, “[c]ooperative utilities are similar to publicly-owned
11 utilities as being treated differently from for-profit, investor-owned utilities.”³³⁴

12 An analysis of these factors supports the conclusion that Big Rivers’ proposed
13 recovery of all fixed costs of the Coleman Station is fair, just, and reasonable.

³²⁹ *Jersey Central III*, 810 F.2d at 1175.

³³⁰ Direct Testimony of Larry W. Holloway (“Holloway Direct Testimony”), p. 19:4-6 (May 24, 2013) (acknowledging that used & useful is not the only measure of recovery when he argues: “To the extent that the Commission believes that Wilson costs should be recovered even though the facility will be neither used nor useful during the forecasted test period, I believe the Commission should at the very least adjust the Wilson depreciation expenses to recognize that the remaining service life of the plant accounts will be extended by the forecasted layup period.”).

³³¹ *National-Southwire*, 785 S.W.2d at 512 (quoting KRS 278.290(1)).

³³² *National-Southwire*, 785 S.W.2d at 512. See also *In the Matter of Application of Louisville Gas & Elec. Co. for Approval of an Alternative Method of Regulation of Its Rates and Service*, Order, Case No. 98-426, (Jan. 7, 2000) (in which the Commission refers to LG&E as operating “in an environment where it has an inalienable right to charge a rate that covers all its reasonable and prudent costs and provides its investors an opportunity to earn a reasonable return” (emphasis added)); *Duquesne Light Co.*, 488 U.S. at 309 (recognizing the prudent investment test) (superseded as it relates to telecommunications industry only by the Telecommunications act of 1996); *Violet v. Fed. Energy Reg. Comm’n*, 800 F.2d 280 (1st Cir. 1986) (acknowledging use of prudent investment test in Rhode Island and Massachusetts).

³³³ *Hope*, 320 U.S. at 603.

³³⁴ *National-Southwire*, 785 S.W.2d at 516.

1 A. The Coleman Station Is Used and Useful.

2 The Coleman Station provides ongoing benefits to Big Rivers' Members and
3 their member-owners and, therefore, is used and useful whether it is idled or
4 operated as a System Support Resource ("SSR").³³⁵ Accordingly, allowing Big
5 Rivers to recover the Coleman Station's fixed costs—interest expense, depreciation,
6 property tax, and property insurance³³⁶—is fair, just, and reasonable. Even if
7 temporarily idled, the Coleman Station will continue to serve a critical role in Big
8 Rivers' system reliability; Big Rivers will be able to sell the available generation
9 capacity on the open market; and Big Rivers' Members will benefit from the
10 generation capacity's use as an "insurance policy" against uncertain future
11 developments.³³⁷ Thus, contrary to the Opposing Intervenors' assertions, the
12 Coleman Station remains used and useful in multiple ways.

13 First, the Coleman Station provides benefits beyond simple generation
14 capacity—it was constructed only after detailed study of how its location would
15 affect load concentration and transmission availability, and consequently, it is
16 critical to Big Rivers' overall transmission system reliability.³³⁸ This is confirmed
17 by MISO's recent designation of the Coleman Station as a "must run" System
18 Support Resource that MISO may require Big Rivers to continue to operate for
19 reliability purposes if Century continues to operate its Hawesville Smelter without
20 installing certain equipment. Thus, the Coleman Station is "used and useful"

³³⁵ Berry Rebuttal Testimony at p. 12:1-14.

³³⁶ *Id.* at p. 6:5-7.

³³⁷ *Id.* at pp. 6:8-7:2.

³³⁸ *Id.* at p. 6:4-5, p. 16:6-14.

1 because it is necessary for the ongoing reliability of Big Rivers' entire transmission
2 system, including those portions of Big Rivers' system serving retail member-
3 owners other than the Smelters.³³⁹

4 Second, the Coleman Station's available generation capacity provides a
5 unique opportunity for growth. This "potential for future growth and expansion" is
6 expressly cited by Kentucky courts as an important factor to consider in the
7 ratemaking process.³⁴⁰ As discussed in Section VI above, Big Rivers' Mitigation
8 Plan includes a reasonable and attainable business plan for increasing off-system
9 sales, and has already started pursuing that business plan for the benefit of its
10 Members and their member-owners.³⁴¹ Available generation capacity is, of course, a
11 necessary element of that off-system sales plan.³⁴² Consequently, the Coleman
12 Station's available generation capacity is not mere "excess," as the Opposing
13 Intervenors dismissively claim.³⁴³ It is a fundamental asset of Big Rivers'
14 Mitigation Plan, and it is already being put to use through Big Rivers' active
15 marketing of its power in the off-system market.³⁴⁴ As an added benefit to Big
16 Rivers' Members and their member-owners, successful marketing of the available
17 Coleman Station generation capacity "gives Big Rivers an excellent opportunity to
18 diversify its load concentration and to encourage economic development by

³³⁹ *Id.* at p. 7:10-18.

³⁴⁰ *National-Southwire*, 785 S.W.2d at 512.

³⁴¹ Berry Rebuttal Testimony at p. 10:3-11.

³⁴² See Bailey Hearing Testimony, July 1, 2013, Tr. 11:40'07" (available generation capacity is a "key element of our rate mitigation plan. If we don't have the opportunity to utilize that [capacity], we won't have the ability to lower the rates in the future.").

³⁴³ See, e.g., Kollen Direct Testimony at p. 5:12-14; Brevitz Direct Testimony at p. 37:5-6.

³⁴⁴ Berry Rebuttal Testimony at p. 6:10-18.

1 attracting new industries to the region.”³⁴⁵ While Big Rivers would not, today, seek
2 to construct the Coleman Station merely to have the capacity it provides, the
3 existing capacity remains a benefit to the Members, and it would be unreasonable to
4 abandon that facility at this time, thereby depriving the Members of the investment
5 they have already made.

6 Third, the Coleman Station serves as an “insurance policy” to protect Big
7 Rivers’ Members and their member-owners against outages and uncertain
8 fluctuations in the energy markets.³⁴⁶ The energy independence it provides protects
9 Big Rivers’ Members and their member-owners from periodic spikes in electric
10 market rates, energy shortages, and similar future exigencies.³⁴⁷ The Commission
11 has previously recognized similar attributes for the Wilson Station, which the
12 Commission found to be used and useful even though it made Big Rivers “capable of
13 producing more electric energy than is presently being marketed”³⁴⁸ This
14 conclusion turned at least in part on the Commission’s finding that the Wilson
15 Station ensured that there was “excess capacity to provide dependable and

³⁴⁵ Bailey Rebuttal Testimony at p. 12:11-14. *See also* Berry Rebuttal Testimony at p. 6:8-10 (“the generation capacity of the Coleman Station provides Big Rivers with an opportunity for growth in the Hawesville area”); Berry Rebuttal Testimony at p. 12:1-14 (“Even before any load mitigation occurs, available generation capacity . . . provides Big Rivers with an opportunity to diversify its load”).

³⁴⁶ Berry Rebuttal Testimony at pp. 6:19-7:2; Bailey Rebuttal Testimony at p. 12:14-18 (“Big Rivers’ generating capacity serves as an effective hedge against any risks posed by: (i) unanticipated major outages at any of Big Rivers’ other generating plants; (ii) the Hawesville Smelter’s historically shifting power purchase preferences; and (iii) other unforeseen scenarios.”); Berry Rebuttal Testimony at p. 12:1-14 (“Even before any load mitigation occurs, available generation capacity . . . insulates Big Rivers’ members from the volatility of the wholesale electricity market and potential price increases”).

³⁴⁷ Berry Rebuttal Testimony at pp. 6:20-7:2.

³⁴⁸ *National-Southwire*, 785 S.W.2d at 510-14.

1 adequate electricity at times of peak or extreme demand, and there is potential for
2 some industrial and population growth”³⁴⁹

3 The Michigan Public Service Commission, for example, took this approach to
4 permit recovery in even more extreme circumstances, when it permitted a utility to
5 recover on a mothballed natural gas plant after finding that “the fact that [the
6 utility] has not in the past ten years and may not in the foreseeable future need to
7 rely on its Marysville SNG plant for its gas supply requirements does not
8 necessarily mean that member-owners are not realizing a benefit from continuing
9 the plant as an insurance policy against another supply shortage.”³⁵⁰

10 In the context of the present case, this kind of broader market uncertainty is
11 perhaps best exemplified by—as discussed in Section IV.A—the Smelters’ historical
12 vacillation between wanting to benefit from the wholesale electrical energy market
13 and, alternatively, wanting to be insulated from the volatility of that market.³⁵¹
14 Other, unforeseeable future developments could similarly make the Coleman
15 Station critically important to Big Rivers’ Members and their member-owners.

16 Because the Coleman Station is critical to Big Rivers’ transmission system
17 reliability, is actively being marketed for off-system sales, and serves as an
18 “insurance policy” to protect Big Rivers’ Members, it remains used and useful, and
19 allowing Big Rivers to recover the Coleman Station’s fixed costs—interest expense,

³⁴⁹ *Id.* at 513-14.

³⁵⁰ *In the Matter of the Rates and Tariffs of Consumers Power Co. Regarding Gas Transportation Service and Related Matters, the Application of Consumers Power Co. for Authority to Increase Its Rates for the Sales of Gas, and the Application of Consumers Power Co. for Accounting and Ratemaking Approval of Depreciation Practices for Gas Utility Plant*, Order, Mich. P.S.C. Case Nos. U-8678, U-8924, U-9197, *95 (Dec. 7, 1989).

³⁵¹ Bailey Rebuttal Testimony at p. 7:7-9.

1 depreciation, property tax, and property insurance³⁵²—results in fair, just, and
2 reasonable rates.

3 **B. The Coleman Station Was a Prudent Investment.**

4 Recovery of the fixed costs of the Coleman Station is appropriate not only
5 because it remains used and useful, as described above, but also because it was a
6 prudent investment at the time it was built.³⁵³

7 Ratemakers have regularly permitted the recovery of costs where the utility's
8 actions leading to those costs were prudent “based on all it knew or should have
9 known at the time”³⁵⁴ As just one example, the D.C. Circuit Court of Appeals
10 has explained that FERC determines reasonableness of rates by applying a
11 “prudence” test that “evaluate[s] a utility's decision on the basis of information
12 available to the utility at the time the decision is made.”³⁵⁵ No one can plausibly
13 argue that the Coleman Station was an imprudent investment.

14 When the Hawesville Smelter was built in Kenergy's certified territory, Big
15 Rivers had a contractual obligation to provide generation services for all of
16 Kenergy's wholesale power requirements.³⁵⁶ As a result, Big Rivers built power
17 plants, including the Coleman Station, specifically to meet its legal obligations to

³⁵² Berry Rebuttal Testimony at p. 6:5-7.

³⁵³ Bailey Rebuttal Testimony at p. 7:17-18 (“Our generation investments were made many years ago and were prudent when they were incurred.”).

³⁵⁴ *In re Western Mass. Elec. Co.*, 80 P.U.R. 4th 479, 520 (Mass. 1986). *See also, e.g., Duquesne Light Co.*, 488 U.S. 299 (recognizing prudent investment test); *Violet v. FERC*, 800 F.2d 280 (1st Cir. 1987) (discussing application of the prudent investment test in Rhode Island and Massachusetts).

³⁵⁵ *City of New Orleans v. FERC*, 67 F.3d 947, 954 (1995) (citing *New England Power Co.*, 31 F.E.R.C. P 61,047 (1985), *aff'd sub nom. Violet v. FERC*, 800 F.2d 280 (1st Cir. 1986) (“our task is to review the prudence of the utility's actions and the costs resulting therefrom based on the particular circumstances existing at the time the challenged costs were actually incurred, or the time the utility became committed to incur those expenses”)).

³⁵⁶ Berry Rebuttal Testimony at p. 24:20-22.

1 meet the generation needs that increased dramatically with the construction of the
2 Hawesville Smelter.³⁵⁷ The Commission reviewed and authorized the construction
3 of the Coleman Station by issuing a certificate of public convenience and
4 necessity.³⁵⁸ Because Big Rivers' construction of the Coleman Station was a direct
5 response to the legal obligation to serve that dramatic increase in demand, the
6 investment was prudent and reasonable at the time it was made.³⁵⁹

7 The prudence of Big Rivers' investment in the Coleman Station is
8 established, and it is not affected by the current status of the plant, even if the
9 Commission were to determine that the Coleman Station is no longer used and
10 useful despite the present benefits it provides. Consequently, Big Rivers' recovery
11 of its prudent investment costs remains fair, just, and reasonable for those
12 prudently-constructed assets. This conclusion is especially true where, as here,
13 intervening circumstances beyond the control of the utility necessitate a temporary
14 change in a power plant's status.

15 Here, Big Rivers has worked closely with the Commission and the Smelters
16 for many years to comply with all of its legal and contractual requirements.³⁶⁰ The
17 anticipated change in the Coleman Station's status to either temporarily idled or
18 operating under SSR status is the direct result of market forces unquestionably
19 beyond Big Rivers' control.³⁶¹ No one foresaw the worldwide decline in aluminum

³⁵⁷ *Id.* at p. 24:22-23.

³⁵⁸ *Id.* at pp. 24:23-25:3.

³⁵⁹ See *Duquesne Light Co.*, 488 U.S. at 317 (Scalia, concurring) (defining "prudent investment" as "capital reasonably expended to meet the utility's legal obligation to assure adequate service").

³⁶⁰ Berry Rebuttal Testimony at p. 24:15-18.

³⁶¹ Bailey Rebuttal Testimony at pp. 7:20-8:4.

1 prices that increased the financial pressure on the Smelters, nor did anyone foresee
2 that wholesale electricity prices would dip so low or that the market downturn
3 would last so long.³⁶² All of these events were outside of Big Rivers' control, as was
4 Century's unilateral contract termination.

5 In light of Big Rivers' prudent investment in the Coleman Station and in
6 light of Big Rivers' ongoing mitigation efforts, it would be inequitable to deny Big
7 Rivers the full recovery of the plant's fixed costs simply because changes in the
8 wholesale energy and aluminum markets beyond Big Rivers' control forced
9 operational changes. This seems particularly true when the operational changes
10 are designed to reduce costs until market opportunities dictate it should no longer
11 be idled. Moreover, disallowing these costs—as suggested by the Opposing
12 Intervenors—despite the established prudence of Big Rivers' investment in the
13 Coleman Station would mark an abrupt shift in the Commission's previous
14 decisions involving Big Rivers and the Smelters³⁶³ and would, consequently, violate
15 Big Rivers' due process rights.³⁶⁴ It would also signal to all other regulated utilities
16 in Kentucky, as well as to investors and lenders, that prudent investment decisions
17 in facilities that have forty- and fifty-year useful lives are always subject to second
18 guessing due to relatively short-term market fluctuations, even after decades of
19 those investments being used and useful in providing utility service.

³⁶² *Id.* at p. 8:1-4.

³⁶³ *Id.* at p. 8:4-6.

³⁶⁴ *See Duquesne Light Co.*, 488 U.S. 299.

1 Because Big Rivers' investment in the Coleman Station was prudent, it is
2 fair, just, and reasonable for Big Rivers to recover the fixed costs of the Coleman
3 Station.

4 **C. Recovery of the Coleman Station's Fixed Costs Is Necessary to Ensure**
5 **Big Rivers' Ongoing Financial Viability.**

6 As discussed in Sections V and VII above, Big Rivers has requested the bare
7 minimum adjustment to meet its debt service and continue funding an
8 appropriately reduced scale of operations in light of Century's contract
9 termination.³⁶⁵ That "bare minimum" for financial viability includes the recovery of
10 the Coleman Station's fixed costs.

11 As noted above, Kentucky law regarding ratemaking applies the results-
12 oriented *Hope* doctrine, pursuant to which "it is the result reached not the method
13 employed which is controlling."³⁶⁶ Key to that analysis is a consideration of the
14 utility's "financial integrity."³⁶⁷ It is a longstanding principle of ratemaking that a
15 "return should be reasonably sufficient to assure confidence in the financial
16 soundness of the utility, and should be adequate, under efficient and economical
17 management, to maintain its credit and enable it to raise the money necessary for
18 the proper discharge of its public duties."³⁶⁸ Indeed, rates "threatening [a utility's]

³⁶⁵ Bailey Rebuttal Testimony at p. 3:5-7.

³⁶⁶ *Hope*, 320 U.S. at 602.

³⁶⁷ *Hope*, 320 U.S. at 603.

³⁶⁸ *Bluefield Waterworks*, 262 U.S. 679.

1 'financial integrity'"³⁶⁹ may be an unconstitutional taking under the Fifth
2 Amendment.³⁷⁰

3 As previously noted, Big Rivers' recovery of the Coleman Station's fixed costs
4 is critical to its ongoing financial integrity. As an initial matter, Big Rivers'
5 ownership of the Coleman Station and its available generation capacity provides
6 credit and collateral support to its lenders, and that value in its balance sheet
7 provides the equity necessary to allow Big Rivers reasonable access to the capital
8 markets on which its financial viability depends.³⁷¹ In addition, as discussed in
9 Section VIII.D, Big Rivers' recovery of its corresponding depreciation expenses is
10 critical to maintaining the cash flow necessary for it to satisfy its loan covenants.³⁷²
11 In the end, for the reasons discussed in Section VII, a denial of Big Rivers' recovery
12 of the Coleman Station's depreciation and other fixed expenses (or even half or more
13 of the expenses, as proposed by KIUC)³⁷³ would critically injure Big Rivers'
14 "financial soundness."³⁷⁴

15 By narrowly focusing in on the rate treatment of temporarily idled generation
16 assets, the Opposing Intervenors have attempted an end-run around the results-
17 oriented *Hope* doctrine. In diametric opposition to *Hope*, their tactic is to distract
18 from the totality of circumstances by waging a series of isolated attacks on

³⁶⁹ *Verizon Comms., Inc.*, 535 U.S. at 524 (quoting *Duquesne Light Co.*, 488 U.S. at 307, 312).

³⁷⁰ See *Duquesne Light Co.*, 488 U.S. at 307-8 ("The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory.").

³⁷¹ Berry Rebuttal Testimony at p. 7:3-5.

³⁷² Richert Rebuttal Testimony at pp. 15:22-16:10.

³⁷³ Kollen Hearing Testimony, July 3, 2013, Tr. 15:18'22" (explaining that one alternative is to retire the Coleman Plant and to allow the recovery of only 50% of the net book value over several years).

³⁷⁴ *Bluefield Waterworks*, 262 U.S. 679.

1 individual rate components. The law, however, is not so myopic. The law, as set
2 forth by the Supreme Court, is that a ratemaker must ensure that individual
3 components of a ratemaking decision “do not together produce arbitrary or
4 unreasonable consequences.”³⁷⁵ Thus, any discussion of removing prudently-
5 incurred costs associated with idled assets must, as a matter of law, be considered
6 in light of the overall effect anticipated from the exclusion of those costs.

7 In the present case, denial of Big Rivers’ recovery of the fixed costs of the
8 Coleman Station would quickly and severely undermine Big Rivers’ financial
9 viability. Therefore, the Commission should approve the recovery of these costs as
10 part of Big Rivers’ proposed fair, just, and reasonable rate.

11 **D. Recovery of Depreciation Expense on the Coleman Station Is**
12 **Necessary to Ensure Big Rivers’ Ongoing Financial Viability and Is**
13 **Consistent with Well-Established Accounting Principles.**

14 Depreciation is the prime target of the Opposing Intervenors’ attack on
15 Coleman Station’s fixed costs. However, Big Rivers has properly included the
16 depreciation costs of the Coleman Station in its forecast in this proceeding, and the
17 Commission should permit recovery of these depreciation costs for the same reasons
18 that support the recovery of all other Coleman Station fixed costs as set forth in
19 Sections VIII.A-C: the plant remains used and useful, it was a prudent investment,
20 and recovery is necessary to ensure Big Rivers’ financial viability.

21 Recovery of depreciation expense on the Coleman Station is necessary to
22 ensure Big Rivers’ financial viability because depreciation expense is “the

³⁷⁵ *Permian Basin*, 390 U.S. 747.

1 mechanism by which cash flow is generated for the purposes of making debt
2 principal payments in compliance with all debt agreements.”³⁷⁶ If Big Rivers cannot
3 recover the Coleman Station’s depreciation expenses, it will be unable to pay
4 approximately 31% of its principal debt payments.³⁷⁷ As detailed in Section VII.B,
5 the subsequent default would cause Big Rivers to deplete its cash resources, have
6 its revenues “lockboxed,” and be cut off from access to the capital it needs in order to
7 continue operations,³⁷⁸ ultimately leading to bankruptcy.³⁷⁹ Therefore, adjusting
8 Big Rivers’ depreciation expense on the Coleman Station as suggested by the
9 Opposing Intervenors would result in a rate that unconstitutionally jeopardizes Big
10 Rivers’ financial integrity.

11 Given these overarching reasons why the Commission should permit Big
12 Rivers to recover the Coleman Station’s depreciation costs while it is temporarily
13 idled, well-established accounting principles and Big Rivers’ operational plans also
14 support this outcome. As explained by Ms. Richert during the final hearing, Big
15 Rivers has continued to account for the plant’s depreciation because it is not being
16 retired or abandoned; rather, it will either continue to run under SSR status or be
17 idled on a temporary basis.³⁸⁰ Ms. Richert’s testimony is based on the applicable
18 RUS guidelines that indicate that depreciation should continue in these
19 circumstances.³⁸¹ Indeed, Big Rivers has undertaken a covenant in its loan contract

³⁷⁶ Richert Rebuttal Testimony at p. 17:5-12.

³⁷⁷ Richert Rebuttal Testimony at p. 16:8-10.

³⁷⁸ Bailey Rebuttal Testimony at p. 5:8-14.

³⁷⁹ Richert Rebuttal Testimony at p. 17:5-12.

³⁸⁰ *Id.* at p. 16:11-15; Richert Hearing Testimony, July 2, 2013, Tr. 10:48’01”.

³⁸¹ Big Rivers’ Response to Post-Hearing Request for Information No. 4, pp 2-3 (July 15, 2013).

1 with RUS to adopt only those depreciation rates that RUS has approved,³⁸² and
2 RUS has already approved the depreciation rates set forth in this proceeding.³⁸³

3 In addition to RUS, Big Rivers looked to a number of other guidelines in the
4 process of determining whether or not depreciation should be continued on the
5 Coleman Station for ratemaking purposes.³⁸⁴ Those authorities establish that, in
6 such circumstances, it is appropriate to continue depreciating an asset.³⁸⁵ For
7 example, the IASB explains that “the useful life of an asset should encompass the
8 entire time it is available for use, regardless of whether during that time it is in use
9 or is idle.”³⁸⁶ As explained in detail in Big Rivers’ Response to Post-Hearing
10 Request for Information No. 4, this conclusion is further supported by rules and
11 regulations issued by or set forth in the Code of Federal Regulations,³⁸⁷ the
12 FASB,³⁸⁸ the IASB,³⁸⁹ and the IRS.³⁹⁰ Big Rivers’ independent auditor, KPMG, also

³⁸² *Id.* at pp. 16:19-17:2; *see also* Exhibit Richert-3.

³⁸³ Richert Rebuttal Testimony at p. 17:1-2 (“The depreciation expense included in this proceeding is based upon depreciation rates already approved by the RUS.”)

³⁸⁴ Richert Hearing Testimony, July 2, 2013, Tr. 10:48’44”.

³⁸⁵ Richert Rebuttal Testimony at p. 16:11-15. *See generally* Big Rivers’ Response to Post-Hearing Request for Information No. 4 (July 15, 2013).

³⁸⁶ *See* IASB, “Basis for Conclusions on IAS 16 – Property, Plant, and Equipment (BC 30-31)”.

³⁸⁷ *See, e.g.*, 7 CFR 1767.10 (“Service life is the time between the date electric plant is includable in electric plant in service . . . and the date of its retirement.”); 7 CFR 1767.15 (“Utilities must use a method of depreciation that allocates . . . the service value of depreciable property over the service life of the property.”); 7 CFR 1767.18 (restricting plant held for future use to unused or retired property).

³⁸⁸ *See* FASB, “Accounting Standards Codification 360-10-35-49 (Property, Plant, and Equipment – Overall – Subsequent Measurement – Long-Lived Asset Temporarily Idled),” (“A long-lived asset that has been temporarily idled shall not be accounted for as if abandoned.”)

³⁸⁹ *See* International Accounting Standards 16 – “Property, Plant, and Equipment,” § 55 (“depreciation does not cease when the asset becomes idle or is retired from active use unless the asset is fully depreciated”); *id.* at § 56 (“other factors, such as technical or commercial obsolescence and wear and tear while an asset remains idle, often result in the diminution of the economic benefits that might have been obtained from the asset”); IAS 16 – “Property, Plant, and Equipment, Basis for Conclusions on IAS 16, Depreciation Period,” BC30 (“the useful life of an asset should encompass the entire time it is available for use, regardless of whether during that time it is in use

1 advised that depreciation should be continued when temporarily idling a plant.³⁹¹
2 This is the position of Burns and McDonnell, the firm that conducted Big Rivers’
3 depreciation study.³⁹² This is likewise the position of Deloitte, an international
4 consulting firm.³⁹³ Thus, Big Rivers’ continued depreciation of the Coleman Station
5 is appropriate.

6 Moreover, it is not known at this point whether Coleman Station will actually
7 be idled or will be under SSR status. If it is under SSR status, it may continue to
8 run for reliability purposes, which reliability would benefit the Members but which
9 would result in additional operating hours.

10 Finally, as discussed in Section VIII.B, Big Rivers’ investment in the
11 Coleman Station was prudent and approved by the Commission. A reversal of
12 course now and a denial of Big Rivers’ authority to collect full depreciation expenses
13 of the Coleman Station would be particularly egregious because depreciation
14 expense is the means by which Big Rivers recovers its prudent investment.³⁹⁴

15 The Opposing Intervenors have proposed suspending or deferring Big Rivers’
16 recovery of these depreciation expenses.³⁹⁵ However, they do not rebut the basic
17 factual points made above. They have provide no answer to the authoritative

or is idle”); *id.* at BC31 (“whether idle or not, it is appropriate to depreciate an asset with a limited useful life”).

³⁹⁰ See IRS Publication 946, “How to Depreciate Property” (2012), p. 7 (“Continue to claim a deduction for depreciation on property used in your business or for the production of income even if it is temporarily idle”).

³⁹¹ Richert Hearing Testimony, July 2, 2013, Tr. 10:48’51”.

³⁹² See Big Rivers’ Response to Post-Hearing Request for Information No. 4 (July 15, 2013).

³⁹³ Richert Hearing Testimony, July 2, 2013, Tr. 10:49’02”.

³⁹⁴ Richert Rebuttal Testimony at p. 15:17-21, p. 17:2-5.

³⁹⁵ Kollen Direct Testimony at pp. 63:7-64:10; Holloway Direct Testimony at p. 19:4-8.

1 accounting principles cited above, nor have they presented evidence that rebuts the
2 multiple legal and practical (cash flow) reasons, set forth in Section VIII.A-C, for
3 Big Rivers' recovery of these costs. Instead, Mr. Kollen cites the RUS Uniform
4 Statement of Accounts for "Plant Held for Future Use"—a category for which the
5 Coleman Station does not qualify—and argues that it can be "inferred" that those
6 rules establish that it is appropriate to suspend depreciation when a unit is idled.³⁹⁶
7 As explained above, Mr. Kollen's conclusion is incorrect and contradicted by RUS
8 guidelines and numerous well-established accounting principles. The Opposing
9 Intervenors do not cite any guideline or regulation addressing depreciation on a
10 temporarily idled generating plant. Mr. Kollen states that if a plant is idled, the
11 time (operating hours) it is idled would be "tacked on" at the end to extend its useful
12 life. However, Mr. Ted J. Kelly, Big Rivers' depreciation expert, indicated that
13 accounting data, certain performance results, budgets, inspection reports, technical
14 documents such as drawings and specifications, contracts, policies and procedure
15 manuals, and other documents such as prior related studies were also used in the
16 analysis, not just operating hours.³⁹⁷

17 Additionally, the Opposing Intervenors want Big Rivers to receive no money
18 in rates to maintain an idled Coleman Station, yet they expect that idling Coleman

³⁹⁶ See Kollen Hearing Testimony, July 3, 2013, Tr. 15:08'54".

³⁹⁷ Direct Testimony of Ted J. Kelly, Application, Tab 71 ("Kelly Direct Testimony") at pp. 8:13-10:10, p. 30:1-3; see Exhibit Kelly-1, pp. ES-6, III-6.

1 Station would extend its life.³⁹⁸ However, if Big Rivers does not maintain the idled
2 plant, it would deteriorate, and its expected life would be reduced.

3 For these reasons, Big Rivers' recovery of the Coleman Station's fixed costs
4 should include the full recovery of all Coleman Station depreciation expenses as set
5 forth in the 2012 Depreciation Study.

6 **IX. The Budget Forecast Appropriately Includes Revenues and Expenses**
7 **Associated with Serving Alcan, and the Potential Effects of the Alcan Contract**
8 **Termination Will Be Fully Addressed in the Alcan Rate Case.**

9 Although the Opposing Intervenors, particularly KIUC, focus much of their
10 testimony on speculation about the effects of Alcan's recent termination of its retail
11 electric service agreement, those effects will be fully addressed in Case No. 2013-
12 00199 and should not be a basis for denying Big Rivers' proposed rates in this
13 proceeding. That termination does not mean that Big Rivers' forecast in this
14 proceeding is unreliable or that Big Rivers will recover more than it should. As
15 explained in Section VII, the timing of the two cases does not change Big Rivers'
16 need for the rates proposed in this proceeding to go into effect by August 20, 2013.

17 Big Rivers filed this case primarily to address the revenue deficiency
18 associated with Century's unilateral termination of the 2009 Retail Agreement.³⁹⁹
19 And as previously noted, although Alcan also terminated its retail electric service
20 agreement, it sent its notice of termination after Big Rivers filed its Application in

³⁹⁸ Statement of Michael L. Kurtz, Counsel for KIUC, July 3, 2013, Tr. 15:12'30".

³⁹⁹ Bailey Direct Testimony at p. 8:10-13; Richert Direct Testimony at p. 14:4-11.

1 this rate case.⁴⁰⁰ On June 28, 2013 Big Rivers filed a separate rate case, Case No.
2 2013-00199, to fully address Alcan's contract termination.⁴⁰¹

3 The Opposing Intervenors' witnesses have repeatedly noted that the effective
4 date of the Alcan termination will fall within Big Rivers' forecasted test period.⁴⁰²
5 Likewise, they note that the effects of the Alcan termination are not included in the
6 forecast,⁴⁰³ and they go so far as to assert that Big Rivers chose to "ignore" the
7 effects of the Alcan termination.⁴⁰⁴ Mr. Kollen, in particular, continually
8 emphasizes the combined effect of the Century and Alcan terminations,⁴⁰⁵ instead of
9 focusing on what is truly at issue in this proceeding: the financial impact of
10 Century's contract termination. Mr. Kollen also attacks the forecasted test period
11 on the grounds that it does not include any loss of revenue from the Alcan
12 termination or the effects of any additional generation layups that may be required
13 as a result of the Alcan termination.⁴⁰⁶

14 Big Rivers could not be more clear about this. Big Rivers' assumptions about
15 the status of Alcan were correct when it filed its Application, and it could not have
16 included the Alcan contract termination in the forecast when this case was filed.⁴⁰⁷
17 Additionally, the Commission's regulations require that "there shall be no revisions
18 to the forecast, except for the correction of mathematical errors, unless the revisions

⁴⁰⁰ Direct Testimony of Bion C. Ostrander ("Ostrander Direct Testimony"), p. 13:6-9 (May 24, 2013).

⁴⁰¹ See Alcan Rate Case, Application (June 28, 2013).

⁴⁰² Ostrander Direct Testimony at p. 10:15-16; Brevitz Direct Testimony at pp. 8:14-9:2.

⁴⁰³ Brevitz Direct Testimony at p. 8:14-15.

⁴⁰⁴ Kollen Direct Testimony at p. 8 n. 4.

⁴⁰⁵ *Id.* at p. 17:13-14, p. 26:3-4, p. 42:17-21.

⁴⁰⁶ *Id.* at pp. 44:20-45:6.

⁴⁰⁷ Wolfram Rebuttal Testimony at p. 10:16-19.

1 reflect statutory or regulatory enactments that could not, with reasonable diligence,
2 have been included in the forecast on the date it was filed.”⁴⁰⁸ Therefore, pursuant
3 to Commission regulations, Big Rivers was not permitted to change its forecast to
4 address the effects of Alcan’s termination.⁴⁰⁹

5 Even if Big Rivers had been able to include Alcan’s unilateral contract
6 termination in its forecast for this case, Big Rivers would have had to adjust out of
7 its test year the effects of serving Alcan on Big Rivers’ revenues and expenses to
8 avoid a double recovery of the Alcan-related costs on and after August 20, 2013.⁴¹⁰
9 Moreover, by excluding the Alcan termination (which was, again, unknown at the
10 time), it allows an evaluation of the rates proposed in connection with that
11 termination to be conducted more contemporaneously with the actual occurrence
12 itself. Excluding the Alcan termination also helps to ensure that rates would be no
13 higher than they would need to be on August 20 in order to offset the revenue
14 deficiency existing on that date. On the contrary, Mr. Kollen’s speculations about
15 the possible effects of the Alcan termination only confuse the Commission’s task in
16 determining the reasonableness of the rate adjustments Big Rivers requests in
17 response to Century’s contract termination. The Opposing Intervenors and the
18 Commission will have ample opportunity—with more current information
19 available—to address the effects of the Alcan termination in the Alcan Rate Case.

⁴⁰⁸ 807 KAR 5:001(16)(11)(d).

⁴⁰⁹ Wolfram Rebuttal Testimony, p. 10:21-24.

⁴¹⁰ *Id.* at pp. 10:24-11:3.

1 In the simplest terms, the test period used in this case should include Big
2 Rivers' anticipated revenues and expenses associated with serving Alcan, because
3 Alcan will continue to take service on August 20, 2013 when the rates proposed in
4 this case will become effective. That will remain the case until January 31, 2014.
5 In the Alcan Rate Case, the effects of the Alcan contract termination are included in
6 the test period and in the proposed rates. Those rates will take effect on January
7 31, 2014, when the Alcan contract termination becomes effective. Thus, in each of
8 the two rate filings, the treatment of Big Rivers' Alcan-related revenues and
9 expenses matches the status of service to Alcan on the Big Rivers system for the
10 date at which the proposed rates in each case will become effective.

11 Accordingly, the fact that Big Rivers complied with applicable regulations
12 prohibiting factual updates of forecasted test years by not including the Alcan
13 contract termination should not be a basis for denying Big Rivers' proposed rates in
14 this proceeding.

15 **X. The Century Transaction Will Not Impose Additional Costs on Big Rivers or**
16 **Its Members; Consequently, the Budget Forecast Is Unaffected by the Century**
17 **Transaction.**

18 The Century Transaction should have no effect on this rate case for a simple
19 reason: Big Rivers and Kenergy worked diligently to ensure that all costs associated
20 with allowing Century to purchase electricity at market-based rates are addressed
21 in the Century Transaction so that they will not be passed on to Big Rivers, its
22 Members, or their member-owners.

1 Under an existing cost reimbursement agreement, Century is reimbursing,
2 on a monthly basis, Big Rivers' costs associated with negotiating and securing
3 approval of the Century Transaction. Additionally, pursuant to the Century
4 Transaction documents, Century has agreed to pay the costs of arranging,
5 procuring, and delivering electricity for its Hawesville Smelter.

6 The Century Transaction also obligates Century to pay the costs that would
7 be incurred if MISO requires Big Rivers to run its Coleman Station as a System
8 Support Resource to ensure the transmission system's reliability. As Mr. Berry
9 explained, "[i]f Big Rivers is forced to operate the Coleman Station for reliability
10 purposes, there will unavoidably be additional costs related to that operation. . . .
11 Century—not Big Rivers or its members—will pay for all costs not reimbursed to
12 Big Rivers related to operating the Coleman Station under SSR status."⁴¹¹ If MISO
13 identifies the Coleman Station as a must-run System Support Resource, the
14 Century Transaction ensures that "from a financial perspective the Coleman
15 Station will look as if it were idled."⁴¹²

16 In the Century Transaction, Century also agreed to indemnify Big Rivers and
17 Kenergy against various potential costs and liabilities, including tax liabilities
18 incurred as part of the transaction. Century's parent corporation has further
19 agreed to backstop all of these payments and indemnification obligations with an
20 unconditional guarantee to Big Rivers and Kenergy.

⁴¹¹ Berry Rebuttal Testimony at pp. 7:19–8:2.

⁴¹² *Id.* at p. 18:13–14.

1 In short, Big Rivers and Kenergy went to great lengths to ensure that
2 Century will bear all costs associated with its decision to purchase electricity at
3 market-based rates. None of these costs will be passed on to retail member-owners,
4 and thus the Commission need not and should not consider them as part of this rate
5 proceeding.

6 The Opposing Intervenors take some issue with the possibility that severance
7 costs will be delayed and Big Rivers may receive some transmission revenues from
8 Century if Coleman Station is put into SSR status. The timing of those
9 developments (if they occur), as well as the amount, if any, makes it inappropriate
10 to incorporate any such potential benefits into the revenue requirement in this case.
11 Moreover, Big Rivers needs the rate relief it is seeking on August 20, 2013. If Big
12 Rivers' revenue requirement is reduced to account for potential benefits that may
13 arise under the Century Transaction, and those potential benefits do not
14 materialize before August 20, 2013 (or at all), Big Rivers will have insufficient
15 revenues to satisfy its debt covenants. As Big Rivers has noted many times
16 throughout this proceeding, if and when any such benefits materialize, Big Rivers
17 will (consistent with its not-for-profit cooperative status) assure that its Members
18 and their member-owners benefit.

1 XI. Big Rivers' Forecast Methodology Is Reasonable and Produces Fair, Just, and
2 Reasonable Rates.

3 A. Big Rivers' Use of a Fully Forecasted Test Period Is Appropriate, and
4 Big Rivers Diligently Analyzed Its Forecast.

5 Big Rivers' use of a fully forecasted test period, which reflects the first full
6 twelve calendar months following the effective termination of Century's 2009 Retail
7 Agreement,⁴¹³ is reasonable and appropriate for setting its proposed rates in this
8 case, and should be relied upon by the Commission. Kentucky law provides that an
9 application requesting a general adjustment in existing rates shall be supported by
10 either a "historical test period that may include adjustments for known and
11 measurable changes; or [a] fully forecasted test period...."⁴¹⁴ The use of a fully
12 forecasted test year is particularly appropriate where, as here, a major future
13 change will render historical revenue information obsolete.⁴¹⁵ In fact, it is difficult
14 to imagine a set of circumstances better suited to a forecasted test year.

15 One of the critical underlying principles that govern rate proceedings is the
16 effort to match capital, expenses, and revenues in the test period.⁴¹⁶ Regulatory lag
17 is a serious problem when a massive downward trend in revenue is expected in the
18 foreseeable future.⁴¹⁷ Basing rates on a test period that does not reflect the period
19 when the rates will be effective would put Big Rivers in a situation where it cannot

⁴¹³ Wolfram Direct Testimony at p. 8:6-14.

⁴¹⁴ 807 KAR 5:001(16).

⁴¹⁵ See LOWELL E. ALT, JR., ENERGY UTILITY RATE SETTING, pp. 25-26 (2006) ("[T]he test period used in a rate case should be the one that best reflects the conditions that a public utility will encounter during the period when the rates set by the commission will be in effect."); see also LEONARD SAUL GOODMAN, THE PROCESS OF RATEMAKING I, pp. 141-42, pp. 269-70 (1998) (discussing the use of projected test periods in special circumstances).

⁴¹⁶ See LOWELL E. ALT, JR., ENERGY UTILITY RATE SETTING, pp. 32-33 (2006).

⁴¹⁷ *Id.* at p. 33.

1 make up for its revenue deficiency even through increased efficiencies and cost
2 saving measures.

3 Here, a historic test year is simply not a viable option. The use of a historical
4 test period requires the assumption that the actual test period revenues and
5 expenses can be adjusted such that they will be representative of those expected for
6 the period of time in which the proposed rates will be in effect. In this case, a fully
7 forecasted test period is the most appropriate way to reflect the significant changes
8 to Big Rivers' operations and financials that will result from Century's contract
9 termination. Even Attorney General witness Bion C. Ostrander acknowledges that
10 the "forecasted test period filing appears to be technically compliant with Kentucky
11 statutes."⁴¹⁸

12 Big Rivers exercised great diligence to ensure the reasonableness of its
13 forecasted test period. Big Rivers prepared its forecast using various different
14 scenarios and has been transparent regarding the implications of those scenarios.⁴¹⁹
15 Data that were fed into the financial model underwent several levels of review
16 before being finalized.⁴²⁰ The Commission has recognized that forecasted test

⁴¹⁸ Ostrander Direct Testimony at p. 12:4-15.

⁴¹⁹ Berry Rebuttal Testimony at p. 13:17 ("[The Load Concentration Analysis and Mitigation Plan] also addresses a number of possible scenarios going forward, particularly with respect to the strength of various markets"); *id.*, Exhibit Berry Rebuttal-2 (comparing the financial impacts of idling the Wilson and Coleman plants); Kelly Direct Testimony, Exhibit Kelly-1 at pp. II-4 to II-6 (considering six depreciation scenarios).

⁴²⁰ Direct Testimony of Lindsay N. Barron, Application, Tab 69 ("Barron Direct Testimony"), p. 5:11-14 (Jan. 15, 2013) ("Big Rivers is required . . . to update its load forecast every two years and to submit the forecast to RUS for review and approval"); *id.* at p. 8:9-11 ("Big Rivers' members provide feedback during the development of the load forecast and provide a review of the results prior to finalization"); Berry Direct Testimony at p. 17:5-6 ("The scope and expense for planned outages are developed from a rigorous review of multiple reports and documents"); *id.* at p. 18:3-4 ("Big Rivers' non-outage O&M budget is developed through an arduous process of line by line review by each

1 periods, by their nature, have some uncertainties,⁴²¹ and Big Rivers is not immune
2 to these uncertainties. However, the budget variances identified (and
3 exaggerated)⁴²² by the Attorney General relate only to Big Rivers' margins, which
4 account for only 1-2% of the total revenue budget⁴²³ and are particularly vulnerable
5 to market fluctuations outside of Big Rivers' control.⁴²⁴

6 Furthermore, when Big Rivers developed the forecast for this rate case, it
7 included all information that was known and available to it at that time.⁴²⁵
8 Although other information became available after Big Rivers filed its Application,
9 Kentucky law forbids "revisions to the forecast, except for the correction of
10 mathematical errors, unless the revisions reflect statutory or regulatory enactments
11 that could not, with reasonable diligence, have been included in the forecast on the

respective department."); Direct Testimony of DeAnna M. Speed, Application, Tab 68 ("Speed Direct Testimony"), pp. 6:17-7:1 (Jan. 15, 2013) ("This stage of the [budgeting] process is iterative, with several rounds of review by budget analysts, department managers, and the senior management team. After these reviews, Big Rivers provides a draft budget to two smelters ('the Smelters') for their information pursuant to their contractual agreements. Once a proposed budget is reviewed by senior management, Big Rivers presents the proposed budget to the Board of Directors for their review and approval.").

⁴²¹ See *In the Matter of: The Application of the Union Light, Heat and Power Company for a Certificate of Public Convenience to Acquire Certain Generation Resources and Related Property; for Approval of Certain Accounting Treatment, and for Approval of Deviation From Requirements of KRS 278.2207 and 278.2213(6)*, Interim Order, P.S.C. Case No. 2003-00252, *20 (Dec. 5, 2003) (recognizing "the uncertainty attendant to forecasting off-system sales"); *In the Matter of: Application of Kentucky-American Water Company to Increase Its Rates*, Order, P.S.C. Case No. 95-554, *53 (Sept. 11, 1996) (a forecasted budget "requires a review of the historical relationship between budgets and actual results to determine if the method used to develop the forecast is reasonable").

⁴²² Rebuttal Testimony of DeAnna M. Speed ("Speed Rebuttal Testimony"), p. 19:21-22 (June 24, 2013); see Ostrander Direct Testimony at pp. 20:1-21:2.

⁴²³ See Attachment for Big Rivers' Response to Item No. 15 of Alcan Primary Products Corporation's Initial Request for Information ("Alcan 1-15"), p. 2:29-30 (February 28, 2013) (indicating that Big Rivers' 2012 margins were \$10,252,476 and total cost of service was \$558,089,760 (\$10,252,476 ÷ \$558,089,760 = 1.84%)).

⁴²⁴ *Id.* at p. 3 ("The net sales margin variance of \$18.5 million is driven by lower pricing from off-system sales (OSS), smelter sales, and non-smelter member sales, as well as lower volumes from OSS and non-smelter member sales.").

⁴²⁵ Wolfram Rebuttal Testimony at pp. 9:20-10:11.

1 date it was filed.”⁴²⁶ Thus, for many of the Opposing Intervenors’ claims regarding
2 the accuracy of the forecasted test period, Big Rivers was simply adhering to the
3 requirements of this regulation. For example, Big Rivers could not have included
4 the effects of the refinancing in the 2012-00492 case because Big Rivers filed its
5 Application on January 15, 2013 and the Commission issued its Order on March 26,
6 2013.⁴²⁷ However, now that the Commission has issued an order in Case No. 2012-
7 00492 approving Big Rivers’ proposal to pay off certain pollution control bonds, Big
8 Rivers has incorporated the cost savings from that proposal into the revised revenue
9 requirement in this proceeding.⁴²⁸

10 Thus, Big Rivers’ use of a fully forecasted test period satisfies two objectives:
11 it best reflects the conditions in the rate-effective period, and it provides Big Rivers
12 with a reasonable opportunity to fully recover the revenue deficiency resulting from
13 Century’s contract termination without exposure to the regulatory lag present in
14 historical test year rate cases. Accordingly, Big Rivers’ use of a fully forecasted test
15 period in this proceeding is appropriate.

16 **B. Big Rivers’ Financial Model Is Reasonable.**

17 In developing its financial model to support its forecast, Big Rivers prepared
18 a spreadsheet model that calculates revenues and generates financial statements.⁴²⁹
19 For the reasons discussed below, Big Rivers’ financial model is reasonable.

⁴²⁶ 807 KAR 5:001(16)(11)(d).

⁴²⁷ 2012 Refinancing Case Order at *7.

⁴²⁸ See Rebuttal Testimony of John Wolfram.

⁴²⁹ Siewert Direct Testimony at p. 5:5-8.

1 The financial model integrates a number of inputs and data sets, including
2 Member base rates, the load forecast, the production cost model, debt schedules,
3 depreciation and amortization, capital expenditures, and all expense items captured
4 by the budget.⁴³⁰ It also determines the appropriate charges for other rate
5 mechanisms—the fuel adjustment clause (“FAC”), the environmental surcharge
6 (“ES”), and non-FAC purchase power adjustment (“Non-FAC PPA”) for each of the
7 rate classes—while assuming perfect rate treatment,⁴³¹ and accounts for the reserve
8 funds and their associated tariff riders.⁴³²

9 The reliability of the financial model is reviewed at various stages of its use
10 and all data are reviewed and verified as accurate before being integrated into the
11 financial model.⁴³³ Modeling results are validated through a reconciliation process,
12 including comparing them to prior years.⁴³⁴ Additionally, Big Rivers’ approach to
13 modeling allows a high level of sensitivity analysis, especially around the timing,
14 duration, and impacts of idling units, to ensure the robustness of the model in the
15 fact of these uncertainties.⁴³⁵ More detailed sensitivity analysis around production
16 cost and unit dispatch is performed through the production cost modeling, some of
17 which were also filed in this case.⁴³⁶ Although the Attorney General incorrectly
18 suggests that Big Rivers’ net margin variances indicate systemic flaws in the

⁴³⁰ Siewert Direct Testimony at p. 5:15-19.

⁴³¹ *Id.* at p. 6:19-20.

⁴³² *Id.* at p. 7:5-22.

⁴³³ Warren Hearing Testimony, July 3, 2013, Tr. 11:18’29” (“I take that information from the budget and then we verify that what I took into the Financial Model is correct.”). *See also* note 469.

⁴³⁴ Warren Hearing Testimony, July 3, 2013, Tr. 11:23’43”.

⁴³⁵ *See* Berry Supplemental Rebuttal Testimony at p. 11:14-18.

⁴³⁶ *See* Response and Attachments to AG 1-89; Updated Response and Attachments to Item 2 of Sierra Club’s Second Request for Information (“SC 2-2”) (April 25, 2013).

1 financial model, those variances are not attributable to the financial model but are
2 instead, as discussed in Section XI.C, a normal reflection of an especially volatile
3 but small portion of Big Rivers' budget.⁴³⁷ The financial model itself is sound.

4 In an effort to ensure transparency, Big Rivers provided a great deal of
5 information during this proceeding to explain how particular elements of the
6 financial model work.⁴³⁸ Despite these efforts, the Attorney General's witnesses
7 cast a number of aspersions about the transparency of the financial model and
8 about Big Rivers' motives in designing and using the model in this case to prepare
9 the forecasted test period. These allegations are baseless and, in some cases,
10 suggest a fundamental misunderstanding of the financial model.

11 Mr. Ostrander, for example, alleges that Big Rivers "has refused to provide
12 certain historical data which could be used to test the transparency and accuracy of
13 BREC's forecasted costs."⁴³⁹ Specifically, he identifies this "refused" data as the
14 "'actual' impacts of the termination of the Century Smelter."⁴⁴⁰ Big Rivers has not
15 "refused" to provide this information; rather, because Century is still on the system,
16 Big Rivers cannot provide the actual impacts on historical data of Century not being
17 on the system. This type of information is simply not available, as Big Rivers
18 explained in its responses to AG 1-51 and AG 2-17.

⁴³⁷ Warren Hearing Testimony, July 3, 2013, Tr. 11:14'35".

⁴³⁸ Wolfram Rebuttal Testimony at p. 14:4-7. *See also, e.g.*, Big Rivers' Responses to PSC 1-57, Item 13 of Commission Staff's Second Request for Information ("PSC 2-13") (Feb. 28, 2013), AG 1-7, AG 1-8, AG 1-17, AG 1-97, AG 1-131, AG 1-190, AG 1-236, AG 1-239, AG 1-240, AG 1-241, AG 1-242, and AG 1-267.

⁴³⁹ Ostrander Direct Testimony at p. 18:5-7.

⁴⁴⁰ Ostrander Direct Testimony at p. 18:10-12.

1 In any event, it is not possible, on a “known and measurable” basis, to extract
2 from Big Rivers’ historical cost data the portion of those costs that would have
3 changed had Century not been on Big Rivers’ system in some historical time period.
4 In addition to conveying Mr. Ostrander’s unfamiliarity with future test year
5 cases,⁴⁴¹ the request itself indicates a very serious misunderstanding of the utility
6 operating and accounting principles employed by Big Rivers and other utilities that
7 adhere to the RUS system of accounts.⁴⁴² Big Rivers would have had to make
8 assumptions about most every aspect of its business, which is simply not possible on
9 a known and measurable, historical basis.

10 Nevertheless, Big Rivers did provide the estimated impact of Century’s
11 contract termination on the revenue requirement, along with all supporting details
12 and calculations.⁴⁴³ Big Rivers also provided abundant historical data in response
13 to multiple data requests that the Attorney General could have reviewed to
14 evaluate the validity of Big Rivers’ estimated impact of the Century contract
15 termination.⁴⁴⁴

16 Similarly, Mr. Ostrander alleges, without substantiation, that Big Rivers’
17 financial model was “intentional[ly] design[ed] to avoid the most rigorous sensitivity

⁴⁴¹ See Attorney General’s Response to Big Rivers Data Request No. 1 (“None of the witnesses have participated in a rate application using a fully forecasted test year.”). See also Ostrander Hearing Testimony, July 3, 2012, Tr. 17:29’07” (“I have not addressed a fully forecasted test period before . . .”).

⁴⁴² Wolfram Rebuttal Testimony at pp. 15:21-16:5.

⁴⁴³ See Financial Model, Electronic Attachment for Big Rivers’ Response to PSC 1-57.

⁴⁴⁴ See, e.g., Big Rivers’ Responses to Items AG 1-7, AG 1-17, AG 1-31, AG 1-33, AG 1-34, AG 1-46, AG 1-54, AG 1-57, AG 1-62, AG 1-128, AG 1-162, AG 1-165, AG 1-166, AG 1-169, AG 1-248, and AG 1-250.

1 test of the Model.”⁴⁴⁵ This complaint makes even less sense than the first, because
2 Big Rivers provided an electronic version of the financial model to the Commission
3 and the Intervenors with all links and formulae intact for review.⁴⁴⁶ Consequently,
4 if it had chosen to do so, the Attorney General could have checked every single
5 formula and calculation that Big Rivers relied on. Big Rivers also provided data
6 request responses with still more detailed information about the meaning and
7 purpose of specific calculations contained in the financial model in order to assist
8 the Attorney General’s review.⁴⁴⁷

9 Mr. Ostrander’s complaints about the financial model not including a
10 “manual”⁴⁴⁸ are similarly off-base—there is no manual because Big Rivers’ financial
11 model was not purchased “off the shelf” from a third party,⁴⁴⁹ but that does not
12 prevent a thorough and rigorous review of the financial model based on the
13 information already provided by Big Rivers.

14 Mr. Ostrander also alleges that Big Rivers cannot input historical data in its
15 financial model. However, this allegation is false. Big Rivers did not state that it
16 could not input historical data into the financial model.⁴⁵⁰

17 The Attorney General makes a more serious accusation when it implies that
18 Big Rivers may have manipulated or changed “how the model operates from year to

⁴⁴⁵ Ostrander Direct Testimony at p. 19:12-28.

⁴⁴⁶ Warren Hearing Testimony, July 3, 2013, Tr. 11:17’50”.

⁴⁴⁷ See note 450.

⁴⁴⁸ Ostrander Direct Testimony at p. 19:7-27.

⁴⁴⁹ Wolfram Rebuttal at p. 19:2-4; see Siewert Direct Testimony at p. 5:5.

⁴⁵⁰ See Wolfram Rebuttal at pp. 19:11-20:14.

1 year.”⁴⁵¹ Notably, the Attorney General’s witness does not offer a single piece of
2 evidence to support this accusation. Big Rivers absolutely does not manipulate its
3 financial model or alter its calculations as the Attorney General alleges. The
4 financial model run that was used in this case is the same one that Big Rivers uses
5 for decision-making purposes in the ordinary course of business.⁴⁵² Big Rivers has
6 been transparent about its use and development of the financial model and has even
7 laid bare the financial model’s inner workings by providing a full electronic copy
8 with all links and formulae intact. In light of that transparency, the Commission
9 should reject this accusation for what it is: wild and, frankly, irresponsible
10 speculation.

11 Big Rivers has filed monthly budget variance reports in this case, both in its
12 application and in monthly updates. These reports indicate where the financial
13 results predicted by the financial model differ from actual results. The differences
14 largely relate to events out of Big Rivers’ control (like off-system sales prices) or Big
15 Rivers’ reaction to those events (like deferring maintenance). In no case had the
16 reason for the budget to actual variance been an error in the financial model,⁴⁵³ and
17 the Attorney General has not identified any actual errors in the model. This is how
18 the financial model is tested (in addition to the reviews mentioned above).

⁴⁵¹ Ostrander Direct Testimony at p. 19:14.

⁴⁵² Siewert Direct Testimony at p. 16:3-6; Warren Hearing Testimony, July 3, 2013, Tr. 11:45’32”; Wolfram Rebuttal Testimony at pp. 20:15-21:2 (the financial model “is used not only for this rate case but also by Big Rivers’ management for its general business purposes”); Application, Tab 28 (Mr. Bailey’s attestation that the forecast contains the same assumptions and methodologies as used in the forecast prepared for use by management).

⁴⁵³ Warren Hearing Testimony, July 3, 2013, Tr. 11:14’10”.

1 Big Rivers' financial model is reasonable, reliable, and based on principles of
2 accounting that are generally accepted in the industry and mandated by Big Rivers'
3 creditors. The Opposing Intervenors' accusations to the contrary are baseless.
4 Accordingly, the methodology of Big Rivers' financial model should be accepted by
5 the Commission.

6 **C. Big Rivers' Budget Forecast Is Reasonable.**

7 Big Rivers provided a reasonable budget forecast based on its sound
8 budgeting process.⁴⁵⁴ Big Rivers engages in a detailed and rigorous process to
9 prepare its annual budget.⁴⁵⁵ Data from a number of sources⁴⁵⁶ are first analyzed
10 for reasonableness and then integrated into Big Rivers' in-house financial model to
11 create a preliminary budget.⁴⁵⁷ That preliminary budget is then assessed in light of
12 various financial metrics that are relevant to Big Rivers' debt covenants and other
13 requirements to determine what adjustments need to be made.⁴⁵⁸ After several
14 rounds of review and revision by budget analysts, department managers, and then
15 senior management, the budget is provided to the Smelters for their information
16 and presented for Board approval.⁴⁵⁹ Once approved by the Board, the final budget
17 is submitted to the Smelters and Big Rivers' creditors for their information.⁴⁶⁰ The
18 budget information incorporated in Big Rivers' fully forecasted test period relies on

⁴⁵⁴ Speed Rebuttal Testimony at p. 19:20-21.

⁴⁵⁵ See Speed Direct Testimony at pp. 6:1-18:14.

⁴⁵⁶ See *id.* at pp. 7:6-17:16 for a detailed discussion about the process each department uses to prepare the data sets it submits for inclusion in Big Rivers' budget forecast.

⁴⁵⁷ *Id.* at pp. 5:13-6:12. See Section XI.B for a discussion of Big Rivers' financial model.

⁴⁵⁸ *Id.* at p. 6:15-17.

⁴⁵⁹ Speed Direct Testimony at pp. 6:19-7:1.

⁴⁶⁰ Speed Direct Testimony at p. 7:2-5.

1 the same process, data, assumptions, and results that Big Rivers' management
2 team uses in the ordinary course of business.⁴⁶¹

3 As in any forecasted budget, there are minor variances in Big Rivers'
4 forecasted budget, but none that impact the reasonableness of Big Rivers' forecast
5 or its proposed rate.⁴⁶² The Commission itself has recognized that "[b]udgeting of a
6 forecasted test period is an inexact science" ⁴⁶³ Therefore, such minor variances
7 do not automatically signify that the model is flawed or otherwise unreliable.⁴⁶⁴

8 Moreover, the budget variances identified (and exaggerated)⁴⁶⁵ by the
9 Attorney General both relate to Big Rivers' net margins, which account for only 1-
10 2% of the total revenue budget and are particularly vulnerable to market
11 fluctuations.⁴⁶⁶ Also, because Big Rivers operates with such narrow margins, small
12 variances in overall revenues and expenses have a much larger effect on a
13 percentage basis on margins.

14 In this case, the identified variances relating to off-system sales occurred
15 because of current volatility in the off-system sales market, and because the Cross-
16 State Air Pollution Rule ("CSAPR"), which would have significantly increased

⁴⁶¹ Speed Direct Testimony at p. 21:2-4.

⁴⁶² See Speed Rebuttal Testimony at p. 19:21-22.

⁴⁶³ *In the Matter of: Application of Kentucky-American Water Company to Increase Its Rates*, Order, P.S.C. Case No. 95-554, *53 (Sept. 11, 1996) (a forecasted budget "requires a review of the historical relationship between budgets and actual results to determine if the method used to develop the forecast is reasonable").

⁴⁶⁴ Berry Rebuttal Testimony at p. 13:8-10 ("The fact that budget amounts and actual amounts sometimes differ (significantly or otherwise) does not automatically signify a deficiency in the model.").

⁴⁶⁵ Speed Rebuttal Testimony at p. 19:21-22; Ostrander Direct Testimony at pp. 20:1-21:2.

⁴⁶⁶ See notes 435-36.

1 generation costs and affected market prices, was not implemented as expected.⁴⁶⁷
2 In short, the minor variances present in Big Rivers' budget are not an indication
3 that the budget methodology is flawed; rather, they are the result of uncontrollable
4 or unforeseeable developments, such as the D.C. Circuit Court of Appeals' decision
5 to vacate certain elements of CSAPR.

6 Big Rivers has repeatedly demonstrated that it engages in a comprehensive
7 budgeting process that relies on a wealth of sound data to produce a budget that is
8 reviewed on multiple levels. Big Rivers' budget methodology is reliable and
9 appropriate for this proceeding and is the same budget Big Rivers uses for its
10 operating purposes. Moreover, Big Rivers has used this methodology to deal with
11 significant events outside of its control and, yet, remain within the very narrow
12 window of financial performance in which it must operate. In light of that success,
13 Big Rivers should not be criticized for its budgeting process.

14 **D. The Budget Forecast Is Reasonable Even Though Big Rivers Now**
15 **Plans to Temporarily Idle the Coleman Station Instead of the Wilson**
16 **Station.**

17 When Big Rivers filed this proceeding, it assumed that Wilson Station would
18 be the generating station that it would temporarily idle in response to the Century
19 contract termination. Further evaluation has led Big Rivers to conclude that it may
20 be permitted to temporarily idle Coleman Station, instead—a possibility it has
21 acknowledged throughout this proceeding.⁴⁶⁸ The fixed costs savings of idling the

⁴⁶⁷ Berry Rebuttal Testimony at pp. 12:18-13:2.

⁴⁶⁸ As Big Rivers recently explained, it has taken great pains throughout this proceeding to explain that the anticipated idling of the Wilson Station was “subject to change” depending on the outcome of

1 Coleman Station are virtually identical to the fixed cost savings of idling the Wilson
2 Station.⁴⁶⁹ So, although the fixed costs are in base rates, because the fixed cost
3 savings are virtually identical, the decision to idle the Coleman Station rather than
4 the Wilson Station in response to the Century contract termination does not impact
5 the validity of the budget forecast, the financial model, the cost of service study, or
6 the proposed rates.⁴⁷⁰

7 **E. Big Rivers' Load Forecast Is Reasonable.**

8 Big Rivers' load forecast methodology for the test period is reasonable,
9 accurate, and appropriate for setting rates.⁴⁷¹ Big Rivers retains an outside
10 consultant every two years to produce a formal load forecast study.⁴⁷² As needed in
11 the interim, Big Rivers' staff updates the load forecast to reflect known changes in

certain MISO reports, and explicitly stated that the Coleman Station may be idled in its place. *See, e.g.,* Attachment to Big Rivers' Response to Item 15 of the Commission Staff's Second Requests for Information, p. 3 ("[C]urrent outage plans depict the Wilson unit temporarily idled until Big Rivers can secure replacement load. Big Rivers is still evaluating this strategy and the current plan is subject to change."). *See generally* Response of Big Rivers Elec. Corp. to Joint Motion of Attorney General, Ben Taylor and Sierra Club to Reschedule Hearing (June 27, 2013) (citing numerous references throughout the record in this case demonstrating that Big Rivers has consistently explained that either the Wilson Station or the Coleman Station is likely to be idled as a result of the Century contract termination); Order (June 28, 2013) (in which the Commission denied the Attorney General's and Sierra Club's last-minute attempt to reschedule the final hearing in this matter and acknowledged Big Rivers' citation of "numerous instances in its testimony and discovery responses, as well as references made by Movants in their respective testimonies and discovery questions, that acknowledge and support the proposition that Big Rivers' anticipated idling plans were not yet final.").

⁴⁶⁹ As set forth in Berry Rebuttal Exhibit-2, the total cost of service difference between the two scenarios is \$91,426. *See* Berry Rebuttal Testimony, Berry Rebuttal Exhibit-2.

⁴⁷⁰ Because of Big Rivers' FAC and Environmental Surcharge tariff riders, variable costs associated with Coleman Station and Wilson Station are not included in the base rates. Consequently, any difference in the variable costs associated with the two plants is irrelevant to the rate adjustment sought in this proceeding. Big Rivers seeks to idle the less-efficient Coleman Station, in any event. *See also* Berry Rebuttal Testimony at p. 5:7-17.

⁴⁷¹ Rebuttal Testimony of Lindsay N. Barron ("Barron Rebuttal Testimony"), p. 3:19-21 (June 24, 2013).

⁴⁷² Barron Direct Testimony, p. 5:15-16.

1 direct serve loads, transmission loss rates, or other material information.⁴⁷³ RUS
2 approved the load forecast used in this case,⁴⁷⁴ finding that “[t]he methods and
3 assumptions used are reasonable.”⁴⁷⁵ Additionally, the demand and energy forecast
4 values used for this case are the same used by Big Rivers’ management team in the
5 ordinary course of business.⁴⁷⁶

6 The Opposing Intervenors make a number of incorrect assertions about the
7 quality and reasonableness of the load forecast. First, the Opposing Intervenors
8 argue that the load forecast does not account for price elasticity of demand.⁴⁷⁷ For
9 this case, Big Rivers updated the most recently-approved load forecast with all of
10 the data that could, with reasonable diligence, have been included at the time this
11 case was prepared and filed.⁴⁷⁸ Instead of making an arbitrary estimation about
12 elasticity (thus risking over-collecting from its Members), Big Rivers took the time
13 to conduct a study to determine the appropriate level of price elasticity of demand
14 and thus, has addressed the issue with the appropriate specificity in Case No. 2013-
15 00199.⁴⁷⁹ For the purposes of this proceeding, however, the elasticity included in
16 the load forecast is reasonable because timing prohibited a new price elasticity
17 study, the rates from this proceeding are expected to be in effect for only five
18 months, price elasticity of demand lags rate adjustments for most rural customers,
19 and the nature of industrial load makes industrial customers less susceptible to

⁴⁷³ *Id.* at p. 5:16-18.

⁴⁷⁴ Barron Rebuttal Testimony at p. 4:16; Exhibit Barron-2.

⁴⁷⁵ Barron Direct Testimony, Exhibit Barron-2.

⁴⁷⁶ *Id.* at p. 9:14-16.

⁴⁷⁷ Brevitz Direct Testimony at p. 39:5-15; Kollen Direct Testimony at pp. 54:17-56:15.

⁴⁷⁸ Barron Rebuttal Testimony at p. 5:8-10.

⁴⁷⁹ *Id.* at p. 5:12-15. Barron Hearing Testimony, July 3, 2013, Tr. 9:44’49”.

1 price elasticity changes.⁴⁸⁰ Thus, the test period would be impacted only slightly, if
2 at all, by price elasticity.⁴⁸¹

3 Second, Larry W. Holloway for the Attorney General questions the basic
4 assumptions of the load forecast model, arguing that Big Rivers seems to assume
5 very little growth in the industrial load and an increasing load in the rural class,
6 which is allegedly inconsistent with historical data.⁴⁸² Mr. Holloway is making an
7 apples-to-oranges comparison because he is inappropriately juxtaposing non-
8 weather-normalized actuals with forecasted weather-normalized projections.⁴⁸³ In
9 addition, Big Rivers recognizes the uncertainty regarding the timing and magnitude
10 of replacement load from industrial customers. Because this replacement load could
11 take several years to secure, its impacts would be outside the test period in this
12 case, and Big Rivers properly excluded it from its test period load forecast.⁴⁸⁴ Also,
13 Mr. Holloway's criticism violates the axiomatic rule that past performance is no
14 guarantee of future results. In light of these mistakes and Mr. Holloway's failure to
15 conduct his own forecast analysis, the Commission should reject the Attorney
16 General's criticisms of the load forecast.

17 Big Rivers has used a detailed and rigorous process to develop its load
18 forecast. The load forecast is reasonable, and it has been approved and identified as
19 reasonable by RUS.⁴⁸⁵

⁴⁸⁰ Barron Rebuttal Testimony at p. 5:8-15.

⁴⁸¹ Barron Rebuttal Testimony at p. 8:1-21.

⁴⁸² Holloway Direct Testimony at p. 22:14-18.

⁴⁸³ Barron Rebuttal Testimony at p. 4:7-8.

⁴⁸⁴ Berry Direct Testimony at p. 21:9-15; Barron Rebuttal Testimony at p. 4:17-21.

⁴⁸⁵ Barron Rebuttal Testimony at p. 4:16; Exhibit Barron-2.

1 **F. Big Rivers' Production Cost Modeling Is Reasonable.**

2 Big Rivers' production cost modeling methodology for the test period is
3 reasonable, accurate, and appropriate for setting rates. Big Rivers' energy services
4 and production personnel worked with ACES, a third-party consulting and energy
5 marketing firm, to prepare the production cost modeling used in the financial model
6 supporting the application.⁴⁸⁶ Big Rivers provided ACES with certain inputs for the
7 model, including fuel contract information, Big Rivers' load forecast, and generating
8 unit operating characteristics such as heat rates, capacity, and outage rates.⁴⁸⁷
9 ACES, in turn, provided price forecasts for energy and emission allowances and
10 integrated all of the inputs in its Planning and Risk model.⁴⁸⁸ To ensure
11 robustness, ACES provided five runs of the production cost model: a base run, and
12 four sensitivity runs.⁴⁸⁹ The appropriate outputs from this model were then
13 incorporated into Big Rivers' financial model,⁴⁹⁰ and all outputs have been provided
14 in this proceeding.⁴⁹¹

15 This process has given Big Rivers accurate, reliable production cost data
16 based on the best information available. The Opposing Intervenors' criticisms of
17 Big Rivers' use of the PACE Global price forecast in a 2012 proceeding⁴⁹² are clearly
18 inapplicable as Big Rivers used price forecasts from ACES (not PACE Global) and

⁴⁸⁶ Berry Direct Testimony at p. 31:9-12.

⁴⁸⁷ Berry Direct Testimony at p. 31:17-21. *See also* Big Rivers' Response to AG 1-97.

⁴⁸⁸ Berry Direct Testimony at p. 31:21-22.

⁴⁸⁹ Berry Supplemental Rebuttal Testimony at pp. 6:6-7:9.

⁴⁹⁰ *Id.*

⁴⁹¹ *See* Big Rivers' Response to PSC 1-57.

⁴⁹² Ackerman Direct Testimony at p. 15:7-15.

1 provided a new production cost model for this proceeding. The production cost
2 model is reasonable.

3 **G. Big Rivers Appropriately Accounted for Its Reserve Funds in Its**
4 **Forecast.**

5 In preparing its forecast for this case, Big Rivers appropriately accounted for
6 its various reserve funds when determining its revenue requirements. As part of
7 the Unwind Transaction, Big Rivers established three different reserves. The
8 Economic Reserve (“ER”) cushions the effects of future rate increases for fuel and
9 environmental expenses on the Rural Delivery Service and Large Industrial
10 Customer rate classes.⁴⁹³ The Rural Economic Reserve (“RER”) serves an identical
11 purpose for the Rural Delivery Service rate class only, and only upon exhaustion of
12 the ER.⁴⁹⁴ Finally, the Transition Reserve was established to provide assurance to
13 Big Rivers’ creditors and the ratings agencies that Big Rivers had the protection of
14 additional liquidity should one or both Smelters cease operations.⁴⁹⁵ The funds in
15 the Transition Reserve were reclassified for use for capital expenditures by the
16 Commission’s March 26, 2013, order in Case No. 2012-00492.⁴⁹⁶

17 Big Rivers’ financial model tracks the ER and RER.⁴⁹⁷ Both are modeled to
18 mirror their respective tariffs (the Member Rate Stability Mechanism and the Rural

⁴⁹³ Richert Direct Testimony at p. 38:3-6.

⁴⁹⁴ Richert Direct Testimony at p. 38:6-9.

⁴⁹⁵ Richert Direct Testimony at p. 38:12-14.

⁴⁹⁶ See Refinancing Case Order at *5 (“Big Rivers is authorized to use the Transition Reserve funds to replace up to \$35 million of the aforementioned CoBank funds and use them for capital expenditures in the ordinary course of business”).

⁴⁹⁷ Siewert Direct Testimony at p. 7:9.

1 Economic Reserve Rider), and amounts drawn from those funds are booked as
2 revenue.⁴⁹⁸

3 Big Rivers has proposed no changes to the ER or the RER in response to
4 Century's contract termination. As the respective tariffs establish, those funds will
5 continue to provide rate stability for non-Smelter customers and rural customers,
6 respectively.⁴⁹⁹ Currently, the ER is projected to become exhausted in April 2015
7 and the RER in March 2017.⁵⁰⁰ Big Rivers proposes in its filing in the Alcan Rate
8 Case to accelerate the use of the ER and RER to delay the impact of the rate
9 adjustment requested in that case.⁵⁰¹ Under the proposals in the Alcan Rate Case,
10 the ER is projected to become exhausted in July 2014, and the RER in April 2015.⁵⁰²

11 KIUC makes several inaccurate suggestions about the reserve funds, and in
12 doing so it mischaracterizes the purpose and accounting of those funds.

13 First, Big Rivers carefully evaluated the possible use of the Transition
14 Reserve to help it achieve its 1.10 MFIR requirements, as the KIUC suggests,⁵⁰³ but
15 determined that the reserve cannot be used in this manner. The reserve was
16 already booked as income at the close of the Unwind Transaction.⁵⁰⁴ Therefore, it
17 cannot be used to offset decreases in revenue or increases in expenses, and cannot

⁴⁹⁸ Siewert Direct Testimony at p. 7:11-15.

⁴⁹⁹ Richert Direct Testimony at p. 39:15-20.

⁵⁰⁰ See Wolfram Hearing Testimony, July 3, 2013, Tr. 13:12'04".

⁵⁰¹ *Id.*

⁵⁰² *Id.*

⁵⁰³ See Richert Direct Testimony at p. 39:1-12. See Bailey Hearing Testimony, July 1, 2013, Tr. 13:13'20" (responding to KIUC's suggestion of using the reserves to meet MFIR).

⁵⁰⁴ Richert Direct Testimony at p. 38:16-18, p. 39:8-9.

1 help Big Rivers meeting its annual MFIR requirements.⁵⁰⁵ In addition, the Smelter
2 Agreements explicitly prohibit including the Transition Reserve in the 1.10
3 Contract TIER calculation.⁵⁰⁶

4 Second, the Transition Reserve was not developed “to make up the
5 difference”⁵⁰⁷ in the event of a smelter shutdown.⁵⁰⁸ As explained in Big Rivers’
6 testimony in this case⁵⁰⁹ and in the Unwind Transaction,⁵¹⁰ the Transition Reserve
7 provided a mere cushion against the short-term negative financial effects to
8 reassure creditors and ratings agencies. The Transition Reserve funds were used to
9 accomplish this very objective.

10 Third, it is simply untrue that the effects of Big Rivers’ proposed rates are
11 “understated and temporarily masked because of [Big Rivers’] proposal to use
12 additional amounts from the Economic Reserve.”⁵¹¹ It is also untrue that Big Rivers
13 has “masked the effect of the rate increases due to the Century termination by
14 increasing the MRSM surcredit for the Rural class.”⁵¹² In this proceeding, Big
15 Rivers is not proposing any changes to the operation of its MRSM tariff rider (which

⁵⁰⁵ Richert Direct Testimony at p. 39:9-12; Siewert Direct Testimony at p. 7:17-22.

⁵⁰⁶ Siewert Direct Testimony at p. 13:1-3. *See also id.* at p. 12:17-21 (explaining that Section 4.7.5(f) of the Smelter Agreements establish that the Transition Reserve shall not “generate any revenue or tax liability and the application of funds . . . shall not result in any change in the Net Margins of Big Rivers.”).

⁵⁰⁷ Kollen Direct Testimony at p. 39:12-15.

⁵⁰⁸ Berry Rebuttal Testimony at p. 23:1.

⁵⁰⁹ *See* note 115.

⁵¹⁰ *See* Unwind Case, Application, Direct Testimony of C. William Blackburn, p. 85:14-16 (Dec. 28, 2007).

⁵¹¹ Kollen Direct Testimony at p. 9:6-8.

⁵¹² Kollen Direct Testimony at p. 52:16-17.

1 specifies the use of ER)⁵¹³ or to the RER tariff rider (which specifies the use of the
2 RER).⁵¹⁴

3 Fourth, the calculations in the cost of service study were gross of the effects of
4 the MRSM, resulting in calculated rates consisting of the full amounts without any
5 offset or reduction that the Members receive from the reserve funds.⁵¹⁵ These
6 calculations are transparent and not designed to “mask” the effects of any rate
7 adjustments, as Mr. Kollen alleges.⁵¹⁶

8 Accordingly, Big Rivers properly accounted for the reserve funds in its
9 financial model,⁵¹⁷ cost of service study,⁵¹⁸ and its overall forecast.

10 **XII. The Commission Should Approve the Depreciation Rates Determined by Big**
11 **Rivers’ 2012 Depreciation Study.**

12 Big Rivers proposes that the Commission approve the Report on the
13 Comprehensive Depreciation Study (November 2012) prepared by engineering and
14 consulting firm Burns & McDonnell (the “2012 Depreciation Study”).⁵¹⁹ The
15 methodology used to determine the depreciation rates set forth in Table ES-1 of the
16 2012 Depreciation Study is the same methodology approved by the Commission in
17 Big Rivers’ 2011 Rate Case.⁵²⁰

⁵¹³ Wolfram Direct Testimony at pp. 35:22-36:1; Wolfram Rebuttal Testimony at p. 6:12-15.

⁵¹⁴ Wolfram Rebuttal Testimony at p. 6:15-17.

⁵¹⁵ Wolfram Rebuttal Testimony at p. 7:1-7.

⁵¹⁶ Wolfram Rebuttal Testimony at p. 6:20-22.

⁵¹⁷ See note 444.

⁵¹⁸ See Section XIII.

⁵¹⁹ Kelly Direct Testimony, Exhibit Kelly-1 (“Report on the Comprehensive Depreciation Study (November 2012)”).

⁵²⁰ Kelly Direct Testimony at p. 30:9-12; *id.*, Exhibit Kelly-1, pp. ES-6, III-6.

1 The 2012 Depreciation Study was conducted to analyze the service life
2 characteristics, net salvage indications, and depreciation reserve status to
3 determine appropriate depreciation rates for Big Rivers' physical plant.⁵²¹ This
4 analysis was based on Big Rivers' generation, transmission, and general plant
5 historical accounting records as of July 31, 2012.⁵²²

6 The Commission has recognized that "a depreciation study involves the
7 analysis of a significant amount of information and the preparer's judgment and
8 experience."⁵²³ In this case, Burns & McDonnell used methodologies similar to the
9 process utilized in completing the Report on the Comprehensive Depreciation Study
10 (January 2011) (the "2010 Depreciation Study").⁵²⁴ The average service lives are
11 the same in both studies for all accounts; thus the remaining services lives in the
12 2012 study merely reflect the passage of time between the two studies.⁵²⁵
13 Furthermore, the Commission "authorize[d] and approve[d] Big Rivers' use, on a
14 going-forward basis, of the [2010 depreciation rates],"⁵²⁶ and the depreciation rates
15 in the 2012 Depreciation Study were developed using the same methodology that
16 was approved in the 2011 Rate Case.⁵²⁷ As is more fully explained in Section

⁵²¹ Kelly Direct Testimony at p. 11:12-15.

⁵²² *Id.* at p. 29:10-12.

⁵²³ *In the Matter of: An Adjustment of the Gas Rates of the Union Light, Heat, and Power Company*, Order, P.S.C. Case No. 2005-00042, *32 (Dec. 22, 2005).

⁵²⁴ Kelly Direct Testimony at p. 29:12-15. *See also* 2011 Rate Case, Application, Exhibit 33 (March 1, 2011).

⁵²⁵ Kelly Direct Testimony at p. 29:12-13.

⁵²⁶ 2011 Rate Case Order at *20 (modified on reh'g on other grounds).

⁵²⁷ *See* Kelly Direct Testimony, Exhibit Kelly-1, pp. ES-6, III-6 (containing tables comparing existing and proposed depreciation rates).

1 VIII.D, Big Rivers requires recovery of the full amount of depreciation it requests in
2 order to meet its revenue requirement.

3 In preparing the 2012 Depreciation Study, Big Rivers employed a
4 methodology approved by both the Commission and the RUS.⁵²⁸ As before, these
5 depreciation rates and the resulting adjustment in depreciation expense will
6 produce rates that are fair, just, and reasonable. Accordingly, the Commission
7 should accept the depreciation rates set forth in the 2012 Depreciation Study.

8 The Opposing Intervenors suggest that depreciation on the Coleman Station
9 can be suspended for as long as that plant is idled. However, they offer no
10 depreciation study showing that the life of the Coleman Station would be extended
11 for the same number of years that it is idled. They also offer no authority
12 supporting the position that the life of a plant should be extended for the same
13 number of years that it is idled. They completely ignore the fact that an idled unit
14 will continue to depreciate pursuant to the uncontroverted accounting policies and
15 other authorities cited in Section VIII.D that support continuing depreciation
16 expense on a temporarily idled (not retired) plant that had previously provided
17 utility service. They also completely ignore that MISO may require the Coleman
18 Station to run for reliability purposes.

19 **XIII. The Commission Should Accept Big Rivers' Cost of Service Study.**

20 As in its 2011 Rate Case, Big Rivers has supported its Application in this
21 proceeding with a cost of service study designed "to assess Big Rivers' overall rate of

⁵²⁸ *Id.*; Richert Rebuttal Testimony at p. 17:1-2 ("The depreciation expense included in this proceeding is based upon depreciation rates already approved by the RUS.")

1 return on rate base and to determine the relative rates of return that Big Rivers is
2 earning from each rate class.”⁵²⁹ This study “provides an indication as to whether
3 each class is contributing its appropriate share of Big River's cost of providing
4 service,”⁵³⁰ and forms the basis for Big Rivers’ proposed allocation of the rate
5 increase among its Rural, Large Industrial, and Smelter rate classes.⁵³¹

6 The cost of service study used in this proceeding employs the same
7 methodology approved by the Commission in the 2011 Rate Case.⁵³² As it did in
8 that study, Big Rivers here followed the standard methodology for creating an
9 embedded cost of service study. Under those industry standard practices, the study
10 was carried out by (1) assigning costs to Big Rivers’ major functional groups (i.e.,
11 production or transmission costs); (2) classifying the costs as energy-related or
12 demand-related; and then (3) allocating the costs to the rate classes.⁵³³

13 The Opposing Intervenors have not offered their own cost of service study.
14 Nevertheless, Attorney General witness Mr. Ostrander offered minor critiques of
15 specific charges—since addressed by Big Rivers—included in the cost of service
16 study. As explained below, these critiques are unfounded.

17 First, the Attorney General’s suggestion that the cost of service study had not
18 been updated to reflect the rate impact of the Commission’s January 29, 2013
19 Rehearing Order in the 2011 Rate Case, which was issued after Big Rivers filed its

⁵²⁹ Wolfram Direct Testimony at p. 21:15-17.

⁵³⁰ *Id.* at p. 21:18-19.

⁵³¹ *See id.* at p. 21:17-19 (“Additionally, the cost of service study provides an indication as to whether each class is contributing its appropriate share of Big River’s cost of providing service.”)

⁵³² *See id.* at p. 22:7-11.

⁵³³ *See id.* at p. 22:2-4.

1 direct testimony in this case, is no longer accurate. Big Rivers has submitted
2 “revised exhibits [that] correctly incorporate the rate impact of the Commission’s
3 Rehearing Order.”⁵³⁴ Second, the small discrepancy identified by the Attorney
4 General between Big Rivers’ financial model and its cost of service study was
5 attributable to an inadvertent failure to delete a particular line item from the
6 financial model (\$62,500 in membership dues for the Southeastern Federal Power
7 Customers, Inc.).⁵³⁵ As explained by Mr. Wolfram, no adjustment to the cost of
8 service study was required because that study correctly showed that Big Rivers had
9 decided to forgo its membership in that organization.⁵³⁶

10 The Opposing Intervenors point to no fixed costs that were inappropriately
11 assigned to the demand charge, and they identify no variable costs that were
12 inappropriately assigned to the energy charge. Given that the rate adjustment
13 sought in this case predominately results from the cessation of Century’s
14 contributions to Big Rivers’ fixed costs (as opposed to variable costs), it is entirely
15 reasonable and understandable that the revenue increase in this case is
16 predominately derived from the proposed increase to the demand charges.

17 In sum, Big Rivers’ cost of service study is grounded in a well-recognized
18 methodology that has been approved by the Commission many times, and it should
19 be approved.

20 In addition, the Commission should accept Big Rivers’ proposed revenue

⁵³⁴ Wolfram Rebuttal Testimony at p. 23:20-21. *See also* Big Rivers’ Response to PSC 2-36; Wolfram Rebuttal Testimony, Exhibit Wolfram-3.3.

⁵³⁵ Wolfram Rebuttal Testimony at p. 24:1-10.

⁵³⁶ *Id.*

1 allocation methodology, which appropriately eliminates the rural rate class
2 subsidies. Big Rivers' cost of service study shows that its rural rate class customers
3 currently pay less for their electric service than it costs to provide them that
4 service.⁵³⁷ These customers are currently being subsidized by Big Rivers' large
5 industrial and smelter rate class customers.⁵³⁸ The Commission made clear in the
6 2011 Rate Case that it wished to eliminate this disparity, explicitly acknowledging
7 a goal of "moving to cost-of-service-based rates for all classes."⁵³⁹ To help
8 accomplish that goal, the Commission ordered "that the Rural subsidy should be
9 reduced by an amount greater than [that] proposed by Big Rivers" at the time.⁵⁴⁰

10 As a result of the Commission's 2011 Rate Case Order, the current rural
11 subsidy is relatively small compared to what it was previously. In this proceeding,
12 Big Rivers proposes to continue that gradual trend by eliminating "the [remaining]
13 subsidy that the Rural rate class receives in total from the Large Industrials and
14 the Smelters."⁵⁴¹ Specifically, Big Rivers allocated the proposed revenue increase in
15 a manner "designed to eliminate the gap between the rate of return shown in the
16 cost of service study for the Rurals and the rate of return for the other classes on a
17 combined basis."⁵⁴² Under the present proposal, the rural class rate of return would
18 be equivalent to both the rate of return for the total system and the rate of return

⁵³⁷ Wolfram Direct Testimony at p. 27:7-9, p. 29:15-18; Wolfram Rebuttal Testimony, Exhibit Wolfram-4.3, p. 11.

⁵³⁸ 2011 Rate Case Order at *38.

⁵³⁹ *Id.* at *47.

⁵⁴⁰ *Id.*

⁵⁴¹ Wolfram Direct Testimony at p. 29:18-20.

⁵⁴² *Id.* at p. 29:15-18.

1 for the combined large industrial and smelter rate classes.⁵⁴³

2 This methodology ensures that “the impact of the proposed rate relief,
3 including the impact of the Century contract termination, is shared by all classes on
4 a cost-of-service basis”⁵⁴⁴ as the Commission directed in the 2011 Rate Case. Big
5 Rivers’ proposal to eliminate interclass subsidies is supported by the KIUC and is
6 not contravened by the other Opposing Intervenors.⁵⁴⁵ Big Rivers’ proposed revenue
7 allocation methodology should therefore be adopted.

8 **XIV. Big Rivers Should Be Granted Authority to Establish a Regulatory Asset and**
9 **Amortize Certain Severance Costs.**

10 Big Rivers has included anticipated severance expenses in the fully
11 forecasted test period related to the possible idling of a power plant, and it should
12 be granted the authority to establish a regulatory asset to amortize those severance
13 expenses over a sixty-month period.⁵⁴⁶

⁵⁴³ *Id.* at pp. 29:20-30:19. As explained in the Direct Testimony of Mr. Wolfram, the Large Industrial class rate of return can never equal the Smelter class rate of return because the Smelter base rate is determined by adding certain contractually required surcharges to the Large Industrial base rate. *See id.* at p. 28:3-21. However, as explained in text above, Big Rivers can—and proposes to—allocate the proposed rate increase so that the combined rate of return for the Large Industrial and Smelter classes is equal to both the Rural and overall system rates of return.

⁵⁴⁴ Bailey Direct Testimony at p. 13:10-12.

⁵⁴⁵ Kollen Direct Testimony, p. 61:6-8 (“Q: Should the Commission adopt the Company’s proposal to eliminate the Rural subsidy and set rates at cost of service? A: Yes. It is generally appropriate to set rates at cost of service. It is especially so here.”)

⁵⁴⁶ Speed Direct Testimony at p. 19:20-21. *See also Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company for an Order Approving Proposed Deferred Debits and Declaring the Amortization of the Deferred Debits to be Included in Earnings Sharing Mechanism Calculations*, Order, P.S.C. Case No. 2001-00169 (Dec. 3, 2001) (permitting a five year amortization period for “VDT” workforce reduction costs); *The Application of East Kentucky Power Cooperative, Inc. for an Order Approving Accounting Practices to Establish a Regulatory Asset Related to Certain Replacement Power costs Resulting from Generation Forced Outages*, Order, P.S.C. Case No. 2008-00436, *4 (Dec. 23, 2008) (indicating that extraordinary or nonrecurring expense that over time will result in a savings that fully offsets the cost should be recovered over a five-year period).

1 Big Rivers assumed for the purposes of preparing its forecast that plant
2 employees 61 years of age or older would choose severance and that those less than
3 61 would choose to exercise their right under the labor agreement to displace less
4 senior employees or fill vacancies at other power plants operated by Big Rivers.⁵⁴⁷
5 Although Big Rivers is required to negotiate in good faith the final severance costs
6 with the International Brotherhood of Electrical Workers,⁵⁴⁸ the severance costs in
7 Big Rivers' forecast are a reasonable assumption based upon the best available
8 data.⁵⁴⁹

9 In the budget, a regulatory account has been set up for these costs in August
10 2013, and the costs are amortized over sixty months beginning September 2013.⁵⁵⁰
11 Because the amortization begins in the first month of the fully forecasted test
12 period, this item is already included and does not require a pro forma adjustment to
13 test period expenses.⁵⁵¹ This approach is consistent with the Commission practice
14 of requiring a utility to request Commission approval to establish a regulatory asset
15 to defer certain non-recurring costs when incurred (rather than charge them to
16 expense at that time) to preserve the right to seek rate recovery of those costs.⁵⁵²

17 Even though the Opposing Intervenors complain that severance may be
18 delayed by a few months if Coleman Station is put into SSR status, that possibility
19 remains uncertain, and the regulatory asset should still be established. As

⁵⁴⁷ Direct Testimony of James V. Haner, Application, Tab 70 ("Haner Direct Testimony"), p. 10:11-15 (Jan. 15, 2013).

⁵⁴⁸ Berry Hearing Testimony, July 2, 2013, Tr. 15:03'20".

⁵⁴⁹ *Id.* at Tr. 15:02'45".

⁵⁵⁰ Speed Direct Testimony at pp. 19:22-20:2.

⁵⁵¹ *Id.* at p. 20:2-4.

⁵⁵² 2011 Rate Case Order at *15-16.

1 explained in Section X, above, if any such benefits materialize, Big Rivers will
2 (consistent with its not-for-profit cooperative status) be sure that its Members and
3 their member-owners benefit.

4 Accordingly, the Commission should grant Big Rivers the authority to
5 establish a regulatory asset and amortize certain severance costs.

6 **XV. Big Rivers' Rate Case Expenses Are Fair, Just, and Reasonable and Should**
7 **Be Amortized Over 36 Months.**

8 It is a well-settled principle of utility law that rate case expenses “must be
9 included among the costs of operation in the computation of a fair return.”⁵⁵³ Big
10 Rivers is entitled in this proceeding “to recover all prudent and reasonable rate case
11 costs.”⁵⁵⁴ As the Commission has repeatedly stated, its “typical practice for many
12 years has been to allow [a] utility to amortize its rate case expenses over a three-
13 year period and include the annual amortization expense in determining the
14 utility’s required revenue increase.”⁵⁵⁵

15 Big Rivers’ rate case expenses satisfy this “prudent and reasonable” standard
16 and should be approved. As explained in Section VII above, this case is “critical to
17 Big Rivers’ financial viability.”⁵⁵⁶ Consequently, the associated costs are a
18 necessary and prudent investment in Big Rivers’ future.

19 Moreover, as discussed in Section XI.A above, reliance on a historical test

⁵⁵³ *In the Matter of: Application of Kentucky-American Water Company for an Adjustment of Rates Supported By a Fully Forecasted Test Year*, Order, P.S.C. Case No. 2010-00036, *73 (Dec. 14, 2010) (citing *West Ohio Gas Co. v. Public Utilities Comm’n*, 294 U.S. 63, 74 (1935)).

⁵⁵⁴ *In the Matter of: Application of Kentucky-American Water Company to Increase Its Rates*, Order, P.S.C. Case No. 97-034, *32 (Sept. 30, 1997).

⁵⁵⁵ 2011 Rate Case Rehearing Order at *3 n.2.

⁵⁵⁶ Speed Rebuttal Testimony at p. 11:2

1 year was not a viable option in this case because of the unique circumstances
2 surrounding Century's contract termination. These unique circumstances also
3 indicate that Big Rivers' reasonable expenses in this case cannot simply be
4 benchmarked against those in prior proceedings. The Commission has previously
5 recognized that, due to "the additional work necessitated by the use of a future test
6 year," rate case expenses will likely be higher in forecasted test period cases than in
7 historical test period cases.⁵⁵⁷ Furthermore, the Commission has held that:

8 "[p]ursuant to KRS 278.180, a utility has the discretion to
9 choose the timing of its rate case applications. There is
10 nothing in KRS 278 that authorizes the Commission to
11 adopt a disincentive to, in effect, penalize a utility for
12 exercising its right to seek rate relief.' It would be a
13 disincentive to [a utility] if its shareholders are denied the
14 opportunity to recover all prudent and reasonable rate
15 case costs."⁵⁵⁸

16 Here, Big Rivers' reliance on a forecasted test period was necessitated by the
17 significant future impact of Century's unilateral contract termination, and the costs
18 incurred in connection with this case were prudent.

19 In addition to these generally-recognized factors, the actions of the Opposing
20 Intervenor directly contributed to a significant portion of Big Rivers' expenses in
21 this proceeding. Most notably, Big Rivers was required to respond to more than
22 1,600 data requests, counting subparts. More than half of those requests were
23 served by the Attorney General, alone.⁵⁵⁹ It is ironic, to say the least, that the

⁵⁵⁷ *Kentucky-American Water*, Order, P.S.C. Case No. 97-034 at *32. *See also* Speed Rebuttal Testimony at p. 7:16-17 (explaining "that a rate case based on a fully forecasted test year is more factually complicated than a rate case based on a historical test year").

⁵⁵⁸ *Kentucky-American Water*, Order, P.S.C. Case No. 97-034 at *32.

⁵⁵⁹ Speed Rebuttal Testimony at pp. 7:22-8:3.

1 Attorney General can serve more than 800 data requests, then turn around and
2 argue against recovering the costs necessary for Big Rivers to respond to those
3 requests. Similarly, Big Rivers incurred additional costs as a result of the
4 procedural complications necessitated by the late intervention of Sierra Club, as
5 well as multiple last-minute motions, including eleventh hour attempts to
6 reschedule the final hearing and alter previously uncontested Commission decisions
7 regarding confidential treatment.⁵⁶⁰ In light of their actions in this proceeding, it is
8 disingenuous for the Opposing Intervenors to suggest that Big Rivers' rate case
9 expenses are somehow inappropriate.

10 Even in the face of these difficult circumstances, Big Rivers has remained
11 attentive throughout to the issue of legal and professional costs. Although Big
12 Rivers does not have in-house counsel or a rates department (and therefore does not
13 have to bear those costs full-time),⁵⁶¹ Big Rivers has relied where possible on in-
14 house employees to ensure filing compliance and to perform document production
15 tasks.⁵⁶² Big Rivers has also adopted "a common sense approach to the division of
16 labor that has allowed it to efficiently perform all necessary work and provide all
17 requested information on the timeline established by the Commission."⁵⁶³

18 For preparation of its rate filings, Big Rivers turned primarily to regional
19 counsel at Sullivan, Mountjoy, Stainback & Miller PSC ("SMSM") and Dinsmore &

⁵⁶⁰ *Id.* at p. 11:5.

⁵⁶¹ Speed Hearing Testimony, July 3, 2013, Tr. 9:40'00".

⁵⁶² Speed Rebuttal Testimony at p. 8:9-12.

⁵⁶³ *Id.* at p. 8:6-8.

1 Shohl LLP (“Dinsmore”).⁵⁶⁴ These firms have significant expertise appearing before
2 the Commission, they are located near Big Rivers’ and the Commission’s offices, and
3 they bill at rates commensurate with other Kentucky firms.⁵⁶⁵

4 Big Rivers relied upon national and specialized counsel only where it was
5 essential to the particular task being performed and reasonable under the
6 circumstances. For example, it relied upon attorneys from Hunton & Williams for
7 the limited purpose of responding to environmental issues raised in certain data
8 requests. That firm has been representing Big Rivers on those very issues, and it
9 was uniquely suited to assist with its responses to those requests, and its fees in
10 this matter were very low due to the limited nature of the work.⁵⁶⁶ Similarly, Big
11 Rivers engaged Haynes and Boone solely to advise it on the highly specialized
12 restructuring and bankruptcy issues raised by the Opposing Intervenors.⁵⁶⁷
13 Likewise, Big Rivers has used counsel from Orrick, Herrington & Sutcliffe only in a
14 limited capacity to advise it about issues related to the Unwind Transaction, the
15 smelter contracts, Century contract negotiations, and Big Rivers’ financing
16 transactions—highly specialized subjects on which Orrick has or currently is
17 representing Big Rivers.⁵⁶⁸ Big Rivers has not used Hogan Lovells in this
18 proceeding.

19 Big Rivers has also been diligent about providing invoices for legal and

⁵⁶⁴ *Id.* at p. 8:17-20.

⁵⁶⁵ *Id.* at pp. 7:21-8:2.

⁵⁶⁶ *Id.* at p. 9:3-10.

⁵⁶⁷ *Id.* at p. 9:11-13.

⁵⁶⁸ *Id.* at p. 9:14-17.

1 professional services on an ongoing basis. In addition to providing significant cost
2 information in its responses to data requests,⁵⁶⁹ Big Rivers filed monthly
3 supplements and also filed a special supplement on June 21, 2013⁵⁷⁰ to ensure that
4 all legal and professional services invoices had been accounted for and produced.
5 Although the Opposing Intervenors raised concerns about certain Haynes Boone
6 invoices not being filed in a timely manner, they cannot identify any such items
7 that Big Rivers failed to produce in response to their discovery requests on that
8 topic; in fact, those invoices were provided on June 18, 2013, two weeks in advance
9 of the evidentiary hearing.⁵⁷¹ Thus, all charges for legal fees for this rate case are
10 supported by detailed invoices.

11 Big Rivers also relied heavily on Catalyst Consulting to assist in the
12 preparation of the rate filing. Catalyst Consulting will come in under budget.
13 Despite that success, Attorney General witness Mr. Ostrander complains that the
14 estimated fees were not 100% accurate. However, as with Big Rivers' legal fees, all
15 Catalyst Consulting's charges for this rate case are supported by detailed invoices.

16 Kentucky law entitles Big Rivers "to recover all prudent and reasonable rate
17 case costs."⁵⁷² This case has featured a lengthy and comprehensive application
18 process, extensive procedural activity, more than 1600 data requests, over 700

⁵⁶⁹ Big Rivers' Response to PSC 1-54; First Updated Response to PSC 1-54 (Feb. 15, 2013); Big Rivers' Second Updated Response to PSC 1-54 (March 18, 2013); Big Rivers' Third Updated Response to PSC 1-54 (April 19, 2013); Big Rivers' Fourth Updated Response to PSC 1-54 (May 17, 2013); Big Rivers' Fifth Updated Response to PSC 1-54 (June 18, 2013); Big Rivers' Supplemental Response to PSC 1-54 (June 21, 2013); Big Rivers' Sixth Updated Response to PSC 1-54 (July 24, 2013).

⁵⁷⁰ See Big Rivers' Supplemental Response to PSC 1-54.

⁵⁷¹ See Big Rivers' Fifth Updated Response to PSC 1-54.

⁵⁷² *Kentucky-American Water*, Order, P.S.C. Case No. 97-034 at *32.

1 pages of testimony and exhibits, and a long three-day evidentiary hearing. As was
2 explained in greater detail by Ms. DeAnna M. Speed, Big Rivers' Director Rates and
3 Budgets, all of Big Rivers' rate case expenses are prudent and reasonable under the
4 circumstances.⁵⁷³ Consistent with the Commission's standard practice, Big Rivers
5 should therefore be permitted "to amortize its rate case expenses over a three-year
6 period and include the annual amortization expense in determining the . . . required
7 revenue increase."⁵⁷⁴

8 **XVI. Big Rivers' Proposed Pro Forma Adjustments to the Calculation of Its**
9 **Revenue Requirement Produce Fair, Just, and Reasonable Rates.**

10 Pursuant to the Commission's regulations, "the financial data for the
11 forecasted period shall be presented in the form of pro forma adjustments to the
12 base period."⁵⁷⁵ These adjustments are properly limited to the twelve months
13 following the suspension period.⁵⁷⁶ For the reasons described below, Big Rivers' pro
14 forma adjustments to the calculation of its revenue requirement produce fair, just,
15 and reasonable rates and should be accepted by the Commission.

16 **A. The Adjustments Made to Remove Revenues and Expenses Addressed**
17 **in the 2011 Rate Case Produce Fair, Just, and Reasonable Rates.**

18 Big Rivers submitted this Application for a rate adjustment on January 16,
19 2013. At that time, the Commission had not yet issued a decision on the pending
20 request for rehearing of the 2011 Rate Case. Big Rivers acknowledged that it would
21 need to adjust the rates proposed in this proceeding "[s]hould the Commission issue

⁵⁷³ See Speed Rebuttal Testimony at pp. 7-16.

⁵⁷⁴ 2011 Rate Case Rehearing Order at *3 n.2.

⁵⁷⁵ 807 KAR 5:001(16)(11)(a).

⁵⁷⁶ See 807 KAR 5:001(16)(11)(b).

1 an order on rehearing in Case No. 2011-00036 that results in base rates that differ
2 from the rates in effect at the time this filing was prepared.”⁵⁷⁷

3 On January 29, 2013, the Commission issued its Rehearing Order in the 2011
4 Rate Case, granting Big Rivers an increase in its wholesale base rates sufficient to
5 generate additional annual revenues of \$1,042,535.⁵⁷⁸ Approximately two weeks
6 later, the Commission Staff served its second set of data requests upon Big Rivers,
7 including a request that Big Rivers “[p]rovide revisions of all exhibits that will
8 change due to this change in Big Rivers’ rates.”

9 In response to the Rehearing Order and PSC 2-36, Big Rivers filed new
10 versions of nine separate exhibits.⁵⁷⁹ Big Rivers later revised those numbers
11 slightly to correct a minor error and submitted new versions of those exhibits.⁵⁸⁰ As
12 a result of these filings, Big Rivers has appropriately adjusted for all rate base
13 changes introduced by the Rehearing Order.⁵⁸¹ Thus, the adjustment to remove
14 revenues and expenses addressed in the 2011 Rate Case produce fair, just, and
15 reasonable rates and should be accepted by the Commission.

16 **B. The Adjustments Made to Account for Fuel Cost Expenses and**
17 **Revenues Included in the Fuel Adjustment Clause, to Remove the**
18 **Environmental Surcharge, and to Remove Non-FAC Purchase Power**
19 **Agreement Revenues Produce Fair, Just, and Reasonable Rates.**

20 Consistent with standard Commission practice, Big Rivers has also made
21 adjustments to remove all revenues and expenses associated with “full-recovery cost

⁵⁷⁷ Wolfram Direct Testimony at p. 37:5-8.

⁵⁷⁸ 2011 Rate Case Rehearing Order at *39-40.

⁵⁷⁹ See Big Rivers’ Response to PSC 2-36.

⁵⁸⁰ See Wolfram Rebuttal Testimony at pp. 22:10-23:22.

⁵⁸¹ *Id.* at p. 23:20-21.

1 tracker[s].”⁵⁸² Accordingly, Big Rivers has made adjustments to remove fuel
2 expenses and revenues addressed by the Fuel Adjustment Clause (“FAC”) rate
3 mechanism, to remove the environmental surcharge, and to remove non-FAC
4 Purchase Power Agreement revenues.⁵⁸³ No party has disputed these adjustments.

5 The revenue and expense values associated with the FAC mechanism
6 adjustment are identical because Big Rivers based its Application on a fully
7 forecasted test year and assumes perfect rate treatment for the FAC rate
8 mechanism.⁵⁸⁴ Because these adjustments account only for revenues and expenses
9 accounted for in the separate FAC rate mechanism, they produce fair, just, and
10 reasonable rates and should be accepted by the Commission.

11 Big Rivers similarly has projected zero net impact to its fully forecasted rates
12 from environmental surcharges. Since 2008, the Commission has allowed Big
13 Rivers to collect an “Environmental Surcharge.”⁵⁸⁵ Because that surcharge
14 “provides for full recovery of approved environmental costs that qualify for the
15 surcharge,” Big Rivers properly made an adjustment “to eliminate ES revenues and
16 expenses during the test year.”⁵⁸⁶ Accordingly, these adjustments produce fair, just,
17 and reasonable rates and should be accepted by the Commission.

⁵⁸² Wolfram Direct Testimony at p. 15:17-18.

⁵⁸³ *Id.* at p. 15:4-12.

⁵⁸⁴ *Id.* at p. 15:10-12.

⁵⁸⁵ *See, e.g., In the Matter of: An Examination by The Public Service Commission of The Environmental Surcharge Mechanism of Big Rivers Electric Corporation For The Six-Month Billing Periods Ending January 31, 2012 and July 31, 2012 and The Pass Through Mechanism of Its Three Member Distribution Cooperatives*, Order, P.S.C. Case No. 2012-00534, *1 n.1 (May 6, 2013).

⁵⁸⁶ Wolfram Direct Testimony at p. 15:18-20. *See also* Wolfram Rebuttal Testimony, Exhibit Wolfram-2.3, p. 4, Reference Schedule 1.02.

1 For the same reason, Big Rivers made an adjustment to eliminate from its
2 proposed base rates any projected revenues and expenses associated with the Non-
3 Fuel Adjustment Clause Purchased Power Adjustment (“Non-FAC PPA”). As with
4 the Environmental Surcharge, the Commission has permitted Big Rivers to recover
5 Non-FAC fuel recovery costs through a full-recovery cost tracker.⁵⁸⁷ Therefore, “an
6 adjustment was made to eliminate Non-FAC PPA revenues and expenses during
7 the test year.”⁵⁸⁸ This adjustment produces fair, just, and reasonable rates and
8 should be approved by the Commission.

9 **C. The Adjustments to Remove Certain Revenues and Expenses**
10 **Consistent with Commission Practice Produce Fair, Just, and**
11 **Reasonable Rates.**

12 Big Rivers made additional adjustments to remove certain expenses that are
13 not “includable in a gas or electric utility’s cost of service for rate-making purposes”
14 pursuant to 807 KAR 5:016 and Commission precedent. First, Big Rivers adjusted
15 its operating expenses to remove \$55,756 in promotional advertising expenses.⁵⁸⁹
16 Second, Big Rivers adjusted its expenses to exclude \$70,923 in political lobbying
17 expenses, including the “costs for an outside firm,” “the portions of Big Rivers’
18 internal expenses related to lobbying,” and “the portion of National Rural Electric
19 Cooperative Association (“NRECA”) dues that NRECA specifies on its invoices as

⁵⁸⁷ See Wolfram Direct Testimony at p. 16:5-7; 2011 Rate Case Order at *51 (describing Big Rivers’ Non-FAC PPA recovery mechanisms for smelter and non-smelter customers).

⁵⁸⁸ Wolfram Direct Testimony at p. 16:7-8; Wolfram Rebuttal Testimony, Exhibit Wolfram-2.3, p. 5, Reference Schedule 1.03.

⁵⁸⁹ Wolfram Direct Testimony at p. 16:11-13; Wolfram Rebuttal Testimony, Exhibit Wolfram-2.3, p. 6, Reference Schedule 1.04.

1 lobbying-related.”⁵⁹⁰ Third, Big Rivers adjusted its operating expenses to remove
2 \$140,357 in annual economic development payments to its Members.⁵⁹¹ Fourth, Big
3 Rivers adjusted its operating expenses to eliminate \$63,328 in donations
4 expenses.⁵⁹² Fifth, Big Rivers adjusted its operating expenses to eliminate \$132,766
5 in Touchstone Energy dues.⁵⁹³ No party has disputed these adjustments. These
6 adjustments, which are consistent with standard Commission practice, result in
7 rates that are fair, just, and reasonable rates and should be accepted by the
8 Commission.

9 **D. The Adjustment to Reflect the Amortization of Rate Case Expenses**
10 **from Big Rivers’ Previous Rate Case, Case No. 2011-00036, Produces**
11 **Fair, Just, and Reasonable Rates.**

12 Big Rivers made an adjustment reflecting the amortization of rate case
13 expenses from the 2011 Rate Case.⁵⁹⁴ The adjustment of \$203,352 (revised from the
14 originally-filed amount of \$640,753 to reflect the effect of the Rehearing Order)
15 properly reflects the amortization of Big Rivers’ professional services costs related
16 to the principal case, amortized over a three-year period in accordance with prior
17 Commission practice.⁵⁹⁵

⁵⁹⁰ Wolfram Direct Testimony at p. 16:16-22; Wolfram Rebuttal Testimony, Exhibit Wolfram-2.3, p. 7, Reference Schedule 1.05.

⁵⁹¹ Wolfram Direct Testimony at p. 17:1-6; Wolfram Rebuttal Testimony, Exhibit Wolfram-2.3, p. 8, Reference Schedule 1.06.

⁵⁹² Wolfram Direct Testimony at p. 17:7-10; Wolfram Rebuttal Testimony, Exhibit Wolfram-2.3, p. 9, Reference Schedule 1.07.

⁵⁹³ Wolfram Direct Testimony at p. 17:11-15; Wolfram Rebuttal Testimony, Exhibit Wolfram-2.3, p. 10, Reference Schedule 1.08.

⁵⁹⁴ Wolfram Direct Testimony at p. 17:18-19.

⁵⁹⁵ Wolfram Rebuttal Testimony, Exhibit Wolfram Rebuttal-2.3. 2011 Rate Case Order at *6 (approving recovery of rate case expenses “[b]ased on a three-year amortization”).

1 Big Rivers is not proposing a pro forma adjustment to amortize the rate case
2 expenses associated with the current proceeding.⁵⁹⁶ As discussed in Section XV, Big
3 Rivers included the projected rate case expenses for this proceeding in its budget,
4 amortized over a 36-month period beginning September 2013.⁵⁹⁷ Because the
5 amortization of the costs of the present case is already included in the fully
6 forecasted test period, Big Rivers does not propose a related pro forma adjustment
7 to test year expenses.⁵⁹⁸

8 Big Rivers' adjustment to reflect the amortization of the previous rate case
9 expenses produces fair, just, and reasonable rates and should be accepted by the
10 Commission.

11 **E. The Adjustment to Eliminate Certain Non-Recurring Labor Expenses**
12 **at the Coleman Station Produces Fair, Just, and Reasonable Rates.**

13 Big Rivers proposes an adjustment to eliminate certain expenses associated
14 with a possible plant lay-up.⁵⁹⁹ The adjustment was calculated to eliminate the
15 burdened labor expenses for one idled power plant and plant-related staff included
16 in the 2013 budget in September, October, and November when the anticipated lay-
17 up is to occur.⁶⁰⁰ Because these costs are non-recurring from a ratemaking
18 standpoint, they should be excluded from the rate base.⁶⁰¹

19 As discussed in Section XI.D above, Big Rivers now anticipates idling the
20 Coleman Station instead of the Wilson Station. However, because the fixed

⁵⁹⁶ Wolfram Direct Testimony at p. 18:8.

⁵⁹⁷ Wolfram Direct Testimony at p. 18:9-10.

⁵⁹⁸ Wolfram Direct Testimony at p. 18:11-13.

⁵⁹⁹ Wolfram Direct Testimony at p. 18:16-18.

⁶⁰⁰ Wolfram Rebuttal Testimony, Exhibit Wolfram-2.3, p. 12.

⁶⁰¹ Wolfram Direct Testimony at p. 18:21-22.

1 operating costs (labor, non-labor operating & maintenance) of these two stations are
2 essentially the same, that operational change does not impact Big Rivers' forecast or
3 the calculation of this adjustment.⁶⁰² Additionally, as discussed in Section XIV, if
4 Coleman must run on SSR status to maintain reliability, Big Rivers has ensured
5 that the savings from forgoing severance costs will inure to the Members and the
6 member-owners. No party has disputed these adjustments. Accordingly, Big
7 Rivers' adjustment to eliminate these non-recurring expenses produces fair, just,
8 and reasonable rates and should be approved by the Commission.

9 **F. The Adjustments Normalizing Annual Expenses for Outside**
10 **Professional Services Produce Fair, Just, and Reasonable Rates.**

11 Big Rivers made an adjustment to normalize annual expenses for certain
12 outside professional services.⁶⁰³

13 Big Rivers normalizes expenses incurred for three different initiatives that
14 require the use of outside professional services into a single adjustment.⁶⁰⁴ First,
15 Big Rivers budgets \$445,000 to prepare an Integrated Resource Plan ("IRP") every
16 three years.⁶⁰⁵ Due to timing issues, \$151,000 is included in the test period, while
17 the remaining costs for the upcoming IRP were budgeted to be incurred prior to the
18 test period.⁶⁰⁶ This adjustment normalizes the full cost for the professional services
19 related to the IRP over three years.⁶⁰⁷

⁶⁰² See Berry Rebuttal Testimony, Exhibit Berry Rebuttal-2.

⁶⁰³ Wolfram Direct Testimony, Exhibit Wolfram-2, Reference Schedule 1.11.

⁶⁰⁴ Wolfram Direct Testimony at p. 20:9-10; Wolfram Direct Testimony, Exhibit Wolfram-2, Reference Schedule 1.11.

⁶⁰⁵ Wolfram Direct Testimony at p. 19:14-16.

⁶⁰⁶ *Id.* at p. 19:16-18.

⁶⁰⁷ *Id.* at p. 19:18-19.

1 Second, Big Rivers prepares a load forecast every two years for which it
2 budgets \$65,000.⁶⁰⁸ The proposed adjustment normalizes the full cost for the
3 professional services related to the load forecast over two years.⁶⁰⁹

4 Finally, from time to time, Big Rivers initiates a Transient Stability Study for
5 transmission system reliability purposes.⁶¹⁰ Big Rivers budgeted \$30,000 for this
6 initiative in the test period.⁶¹¹ Because there is no set periodicity for this study, the
7 proposed adjustment removes this cost from the revenue requirement.⁶¹²

8 No party has disputed this adjustment. This adjustment produces fair, just,
9 and reasonable rates and it should be accepted by the Commission.

10 **G. The Adjustments to the Revenue Requirements to Account for Demand**
11 **Side Management Programs Produce Fair, Just, and Reasonable**
12 **Rates.**

13 Big Rivers makes an adjustment to ensure that expenses of \$1 million for
14 Demand Side Management ("DSM") and energy efficiency programs are included in
15 the revenue requirement and allocated only to the Rural Delivery Service rate
16 class.⁶¹³

17 Big Rivers sought and was granted a \$1 million pro forma adjustment for its
18 DSM/energy efficiency programs in the 2011 Rate Case.⁶¹⁴ In 2012, Big Rivers

⁶⁰⁸ *Id.* at p. 19:20-21.

⁶⁰⁹ *Id.* at pp. 19:22-20:2.

⁶¹⁰ *Id.* at p. 20:3-4.

⁶¹¹ *Id.* at p. 20:4-5.

⁶¹² *Id.* at p. 20:6-8.

⁶¹³ *Id.* at p. 20:13-16; Exhibit Wolfram-2.3, p. 14.

⁶¹⁴ *See* 2011 Rate Case, Application, Exhibit 48, p. 20:13-25 (Mar. 1, 2011).

1 offered ten DSM programs that the Commission approved.⁶¹⁵ As reiterated in the
2 hearing testimony of Ms. Lindsay N. Barron, Big Rivers' Vice President Energy
3 Services, Big Rivers did not spend the entire \$1 million in 2012,⁶¹⁶ but Big Rivers
4 intends to spend not only the \$1 million that was approved in Case No. 2011-00036
5 but also the amount that was left over from 2012.⁶¹⁷ Big Rivers has a number of
6 DSM programs that it will be implementing or continuing during the forecasted test
7 period, and it regularly meets with its Members to discuss how to increase
8 participation⁶¹⁸ and considers new programs or ways to improve implementation on
9 an ongoing basis.⁶¹⁹ In total, Big Rivers has budgeted approximately \$1.3 million
10 for its DSM/energy efficiency programs in 2013.⁶²⁰ Consistent with the
11 Commission's findings in the 2011 Rate Case, the proposed rates assign all of the
12 DSM expenses to the Rural rate class.⁶²¹

13 This adjustment removes the amounts that exceed \$1 million from the test
14 period revenue requirement because these amounts are non-recurring.⁶²² No party
15 has disputed this adjustment. The adjustment produces fair, just, and reasonable
16 rates and should be accepted by the Commission.

⁶¹⁵ See *In the Matter of: Tariff Filing of Big Rivers Electric Corporation to Implement Demand-Side Management Programs*, Order, P.S.C. Case No. 2012-00142 (Aug. 22, 2012).

⁶¹⁶ Barron Hearing Testimony, July 3, 2013, Tr. 10:26'43" ("we haven't yet had enough participation to actually spend the \$1 million that we asked for"). See also Yockey Direct Testimony at p. 16:12-13.

⁶¹⁷ Wolfram Direct Testimony at pp. 20:20-21:2.

⁶¹⁸ Barron Hearing Testimony, July 3, 2013, Tr. 10:28'20".

⁶¹⁹ *Id.* at July 3, 2013, Tr. 10:32'55".

⁶²⁰ Wolfram Direct Testimony at p. 21:2-3.

⁶²¹ *Id.* at p. 37:9-12.

⁶²² *Id.* at p. 21:4-6.

1 H. The Adjustment to Account for the Refinancing of the RUS Series A
2 Note, As Set Forth in Response to PSC 2-13, Produces Fair, Just, and
3 Reasonable Rates.

4 Big Rivers made an adjustment to reflect the cost savings from the
5 refinancing of the RUS Series A Note. Big Rivers had sought approval for its
6 refinancing of the RUS Series A Note in Case No. 2012-00119,⁶²³ and the calculation
7 of the effect on the revenue requirement was initially provided in the Response and
8 Attachment for the Response to AG 1-63. The calculation later changed as a result
9 of the Commission's approval of Big Rivers' refinancing in Case No. 2012-00492.⁶²⁴
10 Big Rivers has provided these figures in the Response and Attachment for the
11 Response to PSC 2-13. The adjustment produces fair, just, and reasonable rates
12 and should be accepted by the Commission.

13 XVII. The Opposing Intervenors' Proposed Adjustments Are Not Fair, Just, and
14 Reasonable and Should Be Rejected.

15 Big Rivers discusses above the disastrous consequences of the Opposing
16 Intervenors' positions that Big Rivers' proposed rate relief should be rejected. The
17 following sections address the specific adjustments proposed by the Opposing
18 Intervenors. For the reasons stated in Section VII above and for the reasons stated
19 below, the Opposing Intervenors' proposed adjustments should be rejected.

⁶²³ *In the Matter of: Application of Big Rivers Electric Corporation for Approval to Issue Evidences of Indebtedness*, Application, P.S.C. Case No. 2012-00119 (March 28, 2012).

⁶²⁴ See Wolfram Rebuttal Testimony, pp. 21:21-22:3 (refinancing of RUS Series A affected calculation of this adjustment), pp. 22:6-23:17 (describing revised exhibits); Big Rivers' Attachment for and Response to PSC 2-13 (detailing revisions resulting from a successful refinancing).

1 A. **Big Rivers' Management Decisions Have Been Reasonable, and the**
2 **Opposing Intervenors Cannot Show Otherwise.**

3 Many of the Opposing Intervenors' proposals hinge on unsubstantiated
4 allegations of poor decision-making, bad faith, and bad character on the part of Big
5 Rivers.⁶²⁵ As established above, Big Rivers' management has at all times acted in
6 good faith and engaged in reasonable decision-making.⁶²⁶ Even if Big Rivers had
7 not made that showing, however, the law has a long-established presumption that a
8 utility's management decisions are reasonable. The Opposing Intervenors have
9 offered nothing but the most speculative suspicions in support of their inappropriate
10 accusations. They have not, and cannot, overcome this presumption of
11 reasonableness. Consequently, the Opposing Intervenors' proposed adjustments
12 should be rejected.

13 It is a longstanding principle of law that utility "[m]anagement decisions are
14 presumed to be reasonable."⁶²⁷ As explained by the Commission, "[t]he burden of
15 overcoming the presumption of managerial good faith falls on the party challenging
16 it."⁶²⁸ A decision-maker cannot rely on hindsight to judge management's actions;
17 rather, "[m]anagement must be judged on what was known or should have been
18 known at the time of its decision."⁶²⁹

⁶²⁵ Bailey Rebuttal Testimony at pp. 13:2-15:2.

⁶²⁶ *Id.* at p. 13:10-17.

⁶²⁷ *West Ohio Gas Co. v. Ohio Pub. Util. Comm'n*, 294 U.S. 63 (1935).

⁶²⁸ *In the Matter of Proposed Adjustment of the Wholesale Water Service Rates of the City of Pikeville, Kentucky*, Order, P.S.C. Case No. 2002-00022, *15-16 (Oct. 18, 2002) (finding that utility's decisions were reasonable despite certain "concerns" of the Commission).

⁶²⁹ *Id.* at *15 (internal citations omitted).

1 Here, as discussed in detail in the subsections below, the Opposing
2 Intervenors have uniformly failed to substantiate the allegations that underlie their
3 proposed adjustments, and have thus failed to meet their burden of proof to
4 overcome the presumption of managerial good faith. Moreover, as set forth
5 throughout the brief above, Big Rivers' decisions were reasonable and well-
6 supported. Indeed, many decisions, such as the focus on increasing revenues via off-
7 system sales, were a direct result of the Commission's order in the Unwind
8 Transaction.

9 For these reasons, the Commission should reject all of the Opposing
10 Intervenors' proposals based on unsubstantiated allegations of bad faith and poor
11 decision-making.

12 **B. Big Rivers' 1986 Rate Case Involved a Very Different Set of Facts**
13 **Than Those at Issue in this Proceeding.**

14 The Opposing Intervenors have also repeatedly invoked the Commission's
15 March 17, 1987 order in Case No. 9613 (the "9613 Order") throughout this
16 proceeding,⁶³⁰ no doubt because the Commission denied Big Rivers' rate request in
17 that case.⁶³¹ However, because of the dramatic differences in factual circumstances,
18 the rejection of proposed rates in the 9613 Order sheds no light on this proceeding
19 and no light on whether Big Rivers' proposed rates are fair, just, and reasonable.

⁶³⁰ See, e.g., Kollen Direct Testimony at p. 21 n. 15.

⁶³¹ See generally 9613 Order.

1 The Commission had before it in Case No. 9613 a workout plan that was
2 agreed upon by Big Rivers and its creditors.⁶³² Big Rivers' assets were being
3 foreclosed upon by REA (now RUS),⁶³³ and REA had refused to advance committed
4 loan funds to Big Rivers so Big Rivers could complete the Wilson Station.⁶³⁴ In the
5 9613 Order, the Commission stated that “[t]he overriding issue in this case is the
6 workout plan [with the smelters], not a proposed rate increase.”⁶³⁵ The Commission
7 denied Big Rivers' proposed rates in that case because it found that the proposed
8 “workout plan will not provide for a workable, long-term solution to Big Rivers’
9 financial problems”⁶³⁶ It then required the parties to continue negotiating a
10 new workout plan that established an aluminum-market-based pricing approach for
11 the smelters.⁶³⁷

12 None of these facts are at issue in this case. The Smelters have terminated
13 their retail electric agreements; consequently, the concerns about fluctuations of the
14 global aluminum market are simply not present here.⁶³⁸ Similarly, a “workout plan
15 with the smelters” is not at issue in this case, as the arrangements with the
16 Smelters will have no adverse impact beyond what would be experienced if they
17 simply ceased smelting operations. Also, as discussed above, Big Rivers has already
18 begun implementation of a workable, long-term solution to the financial difficulties

⁶³² See 9613 Order at *16 (“[t]he overriding issue in this case is the workout plan”).

⁶³³ *Id.* at *9.

⁶³⁴ *Id.*

⁶³⁵ *Id.* at *16.

⁶³⁶ *Id.* at *46. See also *id.* at *17 (“Since our approval of this rate increase would trigger the operation of the workout plan, we reject the rate increase as unreasonable.”).

⁶³⁷ *Id.* at *44 (ordering Big Rivers and the smelters to “negotiate a flexible rate plan that recognizes the cyclical nature of the [aluminum] industry”).

⁶³⁸ *Id.* at *44-46.

1 created by the Smelters' contract terminations: the Mitigation Plan. In short, the
2 central factual issues that drove the Commission's decision in the 9613 Order are
3 not issues in this case.

4 Moreover, the various stakeholders and the Commission had the luxury of
5 time in the 9613 case, a fact central to the Commission's ultimate decision to order
6 further negotiations and initiate a new proceeding to monitor those negotiations.⁶³⁹
7 Here, as explained in Section VII.B, Big Rivers does not have that luxury.
8 Century's unilateral contract termination, pursuant to the Smelter Agreements
9 approved by the Commission, put Big Rivers on a 12-month timer. At the end of
10 those 12 months (August 20, 2013), Big Rivers' revenue deficiency must be resolved,
11 or Big Rivers will almost certainly face bankruptcy. There is simply no time for
12 deferring a decision in this matter, just like there is no time for further negotiations
13 like those provided for in the 9613 Order.

14 Despite these significant differences, the 9613 Order does shed light on one
15 issue that remains relevant. In that case, as in this case, certain witnesses
16 advocated for Big Rivers' bankruptcy. The Commission rejected that approach, as it
17 should now, stating:

18 The Commission does not see bankruptcy as a preferable
19 option for Big Rivers. Bankruptcy would prolong the
20 corrosive uncertainty in the Big Rivers service territory.
21 It could prove unfortunate for both customers and
22 creditors.⁶⁴⁰

⁶³⁹ *Id.* at *42-43, *46-47.

⁶⁴⁰ *Id.* at *41.

1 This analysis remains accurate and it will hopefully continue to guide the
2 Commission's consideration of this matter.

3 **C. The Commission Should Reject the Attorney's General's Proposed**
4 **Adjustments.**

5 1. **The Commission should reject proposed adjustment OAG-1-DB**
6 **to remove lost margins due to the impact of the Century**
7 **termination.**

8 The Attorney General proposes removing approximately \$63 million from Big
9 Rivers' revenue requirements in order to prevent any recovery of "lost margins due
10 to Century's departure."⁶⁴¹ The Commission should reject this proposed adjustment
11 because it would lead directly to the disastrous financial consequences described in
12 Section VII.C and because it is premised solely on a serious mischaracterization of
13 the Unwind Transaction.

14 Strangely, the Attorney General apparently intends this adjustment to be
15 punitive. The entire premise for its adjustment is its characterization of the
16 Unwind Transaction as a "bargained-for exchange regarding the terms, conditions
17 and rates under which BREC would provide power to the smelters."⁶⁴² According to
18 Attorney General witness David Brevitz, the fact that the Unwind Transaction was
19 a "bargained-for exchange" means that under no circumstances should any class of
20 retail member-owners pay any costs that were once paid by Century. This
21 argument falsely frames the Unwind Transaction as some kind of guarantee against
22 any rate adjustments to respond to a smelter closure—a mischaracterization echoed

⁶⁴¹ Brevitz Direct Testimony at pp. 33:10-34:20.

⁶⁴² *Id.* at pp. 33:17-34:2.

1 by KIUC's witness who falsely claims that "Big Rivers repeatedly assured the
2 Commission that if one or both Smelters terminated their contracts, the remaining
3 customers would not be harmed."⁶⁴³ However, neither Mr. Brevitz nor Mr. Kollen
4 addresses the fact that Century terminated its contract pursuant to the very
5 agreements approved by the Commission as part of that "bargained-for exchange"
6 Big Rivers and its Members should not be punished for Century's unilateral
7 contract termination.

8 Moreover, as set forth in Section IV.B, all stakeholders, including the
9 Commission, recognized that the Unwind Transaction could not guarantee that the
10 Smelters would stay on Big Rivers' system forever. Although Big Rivers took
11 appropriate measures to help protect its Members from the consequences of a
12 possible smelter closure, neither Big Rivers nor the Commission could guarantee
13 that Big Rivers' Members would be completely insulated from all financial
14 consequences of such a closure. Century's termination is unfortunate, but it was
15 recognized as a possibility at the time of the Unwind Transaction. The proper
16 course forward now is to respond in the best interests of Big Rivers' Members in the
17 manner contemplated for years: through the implementation of what evolved into
18 Big Rivers' Mitigation Plan.

19 The Attorney General does not suggest how Big Rivers could possibly survive
20 the proposed \$63 million downward adjustment, nor, as discussed in Section VII
21 above, does the Attorney General establish any reasonable basis for believing that

⁶⁴³ Kollen Direct Testimony at p. 10:13-15.

1 Big Rivers' bankruptcy is in anyone's best interests. Its proposal would only result
2 in unconstitutionally confiscatory rates intentionally designed to undermine Big
3 Rivers' financial integrity.

4 The Attorney General demonstrated its fundamental lack of understanding
5 about the seriousness of the revenue deficiency that will result from Century's
6 termination when, in a telling exchange, it grilled Mr. Bailey over whether Big
7 Rivers' management team would take a pay cut to reduce its revenue deficiency.⁶⁴⁴
8 Mr. Bailey explained that such a pay cut would have no material effect, and even
9 the elimination of Big Rivers' entire payroll would not eliminate the revenue
10 deficiency caused by the Smelters' terminations.⁶⁴⁵ This line of questioning
11 demonstrates just how badly the Attorney General underestimates the serious
12 impact this proceeding will have on Big Rivers, its Members, and their member-
13 owners. It, perhaps, also explains why the Attorney General's proposals are
14 unrealistic and unworkable.

15 For these reasons, the Attorney General's proposed adjustment should be
16 denied.

⁶⁴⁴ Statement of Larry Cook, Assistant Attorney General, July 1, 2013, July 1, 2013, Tr. 11:26'30" (explaining that, in response to the Commonwealth's financial difficulties, the Governor and Attorney General agreed to take a 10% cut in pay, and asking if Mr. Bailey "or any of the upper management of Big Rivers are willing to do something similar because of Big Rivers' financial condition").

⁶⁴⁵ Bailey Hearing Testimony, July 1, 2013, Tr. 11:27'41" (explaining that although "no options are off the table," Big Rivers' total payroll is \$70 million, and "you can combine all our salaries and nowhere come close to the amount of revenue lost that we're looking at with one or both smelters combined").

1 2. **The Commission should reject proposed adjustment OAG-2(a)-**
2 **BCO because Big Rivers' management compensation is**
3 **reasonably set and properly included in the test period.**

4 The Attorney General also proposes an adjustment to remove increases in
5 base pay implemented primarily during the Unwind Transaction, as well as “some
6 other incentive payments included in the forecasted test period.”⁶⁴⁶ However, there
7 are no incentive payments or bonuses in the test period.⁶⁴⁷ Furthermore, the
8 amounts included in Big Rivers' request were appropriate compensation and they
9 have been properly included in Big Rivers' revenue requirements. The proposed
10 adjustment should be rejected.

11 Mr. Ostrander is forced to resort to innuendo and speculation when charging
12 that “it can be argued” that funds received for maintenance subsidized the
13 compensation adjustments, and that Big Rivers “placed a priority on its own pay
14 increases as it continued to defer maintenance, thus jeopardizing the safety and
15 service quality of its customers and arguably violating the public trust.”⁶⁴⁸ While
16 Mr. Ostrander “can” argue this conspiracy theory, the fact is that Big Rivers
17 absolutely did not redirect maintenance funds to enrich its management. Mr.
18 Ostrander never offered even a scintilla of evidence in support of his reckless
19 accusations. Big Rivers did nothing to jeopardize the safety of its Members and
20 their member-owners. No employee at Big Rivers set his or her own pay, contrary
21 to Mr. Ostrander's assertions; therefore, no employee can decide to enrich himself or

⁶⁴⁶ Ostrander Direct Testimony at p. 23:17-20. *See also id.* at Exhibit BCO-2, Schedule A-3.

⁶⁴⁷ *See* Haner Hearing Testimony, July 3, 2013, Tr. 10:48'55"; Rebuttal Testimony of James V. Haner (“Haner Rebuttal Testimony”), pp. 11:12-12:13 (June 24, 2013).

⁶⁴⁸ Ostrander Direct Testimony at p. 24:11-16.

1 herself at the expense of plant maintenance.⁶⁴⁹ Consequently, the Attorney
2 General's adjustment should be rejected.

3 Big Rivers has also provided ample documentation to support the inclusion of
4 these labor expenses in its revenue requirement.⁶⁵⁰ Regarding the pay increases of
5 Mark Bailey and William Blackburn, their pay was adjusted on August 16, 2009
6 and July 17, 2009, respectively, in recognition of the expansion of responsibilities
7 that Big Rivers undertook at the closing of the Unwind Transaction, when Big
8 Rivers moved from a transmission-only utility to a generation and transmission
9 (G&T) utility.⁶⁵¹ Mr. Blackburn's increase was based on the 75th percentile for
10 G&Ts nationally, to recognize Big Rivers' new size relative to that group.⁶⁵² As
11 described in the Rebuttal Testimony of Mr. James V. Haner, Big Rivers' Vice
12 President Administrative Services, "Mr. Bailey's pay was set by Big Rivers' Board
13 based on the results of a study performed by NRECA's National Consulting Group
14 at the Board's request."⁶⁵³ With respect to the third individual, Mr. Berry, he was
15 hired on the Unwind Transaction closing date of July 17, 2009, and he received no
16 pay increase in 2009.⁶⁵⁴ Additionally, with all of the attrition that has occurred
17 since the Unwind Transaction, Big Rivers has consolidated positions and

⁶⁴⁹ Haner Rebuttal Testimony, p. 11:6-11 ("In my 15 years of experience in the establishment and review of the salary structure at Big Rivers, I know of no employee who, singly or as part of a group, has set his or her pay.").

⁶⁵⁰ Speed Rebuttal Testimony at p. 19:4-10. *See also, e.g.*, Big Rivers' Response to AG 1-253.

⁶⁵¹ Haner Rebuttal Testimony at p. 9:3-7.

⁶⁵² Haner Rebuttal Testimony at p. 9:7-11. Mr. Blackburn is no longer employed by Big Rivers, and his salary is not included in the forecasted test period.

⁶⁵³ Haner Rebuttal Testimony at p. 9:11-13.

⁶⁵⁴ Haner Rebuttal Testimony at p. 9:13-14.

1 responsibilities and is actually spending less (in total) on executive compensation.⁶⁵⁵

2 In short, the compensation challenged by Mr. Ostrander was appropriate and
3 consistent with norms in the industry.⁶⁵⁶

4 Furthermore, it bears reiteration that during Big Rivers' selective
5 maintenance deferral, Big Rivers' plant performance did not suffer, nor did Big
6 Rivers ever jeopardize the safety or quality of its service to its Members.⁶⁵⁷ In fact,
7 as previously noted, Big Rivers' generating fleet has been very reliable since the
8 Unwind Transaction, and has consistently performed in the top quartile of its peer
9 group according to numerous industry-standard performance metrics.⁶⁵⁸

10 Despite this, Mr. Ostrander's adjustment proposes to reduce compensation
11 for Mr. Bailey and Mr. Berry to amounts less than their annual pay rates in 2009
12 (before they received their new responsibilities). He also removes \$1,129,395 that
13 he has attributed to pay increases in 2009 and 2011, an amount greater than the
14 combined salary structure adjustments for 2010, 2011, and 2012. He also removes
15 the January 2, 2013 structure adjustment, and he eliminates the structure
16 adjustment forecasted for January 2, 2014.⁶⁵⁹ The cumulative effect of Mr.
17 Ostrander's adjustment is to leave Big Rivers with a salary structure lower at times

⁶⁵⁵ See Big Rivers' Response to Post-Hearing Data Request No. 1 ("by consolidating responsibilities into Ms. Speed's current position, Big Rivers reduced costs by reducing staff by one employee."); Big Rivers' Response to Post-Hearing Data Request No. 2 ("by consolidating responsibilities into Ms. Richert's current position, Big Rivers reduced costs by reducing staff by one employee").

⁶⁵⁶ See 2011 Rate Case Order at *10-11 (approving recovery of Big Rivers' labor and labor overhead costs, as set forth by Big Rivers, on November 17, 2011 after most of the compensation increases the Attorney General complains about were already made).

⁶⁵⁷ Berry Rebuttal Testimony at pp. 25:18-26:18.

⁶⁵⁸ Berry Direct Testimony at pp. 6:16-7:13 ("Overall, the Big River generating fleet . . . has consistently performed in the top quartile in [Equivalent Forced Outage Rate], [Equivalent Availability Factor], and [Net Capacity Factor].").

⁶⁵⁹ See Ostrander Direct Testimony, Exhibit OAG-2-BCO, Schedule A-3, p. 1.

1 than the one it had in place in 2009.⁶⁶⁰ That result is unreasonable by any
2 measure, and the proposal to remove adjustments approved as part of the revenue
3 requirement in previous cases is both unreasonable and inappropriate.

4 For these reasons, the Commission should reject proposed adjustment OAG-
5 2(a)-BCO.

6 3. The Commission should reject proposed adjustment OAG-2(b)-
7 BCO to remove the 2.25% pay raises to non-bargaining
8 employees because they are reasonable and properly included in
9 the test period.

10 The Attorney General also seeks to selectively remove pay raises for non-
11 bargaining employees for both the base period and the forecasted test period⁶⁶¹ on
12 the grounds that they are not “known and measurable at this time.”⁶⁶²

13 Once again, the Attorney General’s witness either misunderstands the
14 applicable standard or intentionally applies the incorrect standard for the purpose
15 of maligning Big Rivers’ methodology. The Commission’s regulations provide that
16 an applicant may provide either a “twelve (12) month historical test period that may
17 include adjustments for known and measurable changes,” or, instead, a “fully
18 forecasted test period.”⁶⁶³ The “known and measurable” standard simply does not
19 apply here.

⁶⁶⁰ Haner Rebuttal Testimony, p. 13:11-19 (explaining that Mr. Ostrander’s adjustment would reduce Mr. Bailey’s salary “to 71% of his current rate,” which was based on NRECA’s Consulting Group 2009 study, and would reduce Mr. Berry’s salary “to 64% of his January 2, 2013 rate and 11% less than his pay rate on July 17, 2009”).

⁶⁶¹ Ostrander Direct Testimony at p. 24:1-4.

⁶⁶² Ostrander Direct Testimony at p. 40:8.

⁶⁶³ 807 KAR 5:001(16)(a)(1)-(2).

1 Applying the proper standard, this adjustment should be rejected. Mr.
2 Ostrander proposes removing pay increases despite the fact that they are in a range
3 that he characterizes as “normal.”⁶⁶⁴ He provides no justification based upon data
4 or Commission precedent for the adjustment. Big Rivers’ employee compensation
5 adjustment reflects a reasonable and modest cost of living increase through August
6 of 2014, and it is properly included in the test period. The Commission should thus
7 reject proposed adjustment OAG-2(b)-BCO.

8 4. The Commission should reject proposed adjustment OAG-3-BCO
9 to correct for the Commission’s rate relief from the 2011 Rate
10 Case Rehearing Order because Big Rivers has already
11 performed the adjustment.

12 The Attorney General offers an adjustment to correct alleged errors in the
13 exhibits that Big Rivers updated to reflect the effects of the Commission’s
14 Rehearing Order in the 2011 Rate Case.⁶⁶⁵ However, the Attorney General’s alleged
15 corrections are themselves erroneous and should be rejected.

16 First, Mr. Ostrander failed to recognize the correction that was made to
17 Lobbying Expenses in Big Rivers’ original filing of Exhibit Wolfram-4.⁶⁶⁶

18 Second, the issues identified by Mr. Ostrander are not applicable given the
19 updates to the proposed rates provided in Mr. Wolfram’s rebuttal testimony.⁶⁶⁷ The
20 revised exhibits correctly incorporate the rate impact of the Commission’s

⁶⁶⁴ Haner Rebuttal Testimony at p. 14:6-7; Ostrander Direct Testimony at pp. 36:16-37:1.

⁶⁶⁵ Ostrander Direct Testimony, Exhibit BCO-2, Schedule A-4.

⁶⁶⁶ Wolfram Rebuttal Testimony at p. 21:14-18.

⁶⁶⁷ *Id.* at p. 21:18-20.

1 Rehearing Order in the 2011 Rate Case.⁶⁶⁸ This is detailed in Exhibit Wolfram 2.3,
2 page 11 of 14, Reference Schedule 1.09. ⁶⁶⁹

3 Also, Mr. Ostrander described certain un-reconciled differences between
4 Exhibit Wolfram-4.2 and Exhibit Siewert-3.2 of approximately \$60,000.⁶⁷⁰ This
5 difference was related to \$62,500 of membership dues for The Southeastern Federal
6 Power Customers, Inc., a group of electric cooperatives and municipal power
7 companies that represent consumers of public power in the Southeast.⁶⁷¹ Big Rivers
8 included this amount in the forecast but has since elected to forego its
9 membership.⁶⁷² In PSC 2-36, the amount was removed in Exhibit Wolfram-4.2 but
10 was inadvertently retained in Exhibit Siewert-3.2.⁶⁷³ The amount has now been
11 fully removed, as reflected in both Exhibit Wolfram-4.3 and Exhibit Siewert-3.3, so
12 the proposed adjustments for un-reconciled differences are no longer applicable.⁶⁷⁴
13 Thus, Big Rivers has already made proper adjustments for rate relief provided in
14 the Rehearing Order and the Commission should reject proposed adjustment OAG-
15 3-BCO.

16 **5. The Commission should reject proposed adjustment OAG-4-BCO**
17 **to remove losses from the Series A Note refinancing because Big**
18 **Rivers has already performed that adjustment.**

19 The Attorney General proposes an adjustment based on its allegation that
20 Big Rivers has not reflected the effect of the refinancing of the RUS Series A Note

⁶⁶⁸ *Id.* at p. 23:20-22.

⁶⁶⁹ *Id.*

⁶⁷⁰ *Id.* at p. 24:1-2.

⁶⁷¹ *Id.* at p. 24:2-5.

⁶⁷² *Id.* at p. 24:5-6.

⁶⁷³ *Id.* at p. 24:6-8.

⁶⁷⁴ *Id.* at p. 24:8-10.

1 that was approved by the Commission in Case Nos. 2012-00119 and 2012-00492.⁶⁷⁵
2 This assertion is incorrect, and the Commission should reject the proposed
3 amendment.

4 Mr. Ostrander is correct that Big Rivers filed its Application in this case prior
5 to the Commission's final order in Case No. 2012-00492 approving the refinancing.
6 During the Commission Staff's second round of discovery, which was also prior to
7 the Commission's final refinancing order, Big Rivers provided a calculation of the
8 effect that Commission approval of the financing would have on its revenue
9 requirement in its Response to PSC 2-13.⁶⁷⁶

10 The approval of the refinancing qualifies as a "regulatory enactment" under
11 the Commission's rules,⁶⁷⁷ allowing Big Rivers to incorporate the effects of the
12 refinancing as calculated in PSC 2-13 into the revenue requirement.⁶⁷⁸ The
13 Commission should adopt the calculations provided by Big Rivers in response to
14 PSC 2-13⁶⁷⁹ and reject proposed adjustment OAG-4-BCO, as Big Rivers has already
15 made the adjustment.

⁶⁷⁵ Ostrander Direct Testimony at p. 50:4-7.

⁶⁷⁶ Big Rivers' Responses to PSC 2-13 and PSC 2-36.

⁶⁷⁷ See 807 KAR 5:001(16)(11)(d).

⁶⁷⁸ Wolfram Rebuttal Testimony at p. 12:16-19.

⁶⁷⁹ *Id.* at p. 22:1-3.

1 6. The Commission should reject proposed adjustment OAG-5-BCO
2 to remove estimated rate case expenses because Big Rivers' rate
3 case expenses are reasonable, appropriately documented, and
4 properly amortized in the test period.

5 The Attorney General proposes reducing total rate case expenses by
6 \$1,027,929⁶⁸⁰ based on Mr. Ostrander's unsubstantiated assertion that those
7 expenses are unspent, excessive, or speculative.⁶⁸¹ This is inaccurate, and the
8 proposed adjustment should be rejected.

9 A significant portion of Mr. Ostrander's adjustment is due to the fact that
10 almost half of Big Rivers' estimated total rate case expenses had not been spent
11 through February of 2013.⁶⁸² Consistent with Commission precedent, Big Rivers is
12 seeking recovery of its actual rate case expenses, not the estimated amount. For
13 this reason alone, most of Mr. Ostrander's adjustment should be rejected.

14 As discussed in Section XV, however, Big Rivers takes a number of steps to
15 ensure that its legal costs are reasonable. Big Rivers does not have in-house legal
16 counsel, and it relied on outside legal counsel and its outside rate expert, Catalyst
17 Consulting, to prepare and prosecute this case.⁶⁸³ By relying heavily on regional
18 counsel, Big Rivers has been able to control its costs for travel and
19 representation.⁶⁸⁴ Where other counsel have been employed for this rate case, it
20 was to address issues where very specialized expertise was necessary,⁶⁸⁵ or where
21 outside counsel had deep knowledge and experience as a result of previously

⁶⁸⁰ Ostrander Direct Testimony at p. 52:7-9; *id.*, Exhibit BCO-2, Schedule A-6.

⁶⁸¹ Speed Rebuttal Testimony at pp. 5:19-6:2.

⁶⁸² Ostrander Direct Testimony at p. 56:4-5 (Table BCO-5).

⁶⁸³ Speed Hearing Testimony, July 3, 2013, Tr. 9:40'00".

⁶⁸⁴ Speed Rebuttal Testimony at pp. 8:9-9:2.

⁶⁸⁵ *Id.* at p. 9:3-22.

1 representing Big Rivers and as a result were the most cost-efficient option.⁶⁸⁶ Big
2 Rivers has also filed unredacted invoices for the services it was required to use for
3 this case to support all charges.⁶⁸⁷ Big Rivers' expenses in this case are justified,
4 are not excessive, and have been prudently incurred. Therefore, the Commission
5 should permit recovery of those expenses.

6 Mr. Ostrander also misapplies or ignores Commission precedent where he
7 seeks to disallow the bulk of the "estimated" expenses. As noted, Big Rivers is not
8 seeking recovery of "estimated expenses; it seeks recovery of actual expenses.
9 Moreover, as explained by the Commission, "[t]he Commission's longstanding
10 practice is to allow recovery of rate case expenses based on the utility's most recent
11 actual costs, typically through the date of the hearing."⁶⁸⁸ It is also common
12 practice to "allow the utility to amortize its rate case expenses over a three-year
13 period and include the annual amortization expense in determining the utility's
14 required revenue increase."⁶⁸⁹ Other specific allegations by Mr. Ostrander are
15 refuted in the Rebuttal Testimony of Ms. Speed.

16 Big Rivers has met its burden to demonstrate the necessity and prudence of
17 its rate case expenses. Consistent with Commission practice, Big Rivers should be
18 allowed to recover these expenses and to amortize them over a three-year period for
19 the purposes of ratemaking. Accordingly, the Commission should reject proposed

⁶⁸⁶ *Id.* at pp. 9:14-10:8.

⁶⁸⁷ *See* notes 581-82.

⁶⁸⁸ *In the Matter of: Application of Taylor County Electric Cooperative Corporation for an Adjustment in Rates*, Order, P.S.C. Case No. 2012-00023, *18-19 (March 26, 2013).

⁶⁸⁹ *Id.*; *In the Matter of: Application of Public Gas Company for Rate Adjustment for Small Utilities Pursuant to 807 KAR 5:076*, Order, P.S.C. Case No. 2012-00431, *8-9 (March 27, 2013).

1 adjustment OAG-5-BCO because Big Rivers' rate case expenses are reasonable,
2 appropriately documented, and properly included in the test period.

3 7. **The Commission should reject proposed adjustment OAG-6-BCO**
4 **to reduce payroll expensed in the forecasted test period because**
5 **it is based on improper data.**

6 The Attorney General proposes an adjustment to Big Rivers' revenue
7 requirement to reduce payroll expensed in the forecasted test period.⁶⁹⁰ The
8 proposed adjustment is inappropriate and should be rejected.⁶⁹¹

9 The forecasted allocation between expensed and capitalized labor is not based
10 on historical trends; Big Rivers divides labor between these categories based upon
11 specific operational and capital related business needs in a given year which are
12 identified through the company's business planning and budgeting process.⁶⁹² By
13 attempting to establish this split based on historical trends, Mr. Ostrander has
14 failed to consider current business capital planning and his adjustment would
15 introduce unacceptable errors in Big Rivers' forecasting and planning processes.⁶⁹³

16 Big Rivers' percentage of payroll expensed in the test year is larger and the
17 percentage capitalized is less than the historical periods Mr. Ostrander refers to
18 because the internal labor estimated to be expended on budgeted and forecasted
19 construction projects is less than that expended in those historical periods.⁶⁹⁴ Big
20 Rivers' calculation of expensed payroll is based on the most recent and accurate
21 data available. Mr. Ostrander, in contrast, incorrectly relies wholly on historical

⁶⁹⁰ Ostrander Direct Testimony at p. 68:5-8; *id.*, Exhibit BCO-2, Schedule A-7.

⁶⁹¹ Haner Rebuttal Testimony at p. 16:14.

⁶⁹² *Id.* at p. 15:10-13.

⁶⁹³ *Id.* at p. 15:13-15.

⁶⁹⁴ *Id.* at p. 16:6-10.

1 data, perhaps once again as a result of his inexperience with fully forecasted test
2 years.⁶⁹⁵ Because Mr. Ostrander improperly relied solely on historical data, the
3 Commission should reject proposed adjustment OAG-6-BCO.

4 **D. The Commission Should Reject the Attorney General’s Proposal for**
5 **Additional Monitoring and Reporting Requirements.**

6 In addition to proposing no revenue increase, the Attorney General proposes
7 fifteen separate reporting requirements on Big Rivers; it divides these into three
8 categories: immediate, quarterly, and annual reporting.⁶⁹⁶ The Commission should
9 deny these requests for additional monitoring and reporting requirements because
10 they are overreaching, unduly burdensome, and unhelpful.⁶⁹⁷

11 The Attorney General’s proposed requirements appear to be designed to
12 review financial and operational data—much of which is confidential—that would
13 only be relevant in a future rate case.⁶⁹⁸ For that reason alone, they serve no
14 legitimate purpose at this time, and the Commission should deny them.⁶⁹⁹

15 Furthermore, all of the requests are unduly burdensome, both to Big Rivers
16 and the Commission, and some of them are simply unintelligible.⁷⁰⁰ The Attorney
17 General provides no rationale as to why any of these fifteen proposed requirements
18 should be adopted, much less why any of them should be immediate, quarterly,
19 and/or annual.⁷⁰¹ Thus, to the extent the Commission or the Attorney General

⁶⁹⁵ See note 453.

⁶⁹⁶ Ostrander Direct Testimony at pp. 73:3-74:30.

⁶⁹⁷ Bailey Rebuttal Testimony at p. 15: 9-10.

⁶⁹⁸ *Id.* at p. 15:15-16.

⁶⁹⁹ *Id.* at p. 15:16-17.

⁷⁰⁰ *Id.* at p. 15: 12-14.

⁷⁰¹ *Id.* at p. 15: 11-12.

1 legitimately require this information in the future, it is appropriate to wait until
2 those future proceedings have been filed and the information is relevant before
3 deciding the issue(s).⁷⁰²

4 **E. The Commission Should Reject as Imprudently Wasteful Any**
5 **Generation Asset Retirement or Forced Sale Below Book Value.**

6 Suggestions that Big Rivers should, in response to Century's contract
7 termination, retire generation assets or sell them at a price below book value are
8 misguided and should be rejected. Retiring a plant or selling a plant at "fire sale"
9 prices is tantamount to throwing away a valuable asset that serves an important
10 function in Big Rivers' Mitigation Plan. This approach would undermine the equity
11 necessary for Big Rivers to access the capital market.⁷⁰³ It would also constitute
12 permanent waste, because the plant would be unlikely to ever be rebuilt.⁷⁰⁴

13 There are numerous flaws in the suggestion that Big Rivers retire or sell its
14 generating assets.⁷⁰⁵ First, as Big Rivers demonstrated in Case No. 2012-00063,⁷⁰⁶
15 retirement of generation assets would trigger a loss in the book value of the unit(s),
16 which would negatively affect Big Rivers' net margins and prevent it from meeting
17 its minimum MFIR requirements. This would also, in turn, negatively impact Big
18 Rivers' equity.⁷⁰⁷ It is vitally important for Big Rivers to maintain its equity,
19 especially now that all three of its credit ratings are below investment grade,

⁷⁰² *Id.* at p. 15: 18-20.

⁷⁰³ Berry Supplemental Rebuttal Testimony at p. 5:1-3.

⁷⁰⁴ Bailey Hearing Testimony, July 1, 2013, Tr. 15:21'44" ("It's very difficult to add anything to the generation portfolio, whether it's new capacity of one sort or the other in addition to transmission."); Snyder Hearing Testimony, July 2, 2013, Tr. 12:07'22" ("no one's going to build these plants again").

⁷⁰⁵ Ackerman Direct Testimony at p. 29:13-25.

⁷⁰⁶ *See generally* 2012 ECP Case.

⁷⁰⁷ Richert Rebuttal Testimony at pp. 13:22-14:2.

1 because Big Rivers' equity is one of the few remaining positives recognized by the
2 credit agencies.⁷⁰⁸ Second, by retiring a plant or selling below book value, Big
3 Rivers would still be forced to pay the principal and interest expense attributable to
4 the financing that was needed to construct it; and yet, it would be unable to enjoy
5 the benefits of that plant in support of its Mitigation Plan.⁷⁰⁹

6 Third, Big Rivers' generating fleet relies primarily on coal, which is of course
7 a tremendously important driver of Kentucky's economy. However, because of
8 anticipated construction costs and the current regulatory environment, Big Rivers
9 would almost certainly never have the opportunity to construct equivalent power
10 plants in the future.⁷¹⁰ In short, Big Rivers would be permanently throwing away a
11 useful and irreplaceable asset. The decreased volume of local coal purchases would
12 also harm the Commonwealth's economy.

13 For these reasons, it would be imprudent and wasteful for Big Rivers to
14 dispose of physical plant in these circumstances and lose the benefits those
15 generating assets provide Big Rivers, Western Kentucky, and the Commonwealth.
16 KIUC's suggestions that the plant could be retired, with sunk costs being recovered
17 over time, poses no solution whatsoever for the immediate cash-flow needs
18 associated with the debt-service pertaining to that plant. Likewise, KIUC's
19 suggestion would not provide meaningful rate relief because the costs recovered in
20 that scenario would likely be recovered over a short period of time, resulting in

⁷⁰⁸ Richert Rebuttal Testimony at p. 14:2-4.

⁷⁰⁹ Berry Supplemental Rebuttal Testimony at p. 5:4-7.

⁷¹⁰ See note 716.

1 higher rates to customers, not to mention the loss of that valuable generation
2 asset.⁷¹¹ Consequently, that sort of ill-considered “option” should be rejected.
3 Instead, Big Rivers can temporarily idle a plant, maintain its value, and preserve
4 its ability to benefit Big Rivers’ Members, their member-owners, and, indeed, the
5 entire Commonwealth long into the future.

6 **F. The Commission Should Reject KIUC’s Proposals.**

7 KIUC recommends that the Commission reduce Big Rivers’ proposed revenue
8 requirement by \$47.7 million. It seeks to accomplish this by using a vague, ill-
9 defined, and speculative mechanism of “equitable sharing.”⁷¹² This is simply not a
10 realistic strategy. For the reasons set forth below, KIUC’s recommendations should
11 be rejected because they will not result in fair, just, and reasonable rates.

12 The basis for Mr. Kollen’s “equitable sharing” proposal is that “[t]he
13 reduction in the Company’s capacity requirements from the termination of the
14 Century load is 562 mW, or 31% of the Company’s total available capacity.”⁷¹³ But
15 despite the claim that, according to Mr. Kollen, Big Rivers’ capacity requirements
16 decrease by 31%, he nevertheless argues that it is equitable for Big Rivers’ creditors
17 to bear 69% of the rate increase.⁷¹⁴ This proposed sharing does not include the still
18 additional amount Mr. Kollen proposes to force Big Rivers’ creditors to bear as a

⁷¹¹ See Statement of Michael L. Kurtz, Counsel for KIUC, July 2, 2013, Tr. 10:22’02 (describing the possibility of recovering a retired plant’s net book value over a period of time, citing one instance in which the recovery was spread over ten years).

⁷¹² Kollen Direct Testimony at pp. 5:12-6:1.

⁷¹³ *Id.* at p. 57:15-18.

⁷¹⁴ *Id.*

1 result of his contention that depreciation expense on the generating station Big
2 Rivers will idle should be reduced to zero.

3 In any event, as explained in Section VII, Big Rivers is asking for the bare
4 minimum necessary to service its debt and perform necessary maintenance in light
5 of Century's contract termination. Although KIUC attempts to present its proposal
6 as something of a compromise, the results of its \$47.7 million revenue reduction are
7 no different in effect from the Attorney General's proposal: undermine Big Rivers'
8 financial integrity and force it into bankruptcy.

9 As explained in Sections VII.B-C, Mr. Kollen's speculation that Big Rivers'
10 creditors will "make voluntary concessions"⁷¹⁵ or that bankruptcy could be
11 "constructive" are both unrealistic. Mr. Kollen presents nothing to substantiate his
12 speculation about the possible outcomes of bankruptcy (at some unknown cost and
13 unknown time). His view is overly-simplistic, and it provides no useful guidance
14 upon which the Commission should base its decision.

15 Somewhat strangely, KIUC appears not to appreciate what is at stake in this
16 proceeding. KIUC makes no mention of the costs, risks, and other adverse
17 consequences of bankruptcy, and then speculates that bankruptcy could be
18 "constructive."⁷¹⁶ KIUC complains about Big Rivers' rate design, but offers no
19 alternative rate design for the Commission's consideration. Instead of
20 substantiating its claims or suggesting workable solutions, KIUC offers distractions
21 and false choices.

⁷¹⁵ Kollen Direct Testimony at p. 77:8-9.

⁷¹⁶ Kollen Direct Testimony at p. 7:5-15

1 KIUC tried to ambush Big Rivers' CEO on the witness stand with a last-
2 minute, unworkable "settlement" offer, presumably unapproved by KIUC itself,
3 premised on a fundamental misunderstanding of Big Rivers' loan covenants and
4 cash flow constraints.⁷¹⁷ As explained by Mr. Bailey and in Section XI.G, above, the
5 KIUC's proposal is unworkable because it incorrectly assumes that Big Rivers can
6 use its reserve funds to meet its minimum MFIR requirements.⁷¹⁸ Consequently,
7 the KIUC's proposal is unworkable. In addition, the KIUC's proposal hinges on its
8 irrational expectation that Big Rivers' lenders would be willing to quickly make
9 millions of dollars of loan concessions all while lining up to lend yet more money to
10 Big Rivers—as explained in Section VII.B, that is unrealistic, and it would be
11 imprudent to gamble Big Rivers' future on obtaining concessions from its creditors.

12 In addition, many of KIUC's criticisms focus on the potential impact of the
13 Alcan Rate Case. KIUC has already petitioned to intervene in the Alcan Rate
14 Case,⁷¹⁹ and that proceeding will be the proper forum in which to address KIUC's
15 concerns regarding Alcan's contract termination. As discussed in Section IX,
16 however, it is too soon to draw conclusions regarding the outcome of the Alcan Rate
17 Case, and KIUC's speculations regarding that case (just days after it was even filed)

⁷¹⁷ See Statement of Michael L. Kurtz, Counsel for KIUC, July 1, 2013, Tr. 13:12'25". A previous settlement overture was made less than a month before the hearing in this matter without the authority of KIUC itself. KIUC's counsel made that proposal while Big Rivers was busy negotiating the Century Transaction, preparing rebuttal testimony in this proceeding, and preparing its application for the Alcan Rate Case. In response, Big Rivers indicated it is always willing to discuss reasonable settlement terms, but it was unable at that time to set aside a series of days to negotiate, as KIUC's counsel proposed.

⁷¹⁸ See Bailey Hearing Testimony, July 1, 2013, Tr. 13:13'20".

⁷¹⁹ Alcan Rate Case, Petition to Intervene of Kentucky Industrial Utility Customers, Inc. (June 13, 2013).

1 hardly justify the drastic and devastating adjustment KIUC proposes in this
2 proceeding.

3 KIUC's adjustments do not result in fair, just, and reasonable rates, and its
4 recommendations are inherently flawed. Accordingly, the Commission should reject
5 KIUC's adjustments and recommendations.

6 **G. The Commission Should Reject Sierra Club's Proposals.**

7 The Commission should also reject: (i) Sierra Club's recommendation that
8 the Commission "reject the requested rate increase" and "explore other approaches
9 that can resolve its long-term problems;"⁷²⁰ (ii) its suggestion that Big Rivers
10 dispose of its generation assets and go to MISO for power;⁷²¹ and (iii) its assertion
11 that Big Rivers did not account for all appropriate environmental compliance costs.

12 Sierra Club witness Dr. Frank Ackerman acknowledges that what is required
13 in this matter is a temporary solution that addresses the immediate effects of
14 Century's unilateral contract termination.⁷²² That is precisely the effect of Big
15 Rivers' proposed rate in this proceeding. The revenue requirement that Big Rivers
16 used to calculate its proposed rates is the bare minimum necessary to allow Big
17 Rivers to service its debt and perform necessary maintenance.⁷²³ The proposed
18 rates will allow Big Rivers to achieve the modest goal of remaining financially
19 viable through the proceedings in the separate Alcan Rate Case, where Big Rivers
20 will address the long-term issues associated with Alcan's contract termination and

⁷²⁰ Ackerman Direct Testimony at p. 12:4.

⁷²¹ Ackerman Direct Testimony at p. 29:13-25.

⁷²² See Ackerman Hearing Testimony, July 3, 2013, Tr. 16:49'07".

⁷²³ See Section V.B.

1 establish rates that account for the two smelter contract terminations. Because of
2 the timing of the Alcan Rate Case, the rates that Big Rivers proposes in this case
3 are expected to be effective for only about five months, and a new rate will be
4 obtained in the Alcan Rate Case proceedings.⁷²⁴

5 Furthermore, as discussed in Section VII.A, Sierra Club's proposal to deny
6 the requested rate adjustment would directly undermine Big Rivers' long-term
7 financial viability and likely result in Big Rivers' bankruptcy.⁷²⁵ Because Big
8 Rivers has serious and immediate service and financial obligations and credit issues
9 to manage, this simply is not the time to pontificate and dither; Big Rivers requires
10 rate relief now.⁷²⁶

11 Sierra Club's suggestion that Big Rivers' Members should resort entirely to
12 purchased power is also flawed. Because of technical transmission system
13 constraints associated with the Smelter load, it is physically impossible for Big
14 Rivers to shut down all of its power plants and purchase from the wholesale power
15 market,⁷²⁷ a fact that Sierra Club has completely ignored.⁷²⁸ Furthermore, Dr.
16 Ackerman ignores the volatile nature of wholesale market prices and unavoidable
17 operational risks such as deliverability risk or transmission congestion costs and/or

⁷²⁴ See Section IX.

⁷²⁵ Richert Rebuttal Testimony at p. 12:14-16.

⁷²⁶ See Richert Rebuttal Testimony at p. 12:12-14 (“[T]his kind of academic suggestion is misplaced”).

⁷²⁷ Berry Rebuttal Testimony at p. 16:6-8.

⁷²⁸ Ackerman Direct Testimony at pp. 29:12-30:11 (theorizing that “in the worst case, that bankruptcy resulted in the retirement or sale of all of BREC’s generation assets” and that the “only increased risk” to Big Rivers’ customers would be if MISO’s prices rose above Big Rivers’ costs of generation); Ackerman Hearing Testimony, July 3, 2013, Tr. 15:35’15” (admitting he has performed no studies as to whether Big Rivers could import sufficient energy to serve its load if all its generating units were to be retired).

1 curtailments.⁷²⁹ If Big Rivers' Members were forced to give up their energy
2 independence and rely entirely on the wholesale market as Dr. Ackerman proposes,
3 their rates would also be vulnerable to unpredictable fluctuations in market price
4 and subject to sudden, dramatic changes beyond the control of Big Rivers, its
5 Members, or the Commission.⁷³⁰

6 Finally, much of Sierra Club's criticism of Big Rivers' forecast reflects its
7 unsubstantiated speculation about "anticipated" replacement rules,⁷³¹ "recently-
8 proposed" regulation,⁷³² potential "future" regulations,⁷³³ and "widely anticipated"
9 environmental standard changes.⁷³⁴ In doing so, Dr. Ackerman relies almost
10 entirely on a 2012 Sargent & Lundy Study (the "S&L Study") that Big Rivers
11 commissioned and that he admits included an analysis of costs that will no longer
12 be incurred because the D.C. Circuit Court of Appeals overturned the relevant
13 regulation.⁷³⁵ Sierra Club does not otherwise offer evidence that any of these
14 potential rule changes will affect the fully forecasted test period, if they even
15 occur.⁷³⁶

16 Big Rivers is sensitive to the potential for costly additional regulations, as
17 evidenced by its commissioning of the S&L Study. Big Rivers considers such

⁷²⁹ Berry Rebuttal Testimony at p. 16:17-22.

⁷³⁰ *Id.* at p. 17:1-3. *See also* Bailey Hearing Testimony, July 1, 2013, Tr. 15:19'49" (testifying that wholesale energy prices fluctuate, and if Big Rivers is forced to "go into bankruptcy or sell all our assets or retire them in a fire sale and put our Members in a position where they have to buy all their power on the market, they would be exposed to all that risk, and it can fluctuate quickly and it can have significant impact on the Members' profitability and their customers' prices").

⁷³¹ Ackerman Direct Testimony at p. 12:26-27

⁷³² *Id.* at p. 13:8-10.

⁷³³ *Id.* at p. 13:17-18

⁷³⁴ *Id.* at p. 14:14-15.

⁷³⁵ Berry Rebuttal Testimony at p. 15:3-7; Ackerman Direct Testimony at p. 12:3-27.

⁷³⁶ *Id.* at p. 15:12-13.

1 contingencies in its long-term operational planning. However, the fact that Big
2 Rivers keeps informed about the potential costs of possible future regulations does
3 not mean that those amounts can or should be properly included in Big Rivers'
4 budget, particularly when there are no certain costs projected to occur in that
5 particular year's budget. Here, the mere possibility of future regulations that will
6 not be implemented during the fully forecasted test year were properly omitted from
7 Big Rivers' revenue requirement.⁷³⁷ Although the prospect of future regulations
8 may be apropos of integrated resource planning and other longer-term business
9 plans, these speculative and unspecified environmental compliance costs are not
10 appropriately included in the determination of base rates in this proceeding.⁷³⁸

11 It would be unreasonable to force Big Rivers to retire units or sell them below
12 book value simply because of the possibility of future environmental regulations.
13 However, Sierra Club asks the Commission to do just that. Sierra Club, however,
14 offers the Commission no studies or other analyses to support its contention that
15 Big Rivers' units will not be profitable in the future. Dr. Ackerman also filed two
16 power price projections with his testimony, but he does not know if those projections
17 included the impact of the same future environmental regulations, such as carbon
18 regulation, that he demands Big Rivers include in its cost projections.⁷³⁹

19 In short, Sierra Club expects the Commission to find that all of the possible
20 environmental regulations identified in the S&L study will impact Big Rivers; in

⁷³⁷ *Id.* at p. 15:18-21.

⁷³⁸ *Id.* at pp. 15:22-16:2.

⁷³⁹ Ackerman Hearing Testimony, July 3, 2013, Tr. 16:42'51".

1 the same breath, it asks the Commission to ignore the impact that future
2 environmental regulations will have on the generators with which Big Rivers
3 competes in the wholesale power market. Furthermore, the Sierra Club's discovery
4 responses acknowledge that the projections on which it relies show a "shift in
5 relative prices in favor of coal" compared to natural gas from 2011 through 2040.⁷⁴⁰

6 As noted by Mr. Berry at the hearing,, Big Rivers' units cleared the market
7 90% of the time.⁷⁴¹ It simply makes no sense to abandon those units at this time,
8 only to pay higher costs in the market and be subject to the volatility of the market,
9 based on the chance (without any supporting evidence) that potential
10 environmental future regulations might change Big Rivers' position in the market
11 to such an extent that they would never be profitable again. While future
12 environmental regulations may increase Big Rivers' production costs, they will also
13 increase the production costs of other participants in the wholesale power market.
14 It would be wasteful to abandon Big Rivers' generating stations on the mere
15 possibility that potential future environmental regulations could increase Big
16 Rivers' production costs more than its competitors. It is not a reasonable position.

17 In the end, Sierra Club's recommendations are based on unsubstantiated
18 speculation and criticisms of a price forecast (PACE Global) that Big Rivers did not
19 even rely on in this case. Sierra Club's recommendations would not result in fair,
20 just, and reasonable rates. Accordingly, the Commission should reject Sierra Club's
21 recommendations.

⁷⁴⁰ Sierra Club's Response to Item 10 of Big Rivers' First Request for Information to Sierra Club.

⁷⁴¹ Berry Hearing Testimony, July 2, 2013, Tr. 16:42'50".

1 XVIII. The Following Outstanding Motions and Petitions Should Be Granted.

2 The Commission should grant the following outstanding motions and
3 petitions for the reasons stated in the respective motion or petition:

- 4 • Big Rivers' 1/29/13 motion for deviation (related to Big Rivers'
5 responses to PSC 1);
- 6 • Big Rivers' 2/15/13 petition for confidential treatment (related to Big
7 Rivers' updated responses to information requests);
- 8 • Big Rivers' 2/28/13 motion for deviation (related to Big Rivers'
9 responses to PSC 2);
- 10 • Big Rivers' 3/6/13 revised petition for confidential treatment (related to
11 Big Rivers' response to PSC 2);
- 12 • Big Rivers' 3/18/13 petition for confidential treatment (related to Big
13 Rivers' updated responses to information requests);
- 14 • Big Rivers' 3/28/13 motion for deviation and petition for confidential
15 treatment (related to Big Rivers' responses to PSC 3);
- 16 • Big Rivers' 4/25/13 motion for deviation and petition for confidential
17 treatment (related to Big Rivers' responses to SC 1);
- 18 • Big Rivers' 5/15/13 petition for confidential treatment (related to Big
19 Rivers' responses to SC 2);
- 20 • Big Rivers' 5/17/13 petition for confidential treatment (related to Big
21 Rivers' updated responses to information requests);
- 22 • Big Rivers' 6/24/13 motion for deviation and petition for confidential
23 treatment (related to Big Rivers' revised responses to SC 2);
- 24 • Big Rivers' 6/24/13 motion for deviation and petition for confidential
25 treatment (related to Big Rivers' rebuttal testimony);
- 26 • Big Rivers' 7/2/13 motion for deviation (related to Big Rivers'
27 publication of notice of the hearing); and
- 28 • Big Rivers' 7/12/13 motion for deviation and petition for confidential
29 treatment (related to Big Rivers' responses to post-hearing information
30 requests)

1 The Commission should also deny KIUC's January 23, 2013 motion seeking
2 to require Big Rivers to file a corrected notice for the reasons stated in Big Rivers'
3 January 28, 2013 response to that motion.

4 **XIX. Conclusion.**

5 Big Rivers acknowledges the difficult issues presented in this case. However,
6 Century's unilateral contract termination and an unprecedented downturn in the
7 wholesale power market have created difficult times for Big Rivers. Big Rivers has
8 taken every reasonable cost-cutting measure and operational efficiency opportunity
9 available to it to deal with these issues. Consequently, Big Rivers seeks the bare
10 minimum rate adjustment necessary to maintain its generating fleet, meet its debt
11 service, and fund an appropriately reduced scale of operations. Absent this rate
12 adjustment, Big Rivers' faces bankruptcy and the great disruption, expense, and
13 uncertainty that it would bring. For the reasons set forth in this brief, the
14 Commission should find that Big Rivers' proposed rates are fair, just, and
15 reasonable.

16 Despite this financial predicament, Big Rivers was prepared for this day, as
17 its management team has worked with the Commission and other stakeholders for
18 years to plan for this very possibility. Big Rivers' management team's long-term
19 Mitigation Plan has been in development since before the Unwind Transaction
20 finalized, and this rate proceeding is the first step in implementing it. Accordingly,
21 Big Rivers asks only for the Commission's regulatory patience in approving the
22 proposed rates and giving Big Rivers' management team a reasonable opportunity

1 to pursue its Mitigation Plan for the benefit of its Members and their member-
2 owners.

3 If Big Rivers' proposed rates are denied, Big Rivers would certainly fail to
4 achieve its 1.10 MFIR minimum performance requirement, and it would default on
5 numerous loan covenants. In this situation, among other adverse consequences, Big
6 Rivers' revenues would likely be diverted to RUS's lockbox, its cash flow and
7 investments would "burn down" in approximately eight to ten weeks, its loan
8 payments would accelerate, its credit ratings would be lowered even further, and it
9 would likely forever lose access to the capital market which it needs to continue
10 operating. The end result of this cascading sequence of events is bankruptcy, which
11 entails great expense and uncertainty with no counterbalancing guarantee that
12 retail member-owners will benefit.

13 The Opposing Intervenors favor this path of regulatory abandonment, yet
14 they offer no evidence, no studies, and no analyses to support their hope that the
15 retail member-owners would benefit. Bankruptcy guarantees only uncertainty,
16 expense, and risk, not just for Big Rivers but for everyone—Big Rivers' Members,
17 their member-owners, the region, as well as other utilities throughout the
18 Commonwealth. There are no certain benefits, not even lower rates, and the
19 Opposing Intervenors cite no evidence to the contrary.

20 Instead, they ask the Commission to play a dangerous game by intentionally
21 undermining Big Rivers' financial integrity in the uninformed hope that Big Rivers'
22 creditors can be strong-armed into granting tens of millions of dollars per year in

1 concessions. This hope is grounded in neither reality nor logic. Any attempt to
2 force Big Rivers' lenders to grant millions (or hundreds of millions) of dollars in
3 concessions would not only be fruitless, it would prove harmful. It is not reasonable
4 to expect these lenders to loan Big Rivers additional funds for its operational needs,
5 such as pollution control equipment, at the same time the Commission is
6 demanding that those same lenders take a loss on their existing loans. The
7 creditors have already worked with Big Rivers to refinance millions of dollars of
8 loans. Attempting to intimidate them into significant concessions, such as write-
9 downs of loans, by undermining Big Rivers' cash flow would only exacerbate Big
10 Rivers' financial predicament. The end-result of this gamesmanship is bankruptcy,
11 which ultimately places the fate of Big Rivers and rates to its Members and their
12 member-owners in the hands of third parties with very different interests.

13 The Opposing Intervenors' positions also lead to a violation of Big Rivers' due
14 process rights. For years, Big Rivers' management team has strategically planned
15 for this possibility in recognition of the risks entailed by the Unwind and service to
16 the Smelters. Despite this, the Opposing Intervenors now ask the Commission to
17 abruptly change regulatory course with respect to the Smelter issues by
18 intentionally undermining Big Rivers' financial integrity. The law does not condone
19 that sort of regulatory abandonment and confiscatory rate-making.

20 From a broader perspective, the Opposing Intervenors' position, if adopted,
21 would signal to lenders a lack of regulatory support for utilities facing difficult
22 situations brought on by circumstances outside the utility's control. It would signal

1 a return to the mindset that led to the REA embargo in the 1980s. It would harm
2 utilities across the Commonwealth.

3 As Mr. Bailey noted in his testimony, Big Rivers' management team is
4 sensitive to the magnitude of the rate adjustments sought here. But in these
5 circumstances, Big Rivers' Mitigation Plan—including the rates proposed in this
6 proceeding—is the best option to provide for the greatest possible long-term benefit
7 to its Members and their member-owners. Indeed, Big Rivers' proposal is the only
8 practical option that any party has put forth. Accordingly, Big Rivers respectfully
9 requests that the Commission approve its proposed rates as fair, just, and
10 reasonable.

11 On this the 26th day of July, 2013.

12 Respectfully submitted,
13

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1 CERTIFICATE OF SERVICE

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3 I hereby certify that a true and correct copy of the foregoing was or will be
4 served on the following by Federal Express or by hand delivery upon the persons
5 listed below, on the date this brief is filed with the Kentucky Public Service
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On this the 25th day of July, 2013



Counsel to Big Rivers Electric Corporation

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United States
Department
of Agriculture

Rural
Electrification
Administration

Office
of the
Administrator

Washington,
D.C.
20250

April 9, 1987

Honorable Richard D. Heman, Jr.
Chairman, Commonwealth of Kentucky
Public Service Commission
730 Schenkel Lane
Frankfort, Kentucky 40602

RECEIVED

APR 10 1987

CHAIRMAN
P.S.C.

Dear Chairman Heman:

I have carefully reviewed the March 17, 1987 Order of the Public Service Commission of the Commonwealth of Kentucky in Case No. 9885 which denied a modest rate increase for Big Rivers Electric Corporation. I have discussed this Order with the Secretary of Agriculture, the General Counsel of the Department, and officials of the Department of Justice. Frankly, we are all surprised and disappointed at this action of the Commission and the rationale on which the Order is based.

The Order raises profound and disturbing questions about the future feasibility and security of loans made or guaranteed by the Rural Electrification Administration (REA) and the Rural Telephone Bank (RTB) for use in the Commonwealth of Kentucky. It appears that the Commission wants to reserve to itself the final authority to determine when and if loans will be repaid and the manner in which REA will exercise its jurisdiction over power sales of its borrowers.

The Commission's Order denying rate relief to Big Rivers has compromised the ability of Big Rivers to repay its Federal loans. Because of the position taken by the Commission as expressed in this Order, REA is obligated to consider the options available to it to protect the Rural Electrification and Telephone programs and the interest of the American taxpayer. Until we are in a position to reach a final decision, REA and the RTB will suspend all loan and loan guarantee approvals and advances on loans and loan guarantees already approved to all electric and telephone borrowers in Kentucky.

It would be helpful if you and the other members of the Commission would meet with me in Washington, D. C. to discuss this matter and attempt to arrive at a satisfactory resolution assuring repayment of loans to Kentucky borrowers.

For your information, I am enclosing a copy of a letter which REA is sending to its electric and telephone borrowers in Kentucky notifying them of REA's suspension action.

Sincerely,

HAROLD V. HUNTER
Administrator

Enclosure



United States
Department
of Agriculture

Rural
Electrification
Administration

Washington
D.C.
20250

LETTER SENT TO ALL REA-FINANCED ELECTRIC AND TELEPHONE SYSTEMS IN KENTUCKY

Dear Mr./Ms.:

I was surprised and disappointed to learn of the March 17, 1987 Order of the Public Service Commission of the Commonwealth of Kentucky in Case No. 9885 denying a modest rate increase to Big Rivers Electric Corporation (Big Rivers). Big Rivers has sought the rate increase to reflect the commercialization last year of the Wilson Generating Plant, a revenue producing, state-of-the-art, coal-fired, 400 MW power plant located in Western Kentucky.

The Rural Electrification Administration (REA), with the endorsement of the Commission, extended over \$700 million in Federal loans and guarantees to Big Rivers to finance most of the Wilson Plant. Big Rivers has been in default on its Government loans since 1984 and is presently more than \$220 million in arrears.

A similar attempt to modestly increase rates was rejected by the Public Service Commission in 1985, some 6 months after Big Rivers had defaulted on its Government loans. This latest rejection came after years of arduous negotiations among Big Rivers, REA, and other interested parties.

Big Rivers has not had a rate increase since 1981 and currently charges its members the lowest rates of any consumer-owned generating cooperative in the country. Had the Commission granted Big Rivers' request in this case, its rates would still have been far below those projected by Big Rivers in prior Commission proceedings authorizing the construction and financing of the Wilson Plant.

The Commission has apparently undertaken to allocate economic risks to REA in a manner not contemplated in the Rural Electrification Act or assumed by REA. The Order raises profound and disturbing questions about the feasibility of loans made or guaranteed by REA and the Rural Telephone Bank (RTB) for use in the Commonwealth of Kentucky. The Commission has seemingly reserved to itself the final authority to determine when Federal loans will be repaid, if ever. The Order also suggests that the Commission will make repayment of REA loans dependent upon how REA exercises its jurisdiction over power sales of its borrowers.

The Commission's Order denying rate relief has compromised important Federal interests, including the ability of Big Rivers to repay its Federal loans. Because of the climate of uncertainty created by the Order of the Public Service Commission dated March 17, 1987, I am not able to conclude, as required by law, that the security for REA and RTB loans is reasonably adequate and that such loans will be repaid within the time agreed. Accordingly, I must ask you, pursuant to your loan contract, to provide evidence satisfactory to

REA of the continuing economic feasibility of your system taking into account the Order of the Public Service Commission. Regretfully, until I receive satisfactory assurances in this matter, I must suspend any action on requests for the advance of funds on loans made or guaranteed by REA or the RTB, and on applications for additional loans or guarantees.

For your information, a copy of my letter to the Commission Chairman is enclosed.

Sincerely,

Enclosure

MOODY'S

INVESTORS SERVICE

Issuer Comment: Big Rivers Electric Corporation – Credit Opinion

Global Credit Research - 15 Jul 2013

Rating Drivers

- » Contract termination notices from two aluminum smelters create need for significant rate increases and other mitigating strategies to compensate for material loss of load
- » Rate setting subject to jurisdiction of the Kentucky Public Service Commission (KPSC)
- » Revenues from electricity sold to rural and other non-smelter customers under long-term wholesale power contracts with three member owners
- » Ownership of generally competitive coal-fired generation plants; pursuing environmental compliance plan approved by regulators; environmental cost surcharge in place

Corporate Profile

Big Rivers Electric Corporation (BREC or Big Rivers) is an electric generation and transmission cooperative (G&T) headquartered in Henderson, Kentucky and owned by its three member system distribution cooperatives -- Jackson Purchase Energy Corporation; Kenergy Corp; and Meade County Rural Electric Cooperative Corporation. These member system cooperatives provide retail electric power and energy to more than 113,000 residential, commercial, and industrial customers in 22 Western Kentucky counties.

Recent Events

Effective July 11, 2013 we downgraded the senior secured rating of \$83.3 million of County of Ohio, Kentucky (the county) Pollution Control Refunding Revenue Bonds (Big Rivers Electric Corporation Project; cusip number 677288AG7) to Ba2 from Ba1, concluding the review for downgrade which commenced on February 6, 2013. The rating outlook is negative. See press release of July 11, 2013 posted to moodys.com for further details relating to this action.

Rating Rationale

The Ba2 rating considers credit risk related to near term prospects for significant load loss since two aluminum smelters being served by BREC's largest member owner, Kenergy Corp., will be terminating their respective power purchase contracts, in one instance effective August 20, 2013 and the second effective February 1, 2014. The rating further reflects a need for significant rate increases and other mitigation steps to compensate for the impending load loss and to maintain viable financial performance. The Ba2 rating further recognizes the cost plus nature of the cooperative model which generally allows for cost recovery from its members. This factor is tempered in part because BREC's rates are regulated by the KPSC, which is atypical for the G&T coop sector. Still, Big Rivers' credit profile also reflects the financial benefits of several steps it took to unwind a lease and other transactions in 2008 and 2009 wherein its prior deficit net worth turned substantially positive, cash receipts were used to repay debt, and residual cash was set aside in restricted accounts to be used should BREC lose load from the smelters.

Detailed Rating Considerations

High Smelter Load Concentration; Credit Challenge Tied to Impending Loss of Smelter Load

Under historical operating conditions, the two smelters served by Kenergy have been consuming approximately 7 million MWh of energy annually, representing a substantial load concentration risk (e.g. about two-thirds of member energy load and close to 60% of member revenues for Big Rivers). This risk has been a significant rating constraint for Big Rivers,

making its financial and operating risk profile unique compared to peers. This risk was magnified in August 2012 and most recently in January 2013 when each of the two smelters (Century's Hawesville smelter and the Sebree smelter that Century acquired from Alcan in June 2013) gave notice to terminate the power purchase contract with Big Rivers. Under the terms of the contract, termination of the contract requires the terminating party to give notice to Big Rivers of their decision twelve months prior to the planned termination date. During the twelve month period, each of the terminating parties must continue to make payments to Big Rivers over that time frame. The contract with the Hawesville smelter ends on August 20, 2013, while the 12 month period ends on January 31, 2014 under the contract with the Sebree smelter. Although the Hawesville and Sebree smelters are required to pay base energy charges (as defined in their respective agreements with Big Rivers) for power (482 MW and 368 MW, respectively, at 98% capacity factor) during the 12-month notice periods, neither one is required to continue operating their smelter plants.

While initial expectations contemplated the prospect that both smelters could cease operations upon expiration of their respective power contracts, recent developments bode well for the smelters to continue operating, while purchasing power on the wholesale market. Effective June 3, 2013, Century completed a transaction with Rio Tinto Alcan to acquire substantially all the assets of the Sebree aluminum smelter. This deal followed Century's definitive agreement with BREC and Kenergy that, subject to various regulatory approvals, will allow Century to continue operating its Hawesville smelter by purchasing electricity on the open market. Under the agreement, we expect that Kenergy will arrange for the energy purchases at wholesale market prices and Century will pay the market price and agree to pay additional amounts to cover any incremental costs incurred by BREC and Kenergy to accommodate Century's desire to purchase energy on the market for the Hawesville smelter. We understand that Century believes that this framework can serve as a model for a similar arrangement for the Sebree smelter once its current termination period expires on January 31, 2014. When compared to the alternative scenario of having both smelters permanently shut down, we view this outcome as being acceptable particularly since BREC and Kenergy will be reimbursed for the incremental costs to purchase power at wholesale market prices for the smelters.

Need for Supportive Regulation Given Requests for Significant Rate Increases Pending

Notwithstanding the expectation for continuation of operations by the smelters, loss of the smelter load will negatively impact revenues and BREC has pursued a variety of mitigation strategies to address an anticipated \$115 million revenue shortfall. On January 15, 2013, BREC filed a rate case with the KPSC seeking approval for a \$74.5 million rate increase. The rate filing primarily covered the impending load loss from Century when the notice period expires and of the \$74.5 million requested, \$23.7 million is allocated to Alcan. The remaining smaller amounts included in the request are intended to address declining margins from off system sales and other cost pressures. This request was subsequently modified downward to \$68.6 million due to the issuance of orders from the KPSC to recognize cost savings achieved subsequent to the rate case filing date. BREC is among the few electric generation and transmission cooperatives subject to rate regulation, which we view as a negative rating consideration among G&T cooperatives as it can sometimes pose challenges in implementing timely rate increases. The January rate case is in its final stages; BREC now awaits a final rate order from the KPSC and is requesting that new rates become effective August 20, 2013. If the case is not decided by then, BREC would be permitted under state statute to implement the rate increase, subject to refund, pending a final KPSC decision in the rate case. The July 11, 2013 rating action incorporates expectations for a reasonable outcome to the rate case decision.

On June 28, 2013, BREC filed another rate case proceeding, seeking KPSC approval for its rate strategy to address load loss when the former Alcan (Sebree smelter) notice period expires on January 31, 2014. Importantly and a key rating consideration are the plans to accelerate use of the economic reserve and rural economic reserve accounts in the amount of \$70.4 million to offset this second rate increase which goes into effect on February 1, 2014. The accelerated use of the reserve accounts would effectively neutralize any additional non-smelter customer rate impact from this second rate case filing until August 2014 for large industrial (non-smelter) customers and April 2015 for rural (residential) customers. Included in

the \$70.4 million rate increase is Alcan's \$23.7 million share of the \$68.6 million rate increase included in the rate case filing made January 15, 2013. Under this approach, BREC hopes to delay further non-smelter customer rate shock as it implements other load concentration mitigation strategies.

From a historical perspective in reviewing the degree of supportiveness by the KPSC, we view the existence of certain fuel and purchased power cost adjustment mechanisms and the existence of an environmental cost surcharge in rates as favorable to BREC's credit profile since they can temper risk of cost recovery shortfalls if there is a mismatch relative to existing rate levels. Also, Big Rivers received KPSC approval for a \$26.7 million (6.17%) base rate increase effective November 17, 2011. We consider this result to be a reasonably good outcome from a credit quality perspective versus the approximate \$39.3 million rate increase that was requested. The net effects of various appeals in this case decision resulted in the KPSC largely reaffirming its decision in January 2013; importantly, some corrections to calculations resulted in an approximately \$1 million increase to the previously approved revenue amount. The rate increase allowed BREC to bolster wholesale margins, address increased depreciation costs, administrative costs tied to joining the MISO, and maintenance costs incurred during generation plant outages.

Other Load Concentration Mitigation Strategies

Other load concentration mitigation strategies, some of which are already being implemented, include entering into long-term bilateral sales arrangements, temporarily idling generation and reducing staff, making short-term off system sales, participating in the capacity markets, and selling generating assets. In that vein, BREC recently announced that it would specifically consider the sale of its 417-MW D.B. Wilson and 443-MW K.C. Coleman coal-fired plants. At the same time, BREC has responded to requests for proposals to sell power from these plants to other energy providers and awaits further developments related to those responses. Longer term opportunities may arise for sales of electricity, depending on economic development activity in its service territory. Should a transaction, either an outright sale or a long-term power arrangement for all capacity involving both Wilson and Coleman occur, BREC's total owned/available capacity would reduce to 584 MW from 1,444 MW. BREC also has rights to about 197 MW of coal-fired capacity from Henderson Municipal Power and Light Station Two and about 178 MW of contracted hydro capacity from Southeastern Power Administration.

Meanwhile we note the economics of power produced from BREC's generation sources have been enabling it to maintain a reasonable competitive advantage in the Southeast and even more so when compared to other regions around the country. The consistently high capacity factors and efficient operations of the assets resulted in 2012 member wholesale revenue per MWh for rural members and large industrial members of \$50.58 and \$43.15, respectively, compared to \$46.78 and \$41.68, respectively for 2011 (including the beneficial effects of the member rate stability mechanism). The 2012 aluminum smelter wholesale revenue per MWh was \$48.52, compared to \$44.48 in 2011. The year over year increase is largely attributed to the annualized effect of base rate increases approved by the KPSC effective in November 2011.

Wholesale Power Contracts Support Big Rivers' Credit Profile

The revenues derived under Big Rivers' long-term wholesale contracts with its members for sales to non-smelter customers will continue as the contracts were extended by an additional 20 years to December 31, 2043 when the unwind of transactions were completed in 2009. From a historical perspective, the relatively low cost power provided under the contracts mitigated the credit risk that would typically stem from member disenchantment. Notwithstanding a relatively competitive starting point and other price mitigating strategies, it remains possible that the specter of member unrest could surface as the substantial increases from pending regulatory filings loom. That said, the currently overall sound member profile helps provide a degree of assurance of this revenue stream, which is integral to servicing Big Rivers' debt.

Sustaining Historical Financial Metrics Hinges Importantly On Base Rate Increases and Other Load Concentration Mitigation Strategies

On average over the fiscal years 2010-2012, Big Rivers has been achieving financial metrics generally in the range of "Baa" and "A" rating categories for the five ratios covered under the Rating Methodology for U.S. Electric G&T Cooperatives. For example, Big Rivers' three year average FFO to Debt, FFO to interest and TIER for 2010-2012 were 3.1%, 1.57 times, and 1.2 times, respectively, all of which fall within the "Baa" category range under the Methodology. For the same period, DSC averaged 1.2 times (in the "A" category range), and equity to total capitalization averaged 31.6% (also in the "A" category range). The equity ratio in particular is reflective of the lease unwind transactions that were completed in 2009. Prior to that Big Rivers had negative equity. Going forward, Big Rivers will be significantly dependent on supportive outcomes in its pending rate cases and other mitigation strategies in order to sustain the recent historical metric levels.

Liquidity

BREC addressed what had been its most pressing near term obligation by using a portion of its existing cash on May 31, 2013 to repay a \$58.8 million tax-exempt debt maturity which was scheduled for June 1, 2013. Following the debt repayment, BREC reports its cash balance is approximately \$100 million (which includes \$27 million designated for capital expenditures) and its debt maturities over the next eight quarters are largely comprised of scheduled amortizations of long-term debt to be paid at a rate of roughly \$5.5 million per quarter.

We understand that BREC has taken steps to maintain its external liquidity as it is in final stage negotiations with National Rural Utilities Cooperative Finance Corp. (NRUCFC) for a senior secured loan to fund an estimated \$60 million of KPSC approved environmental related capital expenditures over the next two years. We understand that this multi-year loan, which is premised on BREC receiving a favorable order from the KPSC in the rate case filed January 15, 2013, would serve as a bridge to long-term senior secured financing under the U.S. Department of Agriculture's Rural Utilities Service (RUS) loan program.

BREC is also finalizing negotiations to amend and extend its \$50 million unsecured revolver with NRUCFC, which currently expires in July 2014. Subject to completing the negotiations with NRUCFC and approval from the KPSC, the new revolver is expected to convert to a secured facility, permit access to funding despite impending smelter-related load loss, and extend the term to July 2017. Extension of this facility is an important liquidity milestone since BREC terminated its \$50 million CoBank facility, which was scheduled to expire in July 2017. The existing cash on hand and the anticipated extension of the \$50 million revolver with NRUCFC, along with the \$60 million three-year senior secured term loan with NRUCFC for environmental capital expenditures will supplement the cooperative's internally generated cash flow going forward.

The quality of the alternate liquidity provided by the NRUCFC facility benefits from the multi-year tenor and the absence of any onerous financial covenants, which largely mirror the financial covenants in existing debt documents. Big Rivers is in compliance with those covenants. Additionally, the NRUCFC facility benefits from no ongoing material adverse change (MAC) clause. The NRUCFC facility does not have any rating triggers, just a pricing grid based on rating. We understand that BREC must evidence cash of less than \$35 million as a condition to each loan request under the amend and extend facility that it is negotiating to implement with NRUCFC.

Structural Considerations

As part of the unwinding of various transactions completed in 2009, Big Rivers replaced the previously existing RUS mortgage with a new senior secured indenture. Under the current senior secured indenture RUS and all senior secured debt holders, including the \$83.3 million of County of Ohio, Kentucky (the county) Pollution Control Refunding Revenue Bonds (Big Rivers Electric Corporation Project; cusip number 677288AG7), are on equal footing in terms of priority of claim and lien on assets. The current senior secured indenture provides Big Rivers with the flexibility to access public debt markets without first obtaining a case specific RUS lien accommodation, while retaining the right to request approval from the RUS for additional direct borrowings under the RUS loan program, if they choose to do so. Given

persistent questions about the availability of funds under the federally subsidized RUS loan program, we consider the added flexibility of the current senior secured indenture to be credit positive.

Rating Outlook

BREC's rating outlook is negative, due to the uncertainty around the cooperative's success in implementing mitigating strategies, the most critical one being the rate requests pending before the KPSC.

What Could Change the Rating - Up

In light of the negative outlook, BREC's rating is not likely to be upgraded in the near term. Significant support from the KPSC in the pending rate filings and successful results through other load concentration mitigation strategies would be credit positive and help to stabilize BREC's rating outlook.

What Could Change the Rating - Down

There are a variety of factors that could cause us to take further negative rating action, including inability to obtain adequate regulatory support in pending rate filings and delays in shoring up external liquidity. Since we expect limited opportunities to earn margins on off-system sales in the MISO markets over the next 24 months, inability to find other profitable energy and capacity sales opportunities would also be credit negative. Furthermore, if full and timely recovery of environmental compliance costs does not occur as anticipated under the KPSC approved environmental cost recovery mechanism, that would add downward rating pressure, especially if such amounts increase substantially from currently anticipated levels.

Other Considerations

Mapping To Moody's U.S. Electric Generation & Transmission Cooperatives Rating Methodology

Big Rivers' mapping under Moody's U.S. Electric Generation & Transmission Cooperative Rating Methodology is based on historical data through December 31, 2012. The grid indicated rating for Big Rivers' senior most obligations under the Methodology is currently Baa2 and relies on the aforementioned historical quantitative data and qualitative assessments. The grid indicated rating under the Methodology largely reflects Baa scores for the factors relating to funds from operations coverage of debt and interest and even lower scores for the factors relating to potential for rate shock, contractual relationships and regulatory status. Notwithstanding the current Baa2 grid indicated rating for Big Rivers under the Methodology, its actual senior secured rating of Ba2 reflects the unique risks relating to Big Rivers' load concentration to the smelters, the smelter termination notices and questions as to whether rate increases and other mitigating strategies will adequately compensate for loss of load when the smelters' contract termination notice periods expire on August 20, 2013 and January 31, 2014, respectively.

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