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COMMISSION

Via Hand Delivery Mail

November 20, 2013

Mr. Jeff Derouen, Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, Kentucky 40602

Re: **Case No. 2012-00535**

Dear Mr. Derouen:

Please find enclosed the original and ten (10) copies of the PETITION FOR REHEARING OF KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC., ATTORNEY GENERAL, BEN TAYLOR, AND SIERRA CLUB for filing in the above-referenced docket.

By copy of this letter, all parties listed on the Certificate of Service have been served. Please place these document of file.

Very Truly Yours,



Michael L. Kurtz, Esq.
Kurt J. Boehm, Esq.
Jody Kyler Cohn, Esq.
BOEHM, KURTZ & LOWRY

MLKkew
Attachment

cc: Certificate of Service
Quang Nyugen, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by electronic mail (when available) and by regular U.S. mail, unless other noted, this 20th day of November, 2013 to the following:



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

RECEIVED

NOV 20 2013

PUBLIC SERVICE
COMMISSION

In The Matter of: The Application of Big Rivers Electric Corporation for an Adjustment of Rates. :

Case No. 2012-00535 :

:

**PETITION FOR REHEARING OF
KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC.,
ATTORNEY GENERAL, BEN TAYLOR, AND SIERRA CLUB**

Pursuant to KRS 278.400, Kentucky Industrial Utility Customers, Inc., the Attorney General of the Commonwealth of Kentucky, Ben Taylor, and Sierra Club (“Joint Intervenors”) petition the Kentucky Public Service Commission (“Commission”) for rehearing of its October 29, 2013 Order in Case No. 2012-00535 (“Order”). Joint Intervenors seek rehearing because:

- 1) While claiming to do so, the Commission’s Order fails to achieve a balance of interests between Big Rivers Electric Corporation (“Big Rivers” or “Company”) and customers. The requisite balance was not achieved because under generally accepted accounting principles, a deferral of depreciation expense on excess capacity is only allowed if this Commission provides “reasonable assurance” that future recovery from customers is “probable.” Instead of providing Big Rivers a regulatory promise of future recovery through a deferral, the Commission should not allow depreciation expense on excess capacity in the revenue requirement and not allow the utility to recover any disallowed depreciation expense in the future. If the excess capacity once again becomes “used and useful,” then the Commission can allow Big Rivers to recover depreciation expense on a prospective basis at that time;

- 2) The Commission's Order fails to account for recent Midcontinent Independent System Operator ("MISO") filings with the Federal Energy Regulatory Commission ("FERC") indicating that Big Rivers will likely receive \$12.313 million more in compensation for the Coleman units as a result of its System Support Resources ("SSR") Agreement than was reflected in the Commission-approved revenue requirement; and
- 3) The Commission's Order fails to provide specific parameters regarding the implementation of Big Rivers' load mitigation plan.

For the reasons set forth herein, Joint Intervenors request that the Commission reexamine and modify its Order to correct these errors.

Respectfully submitted,



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CLUB**

ARGUMENT

ASSIGNMENT OF ERROR #1: The Commission's Order fails to achieve the requisite balance of interests regarding the costs of excess capacity between Big Rivers and its customers, as the deferral of depreciation expense on Coleman is only authorized under generally accepted accounting principles if this Commission provides "*reasonable assurance*" that future recovery from customers is "*probable*."

In making its ultimate decision on Big Rivers' requested rate increase, the Commission emphasized that it was attempting to strike a "*balance*" between the interests of Big Rivers and its customers. In fact, the Commission conceded that it was required to achieve such a balance, stating that "*[u]nder the circumstances presented in this case, the Commission finds that in setting rates, we must balance the interests of both the utility and its ratepayers.*"¹ But while claiming to do so, the Commission's Order fails to actually achieve such a balance.

The Commission's Order repeatedly acknowledges that Big Rivers has "*excess capacity.*"² And the Commission expressly finds that "*[i]t would simply not be fair to require ratepayers to pay all of [sic] costs of the excess capacity.*"³ Yet the probable result of the Commission's Order is that customers *will* pay 100% of the costs of Big Rivers' excess capacity, either now or in the future. This unbalanced outcome, in which customers will ultimately be forced to assume 100% of the cost responsibility for Big Rivers' excess capacity, is contrary to both the Commission's stated objective in its Order and Commission precedent.

In its attempt to strike a balance between the interests of the utility and its customers, the Commission decided to "*exclude the depreciation expense associated with the Coleman Station from rates at this time....*"⁴ The exclusion of the Coleman depreciation expense from current rates is what

¹ Order at 19 (emphasis added).

² Order at 16-19.

³ Order at 19.

⁴ Order at 19 (emphasis added).

the Commission cites as the benefit to customers from the “*balance*” it claims to have achieved.⁵ However, the temporary exclusion of that expense from current rates fails to strike the required balance between Big Rivers and its customers. While it does result in lower rates than Big Rivers requested for the current time, the Coleman depreciation expense is merely deferred and the deferred expense will be collected from customers at a future date unless there is a future disallowance of the deferred amounts. Hence, the Commission’s Order merely results in a “*pay me now or pay me later*” situation in which customers will eventually pay 100% of the costs of Big Rivers’ excess capacity.

According to generally accepted accounting principles (“GAAP”), a utility cannot defer an expense and record it as a regulatory asset unless its regulator provides “*reasonable assurance*” that it is “*probable*” that the utility will ultimately be able to recover that expense at a later date. Accounting Standards Codification (“ASC”) 980-340-25-1 (formerly Statement of Financial Accounting Standards No. 71) provides:

Rate actions of a regulator can provide **reasonable assurance** of the existence of an asset. An enterprise shall capitalize all or part of an incurred cost that would otherwise be charged to expense if both of the following criteria are met:

- a. It is **probable** that future revenue in an amount at least equal to the capitalized cost will result from inclusion of that cost in allowable costs for ratemaking purposes.
- b. Based on available evidence, the future revenue will be provided to permit recovery of the previously incurred cost rather than to provide for expected levels of similar future costs. If the revenue will be provided through an automatic rate adjustment clause, this criterion requires that the regulator’s intent clearly be to permit recovery of the previously incurred cost.⁶

Thus, under GAAP, Big Rivers cannot defer and record the excluded Coleman depreciation expense as a regulatory asset unless this Commission gives “*reasonable assurance*” that it is “*probable*” that Big Rivers will recover that expense from customers in the future.

⁵ Order at 20.

⁶ Emphasis added.

The Commission seems to recognize this GAAP requirement. Though it states that “[r]atepayers will not be required to pay for depreciation on the Coleman Station that is currently excess capacity...,”⁷ this position is changed later in its Order. In directing Big Rivers to record the excluded Coleman depreciation expense in a regulatory asset account, the Commission notes that “[b]y recording this depreciation in a regulatory asset account, the depreciation expense may be considered for recovery in rates at a future point in time.”⁸ The Commission further adds that “[i]t is the Commission’s intent that the amount recorded as a deferred asset will be considered for amortization at some future point in time if and when the facility is needed to serve customers, is sold, or is permanently closed.”⁹ This statement covers virtually all future power plant contingencies. Almost by definition, in the future Coleman will be needed, sold, or retired. The only contingency that is left out is the lease of the plant. The Commission thereby virtually guarantees that Big Rivers will recover the Coleman depreciation expense from customers in the future.

Forcing customers to pay 100% of the costs associated with the Coleman excess capacity, either now or in the future, does not strike the balance of interests between Big Rivers and its customers that the Commission “firmly” believed it was achieving.¹⁰ Rather, the deferral approach merely fulfills the needs of Big Rivers and its creditors, while ultimately forcing customers to pay for all excess capacity. It is not reasonable for the Commission to ostensibly claim that it is establishing a “balance of interests,” but then tip the scales entirely in favor of the utility and its creditors. Given that customers are receiving no benefit from Big Rivers’ excess capacity (which results in an 83% reserve margin now that the Hawesville smelter is receiving market-based rates),¹¹ the Commission should not require customers to pay 100% of the costs associated with that excess capacity.

⁷ Order at 20.

⁸ Order at 33.

⁹ Order at 33.

¹⁰ Order at 20 (“we firmly believe that today’s decision fairly balances the interests of all stakeholders.”).

¹¹ Direct Testimony of Lane Kollen at 29:4-9.

Not only is forcing customers to pay 100% of the costs associated with Big Rivers' excess capacity (either presently or in the future) inconsistent with its stated objectives in this case, it is also inconsistent with Commission precedent. In addressing Big Rivers' excess capacity issues in the past, the Commission found that a balancing of interests was required, as it did in this case. Indeed, the Commission expressly held that "[t]he establishment of fair, just and reasonable rates involves a balancing of utility and ratepayer interests."¹² In the 1987 Order, however, the Commission actually achieved that balance by finding that both customers *and* creditors have a role in addressing, resolving, and sharing the effects of excess capacity. And in that case, the Commission did not hold customers 100% responsible for Big Rivers' debts, "*emphatically*" declaring:

*We emphatically reject the claims of REA, the banks, and Big Rivers that the members of the cooperative ultimately bear the total risk and responsibility for the utility's debts. The distribution cooperatives and their members do not stand in the same position as shareholders of an investor-owned company. The REA, with its oversight and monitoring responsibility, bears a substantial amount of the risk associated with Big Rivers' actions. The creditor banks are compensated for the risks they take. Cooperative members must shoulder a portion of the risk, too, since they have a say in the affairs of the utility. Nor are the aluminum companies exempt from responsibility. Until the downturn of recent years, these companies or their predecessors were in frequent contact with Big Rivers' management. Rather than allocate the risk among all parties now, we have chosen to give the participants an opportunity to discuss the allocation among themselves as a revised workout plan is negotiated.*¹³

In the 1987 Order, the Commission added that "*Big Rivers' ratepayers should not have unlimited responsibility for the payment of Big Rivers' debt. Furthermore, they should not be required to provide all the revenues required to offset shortfalls arising from insufficient off-system sales.*"¹⁴ The

¹² *In the Matter of Big Rivers Electric Corporation's Notice of Changes in Rates and Tariffs for Wholesale Electric Service and of a Financial Workout Plan*, Case No. 9613, Order (March 17, 1987) ("1987 Order") at 37.

¹³ 1987 Order at 19 (emphasis added).

¹⁴ 1987 Order at 37.

Commission ordered the parties to develop a workout plan that “*must offer an equitable balance among all interests,*” i.e. the utility, customers, and creditors.¹⁵

Despite the fact that intervenors repeatedly cited the Commission to this key precedent,¹⁶ the Commission’s recent Order takes an unfortunate step backward from its previous decision. Rather than spreading the cost burden between Big Rivers, its creditors, and its customers, as it did in the past, the Commission now places the entire burden on customers’ shoulders. The 1987 Order correctly recognized that “*the creditor banks are compensated for the risks they take*” and therefore must contribute to an excess capacity solution. The Order here incorrectly fails to even mention the creditor banks. But given the inherent corporate structure of a cooperative utility, where the customers and equity holders are the same, the creditor banks must be part of a balanced solution.

The Commission’s current reasoning that there must be a balancing only of “*utility and ratepayer interests*” is circular and ineffective unless “*utility*” is read to mean “*utility and its creditor banks.*” If “*utility*” means only the equity holders and not the creditors, then any claimed balance is illusory since the equity holders and the customers are one and the same. The laws of this Commonwealth protect the customers of a cooperative utility exactly the same as the customers of an investor-owned utility. All utilities subject to the Commission’s jurisdiction must equally comply with Chapter 278 of the Revised Statutes. The customers of LG&E, or KU, or Kentucky Power or Duke are not the guarantors of their service providers’ debts. The same should be true for the customers of East Kentucky Power Cooperative and Big Rivers. However, this Commission’s October 29, 2013 Order unlawfully fails to provide the customers of Big Rivers with the same protections and, instead, requires them and them alone to pay for the utility’s excess capacity on both a current and deferred basis. This inequity can be cured if there is no regulatory promise of future recovery through a deferral and Big

¹⁵ 1987 Order at 43.

¹⁶ *See, e.g.*, KIUC Brief at 5, 11, and 50; Attorney General Brief at. 29-36.

Rivers is not allowed to recover the booked depreciation expense on its excess capacity (now just Coleman but as of February 1, 2014 both Coleman and Wilson) in current rates or retroactively through future rates.

The Commission's chosen resolution also fails to protect customers from paying for the costs of a plant that is not "*used and useful*." As explained in detail by the Attorney General, Kentucky jurisprudence and Commission precedent favor the exclusion from customers' rates of the costs of a plant that is not "*used and useful*."¹⁷ Though the "*used and useful*" test is not necessarily the single controlling factor in determining whether rates are "*fair, just, and reasonable*," it is a vital part of that inquiry.¹⁸ The Commission seems to implicitly concede that the Coleman plant is not "*used and useful*" by repeatedly referring to it as "*excess capacity*." Yet the Commission's decision will result in customers paying for 100% of that plant even though the Coleman plant is not "*used and useful*" to Big Rivers' remaining customers.

It is not a balance of interests to make customers pay either now or later for all of Big Rivers' uneconomic excess capacity. The Commission may believe that Big Rivers' current excess capacity is not the result of imprudent actions or decisions by Big Rivers,¹⁹ but that does not detract from the fact that customers are equally blameless. Further, customers do not benefit from the excess capacity caused by granting the smelters market-based rates for generation supplied by Kenergy. As the Commission itself stated, "*[i]t would simply not be fair to require ratepayers to pay all of [sic] costs of the excess*

¹⁷ AG Brief at 23-25 (citing *Fern Lake Co. v. Public Service Comm'n*, Ky., 357 S.W.2d 701, 704-705 (1962); *Blue Grass State Telephone Co. v. Public Service Comm'n*, Ky., 382 S.W. 2d 81, 82-83 (1964); *In Re Kentucky-American Water Co.*, Case No. 8571, Order (Feb. 17, 1983); *In Re Kentucky Utilities Co.*, 52 PUR 4th 406, 436 (1983); *In Re Kentucky Power Co.*, Case No. 8904, Order (Sept. 11, 1984); *In Re Kentucky Power Co.*, Case No. 8734, 56 PUR 4th 151, 156, Order (Sept. 20, 1983); *In Re South Central Bell Telephone Co.*, Case No. 9160, Order (May 2, 1985); *In re A Formal Review of the Current Status of Trimble County Unit No. 1*, Case No. 9934, Order (July 1, 1988); KIUC Brief at 11 (citing *In Re Big Rivers*, Case No. 9613, Order (May 6, 1985) and *In Re Big Rivers*, Case No. 9885, Order (Aug. 10, 1987).

¹⁸ *National-Southwire Aluminum Co. v. Big Rivers Elec. Corp.*, 785 S.W. 2d 503, 510 (January 26, 1990) (stating that "[a] determination of what is used and useful is one of many factors which should be considered when establishing rates" and "...we nevertheless conclude that the PSC gave adequate consideration to all applicable factors, including the used and useful facilities of Big Rivers.").

¹⁹ Order at 19.

capacity.”²⁰ The Commission should follow-through on this statement and modify its Order to actually protect customers from paying all of the costs of Big Rivers’ excess capacity, both now and in the future.

KIUC did not propose its depreciation expense adjustment as a remedy for Big Rivers’ excess capacity issues. Rather, KIUC advocated the exclusion of depreciation expense as a standard revenue requirement adjustment pursuant to general accounting principles, which provide that depreciation on idled generating assets should cease while the asset is idled. But if the Commission is going to use the Coleman depreciation expense as the mechanism for addressing excess capacity, then it must completely exclude that depreciation expense from customers’ rates now and ensure that it is not recovered retroactively in the future.

Deferring the Coleman depreciation expense for future recovery is not a balanced remedy for resolving Big Rivers’ excess capacity issues. The appropriate remedy for the excess capacity is to permanently disallow and completely exclude the depreciation expense from customer rates, regardless of whether Big Rivers continues to book the depreciation expense for accounting purposes. By “*completely exclude*,” Joint Intervenors mean that the Commission would not allow Big Rivers to defer the Coleman depreciation expense for future recovery from customers. If at some point in the future Coleman no longer represents excess capacity, then the Commission should allow Big Rivers to begin prospectively recovering Coleman depreciation expense, but not retroactively for the period in which the Coleman plant was excess capacity.

Big Rivers hopes that it will procure sufficient replacement load to supplant the loss of the smelters is realistic and that its excess capacity problems are only temporary. Big Rivers, however, has provided scant evidence that such hope will pan out. Nevertheless, if the replacement load materializes, then the generating capacity which is now excess may once again become “*used and useful*.” At that

²⁰ Order at 19.

time the recovery of depreciation expense could commence. This regulatory outcome would give the utility and its creditors a real incentive to cure the structural imbalance between load and generation supply. A mere deferral with a regulatory promise of future recovery is no incentive to find a balanced solution.

ASSIGNMENT OF ERROR #2: The Commission's Order fails to account for recent MISO filings at FERC indicating that Big Rivers will likely receive \$12.313 million more for the Coleman units as a result of its SSR Agreement than was reflected in the Commission-approved revenue requirement.

The Commission's Order rejected the arguments of intervenors that Big Rivers did not properly update its proposed test period for post-application events and changes of circumstance, concluding that Big Rivers' forecasted test period was "reasonable."²¹ But recently changed circumstances have exposed problems with the Commission's approach that, if left unaddressed in this case, will result in an overstated revenue requirement for the 5-month period from August 20, 2013 through January 31, 2014 before the rates resulting from the Sebree rate case will become effective.

When this case was being litigated, the proposed language of the SSR Agreement between MISO and Big Rivers' related to the Coleman unit was not available for review because it was still being negotiated. Hence, it could not with reasonable diligence have been offered at the hearing in this case. Instead, both the Commission and the parties were left to rely upon Big Rivers' estimate of the costs that it would recover from MISO (or from Century in lieu of MISO) under a final SSR Agreement.

In its filing in this case, Big Rivers resolved this uncertainty in its own favor and in a manner that overstated the revenue requirement it needed to collect from customers. Specifically, Big Rivers assumed that MISO would limit the SSR "Fixed Component of Compensation" to the avoided payroll costs and fixed departmental expenses in the test year and the effects of the avoided non-environmental

²¹ Order at 6.

capital costs.²² On the basis of Big Rivers' representations, the Commission allowed recovery of all other fixed Coleman plant costs in the revenue requirement, including the remaining payroll costs and fixed departmental expenses that it would incur during the shutdown, all of the property tax and property insurance expenses, all of the depreciation expense, and all of the interest and TIER margin on its related debt financing, including the additional interest and TIER from the additional capital expenditures on the Coleman plant while it was shut down.

Recent MISO filings at FERC, however, indicate that Big Rivers likely underestimated the costs it will recover under the SSR Agreement with MISO. The proposed SSR Agreement between MISO and Big Rivers (dated November 1, 2013) is now available for review and MISO has made a filing at the FERC seeking its approval.²³ Exhibit 2 to Attachment D of the MISO filing provides that Big Rivers would receive a monthly amount of \$3.415 million for the Fixed Component of Compensation for Coleman Units 1-3 under the proposed SSR Agreement. This equates to an annual amount of \$40.974 million. Despite their clear relevance, Big Rivers has not filed these proposed SSR documents here.

In these recent FERC filings, Big Rivers' Chief Operating Officer describes the individual components making up the \$40.974 million that it will receive from MISO. These include:

- \$32.058 million in "fixed operating costs," (non-labor O&M costs, plant labor, general and administrative costs, and property taxes and insurance");
- \$0.715 million for a 7.85% return on net rate base;²⁴ and
- \$8.201 million in capital costs.²⁵

The proposed \$40.974 million in total SSR revenue is substantially greater than the \$28.661 million savings in fixed costs reflected by Big Rivers in its filing and accepted by the Commission in its

²² Confidential Exhibit Berry Rebuttal-2.

²³ FERC Docket No. ER14-292-000, Application and Exhibit D (Attached).

²⁴ Defined as fuel inventory, reagent, and materials and supplies.

²⁵ FERC Docket No. ER14-292-000, Exhibit E (Attached).

test year revenue requirement.²⁶ The proposed SSR revenue is \$12.313 million greater than the estimated fixed cost savings that the Commission reflected in the test year revenue requirement. This additional \$12.313 million in savings results from \$4.112 million in additional fixed costs and \$8.201 million in capital costs that Big Rivers would collect from MISO while the SSR Agreement, if approved by FERC in its current form, is in effect. This means that the rate increase granted by the Commission is likely excessive. Now that the actual SSR revenue that Big Rivers will receive from MISO is known, the Commission should reduce Big Rivers' rate increase by \$12.313 million (or the final amount approved by FERC) for as long as the SSR Agreement is in effect.

At minimum, the Commission should reduce Big Rivers' rate increase by \$4.112 million (or the final amount approved by FERC) for as long as the SSR Agreement is in effect because \$4.112 million of the additional \$12.313 million in proposed SSR revenue that Big Rivers will likely receive from MISO specifically relates to fixed costs savings. In addition, though the \$8.201 million in capital costs that Big Rivers will likely receive from MISO may not have been included in its revenue requirement in this proceeding, it should also be used to reduce the Commission-established revenue requirement. The MISO reimbursement for capital costs essentially converts them into an expense compared to traditional ratemaking for capital costs. Accordingly, the \$8.201 million in capital costs and the \$4.112 million in fixed costs that Big Rivers will likely recover from MISO should immediately be used to reduce the Commission-approved revenue requirement.

Once FERC approval is secured, Big Rivers will be entitled to the SSR revenue from MISO as of August 20, 2013. Though the SSR Agreement with MISO is effective as of September 1, 2013, Century is obligated to pay Big Rivers the equivalent amount of revenue they would have received if there had been an SSR Agreement in place starting on August 20, 2013 pursuant to the terms of the *Direct*

²⁶ Order at 38.

Agreement between Big Rivers and Century approved by the Commission in Case No. 2013-00197. Thus, the Commission should reduce the rates to reflect the additional revenue to Big Rivers not reflected in the Commission-established revenue requirement effective as of August 20, 2013 and require the issuance of refunds for the entirety of this rate-effective period.

Procedurally, the Commission can reduce rates and direct the issuance of refunds simply by granting this rehearing and comparing the proposed SSR annual revenue of \$40.974 million (or the final amount approved by FERC, if modified) to the \$28.661 million in Coleman costs that it removed from the test year revenue requirement. Alternatively, the Commission could re-open the record in this proceeding to take additional evidence on this issue.

Joint Intervenors note that the revenue requirement resulting from this case will only be effective until January 31, 2014. If Coleman continues to operate under the SSR Agreement for that entire period, then the additional \$12.313 million in savings (or the final amount approved by FERC) should be used to reduce customers' rates for that entire period. However, if Coleman is idled before January 31, 2014, then Big Rivers will no longer collect SSR revenue as of that date. In that instance, there are still savings to Big Rivers that should be reflected in customers' rates. Specifically, Big Rivers would then begin receiving \$7.737 million annually in transmission revenues from Century for the Hawesville Smelter. That transmission revenue would no longer be used to offset Century's SSR costs. Thus, if Coleman's SSR status ends prior to January 31, 2014, the Commission should no longer lower customers' rates to recognize the additional SSR revenues from MISO, but instead should lower customers rates by \$7.737 million annually to recognize the transmission revenue Big Rivers will begin receiving from Century.

ASSIGNMENT OF ERROR #3: The Commission's Order fails to provide specific parameters regarding the implementation of Big Rivers' load mitigation plan.

The Order states that the Commission *"find[s] it reasonable to afford Big Rivers the time to pursue its mitigation strategies, including operational changes to reduce costs, seeking to acquire replacement load, increasing off-system sales, and attempting to sell or lease its generating facilities."*²⁷ Yet the Order fails to specify how much time the Commission will allow Big Rivers before assessing whether its mitigation strategies have failed. Nor does it set forth any specific parameters regarding the implementation of Big Rivers' mitigation plan, including any parameters that could be used to assess whether the plan has failed.

Consequently, as it stands now, Big Rivers has an unlimited amount of time to implement its mitigation plan and no specific goals that it must achieve. This is unreasonable. As the Commission is well aware, once a rate increase is approved, it is permanent. Unless the Commission sets forth specific parameters that Big Rivers must adhere to in implementing its mitigation plan, then its customers will be left on the hook indefinitely to continue to pay for rate increases that may never be alleviated. To address this issue, the Commission should define achievement goals (such as the amount of replacement load that Big Rivers must secure by certain dates), identify consequences that would be imposed if those goals are not met (such as a requirement that Big Rivers file another rate case), and make clear that it will review anew the reasonableness and progress of the mitigation plan in the already-filed rate proceeding in Case No. 2013-00199. Procedurally, the Commission can take such action by granting this rehearing or re-opening the record in this proceeding. Doing so is necessary to protect customers from permanent rate increases that may never be alleviated if Big River's proposed mitigation strategies fail.

²⁷ Order at 19.

WHEREFORE, Joint Intervenors respectfully request that the Commission reexamine and modify its Order to correct the errors discussed herein.

Respectfully submitted,



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November 20, 2013



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November 1, 2013

VIA ELECTRONIC FILING

Honorable Kimberly D. Bose
Secretary
Federal Energy Regulatory Commission
888 First St., N.E.
Washington, D.C. 20426

**Re: Midcontinent Independent System Operator, Inc.
System Support Resources Agreement with Big Rivers Electric
Cooperative; Docket No. ER14 - ____ -000**

Dear Secretary Bose:

Pursuant to Section 205 of the Federal Power Act ("FPA"), 16 U.S.C. § 824d and Part 35 of the Federal Energy Regulatory Commission's ("FERC" or "Commission") regulations, 18 C.F.R. § 35, *et. seq.*, the Midcontinent Independent System Operator, Inc. ("MISO") respectfully submits to FERC for approval a System Support Resource ("SSR") Agreement by and between Big Rivers Electric Cooperative ("Big Rivers") and MISO. The SSR Agreement submitted herewith generally conforms to the *pro forma* agreement in Attachment Y-1 of MISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff ("Tariff").¹

I. BACKGROUND

The SSR Tariff provisions permit MISO to negotiate compensation for selected Generation Resources² where a Market Participant desires to retire or suspend operation of a facility but MISO determines that the facility is needed to maintain system reliability.³ Market Participants must submit an Attachment Y Notice to MISO at least 26 weeks in advance of any plan to retire or suspend operation of a generation unit or a Synchronous Condenser Unit. Based upon information submitted by the Market Participant, and MISO's knowledge of grid conditions, MISO will determine if the facility should be designated as an SSR Unit. Upon such

¹ On September 21, 2012, the Commission conditionally approved amendments to the SSR provisions in the Tariff to become effective on September 24, 2012, subject to compliance filings. See *Midwest Indep. Transmission Sys. Operator, Inc.*, 140 FERC ¶ 61,237 (2012) ("SSR Order"); see also *Compliance Filing of the Midwest Indep. Transmission Sys. Operator, Inc.*, FERC eLibrary Accession No. 20121218-5147, Docket No. ER12-2302 (filed Dec. 18, 2012).

designation, MISO will enter into agreements with Market Participants that own or operate an SSR Unit to allow for recovery of certain going-forward costs, offset by any expected payments for resource adequacy and net revenues from energy market transactions. The costs pursuant to an SSR Agreement generally are assigned to the entities serving load in the affected control areas (*i.e.*, Load Serving Entities or “LSEs”).⁴

Big Rivers owns the Coleman facilities located near Hawesville, Kentucky in the northern portion of that state. These facilities include four generating units, the first three of which provide 443 MW of capacity that are the subject of this submission. Coleman has coal-fired steam boilers that were installed in the 1969-1971 period. On December 19, 2012, Big Rivers submitted an Attachment Y-2 (Request for Non-Binding Study Regarding Potential SSR Status) to MISO in order to assess the potential suspension of Coleman Units 1-3, beginning on August 20, 2013 and resuming operations January 1, 2015. MISO completed its analysis of the Attachment Y-2 request, identifying reliability issues associated with the suspension of these units, and MISO provided a response to Big Rivers on May 2, 2013. The MISO Tariff permits the Market Participant to submit an Attachment Y Notice following an Attachment Y-2 that requests a change in status 26 weeks from the date of the original Attachment Y-2 request. On May 24, 2013, Big Rivers submitted a letter to MISO indicating its desire to suspend Coleman for a period of twenty-eight months, and included an Attachment Y Notice that designated September 1, 2013 as the beginning for the suspension.

MISO completed its analysis of the Attachment Y Notice and Mr. Jeffrey R. Webb, MISO’s Senior Director of Expansion Planning, notified Big Rivers that Coleman would be designated an SSR Unit until such time as appropriate alternatives could be implemented to mitigate reliability issues. MISO concluded that the proposed suspension of Coleman during the twenty-eight month suspension period, without curtailment of load by means of demand response, would result in violations of specific applicable reliability standards. As a result, MISO designated Coleman as an SSR Unit until such time as appropriate alternatives can be implemented to mitigate reliability issues.

² Capitalized terms not otherwise defined herein have the meanings ascribed thereto in Section 1 of the Tariff.

³ See generally SSR Order at PP 2-4 (discussing the approval of the SSR provisions).

⁴ See Section 38.2.7.k of the Tariff (formerly Section 38.2.7.j).

MISO began working with Big Rivers and the MISO Independent Market Monitor (“IMM”) to negotiate and develop an appropriate SSR Agreement. Big Rivers submitted a draft SSR Agreement for MISO’s consideration, and Big Rivers proposed a twelve (12) month SSR Agreement for the period between September 1, 2013 and August 31, 2014. Big Rivers has voluntarily continued operating Coleman through the present time.

II. KEY ELEMENTS OF THE SSR AGREEMENT

MISO submits the enclosed SSR Agreement to the Commission for approval as a just and reasonable agreement to ensure Transmission System reliability in the MISO Region. The SSR Order required, among other things, that MISO: (1) submit an SSR Agreement for Commission approval; (2) provide a description of alternatives that were evaluated; (3) discuss the estimated earliest termination date for the SSR Agreement; and (4) explain how MISO would ensure grid reliability once the SSR Unit retires.⁵ As discussed herein, the SSR Agreement maintains the reliability of the MISO system and, as the Tariff requires, provides for equitable compensation for the SSR Unit’s continued availability.

A. Proposed Modifications to the Attachment Y-1 Form Agreement

As discussed herein, there are “novel legal issues or other unique factors” that justify departures from the *pro forma* SSR agreement⁶ and that are consistent with Commission precedent. Specifically, MISO proposes several modifications in the enclosed SSR Agreement to the form agreement found in MISO compliance filing in late 2012 that proposed slight modifications to the Attachment Y-1 found in MISO’s Tariff,⁷ including:

(1) “MISO” is used throughout the Agreement to designate the current name for the Midcontinent Independent System Operator;

⁵ SSR Order at P 10.

⁶ See *Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,170 (2013) (granting MISO the authority to depart from the Attachment Y-1 *pro forma* SSR Agreement); see also *New York Indep. Sys. Operator*, 139 FERC ¶ 61,180 (2012); *Pacific Gas and Electric Co.*, 128 FERC 61,175 (2009) (“The Commission recognizes that allowing non-conforming agreements may result in interconnection customers being treated differently, but nonetheless finds it to be necessary in certain situations.”); see e.g., *Midwest Indep. Transmission Sys. Operator*, 131 FERC 61,199, 62 (2010) (accepting non-conforming interconnection agreement is necessary to allow entities to retain the distinct status afforded to them by Minnesota law); *Florida Power & Light Co.*, 118 FERC ¶ 61,176 (2007) (permitting departure from *pro forma* indemnification provision in LGIA); *Midwest Indep. Transmission Sys. Operator*, 112 FERC 61,270 (2005) (granting departures from *pro forma* LGIA “because of the ownership structure of the wind generating facilities.”).

⁷ *Compliance Filing of the Midwest Indep. Transmission Sys. Operator, Inc.*, FERC eLibrary Accession No. 20121218-5147, Docket No. ER12-2302 (filed Dec. 18, 2012). The compliance filing is the basis for the redlined SSR Agreement. See Exhibit C.

(2) Section 3.A(3) has been modified to provide for “at least sixty (60) days” notice of termination to reflect MISO’s intent to provide advance notice to Big Rivers, but for a shortened period from the *pro forma* “ninety (90) days” in order to better permit an alternative to SSR service to be implemented. Section 3.B also reflects the scenario by which an alternative to the SSR Agreement (a SPS scheme, as discussed below) is developed and Big Rivers requests termination of the SSR Agreement (which can also be partial, as provided in Section 3.C);

(3) Abbreviations for the Federal Energy Regulatory Commission, “FERC” and “Commission,” are added for clarification to Section 3.B (an abbreviation is extensively used in Section 9 of the SSR Agreement);

(4) Section 3.D recognizes that two-hour advance notice that is provided for under Section 7.A(2) of the *pro forma* agreement cannot be practically provided in writing;

(5) Section 4.A(1) identifies the jurisdiction in which Big Rivers is authorized to do business (i.e. the “Commonwealth of Kentucky”);

(6) Section 4.A(5) and (6) use the lower case for “prior agreement,” recognizing that the term is not set out for special definition in either the SSR Agreement or MISO’s Tariff;

(7) Section 4.A(9) defines the term “Bankrupt” using terms from MISO’s Tariff;

(8) Section 7.A(1) clarifies that a capacity test does not include a “ramp-up period” that would reduce the test value for a generating unit;

(9) Section 7.C(3) contains a change from “purchase” to “dispatch” to more precisely describe the action taken by MISO towards the SSR Unit;

(10) A new provision has been added as Section 7.D, clarifying that the SSR Unit will be subject to the Module E-1 capacity testing requirements that became effective on October 1, 2012, which are not included in the *pro forma* SSR Agreement.⁸ The Module E-1 capacity testing requirements will not preempt the approved Capacity Tests in Section 7.A of the Agreement;

(11) A new provision has been added as Section 7.E, stating that MISO and Big Rivers will coordinate their schedules to permit Big Rivers to undergo both testing for capacity and for other requirements (such as for “environmental and insurance requirements”);

⁸ On June 11, 2012, the Commission conditionally approved MISO’s new Module E-1 Tariff language, to become effective on October 1, 2012. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 139 FERC ¶ 61,199 (2012).

(12) The Operation provisions in Section 8 have been revised to clarify maintenance, planning data, and delivery obligations to be consistent with other Tariff provisions.⁹ Section 8 contains certain changes necessary to align the SSR Agreement with the current structure of the MISO markets and the date upon which the SSR Agreement was finalized for filing. Section 8.A. clarifies that Participant shall follow MISO's outage scheduling system and that MISO shall approve or reject Generator Planned Outages in accordance with MISO's Business Practices Manuals. Section 8.B clarifies Participant's obligations to notify MISO of the availability of the SSR Unit. Section 8.C clarifies that MISO shall notify Big Rivers of the hours and levels, if any, that the SSR Unit is to operate through day-ahead commitment and real-time dispatch for system reliability. Section 8.C further clarifies that the set point in the real-time dispatch shall be considered the "Delivery Plan" for the purposes of the SSR Agreement. These changes ensure that MISO and Big Rivers have a common understanding of how the SSR Unit is to be made available to MISO for system reliability and the SSR Unit may be otherwise operated. Section 8.C also clarifies that all Offers from the SSR Unit during the term of the SSR Agreement shall be cost-based;

(13) The responsibilities for providing information regarding Operational Limitations is placed on the incorrect party in Section 8.B(3), and that matter is corrected in conformance with the general obligations on the Participant in Section 8.B and regarding the Environmental Limitations that are partly the topic of Section 8.B(3);

(14) The Payment Provisions in Section 9 are modified to reflect MISO Settlement provisions and the terms/conditions of Exhibit 2;¹⁰

(15) Section 9.D(3) has been modified to clarify that the SSR Agreement is entered into to ensure the reliability of the "MISO Transmission System," as that term is defined in Section 1.677 of the MISO Tariff;

(16) Section 9.D(4) has been modified to clarify that the ceiling on lowering payments to Big Rivers as the result of a Misconduct Event applies to all Coleman units subject to the SSR Agreement;

(17) Section 9.D(7) has been added to clarify that SSR payments are reduced if the Tested Capacity falls sort of the SSR Capacity (defined in Section 1.E) and if the SSR Unit does not fully respond to MISO dispatches under circumstances where the reductions are unexcused. Since Billing Capacity is only reduced under certain circumstances, specified in Section 9.D(7),

⁹ Section 38.2.5.g of MISO's Tariff requires that all Market Participants coordinate their Generator Planned Outage schedules with MISO, which occur through MISO's CROW procedures.

¹⁰ Attachment Y-1 did not include Tariff details regarding cost recovery provisions when it was originally drafted, which are included in Exhibit 2 as required by the SSR Order. *See* SSR Order at P 140.

the term “may be reduced” is used in Section 7.C regarding the effect of a capacity test on Billing Capacity;

(18) New provisions were added to Section 9.E to address compensation for unanticipated repairs. This section provides an equitable mechanism for Big Rivers to receive cost recovery for unanticipated repairs required to maintain system reliability. Section 9.E also provides that MISO will make a Section 205 filing before any such unanticipated repair costs are incurred by Big Rivers, except in the case of certain emergency repairs. These provisions protect MISO and LSEs by requiring a Section 205 filing before non-emergency unanticipated repair costs are incurred, at which point the Commission would determine the necessity of allocating the unanticipated repairs costs to LSEs pursuant to Schedule 43F;¹¹

(19) Section 9.F was included to reference to the allocation of SSR Agreement costs to LSEs that benefit from the operation of the subject SSR Unit, in accordance with MISO Schedule 43F, which is being filed concurrently;

(20) Good Utility Practice, as that term is used in MISO’s Tariff, is inserted into Section 10 to further explain the obligations to restore conditions to those contemplated by the SSR agreement following any material breach of the SSR Agreement;

(21) Section 13.A contains references to Indiana as the choice in law (the location of MISO’s headquarters), made consistent with the provision in Section 11.A regarding monetary damages as provided for under Indiana law;

(22) Section 13.B(1)(c) provides for notification to the other party under circumstances where collateral financing is arranged, but that notification comes from the assigning party as opposed to a third party since Big Rivers’ financial instruments do not normally include such provisions regarding third parties. This Section also includes a parenthetical definition of “Financing Person,” a defined term that is later used in this same section of the *pro forma* agreement;

(23) Section 13.C through 13.P are re-lettered for clarity and readability purposes; and

(24) Exhibit 2 was drafted to provide a description of how Big Rivers will be compensated for the fixed component of costs and the variable component for instances where MISO dispatches Big Rivers for system reliability purposes. Reference is made to the applicable Tariff Settlement provisions. Sections 9 has been adjusted to correspond to the compensation and settlement provisions arrived at by MISO and Big Rivers.

The proposed modifications are also generally consistent with the enhancements that were conditionally approved by the Commission in the SSR Order, and are just and reasonable given the subject SSR Unit.

¹¹ See SSR Order at P 139.

B. Review of Feasible Alternatives

The SSR Agreement is being filed pursuant to Section 38.2.7 and Attachment Y-1 of the Tariff that (among other matters) require MISO to “assess feasible alternatives”¹² to entering into an SSR Agreement. MISO has assessed available feasible alternatives to entering into the SSR Agreement, as described in more detail in the enclosed Exhibit B (Attachment Y Study Report).¹³ These assessments cover the topics of new generation or generation dispatch, system reconfiguration and operation guidelines, demand response, and transmission projects.¹⁴

Following the Attachment Y determination, MISO evaluated potential mitigation measures (further discussed in the following section) to address the thermal and voltage issues resulting from the Coleman suspension. Limited generation in the area was already committed and did not provide feasible redispatch solutions to alleviate the voltage and thermal issues. Existing operating guides and transmission reconfiguration options do not address the voltage or thermal loading issues, and create further issues for the next contingency. Transmission upgrades could not be implemented within the timeframe for the suspension period. Analysis of demand response was conducted to determine the effectiveness of load shedding for the nearby industrial customer, and a number of further discussions were conducted with Century Aluminum to evaluate possible plans to develop a load curtailment option.

C. Review of Feasible Alternatives with Stakeholders

The Attachment Y Study report states the alternatives to the SSR Agreement that were reviewed. Since Coleman is a suspension, transmission upgrades will not be in place before the expected return of Coleman to service. Order 890 and recent FERC orders related to MISO’s

¹² Section 38.2.7.c of the Tariff.

¹³ SSR Order at P 80; *see* Exhibit B, Attachment Y Study Report at 10-12 (providing: (i) a general description of the types of transmission switching operations and specific operating procedures that MISO has developed to mitigate System Operating Limit violations in the operational timeframe (Section VII.b); (ii) a description of the specific transmission switching operations and operating procedures that MISO evaluated in relation to this proceeding (Sections VII.a and V.b); and (iii) why each evaluated transmission switching operation or operating procedure was determined not to be a feasible alternative (Section VII)). MISO includes a similar, three-part analysis for the other categories of potential alternatives to an SSR Agreement considered (*e.g.*, redispatch/reconfiguration through operating procedures, remedial action schemes, and demand response) and combinations of those options (Section VII).

¹⁴ See Exhibit B, Attachment Y Study Report at 12-13.

SSR filings require MISO to carefully consider transmission, generation, and demand response alternatives to address the local reliability issue.¹⁵

The SSR status of Coleman is expected to continue until load curtailment arrangements by means of demand response from Century Aluminum, a smelter in the area near Coleman, are in place to adequately address possible transmission system overloads. The Attachment Y Study Report (attached Exhibit B) further discusses this alternative.

The demand-side management and special protective scheme alternatives that have undergone discussion with Century Aluminum were discussed at a Central Transmission System Task Force stakeholder conference on July 25, 2013. No significant feedback was received from the participants (approximately a dozen participants) on (1) redispatch or reconfiguration; (2) other remedial action plans or special protection schemes; (3) other demand response or generation alternatives; or (4) any other alternatives.

MISO and Century Aluminum engaged in several meetings and conference calls to develop a plan to allow the industrial load to be curtailed for reliability issues that resulted from the unplanned system conditions. In those discussions, MISO and Century Aluminum considered operating procedures that would permit manual load curtailment actions. These discussions were discontinued since the requirements proved too restrictive to the customer.

Century Aluminum proposed, and began designing, a special protection scheme (“SPS”) that would allow more flexibility to shed load automatically by employing relay equipment to monitor conditions and trip blocks of plant load to reduce loading on the transmission facilities. Century Aluminum continues to coordinate the development of the relay scheme with the Transmission Owners and MISO in order to complete the design, but has not yet finalized the

¹⁵ See SSR Order at P 10 (requiring the consideration of alternatives to SSR Agreements); see also *Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,215, at PP 29, 41 (2013) (stating in an Order on Order No. 1000 Compliance Filings and Tariff Revisions that: “[a] primary objective of the reforms in Order No. 1000 is to ensure that transmission planning processes at the regional level consider and evaluate, on a nondiscriminatory basis, possible transmission alternatives and produce a transmission plan that can meet a transmission planning region’s needs more efficiently and cost-effectively” (citing *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 4, 6 (2011), *order on reh’g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh’g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012)) and “when evaluating the merits of alternative transmission solutions, proposed non-transmission alternatives must be considered on a comparable basis” (citing Order No. 1000 at P 148)); see generally *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh’g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh’g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh’g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

work. Once the design has been approved and implemented, MISO would allow the SPS to provide the necessary load reductions to address the issues and allow the Coleman plant to suspend operations. The SSR Agreement accommodates this development where it provides, in Section 3.A(3), for termination upon sixty days written notice instead of the 90 days provided in the *pro forma* agreement in order to more rapidly change to using the SPS as a substitute for Coleman's SSR status.¹⁶

D. Likely Timing for SSR Agreement Termination

The SSR Order requires that MISO report on its estimate of how long the SSR Agreement will need to remain in effect,¹⁷ and also directs MISO to modify the Attachment Y-1 *pro forma* SSR Agreement to include language that an SSR Agreement must not exceed a one-year term, except in exigent circumstances.¹⁸ Although the SSR Agreement would normally be required for the entirety of the suspension period proposed by Big Rivers for Coleman, the SPS measures discussed above may eliminate the need for the SSR designation for Coleman. Therefore, MISO intends to continue to monitor the SPS developments such that the SSR designation is a last resort measure to maintain Transmission System reliability.

Moreover, pursuant to Section 38.2.7.1 of the Tariff,¹⁹ MISO shall annually review the SSR Unit and grid characteristics to determine whether the SSR Unit is qualified to remain as an SSR Unit. Additionally, under both the Tariff and the *pro forma* Attachment Y-1 SSR Agreement, MISO retains the right to terminate this SSR Agreement prior to the end of the Term by giving written notice to the Participant. As discussed above, the *pro forma* provision for ninety days written notice has been modified in the SSR Agreement to provide sixty days. This modification should provide a better opportunity to switch to SPS operation to render the SSR Agreement unnecessary. In accordance with Section 38.2.7e²⁰ of the Tariff, the proposed term of the SSR Agreement is twelve months.

E. How MISO Will Maintain System Reliability After the SSR Agreement Terminates

As described in the Attachment Y Study Report, alternatives to the SSR Agreement were reviewed in light of submission by Big Rivers of a request to Suspend operations at Coleman. Transmission upgrades will not be in place before the return of Coleman to service, and therefore transmission upgrades are not planned for service after the SSR Agreement terminates. Such termination could occur before the end date for the suspension if load curtailment arrangements are in place to adequately address possible transmission system overloads.

¹⁶ Sixty days was selected in order to conform to the Commission's termination requirements, 18 C.F.R. § 35.15 (2013).

¹⁷ SSR Order at PP 134-135.

¹⁸ *Id.* at P 106.

¹⁹ See also former Section 38.2.7.j of the Tariff.

²⁰ See also former Section 38.2.7.d of the Tariff.

F. Proposed Effective Date of SSR Agreement

As discussed in the contemporaneously filed transmittal letter for Schedule 43F, MISO requests a September 1, 2013 effective date for the SSR Agreement as well as for Schedule 43F. Big Rivers' Attachment Y Notice to MISO, dated May 24, 2013, requested to suspend Coleman on September 1, 2013. MISO completed its reliability analysis and deemed the Coleman required for reliability notified Big Rivers that the subject facilities qualified to become an SSR Unit. As required by the Tariff, MISO and Big Rivers entered into good faith negotiations over the proper compensation to include in the SSR Agreement. Through the present date, Big Rivers has maintained the availability of the subject SSR Unit (*i.e.* Units 1-3 remained available to maintain system reliability) pursuant to MISO's request, and Big Rivers incurred costs that would otherwise be covered by the rate contained in the SSR Agreement. The SSR agreement and the associated Schedule 43F are being submitted as soon as possible following the complexities involved in working through the notification, evaluation, decision-making, and negotiation process, including those related to working through a demand response alternative to designating Coleman as an SSR Unit.

MISO respectfully requests that the September 1, 2013 effective date be granted either through waiver of the prior notice rule or by treating the SSR Agreement as a late-filed service agreement. Good cause exists to grant the waiver of the prior notice rule. The delay in filing the SSR Agreement was a consequence, in part, of the fact that negotiation of the SSR Agreement could not be completed by the requested effective date, but the Tariff required the SSR Units to remain available. Notwithstanding this delay, Big Rivers has maintained its SSR Unit and ensured that it was available to maintain reliability.

The waiver is also required to permit MISO to comply with its Tariff and Commission precedent on the SSR program. Section 38.2.7 of the Tariff provides that SSR Units are due "equitable compensation" in exchange for maintaining availability past its required shut-down date, in this case, September 1, 2013. Moreover, in approving the SSR program, the Commission explained that the SSR Units should be "fully compensated" and that "nothing in the SSR program would require a generator to absorb any uncompensated going-forward costs."²¹ If the September 1, 2013 effective date is not granted for the SSR Agreement and Rate Schedule 43F, then Big Rivers will have provided SSR service on an uncompensated basis while the required Tariff process took its course. This would be an inequitable outcome, and one that would seem to violate both the Tariff and Commission precedent.

To the extent that the Commission believes that waiver of prior notice is not appropriate, MISO respectfully requests that the Commission treat the SSR Agreement as a late-filed service agreement, limiting Big Rivers' revenue recovery to variable operations and maintenance costs

²¹ See also *Midwest Indep. Transmission Sys. Operator, Inc.*, 109 FERC ¶ 61,157, at P 293 (2004) ("Finally, we emphasize that all SSR units should be fully compensated for any costs incurred because of their extended service. For example, nothing in the SSR program would require a generator to absorb any uncompensated going-forward costs.").

from September 1, 2013 to October 2, 2013, the latter date being that which the SSR Agreement and Rate Schedule 43F would be effective under the 30-day rule for service agreements, so that Big Rivers would not be required to provide this reliability service at a loss.²²

In the alternative, to the extent the Commission does not grant the requested September 1, 2012 effective date, MISO requests an effective date of October 2, 2013, consistent with the Commission's rule that service agreements must be filed within 30 days of commencing service.²³ The SSR Agreement is a *pro forma* agreement included in the Tariff, the executed versions of which are therefore service agreements.

For the foregoing reasons, MISO respectfully requests that the Commission waive its sixty (60) day notice requirement, as specified in Section 35.3(a) of the Commission's regulations, 18 C.F.R. § 35.3(a), and make the SSR Agreement effective as of September 1, 2013. To the extent that the Commission determines that any requirement of 18 C.F.R. § 35 apply that have not been specifically addressed herein, MISO respectfully requests waiver of such requirements.

G. SSR Cost Determination

Consistent with SSR Order,²⁴ MISO has negotiated in good faith with Big Rivers to develop just and reasonable rates to compensate Big Rivers for operating the SSR Unit. The enclosed Direct Testimony of Robert W. Berry, enclosed as Exhibit E, supports such proposed rates.²⁵ The compensation provided to Big Rivers for its SSR Unit status is just and reasonable and is no more than necessary to maintain the availability of the SSR Unit for such time as needed to maintain reliability.²⁶ The IMM and MISO have reviewed the financial operating cost information provided by Big Rivers for Coleman and have agreed to a negotiated monthly amount of \$3,414,502 as equitable compensation for maintaining three Coleman units in

²² Under the Commission's policy for late-filed agreements, sellers are still permitted to recover their variable Operating and Maintenance costs so that they are not required to operate at a loss. See *Int'l Transmission Co.*, 140 FERC ¶ 61,151, at P 26 (2012) ("As noted by ITC, the Commission's time-value refund policy for late-filed agreements does not require the utility to operate at a loss; therefore, if the utility is only recovering its out-of-pocket costs incurred to provide the service, there is no requirement to make time-value refunds.").

²³ Under the Commission's regulations, public utilities may adopt standard form service agreements which are included as part of the utility's tariff on file with the Commission. 18 C.F.R. § 35.10a(a). The Commission's regulations further provide that service agreements (defined at 18 C.F.R. § 35.2 as "an agreement that authorizes a customer to take electric service under the terms of a tariff") need only be filed within thirty days after service has commenced. 18 C.F.R. § 35.3(a)(2).

²⁴ SSR Order at P 140.

²⁵ Exhibit E, Robert W. Barry Testimony at 5.

²⁶ *Id.*

operational status.²⁷ While Big Rivers maintains that a higher level of cost recovery would be justified under the Tariff, Big Rivers has agreed to the negotiated rate contained in the SSR Agreement for the purposes of timely regulatory approval and certainty.

The SSR Agreement for Coleman provides for variable generation costs when MISO dispatches the SSR Unit to maintain system reliability. The SSR Agreement also contains equitable mechanisms to ensure that when the SSR Unit is dispatched, Big Rivers will not receive market revenues above variable generation costs.

In contrast to other reliability must-run contracts filed at the Commission, the SSR Agreement does not represent a “fully loaded” cost-of-service rate. The rates do not include, for example, a rate of return on rate base, depreciation, or other cost components of a full cost-based rate.

Moreover, the termination clause of the SSR Agreement will permit MISO to terminate the agreement on 60 days’ notice in MISO’s sole discretion, so customers will not have to pay the subject SSR costs for any longer than necessary to ensure system reliability.

H. SSR Cost Recovery

The Tariff requires that the costs associated with the subject SSR Agreement will be allocated to all LSEs that benefit from the operation of the SSR Unit, as proposed in the new Rate Schedule 43F. The allocation is consistent with revised Section 38.2.7.k of the Tariff (which the Commission conditionally approved in Docket No. ER12-2302²⁸) to allocate costs pursuant to the SSR Agreement to the LSEs that require the operation of the SSR Unit for reliability purposes. Consistent with the SSR Order,²⁹ MISO is contemporaneously submitting a new Rate Schedule 43F in a separate FERC filing to address cost recovery of the subject SSR costs.³⁰

²⁷ Exhibit 2 to the SSR Agreement states a lower level of \$2,250,936 for the Monthly SSR Payment if only Coleman Units 2 and 3 are required in the future to deal with reliability concerns. The Coleman generating units have some common costs, a matter that is dealt with in providing a second level of monthly compensation.

²⁸ SSR Order at P 153; *see also* former Section 38.2.7.j of the Tariff.

²⁹ SSR Order at P 155.

³⁰ MISO respectfully requests that this filing and the related Rate Schedule 43F proceeding be consolidated, consistent with the Commission’s practice to consolidate matters where there are common issues of law or fact and consolidation will ultimately result in greater administrative efficiency. *See e.g., Sw. Power Pool, Inc.*, 125 FERC ¶ 61,001, at P 26 (2008); *Startrans IO L.L.C.*, 122 FERC ¶ 61,306, at P 64 (2008); *PP&L Resources, Inc.*, 90 FERC ¶ 61,203, at 61,653 (2000).

III. DOCUMENTS SUBMITTED WITH THIS FILING

The documents submitted with this filing include the following:

- | | | |
|------------------------|---|-------------------------------------|
| Exhibit A | - | Attachment Y Notice |
| Exhibit B – Non-Public | - | Attachment Y Study Report |
| Exhibit B – Public | - | Attachment Y Study Report |
| Exhibit C | - | Redline of SSR Agreement |
| Exhibit D | - | Clean version of SSR Agreement |
| Exhibit E | - | Direct Testimony of Robert W. Berry |

IV. EFFECTIVE DATE

MISO respectfully requests that the Commission waive its sixty (60) day notice requirement, as specified in Section 35.3(a) of the Commission's regulations, 18 C.F.R. § 35.3(a), and make this SSR Agreement effective as of September 1, 2013. To the extent that the Commission determines that any requirement of 18 C.F.R. § 35 apply that have not been specifically addressed herein, MISO respectfully requests waiver of such requirements.

V. NOTICE AND SERVICE

MISO has served a copy of this filing electronically, including attachments, upon all Tariff Customers under the Open Access Transmission, Energy and Operating Reserve Markets Tariff, MISO Members, Member representatives of Transmission Owners and Non-Transmission Owners, MISO's Advisory Committee participants, as well as all state commissions within the Region.

In addition, the filing has been posted electronically on MISO's website at <https://www.misoenergy.org/Library/FERCFilingsOrders/Pages/FERCFilings.aspx> for other interested parties in this matter.

VI. COMMUNICATIONS

Communications regarding this filing should be addressed to the following individuals, whose names should be placed on the official service list established by the Secretary in this proceeding:

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Matthew R. Dorsett*
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* Persons authorized to receive service

VII. CONCLUSION

For all of the foregoing reasons, MISO respectfully requests that the Commission accept the proposed SSR Agreement, grant the proposed effective date of September 1, 2012, and grant waiver of any Commission regulations not addressed herein that the Commission may deem applicable to this filing.

Sincerely,

/s/ Jeffrey L. Small
Jeffrey L. Small
Matthew R. Dorsett
Midcontinent Independent System Operator,
Inc.
720 City Center Drive
Carmel, Indiana 46032
Telephone: (317) 249-5400
Fax: (317) 249-5248
jsmall@misoenergy.org
mdorsett@misoenergy.org

EXHIBIT E

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

**Midcontinent Independent
System Operator, Inc.**

)
)
)
)

Docket No. ER14-____

**DIRECT TESTIMONY
OF
ROBERT W. BERRY**

October 30, 2013

1 **Q. Please state your name and business address.**

2 A. My name is Robert W. Berry. My business address is 201 Third Street, Henderson,
3 Kentucky 42420. I am employed by Big Rivers Electric Corporation, a Kentucky electric
4 generation and transmission cooperative (“Big Rivers”).

5 **Q. What is your current position with Big Rivers?**

6 A. I am the Chief Operating Officer.

7 **Q. What are your duties and responsibilities in your current role as Chief Operating
8 Officer?**

9 A. In this role, I am responsible for the operations and maintenance activities at Big Rivers’
10 four generating stations, including the Kenneth C. Coleman Generating Station in
11 Hawesville, Kentucky (“Coleman Station”). I am also responsible for Energy Services,
12 Energy Control and Transmission System activities.

13 **Q. What is the purpose of your testimony?**

14 A. I am presenting this testimony in support of the System Support Resource (“SSR”)
15 Agreement between Big Rivers and the Midcontinent Independent System Operator
16 (“MISO”) relating to the continued operation of the Coleman Station generating units.

17 **Q. Please describe the Coleman Station plant.**

18 A. Coleman Station is a coal-fired steam electric generation facility located near Hawesville,
19 Kentucky. It consists of three generating units with a combined net megawatt (“MW”)
20 capacity of 443 MW. The net capacity of the individual units is as follows: 150 MW for
21 Unit 1, 138 MW for Unit 2, and 155 MW for Unit 3.

1 **Q. Were you involved in the preparation of Big Rivers' Attachment Y notification?**

2 A. Yes. On May 24, 2013, Big Rivers submitted a completed Attachment Y notice to MISO
3 requesting permission to suspend from service the Coleman Station units effective
4 September 1, 2013.

5 **Q. Why did Big Rivers submit an Attachment Y for the Coleman Station units?**

6 A. As of August 20, 2013, a large industrial customer of one of Big Rivers' member
7 distribution cooperatives, Kenergy Corp., is no longer being served from Big Rivers'
8 generating resources. Due to the loss of this large industrial customer, Big Rivers
9 determined that it was no longer economic to continue operating the Coleman Station
10 units until such time the wholesale market prices improve or until it can sell the capacity
11 and energy previously utilized by the large industrial customer. Under the MISO Tariff,
12 a Market Participant that plans to retire or suspend all or a portion of a generation
13 resource must notify MISO by submitting a completed Attachment Y. If MISO
14 determines that continued operation of the generation resource is required to maintain the
15 reliability of the MISO-operated transmission system, MISO will designate the resource a
16 SSR and tender a draft SSR Agreement to ensure continued operation of and appropriate
17 compensation for the SSR units.

18 **Q. What was MISO's response to Big Rivers' Attachment Y notification?**

19 A. In response to Attachment Y notification, MISO informed Big Rivers that Big Rivers
20 must maintain availability of the Coleman Station units. MISO tendered a draft of the
21 SSR Agreement to Big Rivers on August 12, 2013. Subsequently, MISO completed a
22 reliability assessment confirming that the continued operation of the Coleman Station
23 units was necessary to avoid violations of applicable reliability standards.

1 **Q. Has Big Rivers maintained the availability of the Coleman Station units since**
2 **receiving notice from MISO?**

3 **A. Yes. Big Rivers has complied with MISO's request and continued to operate the plant**
4 **beyond the date specified in Big Rivers' Attachment Y notice.**

5 **Q. Absent the request from MISO to maintain the availability of the Coleman Station**
6 **units, would Big Rivers have maintained the availability of those units?**

7 **A. No. Big Rivers, having satisfied its Attachment Y notice requirements, would have**
8 **begun to suspend the operation of the Coleman Station units to limit continued**
9 **operational losses.**

10 **Q. Has Big Rivers incurred costs and or losses during the time since MISO requested**
11 **that the Coleman Station units remain available?**

12 **A. Yes. The Coleman Station units continue to lose money because the costs to operate and**
13 **maintain the units exceed wholesale market revenues.**

14 **Q. Has Big Rivers received any SSR compensation for the continued availability of the**
15 **Coleman Station units?**

16 **A. No.**

17 **Q. Were you involved in developing the proposed SSR Agreement and the costs**
18 **recovery provided therein?**

19 **A. Yes.**

20 **Q. Please describe that process.**

21 **A. Since being notified that the Coleman Station units would be needed for reliability, Big**
22 **Rivers engaged with MISO in a series of discussions regarding compensation necessary**
23 **for the continued availability of the Coleman Station units. Big Rivers provided cost data**

1 to MISO, and worked closely with MISO to determine the appropriate level of
2 compensation for maintaining the availability of the Coleman Station units for reliability.

3 **Q. Was the MISO Independent Market Monitor (“IMM”) also involved in those**
4 **discussions?**

5 A. Yes. Representatives of the IMM were involved in these discussions, and reviewed the
6 cost data.

7 **Q. Did Big Rivers make any adjustments in response to the IMM’s comments?**

8 A. Yes. In response to comments from the IMM, Big Rivers re-allocated its capital costs to
9 fixed costs, and limited some other costs, including property taxes, insurance, plant labor,
10 and operations and maintenance. I sometimes refer in my testimony to these other costs
11 as “O&M”. Big Rivers limited O&M to the difference between what O&M would be if
12 the Coleman Station units were suspended from operation versus what O&M would be if
13 Big Rivers were required to maintain the units’ availability for reliability.

14 **Q. Did Big Rivers and MISO agree on the compensation that should be provided under**
15 **the SSR Agreement?**

16 Yes.

17 **Q. Please describe the compensation provided under the SSR Agreement.**

18 A. The SSR Agreement provides for recovery of going-forward fixed and variable costs to
19 maintain the availability of the Coleman Station units for reliability. The fixed cost
20 component is based on an annual revenue requirement to cover some fixed costs related
21 to maintaining the availability of the Coleman Station units. This revenue requirement is
22 referred to in the SSR Agreement as the “Annual SSR Amount.” Subject to the terms of
23 the SSR Agreement, MISO will pay the revenue requirement for all three Coleman

1 Station units through monthly payments of \$3,414,502, representing monthly allocations
2 of the Annual SSR Amount. If the SSR Agreement is terminated with respect to Unit 1,
3 the monthly SSR payments for the remainder of the term of the SSR Agreement will be
4 reduced to \$2,250,936. The SSR Agreement separately provides for variable generation
5 costs reimbursement when the units are dispatched for reliability.

6 **Q. Please explain the cost components of the Annual SSR Amount.**

7 **A. The Annual SSR Amount is based on the 2013 budgets for the Coleman Stations units,**
8 **and includes the following cost components:**

9 (1) **Fixed Costs:** For the one-year SSR Agreement term, fixed costs for operating
10 all three of the Coleman Station units are estimated to be \$32,057,717, or
11 \$24,408,837 if the SSR Agreement is terminated with respect to Unit 1. Included
12 in this estimate is the cost of non-labor O&M costs, plant labor, general and
13 administrative costs, and property taxes and insurance.

14 (2) **Capital:** Capital costs during the one-year SSR Agreement term for operating
15 all three of the Coleman Station units are estimated to be \$8,200,658, or
16 \$1,886,754 if the SSR Agreement is terminated with respect to Unit 1. A detailed
17 list of the capital items included in this estimate was provided with the SSR
18 budget. The replacement of these items is necessary to maintain the operation of
19 the Coleman Station units during the term of the SSR Agreement.

20 (3) **Return on Net Rate Base:** The Annual SSR Amount includes a 7.85% return
21 on net rate base (carrying costs for fuel inventory, reagent, and materials and
22 supplies), calculated as a percentage of the total inventory and capital required to
23 operate the units during the term of the SSR Agreement. The return on net rate

1 base for the operation of (1) all three units, or (2) Unit 2 and Unit 3 is estimated to
2 be \$715,643

3 **Q. Does the SSR compensation account for other sources of revenue Big Rivers may**
4 **receive for the Coleman Station units during the term of the SSR Agreement?**

5 A. Yes. As described in the SSR Agreement, any supplemental revenue received through
6 the MISO markets beyond the SSR compensation will be debited or credited against the
7 SSR compensation in the settlements process to prevent double-recovery by Big Rivers.
8 These additional revenue streams include Schedule 2 payments for reactive power and
9 capacity revenues, if any, attributable to the Coleman Station units.

10 **Q. Please explain the variable generation payment to be paid by MISO when the units**
11 **are dispatched for reliability.**

12 A. Because the Annual SSR Amount covers certain fixed costs that do not include the
13 marginal cost of generating, the SSR Agreement also provides for a separate payment
14 when the unit is dispatched. The SSR Agreement does not establish a fixed price for
15 these payments, but will instead provide for reimbursement of the actual costs of each
16 dispatch. Specifically, under the terms of the SSR Agreement, Big Rivers will offer the
17 Coleman Station units in each available hour at its marginal cost of generating.
18 Accordingly, every time MISO dispatches the Coleman Station units for reliability,
19 MISO will provide Big Rivers with the costs of its three-part offer, consisting of start-up
20 costs, no-load costs, and incremental energy costs. The incremental energy component
21 will be based on average fuel cost.

22 **Q. How will Energy and Ancillary Services revenues be accounted for when the units**
23 **are dispatched for reliability?**

1 A. Because the MISO settlement process is based on market-clearing prices, MISO will
2 implement an additional step in the settlement process for the Coleman Station units.
3 This step is intended to make Big Rivers whole when market-clearing prices are lower
4 than its three-part offer for the Coleman Station units, and to debit Big Rivers' account
5 with MISO when market-clearing prices exceed the three-part offer. This process
6 ensures that Big Rivers does not stand to recover more than its cost-based offer from
7 MISO's reliability-related dispatches, while receiving SSR compensation.

8 **Q. Is there any other provision of the SSR Agreement that ensures that SSR**
9 **compensation will not exceed actual costs of operating the Coleman Station units for**
10 **reliability?**

11 A. Yes. Exhibit 2 includes a provision to "true-up" actual fixed costs with compensation
12 under the SSR Agreement for budgeted fixed costs. That exhibit provides that the
13 Monthly SSR Payment to Big Rivers will be subject to true-up upon termination of the
14 SSR Agreement for any Unit, based on actual costs incurred by Big Rivers in operating
15 the Coleman Station units. The amount paid or charged to Big Rivers by MISO will
16 reflect actual plant O&M and maintenance capital costs incurred in accordance with
17 Good Utility Practice and any unit's operational requirements under the SSR Agreement.

18 **Q. Does the SSR Agreement address any environmental limitations of the Coleman**
19 **Station units?**

20 A. Yes. The SSR Agreement specifies certain limitations on the output of the Coleman
21 Station units for SO₂ and NO_x. Under the pro forma SSR Agreement, MISO cannot
22 dispatch a unit if the dispatch would cause it to violate applicable environmental

1 restrictions. The same would be true for the Coleman Station units under the SSR

2 Agreement.

3 **Q. Does this conclude your testimony?**

4 **A. Yes.**

5 **[Next page is signature page]**

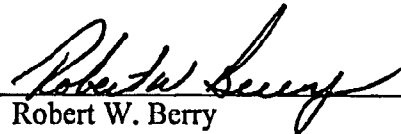
UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Midcontinent Independent
System Operator, Inc.

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Docket No. ER14-____

I, Robert W. Berry, Chief Operating Officer for Big Rivers Electric Corporation, verify, state and affirm that the foregoing testimony is true and correct to the best of my knowledge and belief.



Robert W. Berry
Chief Operating Officer
Big Rivers Electric Corporation

SUBSCRIBED AND SWORN to before me by Robert W. Berry, Chief Operating Officer of Big Rivers Electric Corporation, on this the 30th day of October, 2013.



Notary Public

SA 6505 BIG RIVERS ELECTRIC - COLEMAN SSR Version 0.0.0 Effective 9/1/2013

Original Service Agreement No. 6505

ATTACHMENT Y-1

Standard Form System Support Resource (“SSR”) Agreement

Between

Big Rivers Electric Corporation

and

Midcontinent Independent System Operator, Inc.

ATTACHMENT Y-1 Standard Form System Support Resource (SSR) Agreement Version:

4.0.0 Effective: 6/1/2013

ATTACHMENT Y-1

Standard Form System Support Resource (“SSR”) Agreement

Between

Big Rivers Electric Corporation

and

Midcontinent Independent System Operator, Inc.

This SSR Agreement (“Agreement”), effective as of the 1st of September, 2013 (“Effective Date”), is entered into by and between Big Rivers Electric Corporation, a generation and transmission cooperative located in the Commonwealth of Kentucky (“Participant”) and Midcontinent Independent System Operator, Inc. (“MISO,” collectively with Participant, the “Parties”).

Recitals

WHEREAS:

- A. Participant owns or operates one or more Electric Generation Resources or a Synchronous Condenser Unit (“SCU”) as defined in the MISO Tariff, and MISO requires Participant to supply service in the MISO Transmission Provider region (“MISO Region”) in order to maintain the reliability of the Transmission System;**
- B. MISO is the Regional Transmission Organization (“RTO”) for the MISO Region; and**
- C. The Parties enter into this Agreement in order to establish the terms and conditions by which MISO and Participant will discharge their respective duties and responsibilities under the MISO Tariff.**

Agreements

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the Parties hereby agree as follows:

Section 1. Unit-Specific Terms.

- A. Start Date: September 1, 2013.
- B. Start Time: _000 Hrs. _____
- C. Unit: _Coleman Generating Station Units 1-3 (“Unit 1,” “Unit 2,” and “Unit 3”);
provided, however, that “Unit” or “Units” shall not include any Unit with respect to which this Agreement is terminated pursuant to the terms hereof.

The units described above may also be referred to as the “Designated Units” or “Units” or “SSR Units” (or in the singular in reference to an individual unit) in this Agreement.

- D. Description of Units: Coleman Generating Station Units 1-3, located in Hawesville, Kentucky, as may be described in more detail on Exhibit 1 attached hereto.
- E. Name Plate Information
SSR Unit
 - (a) SSR Capacity in MW: 443 MW (150 for Unit 1; 138 for Unit 2; 155 for Unit 3)
 - (b) Power Factor Lagging
 - (i) 0.85 (Unit 1 & Unit 2); 0.90 (Unit 3) P.F. (at Generator Main Leads)
 - (ii) N/A_____ P.F. (at high side of Main Power Transformer)

(c) Power Factor Leading

(i) 0.85 (Unit 1 & Unit 2); 0.90 (Unit 3) P.F. (at Generator Main Leads)

(ii) N/A__ P.F. (at high side of Main Power Transformer)

F. Delivery Points: BREC.COLE1; BREC.COLE2; BREC.COLE3

G. Revenue Meter Location (Use Resource IDs): N/A

H. Operational and Environmental Limitations (check and describe all that apply):

SSR Unit:

(a) Operational

Maximum annual hours of operation: _____

Maximum annual MWh: _____

Maximum annual starts: _____

Other: Maximum of one (1) start per week, per unit

(b) Environmental

Maximum annual NO_x emissions: _____

Maximum annual SO₂ emissions: 5.2 lbs/MMBTU daily average for each unit (Unit 1, Unit 2, and Unit 3)

Other: Particulate limit of 0.27 lbs/MMBTU (3 hr. avg.) for each unit (Unit 1, Unit 2, and Unit 3); Trigger opacity limits of 72% (duct), 23.6% (bypass) for Unit 1; 62% (duct), 19.8% (bypass) for Unit 2; and 67% (duct), 22.0% (bypass) for Unit 3

Section 2. Definitions.

- A. Unless herein defined, all definitions and acronyms found in the MISO Tariff shall be incorporated by reference into this Agreement.
- B. “MISO Tariff” shall mean the document adopted by MISO, including any attachments or exhibits referenced in that document, as amended from time to time, that contains the scheduling, operating, planning, reliability, and settlement (including customer registration) policies, rules, guidelines, procedures, standards, and criteria of MISO. For the purposes of determining responsibilities and rights at a given time, the MISO Tariff, as amended in accordance with the change procedure(s) described in the MISO Tariff, in effect at the time of the performance or non-performance of an action, shall govern with respect to that action.

Section 3. Term and Termination.

- A. Term.
 - (1) This Agreement is effective beginning on the Effective Date.
 - (2) An SSR Agreement must not exceed a one (1) year term, except in exigent circumstances.
 - (3) The “Term” of this Agreement is a period of twelve (12) months; provided, however, that MISO, in its sole discretion, may terminate this Agreement with respect to any Unit prior to the end of the Term by giving at least sixty (60) days advance written notice to Participant.
 - (4) The period beginning on the Start Date and ending when the Agreement terminates is called the “Full Term” of this Agreement.

(5) An Initial Term may be extended by MISO if MISO provides at least ninety (90) days advance notice of such extension to the Participant.

- B. Termination by Participant. Participant may, at its option, immediately terminate this Agreement upon the failure of MISO to continue to be certified by the Federal Energy Regulatory Commission (“FERC” or the “Commission”) as an RTO. Participant may at any time request that MISO terminate this Agreement with respect to (a) Unit 1, or (b) all Units, but the final determination remains with MISO concerning whether the Unit(s) is(are) no longer required to maintain reliability. Participant may also request that MISO terminate this Agreement in conjunction with Participant agreement, in writing, to continue to operate either (a) Unit 2 and Unit 3, or (b) all Units, without an SSR agreement until such time that the Unit(s) is(are) no longer needed to maintain the reliability of the Transmission System. In case of a decision to retire or suspend service from any Unit subsequent to its removal from SSR status pursuant to the terms hereof, Participant shall again submit an Attachment Y notification under the MISO Tariff.
- C. Effect of Termination and Survival of Terms. If this Agreement is terminated by a Party pursuant to the terms hereof with respect to any Unit, the rights and obligations of the Parties hereunder with respect to such Unit shall terminate, except that (1) the rights and obligations of the Parties that have accrued under this Agreement prior to the date of termination shall survive and (2) the rights and obligations of the Parties relating to any Unit with respect to which this Agreement has not been terminated shall survive.
- D. Notice. All notices (except for the two-hour advance notice specified in Section 7.A(2)) required to be given under this Agreement shall be in writing, and shall be deemed delivered three (3) days after being deposited in the U.S. Mail, first class postage prepaid,

registered (or certified) mail, return receipt requested, addressed to the other Party at the address specified in this Agreement or shall be deemed delivered on the day of receipt if sent in another manner requiring a signed receipt, such as courier delivery or Federal Express delivery. Either Party may change its address for such notices by delivering to the other Party a written notice referring specifically to this Agreement. Notices required hereunder shall be in accordance with the applicable Sections of the MISO Tariff.

If to MISO:

720 City Center Drive
Carmel, IN 46032
Tel. No. (317) 249-5400

If to Participant:

Robert W. Berry
Chief Operating Officer
Big Rivers Electric Corporation
201 Third Street
P.O. Box 24
Henderson, KY 42419-0024

Section 4. Representations, Warranties, and Covenants.

A. Participant represents, warrants, and covenants that:

- (1) Participant is duly organized, validly existing and in good standing under the laws of the jurisdiction under which it is organized, and is authorized to do business in the Commonwealth of Kentucky, including the MISO Region therein;
- (2) Participant has full power and authority to enter into this Agreement and perform all of Participant's obligations, representations, warranties, and covenants under this Agreement;
- (3) Participant's past, present and future agreements or Participant's organizational charter or bylaws, if any, or any provision of any indenture, mortgage, lien, lease,

agreement, order, judgment, or decree to which Participant is a party or by which its assets or properties are bound do not materially affect performance of Participant's obligations under this Agreement;

- (4) The execution, delivery and performance of this Agreement by Participant have been duly authorized by all requisite action of its governing body;
- (5) Except as set out in an exhibit (if any) to this Agreement, MISO has not, within the twenty-four (24) months preceding the Effective Date, terminated for Default any prior agreement with Participant, any company of which Participant is a successor in interest, or any Affiliate of Participant;
- (6) If any Defaults are disclosed on any such exhibit mentioned in subsection 4.A(5), either (a) MISO has been paid, before execution of this Agreement, all sums due to it in relation to such prior agreement, or (b) MISO, in its reasonable judgment, has determined that this Agreement is necessary for system reliability, and Participant has made alternate arrangements satisfactory to MISO for the resolution of the Default under the prior agreement with Participant, any company of which Participant is a successor in interest, or any Affiliate of Participant;
- (7) Participant has obtained, or will obtain prior to beginning performance under this Agreement, all licenses, registrations, certifications, permits and other authorizations and has taken, or will take prior to beginning performance under this Agreement, all actions required by applicable laws or governmental regulations except licenses, registrations, certifications, permits or other authorizations that do not materially affect performance under this Agreement;

- (8) Participant is not in violation of any laws, ordinances, or governmental rules, regulations or order of any Governmental Authority or arbitration board materially affecting performance of this Agreement and to which it is subject;
- (9) Participant is not Bankrupt (“Bankrupt” means any of the events or occurrences described in Section 7.16.1(e) of the MISO Tariff), does not contemplate becoming Bankrupt nor, to its knowledge, will become Bankrupt;
- (10) Participant acknowledges that it has received and is familiar with the MISO Tariff; and
- (11) Participant acknowledges and affirms that the foregoing representations, warranties, and covenants are continuing in nature throughout the Full Term of this Agreement. For purposes of this Section, “materially affecting performance” means resulting in a materially adverse effect on Participant’s performance of its obligations under this Agreement.

B. MISO represents, warrants, and covenants that:

- (1) MISO is the RTO certified under 18 C.F.R. §35.34 for the MISO Region and the subject Electric Generation Resource/SCU is located within the MISO Region;
- (2) MISO is duly organized, validly existing and in good standing under the laws of Delaware, and is authorized to do business in the MISO Region;
- (3) MISO has full power and authority to enter into this Agreement and perform all of MISO’s obligations, representations, warranties, and covenants under this Agreement;
- (4) MISO’s past, present and future agreements or MISO’s organizational charter or

bylaws, if any, or any provision of any indenture, mortgage, lien, lease, agreement, order, judgment, or decree to which MISO is a party or by which its assets or properties are bound do not materially affect performance of MISO's obligations under this Agreement;

- (5) The execution, delivery and performance of this Agreement by MISO have been duly authorized by all requisite action of its governing body;
- (6) MISO has obtained, or will obtain prior to beginning performance under this Agreement, all licenses, registrations, certifications, permits and other authorizations and has taken, or will take prior to beginning performance under this Agreement, all actions required by applicable laws or governmental regulations except licenses, registrations, certifications, permits or other authorizations that do not materially affect performance under this Agreement;
- (7) MISO is not in violation of any laws, ordinances, or governmental rules, regulations or order of any Governmental Authority or arbitration board materially affecting performance of this Agreement and to which it is subject;
- (8) MISO is not Bankrupt, does not contemplate becoming Bankrupt nor, to its knowledge, will become Bankrupt; and
- (9) MISO acknowledges and affirms that the foregoing representations, warranties, and covenants are continuing in nature throughout the Full Term of this Agreement. For purposes of this Section, "materially affecting performance," means resulting in a materially adverse effect on MISO's performance of its obligations under this Agreement.

Section 5. Participant Obligations.

Participant shall comply with, and be bound by, the MISO Tariff as it pertains to the provision of SSR Service.

Section 6. MISO Obligations.

MISO shall comply with, and be bound by, all MISO Tariff provisions.

Section 7. Tests for SSR Units.

A. Capacity Tests for SSR Reliability.

- (1) A "Capacity Test" is a one-hour performance test of the SSR Unit by Participant, which shall not include a ramp-up period for the SSR Unit. The capacity as shown by a Capacity Test is called "Tested Capacity" and is determined by the applicable net meter readings during the Capacity Test.
- (2) MISO may require that a Capacity Test be run at MISO's discretion at any time when the SSR Unit is on-line, but MISO may not require more than four (4) Capacity Tests in a contract year. MISO must give Participant at least two (2) hours advance notice, after the SSR Unit is on line, of a Capacity Test required by MISO, unless Market Participant agrees to less than two (2) hours. Participant may perform as many Capacity Tests as it desires, but Participant may not perform a Capacity Test without the prior approval of MISO, which approval MISO may not unreasonably withhold or delay. The Parties will reasonably cooperate to coordinate a Capacity Test. MISO has the right to reasonable advance notice of, and to have personnel present during, a Capacity Test.

B. Test Report. MISO shall give the Capacity Test results in writing (the "Capacity Test

Report”) to Participant within twenty-four (24) hours after the test is run.

C. Effect of Capacity Test for SSR Reliability.

- (1) A determination of Tested Capacity is effective as of the beginning of the hour in which the Capacity Test is started.
- (2) For all hours in which Tested Capacity is less than SSR Capacity (*i.e.*, the capacity eligible for compensation), then Billing Capacity may be reduced as set out in Section 9.D below and remains so reduced until a subsequent Capacity Test establishes that Tested Capacity equals or exceeds SSR Capacity.
- (3) After the Effective Date, MISO shall dispatch, as part of SSR energy, the electrical energy and/or reactive power produced by the SSR Units, including ramping energy and/or reactive power, during a Capacity Test requested by MISO, net of auxiliary equipment and other electrical requirements of the SSR Units that are supplied by the SSR Units. MISO shall also dispatch, as part of SSR energy, any electrical energy and/or reactive power produced by the SSR Units during a Capacity Test requested by Participant to attempt to show that Tested Capacity equals or exceeds SSR Capacity, net of auxiliary equipment and other electrical requirements of the SSR Units that are supplied by the SSR Units.

D. Capacity Tests for Resource Adequacy. If the SSR Unit is designated as a Capacity Resource pursuant to Module E-1 of the MISO Tariff, then the capacity test provisions of Module E-1 shall apply in addition to the Capacity Tests for System Reliability stated elsewhere in this Section 7.

E. Coordination for Other Tests. The Parties shall coordinate scheduling of any testing of the SSR Units that is required consistent with Good Utility Practice (*e.g.*, testing in

accordance with environmental and insurance requirements applicable to the Units), including the use of weekends and hours when the SSR Units are not expected to be used in order to complete the testing. During times for such testing, the SSR Units shall return to full service as dispatched by MISO (rescheduling the applicable testing) in the event of an emergency.

Section 8. Operation.

- A. **Designated Unit Maintenance.** Before the start of each contract year, Participant shall furnish MISO with its proposed schedule for Generator Planned Outages for inspection, repair, maintenance, and overhaul of the Designated Units for the contract year, in accordance with MISO's outage scheduling system. MISO shall approve or reject Generator Planned Outages in accordance with MISO's Business Practices Manual. MISO shall, if requested by Participant, endeavor to accommodate changes to the schedule to the extent that reliability of the MISO System is not materially affected by those changes. In all cases, MISO must find a time for Participant to perform maintenance in a reasonable timeframe as defined by Good Utility Practice.
- B. **Planning Data.** Participant shall timely report to MISO those items and conditions necessary for MISO's internal planning and compliance with MISO's guidelines in effect from time to time. The information supplied must include, without limitation, the following:
- (1) **Availability Plan for the next day (in accordance with MISO Tariff deadlines).**
The information submitted in the Availability Plan will be consistent with the information submitted in the Resource Plan, and shall specify each Designated Unit's availability for the next day consistent with their Resource Adequacy

Requirements;

- (2) Revised Availability Plan reflecting changes in the Availability Plan in accordance with MISO Tariff deadlines; and
- (3) Status of each Designated Unit with respect to Environmental Limitations, if any. Participant shall timely report to MISO the status of the Designated Units with respect to Operational Limitations.

C. Delivery.

- (1) MISO shall notify Participant of the hours and levels, if any, that the Designated Units are to operate through day-ahead commitment and real-time dispatch for system reliability. The set point in the real-time dispatch shall be considered the “Delivery Plan” for the purposes of this Agreement. MISO shall not notify Participant to operate the SSR Units in a way that would violate the limitations on operation set out in Section 1 above. Notwithstanding the foregoing, Participant may offer its SSR Capability as described in Section 1.E into the MISO Energy & Operating Reserves Markets outside of the Delivery Plan when the SSR Units are not needed to address the reliability issues pertaining to this Agreement, consistent with Section 38.2.7(g) of the MISO Tariff. Such offers into MISO Markets shall be cost-based, including (but not limited to) Start-Up, No Load, and Energy Offers. Participant is encouraged to offer available Zonal Resource Credits into the Planning Resource Auction pursuant to the terms of the MISO Tariff.
- (2) Participant shall produce and deliver electrical energy and/or reactive power from

the SSR Units to the Delivery Point at the levels specified in the Delivery Plan.

- (3) MISO may dispatch the Designated Units only when necessary to ensure transmission system security, including any emergency situation. MISO may not dispatch the Designated Units if compliance with the dispatch would cause the Designated Units to exceed the Operational and Environmental Limitations, if any, set forth in Section 1 above or at levels greater than are shown in the Availability Plan. Notwithstanding the foregoing, Participant retains the responsibility for operating the Designated Units in accordance with limits provided by applicable law.
- (4) During the hours of operation of the SSR Units specified in the Delivery Plan, Participant may only participate in the MISO Energy and Operating Reserve Markets from the SSR Units in accordance with the relevant conditions in the MISO Tariff.

Section 9. Payment Provisions.

- A. For the transfer of any funds under this Agreement directly between MISO and Participant and pursuant to the Settlement procedures described in the MISO Tariff, the following shall apply:
 - (1) Participant appoints MISO to act as its agent with respect to such funds transferred and authorizes MISO to exercise such powers and perform such duties as described in this Agreement or the MISO Tariff, together with such powers or duties as are reasonably incidental thereto.

(2) MISO shall not have any duties, responsibilities to, or fiduciary relationship with Participant and no implied covenants, functions, responsibilities, duties, obligations or liabilities shall be read into this Agreement except as expressly set forth herein or in the MISO Tariff.

B. Compensation for the SSR Unit. MISO shall compensate Participant according to the terms of Exhibit 2 to this Agreement.

C. Settlement Provisions for the SSR Unit. At the conclusion of each calendar month, MISO shall conduct a settlement process for the SSR Units, consistent with the MISO Tariff requirements.

D. Performance-Related Payment Adjustments.

(1) For a SSR Unit, a "Misconduct Event" means any hour or hours during which Participant is requested to, but does not, deliver to MISO electrical energy and/or reactive power at a level of at least 98% on each hour (on a kilowatt-hour/hour or MVAR/hour basis) of the level shown in the Delivery Plan.

(2) Each day that a Misconduct Event continues after Participant receives written notice from MISO of the Misconduct Event is a separate Misconduct Event. A Misconduct Event is measured on a daily basis.

(3) Participant is excused from the Misconduct Event payment reduction arising from any Misconduct Event that is (a) not due to intentionally incomplete, inaccurate, or dishonest reporting to MISO by Participant of the availability of the Designated Unit, or (b) caused by a failure of the MISO Transmission System.

- (4) If a Misconduct Event is not excused, then to reflect this lower-than-expected quality of firmness, MISO's payments to Participant are reduced by the Unexcused Misconduct Amount not to exceed \$10,000 per day for all SSR units.
- (5) MISO shall inform Participant in writing of its determination if a Misconduct Event is unexcused.
- (6) MISO may offset any amounts due by Participant to MISO under this section against any amounts due by MISO to Participant under this Agreement.
- (7) Subject to the maximum amount set forth in clause (4) above, the Unexcused Misconduct Amount reduces payments to Participant (see Exhibit 2), and is composed of two parts:
 - (a) A fixed component equal to a proportionate reduction in the Monthly SSR Payment to Participant (see Exhibit 2) according to the reduction in Billing Capacity below the SSR Capacity, calculated for that portion of the month during which such reduction occurs. Billing Capacity is the lower of (i) the SSR Capacity and (ii) the Tested Capacity if lower than SSR Capacity for reasons not reported through the Outage Scheduler or if such reporting to MISO is intentionally incomplete, inaccurate, or dishonest.
 - (b) A variable component equal to the product of: (i) the difference between:
 - a) the level shown in the Delivery Plan and
 - b) the amount of electrical energy and/or reactive power delivered to MISO;and (ii) an SSR Unit's Hourly Ex Post LMP in any hour or hours in which a Misconduct Event occurs.

E. Compensation for Unanticipated Repairs. During the Term of this Agreement, any

necessary repair or repairs to the SSR Units shall not entitle Participant to any additional compensation under this Agreement, except as provided herein. For the purposes of this Section, “unanticipated” repairs are those for which compensation is not provided for in the Annual SSR Amount contained in Exhibit 2 to this SSR Agreement. If the need arises to make an unanticipated repair to the SSR Units, Participant shall notify MISO before incurring said repair costs, together with reasonable information in support thereof. Upon such notification, MISO shall notify Participant either that: (i) it elects to exercise its rights to terminate this Agreement because the unanticipated repairs could not be accomplished in a manner that would preserve system reliability; or (ii) it agrees that Participant shall make such repairs, subject to the terms of parts 1 and 2 of this Section 9.E. In no circumstances shall the costs of repairs authorized by MISO pursuant to this Agreement be the responsibility of Participant. Participant shall not be deemed to have a Misconduct Event, nor shall Participant be subject to any other performance penalties under this Agreement or the MISO Tariff for the period of time after Participant notifies MISO of the need for repairs as provided in this Section 9.E and MISO provides to Participant written notification that it agrees to fund the costs of such repairs and directs Participant to make such repairs.

(1) Non-Emergency Repairs. Except as provided for in part 2 of this Section 9.E, before MISO may issue a notice to fund unanticipated repairs, MISO shall make and receive approval of a Federal Power Act (“FPA”) Section 205 filing at the Commission to modify this Agreement to provide for the recovery of such repair costs and shall serve such filing on all parties to whom such repair costs would be allocated. Participant shall not make such unanticipated repairs unless

and until MISO informs Participant in writing that it has received FERC approval to modify this Agreement to provide for the recovery of such costs.

(2) Emergency Repairs. If MISO reasonably believes that system security and reliability require any unanticipated repairs to be made before FERC can act on a Section 205 filing ("Emergency Repairs"), then MISO shall so notify Participant in writing and direct Participant to make such Emergency Repairs and MISO shall make a Section 205 filing at FERC as soon as reasonably practicable thereafter to modify this Agreement to provide for recovery of such repair costs. In the case of Emergency Repairs, if FERC later determines MISO's decision to approve such Emergency Repairs was imprudent or otherwise does not accept such modifications to the Agreement, then the costs of the Emergency Repairs shall be allocated pursuant to Section 38.2.7.k of the MISO Tariff (as filed in FERC Docket No. ER12-2302 on December 18, 2012).

F. Allocation of SSR Compensation. MISO will charge the LSEs that benefit from operation of the subject SSR Units in accordance with MISO Tariff Schedule 43F.

Section 10. Default.

A. Event of Default.

(1) Failure to make payment or transfer funds as provided in the MISO Tariff shall constitute a material breach and shall constitute an event of default ("Default") unless cured within three (3) Business Days after delivery by the non-breaching Party of written notice of the failure to the breaching Party. Provided further that if such a material breach, regardless of whether such breach is cured within the

allotted time after notice of the material breach, occurs more than three (3) times within a rolling twelve (12)-month period, the fourth such breach shall constitute a Default by the breaching Party.

(2) For any material breach other than a failure to make payment or transfer funds, the occurrence and continuation of any of the following events shall constitute an event of Default by Participant:

(a) Except as excused under subsection (4) or (5) below, a material breach, other than a failure to make payment or transfer funds, of this Agreement by Participant, including any material failure by Participant to comply with the MISO Tariff, unless cured within fourteen (14) Business Days after delivery by MISO of written notice of the material breach to Participant. Participant must begin work or other efforts within three (3) Business Days to cure such material breach after delivery by MISO of written notice of such material breach by Participant and must prosecute such work or other efforts with reasonable diligence, consistent with Good Utility Practice, until the breach is cured. Provided further that if a material breach, regardless of whether such breach is cured within the allotted time after notice of the material breach, occurs more than three (3) times within a rolling twelve (12)-month period, the fourth (4th) such breach shall constitute a Default.

(b) Participant becomes Bankrupt, except for the filing of a petition in involuntary bankruptcy, or similar involuntary proceedings that is dismissed within ninety (90) days thereafter.

- (c) The Designated Unit's operation is abandoned without intent to return it to operation during the Full Term; or
 - (d) Three or more unexcused Misconduct Events occur during a contract year.
- (3) Except as excused under subsection (4) or (5) below, a material breach of this Agreement by MISO, including any material failure by MISO to comply with the MISO Tariff, other than a failure to make payment or transfer funds, shall constitute a Default by MISO unless cured within fourteen (14) Business Days after delivery by Participant of written notice of the material breach to MISO. MISO must begin work or other efforts within three (3) Business Days to cure such material breach after delivery by Participant of written notice of such material breach by MISO and must prosecute such work or other efforts with reasonable diligence, consistent with Good Utility Practice, until the breach is cured. Provided further that if a material breach, regardless of whether such breach is cured within the allotted time after notice of the material breach, occurs more than three (3) times within a rolling twelve (12)-month period, the fourth such breach shall constitute a Default.
- (4) For any material breach other than a failure to make payment or transfer funds, the breach shall not result in a Default if the breach cannot reasonably be cured within fourteen (14) calendar days, prompt written notice is provided by the breaching Party to the other Party, and the breaching Party began work or other efforts to cure the breach within three (3) Business Days after delivery of the notice to the breaching Party and prosecutes the curative work or efforts with reasonable diligence, consistent with Good Utility Practice, until the curative

work or efforts are completed.

- (5) If, due to a Force Majeure Event, a Party is in breach with respect to any obligation hereunder, such breach shall not result in a Default by that Party.

B. Remedies for Default.

- (1) MISO's Remedies for Default. In the event of a Default by Participant, MISO may pursue any remedies MISO has under this Agreement, at law, or in equity, subject to the provisions of Section 12: Dispute Resolution of this Agreement. In the event of a Default by Participant, if the MISO Tariff does not specify a remedy for a particular Default, MISO may, at its option, upon written notice to Participant, immediately terminate this Agreement, with termination to be effective upon the date of delivery of notice.

(2) Participant's Remedies for Default.

- (a) Unless otherwise specified in this Agreement or in the MISO Tariff, and subject to the provisions of Section 12: Dispute Resolution of this Agreement, in the event of a Default by MISO, Participant's remedies shall be limited to:

- (i) Immediate termination of this Agreement upon written notice to MISO,
- (ii) Monetary recovery in accordance with the Settlement procedures set forth in the MISO Tariff, and
- (iii) Specific performance.

- (b) However, in the event of a material breach by MISO of any of its

representations, warranties or covenants, Participant's sole remedy shall be immediate termination of this Agreement upon written notice to MISO.

- (c) If as a final result of any dispute resolution MISO, as the settlement agent, is determined to have over-collected from a Market Participant(s), with the result that refunds are owed by Participant to MISO, as the settlement agent such Market Participant(s) may request MISO to allow such Market Participant to proceed directly against Participant, in lieu of receiving full payment from MISO. In the event of such request, MISO, in its sole discretion, may agree to assign to such Market Participant MISO's rights to seek refunds from Participant, and Participant shall be deemed to have consented to such assignment. This subsection (c) shall survive termination of this Agreement.

- (3) A Default or breach of this Agreement by a Party shall not relieve either Party of the obligation to comply with the MISO Tariff.

C. Force Majeure.

- (1) If, due to a Force Majeure Event, either Party is in breach of this Agreement with respect to any obligation hereunder, such Party shall take reasonable steps, consistent with Good Utility Practice, to remedy such breach. If either Party is unable to fulfill any obligation by reason of a Force Majeure Event, it shall give notice and the full particulars of the obligations affected by such Force Majeure Event to the other Party in writing or by telephone (if followed by written notice) as soon as reasonably practicable, but not later than fourteen (14) calendar days,

after such Party becomes aware of the event. A failure to give timely notice of the Force Majeure event shall constitute a waiver of the claim of Force Majeure Event. The Party experiencing the Force Majeure Event shall also provide notice, as soon as reasonably practicable, when the Force Majeure Event ends.

- (2) Notwithstanding the foregoing, a Force Majeure Event does not relieve a Party affected by a Force Majeure Event of its obligation to make payments or of any consequences of non-performance pursuant to the MISO Tariff or under this Agreement, except that the excuse from Default provided by subsection 10.A(5) above is still effective.

- D. Duty to Mitigate. Except as expressly provided otherwise herein, each Party shall use commercially reasonable efforts to mitigate any damages it may incur as a result of the other Party's performance or non-performance of this Agreement.

Section 11. Limitation of Damages and Liability and Indemnification.

- A. EXCEPT AS EXPRESSLY LIMITED IN THIS AGREEMENT OR MISO BUSINESS PRACTICES, MISO OR PARTICIPANT MAY SEEK FROM THE OTHER, THROUGH APPLICABLE DISPUTE RESOLUTION PROCEDURES SET FORTH IN MISO PROTOCOLS, ANY MONETARY DAMAGES OR OTHER REMEDY OTHERWISE ALLOWABLE UNDER INDIANA LAW, AS DAMAGES FOR DEFAULT OR BREACH OF THE OBLIGATIONS UNDER THIS AGREEMENT; PROVIDED, HOWEVER, THAT NEITHER PARTY IS LIABLE TO THE OTHER FOR ANY SPECIAL, INDIRECT, PUNITIVE OR CONSEQUENTIAL DAMAGES OR INJURY THAT MAY OCCUR, IN WHOLE OR IN PART, AS A RESULT OF A

DEFAULT UNDER THIS AGREEMENT, A TORT, OR ANY OTHER CAUSE, WHETHER OR NOT A PARTY HAD KNOWLEDGE OF THE CIRCUMSTANCES THAT RESULTED IN THE SPECIAL, INDIRECT, PUNITIVE OR CONSEQUENTIAL DAMAGES OR INJURY, OR COULD HAVE FORESEEN THAT SUCH DAMAGES OR INJURY WOULD OCCUR.

- B. The Parties have expressly agreed that, other than subsections A and B of this Section, this Agreement shall not include any other limitations of liability or indemnification provisions, and that such issues shall be governed solely by applicable law, in a manner consistent with the Choice of Law and Venue subsection 13.A of this Agreement, regardless of any contrary provisions that may be included in or subsequently added to the MISO Tariff (outside of this Agreement).

Section 12. Dispute Resolution.

- A. In the event of a dispute, including a dispute regarding a Default, under this Agreement, Parties to this Agreement shall first attempt resolution of the dispute using the applicable dispute resolution procedures set forth in the MISO Tariff.
- B. In the event of a dispute, including a dispute regarding a Default, under this Agreement, each Party shall bear its own costs and fees, including, but not limited to attorneys' fees, court costs, and its share of any mediation or arbitration fees.

Section 13. Miscellaneous.

- A. **Choice of Law and Venue.** Notwithstanding anything to the contrary in this Agreement, this Agreement shall be deemed entered into in Indiana and, with the exception of matters governed exclusively by federal law, shall be governed by and construed and interpreted

in accordance with the laws of the State of Indiana that apply to contracts executed in and performed entirely within the State of Indiana, without reference to any rules of conflict of laws. Neither Party waives primary jurisdiction as a defense; provided that any court suits regarding this Agreement shall be brought in a state or federal court located within Indiana, and the Parties hereby waive any defense of *forum non-conveniens*.

B. Assignment.

- (1) Notwithstanding anything herein to the contrary, a Party shall not assign or otherwise transfer all or any of its rights or obligations under this Agreement without the prior written consent of the other Party, which shall not be unreasonably withheld or delayed, except that a Party may assign or transfer its rights and obligations under this Agreement without the prior written consent of the other Party (if neither the assigning Party or the assignee is then in Default of any Agreement with MISO):
 - (a) Where any such assignment or transfer is to an Affiliate of the Party; or
 - (b) Where any such assignment or transfer is to a successor to or transferee of the direct or indirect ownership or operation of all or part of the Party, or its facilities; or
 - (c) For collateral security purposes to aid in providing financing for itself, provided that the assigning Party will notify the other Party of any such assignment. Prior to or upon the exercise of the secured party's, trustee's or mortgagee's assignment rights pursuant to said arrangement entered into by either Party pursuant to this Section, the assigning Party, the secured creditor, the trustee or mortgagee will notify the other Party of the

date and particulars of any such exercise of assignment right(s). If requested by the Party making any such collateral assignment to a secured party, trustee or mortgagee (any such secured party, trustee, or mortgagee is hereinafter referred to as a "Financing Person"), the other Party shall execute and deliver a consent to such assignment containing customary provisions, including representations as to corporate authorization, enforceability of this Agreement and absence of known Defaults, notices of Default, and an opportunity for the Financing Person to cure Defaults.

- (2) An assigning Party shall provide prompt written notice of the assignment to the other Party. Any attempted assignment that violates this Section is void and ineffective. Any assignment under this Agreement shall not relieve either Party of its obligations under this Agreement, nor shall either Party's obligations be enlarged, in whole or in part, by reason thereof.

C. No Third Party Beneficiary. Except with respect to the rights of other Market Participants in Section 10.B and the Financing Persons in Section 13.B, (1) nothing in this Agreement nor any action taken hereunder shall be construed to create any duty, liability or standard of care to any third party, (2) no third party shall have any rights or interest, direct or indirect, in this Agreement or the services to be provided hereunder and (3) this Agreement is intended solely for the benefit of the Parties, and the Parties expressly disclaim any intent to create any rights in any third party as a third-party beneficiary to this Agreement or the services to be provided hereunder. Nothing in this Agreement shall create a contractual relationship between one Party and the customers of the other Party, nor shall it create a duty of any kind to such customers.

- D. No Waiver. Parties shall not be required to give notice to enforce strict adherence to all provisions of this Agreement. No breach or provision of this Agreement shall be deemed waived, modified or excused by a Party unless such waiver, modification or excuse is in writing and signed by an authorized officer of such Party. The failure by or delay of either Party in enforcing or exercising any of its rights under this Agreement shall (1) not be deemed a waiver, modification or excuse of such right or of any breach of the same or different provision of this Agreement, and (2) not prevent a subsequent enforcement or exercise of such right. Each Party shall be entitled to enforce the other Party's covenants and promises contained herein, notwithstanding the existence of any claim or cause of action against the enforcing Party under this Agreement or otherwise.
- E. Headings. Titles and headings of paragraphs and sections within this Agreement are provided merely for convenience and shall not be used or relied upon in construing this Agreement or the Parties' intentions with respect thereto.
- F. Severability. In the event that any of the provisions, or portions or applications thereof, of this Agreement is held to be unenforceable or invalid by any court of competent jurisdiction, that determination shall not affect the enforceability or validity of the remaining portions of this Agreement, and this Agreement shall continue in full force and effect as if it had been executed without the invalid provision; provided, however, if either Party determines, in its sole discretion, that there is a material change in this Agreement by reason thereof, the Parties shall promptly enter into negotiations to replace the unenforceable or invalid provision with a valid and enforceable provision. If the Parties are not able to reach an agreement as the result of such negotiations within fourteen (14) days, either Party shall have the right to terminate this Agreement on three

(3) days written notice.

- G. Entire Agreement. Any exhibits attached to this Agreement are incorporated into this Agreement by reference and made a part of this Agreement as if repeated verbatim in this Agreement. This Agreement represents the Parties' final and mutual understanding with respect to its subject matter. It replaces and supersedes any prior agreements or understandings, whether written or oral. No representations, inducements, promises, or agreements, oral or otherwise, have been relied upon or made by any Party, or anyone on behalf of a Party, that are not fully expressed in this Agreement. An agreement, statement, or promise not contained in this Agreement is not valid or binding.
- H. Amendment. The standard form of this Agreement may only be modified through the procedure for modifying the MISO Tariff described in the MISO Tariff. Any changes to the terms of the standard form of this Agreement shall not take effect until a new Agreement is executed between the Parties.
- I. MISO's Right to Audit Participant. Participant shall keep detailed records for a period of three years of all activities under this Agreement giving rise to any information, statement, charge, payment or computation delivered to MISO under the MISO Tariff. Such records shall be retained and shall be available for audit or examination by MISO as hereinafter provided. MISO has the right during Business Hours and upon reasonable written notice and reasonable cause to examine the records of Participant as necessary to verify the accuracy of any such information, statement, charge, payment or computation made under this Agreement. If any such examination reveals any inaccuracy in any information, statement, charge, payment or computation, the necessary adjustments in such information, statement, charge, payment, computation, or procedures used in

supporting its ongoing accuracy will be promptly made.

- J. Participant's Right to Audit MISO. Participant's right to data and audit of MISO shall be as described in the MISO Tariff and shall not exceed the rights described in the MISO Tariff.
- K. Further Assurances. Each Party agrees that during the term of this Agreement it will take such actions, provide such documents, do such things and provide such further assurances as may reasonably be requested by the other Party to permit performance of this Agreement.
- L. Conflicts. This Agreement is subject to applicable federal, state, and local laws, ordinances, rules, regulations, orders of any Governmental Authority and tariffs. Nothing in this Agreement may be construed as a waiver of any right to question or contest any federal, state and local law, ordinance, rule, regulation, order of any Governmental Authority, or tariff. In the event of a conflict between this Agreement and an applicable federal, state, and local law, ordinance, rule, regulation, order of any Governmental Authority or tariff, the applicable federal, state, and local law, ordinance, rule, regulation, order of any Governmental Authority or tariff shall prevail, provided that Participant shall give notice to MISO of any such conflict affecting Participant. In the event of a conflict between the MISO Tariff and this Agreement, the provisions expressly set forth in this Agreement shall control.
- M. No Partnership. This Agreement may not be interpreted or construed to create an association, joint venture, or partnership between the Parties or to impose any partnership obligation or liability upon either Party. Neither Party has any right, power, or authority to enter any agreement or undertaking for, or act on behalf of, or to act as or be an agent

or representative of, or to otherwise bind, the other Party except as provided in Section 9.A.

N. No State Public Utility Created. This Agreement may not be interpreted or construed as modifying the jurisdictional status of MISO, including, but not limited to establishment of MISO as a state public utility under the laws of any jurisdiction, as a result of MISO's performance under this Agreement.

O. Construction. In this Agreement, the following rules of construction apply, unless expressly provided otherwise or unless the context clearly requires otherwise:

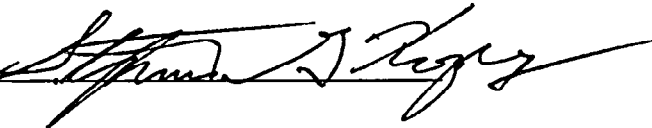
- (1) The singular includes the plural, and the plural includes the singular.
- (2) The present tense includes the future tense, and the future tense includes the present tense.
- (3) Words importing any gender include the other gender.
- (4) The word "shall" denotes a duty.
- (5) The word "must" denotes a condition precedent or subsequent.
- (6) The word "may" denotes a privilege or discretionary power.
- (7) The phrase "may not" denotes a prohibition.
- (8) References to statutes, tariffs, regulations or the MISO Tariff include all provisions consolidating, amending, or replacing the statutes, tariffs, regulations or the MISO Tariff referred to.
- (9) References to "writing" include printing, typing, lithography, and other means of reproducing words in a tangible visible form.

- (10) The words “including,” “includes,” and “include” are deemed to be followed by the words “without limitation.”
- (11) Any reference to a day, week, month or year is to a calendar day, week, month or year unless otherwise indicated.
- (12) References to Articles, Sections (or subdivisions of Sections), Exhibits, annexes or schedules are to this Agreement, unless expressly stated otherwise.
- (13) Unless expressly stated otherwise, references to agreements, the MISO Tariff and other contractual instruments include all subsequent amendments and other modifications to the instruments, but only to the extent the amendments and other modifications are not prohibited by this Agreement.
- (14) References to persons or entities include their respective successors and permitted assigns and, for governmental entities, entities succeeding to their respective functions and capacities.
- (15) References to time are to Eastern Standard Time.
- (16) References to any capitalized word or phrase not defined herein shall have the meanings from the MISO Tariff.

P. Multiple Counterparts. This Agreement may be executed in two or more counterparts, each of which is deemed an original but all constitute one and the same instrument.

SIGNED, ACCEPTED AND AGREED TO by each undersigned signatory who, by signature hereto, represents and warrants that he or she has full power and authority to execute this Agreement.

Midcontinent Independent System Operator, Inc.:

By: 

Name: Stephen Kozey

Title: Sr. Vice President and General Counsel

Date: November 1, 2013

Participant:

By: /s/ Robert W. Berry

Name: Robert W. Berry

Title: Chief Operating Officer

Date: November 1, 2013

EXHIBIT 1

Detailed Description of SSR Units

Coleman Generating Station

Unit Nos. 1-3

4982 River Road

Hawesville, KY 42348

UNIT DESCRIPTION

Initial service date – Unit 1 (1969); Unit 2 (1970); Unit 3 (1971)

Coal Fired Steam Boiler

Bituminous Coal Fueled

EXHIBIT 2

Description of SSR Unit Going-Forward Compensation

A. Fixed Component of Compensation

Pursuant to Section 9 of the Agreement, MISO shall pay Participant a Monthly SSR Payment of \$3,414,502 for Units 1-3, representing monthly allocations of budgeted fixed costs from an Annual SSR Amount for all Units to each month during the term of the SSR Agreement. If (i) this Agreement is terminated with respect to Unit 1 and (ii) Units 2 and 3 remain SSR Units, MISO shall pay Participant a Monthly SSR Payment of \$2,250,936, representing monthly allocations of budgeted fixed costs from an Annual SSR Amount for Units 2-3 to each month during the term of the SSR Agreement. Each such Monthly SSR Payment shall be made regardless of dispatch of the SSR Unit during that month. If this SSR Agreement is terminated for any Unit, effective during the course of a calendar month, then the corresponding Monthly SSR Payment shall be prorated for that month.

The MISO payment to Participant is subject to true up for the SSR Units based upon the actual costs incurred by Participant in operating the SSR Units, which shall be settled within 55 days after the last day of the month for each month of the Agreement. For the completion of the true up calculations, Participant shall submit the actual costs to MISO such that the information is received by MISO within 50 days after the last day of the month for each month of the Agreement. Such submissions to MISO shall be sent to MISO at the address stated in Section 3.D of this Agreement, to the attention of the Manager of Market Settlements. Both Parties acknowledge that actual costs under this Agreement may be larger or smaller than the agreed upon (budgeted) Monthly SSR Amount for each Unit. Actual plant O&M and maintenance capital costs sustained in accordance with Good Utility Practice and any unit operational requirements dictated under the

terms of this agreement will form the basis for the trued up amount paid or charged to Participant by MISO.

The compensation provided for under this Agreement may be further modified pursuant to Section 7 (adjustment to Monthly SSR Payment based on Capacity Tests) and/or Section 9.D (“Performance-Related Payment Adjustments) and/or Section 9.E (“Compensation for Unanticipated Repairs”) of the Agreement. Compensation shall be settled on a monthly basis.

B. Variable Component of Compensation

Pursuant to Section 9 of the Agreement, MISO shall pay Participant its Production Cost for the amount of Actual Energy Injections (as defined in Module A Section 1.1a of the MISO Tariff) and Operating Reserve Cost in each instance that MISO dispatches the SSR Unit. For purposes of this Agreement, “Production Cost” shall mean the Energy output cost of the SSR Unit based upon Start Up, No Load, and Energy Offer cost components that reflect the actual costs of physically operating the SSR Unit, and “Operating Reserve Cost” shall mean the actual cost to provide Operating Reserves. All Production Costs and Operating Reserve Costs will be subject to audit by MISO, and will be subject to audit and enforcement by the Independent Market Monitor (“IMM”) (such audit and enforcement provision shall not be interpreted as a limitation on MISO and IMM activities or responsibilities).

Through the MISO settlement process, MISO will ensure that Participant is paid the “SSR Unit Compensation,” which is equal to the sum of Production Cost and Operating Reserve Cost over all the SCUC Instructed Hours of Operation in the Day for that SSR Unit. MISO will compare the SSR Unit Compensation to the “SSR Unit Energy and Operating Reserve Credit.” The SSR Unit Energy and Operating Reserve Credit are those charges and credits calculated pursuant to Sections 39.3 Day-Ahead Energy and Operating Reserve Market and 40.3 Real Time

Energy and Operating Reserve Market Settlement of the MISO Tariff, plus any revenues from Schedule 2 associated with the SSR Unit or from Planning Resource designation and any charges assessed through Schedule 17 and Schedule 24. In those hours where the SSR Unit Compensation is greater than the SSR Unit Energy and Operating Reserve Credit, MISO will make the applicable make-whole payment to Participant (such make-whole payment to be equal to the difference between the SSR Unit Compensation and the SSR Unit Energy and Operating Reserve Credit). In those hours where the SSR Unit Compensation is less than the SSR Unit Energy and Operating Reserve Credit, MISO will debit from Participant (such debit to be equal to the difference between the SSR Unit Energy and Operating Reserve Credit and the SSR Unit Compensation).