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February 13, 2014

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Executive Director
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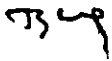
*In The Matter Of: Application of Big Rivers Electric Corporation For A
General Adjustment In Rates - Case No. 2013-00199*

Dear Mr. Derouen:

Enclosed for filing are an original and ten (10) copies of Big Rivers Electric Corporation's Post-Hearing Brief in the above-referenced matter. I certify that on this date, a copy of this letter and a copy of the brief were served on each of the persons listed on the attached service list by first class mail or by overnight delivery.

Please confirm the Commission's receipt of this information by having the Commission's date stamp placed on the enclosed additional copy and returning to Big Rivers in a self-addressed, postage paid envelope provided.

Sincerely,



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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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PUBLIC SERVICE
COMMISSION

In the Matter of:

**APPLICATION OF BIG RIVERS
ELECTRIC CORPORATION FOR A
GENERAL ADJUSTMENT IN RATES**

)
) **Case No. 2013-00199**
)

POST-HEARING BRIEF OF
BIG RIVERS ELECTRIC CORPORATION

February 14, 2014

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

5 In the Matter of:
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8 APPLICATION OF BIG RIVERS)
9 ELECTRIC CORPORATION FOR A) Case No. 2013-00199
10 GENERAL ADJUSTMENT IN RATES)
11

12
13 **POST-HEARING BRIEF OF BIG RIVERS ELECTRIC CORPORATION**

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

17 **I. Introduction.**

18 Big Rivers is entitled to fair, just, and reasonable rates – rates that are “reasonably
19 sufficient to assure confidence in the financial soundness of the utility, and rates that should be
20 adequate, under efficient and economical management, to maintain its credit and enable it to
21 raise the money necessary for the proper discharge of its public duties.”¹ No issue raised in this
22 proceeding changes the Commission’s Constitutional mandate to grant Big Rivers sufficient
23 rates. The rates proposed by Big Rivers will ensure its financial viability, allow it to service its
24 debt and pay its expenses, and allow it to be in a financial position that will enable it to access
25 the capital markets. The rates proposed by the Opposing Intervenors² do not and are, instead,
26 designed to undermine Big Rivers’ financial integrity. As such, the rates proposed by Big Rivers
27 should be approved, and the rates proposed by the Opposing Intervenors should be denied.

¹ *Bluefield Waterworks v. Public Serv. Comm’n of W. Va.*, 262 U.S. 679 (1923).

² The “Opposing Intervenors” are (i) the Office of the Attorney General (the “Attorney General”), (ii) Kentucky Industrial Utility Customers, Inc. (“KIUC”), and (iii) Ben Taylor and Sierra Club (together, “Sierra Club”).

1 As a not-for-profit, member-owned cooperative, Big Rivers' only interest is to provide
2 safe and reliable power to its Members³ at the lowest reasonable cost, and Big Rivers has
3 historically been able to maintain some of the lowest rates in the country. Unfortunately, in
4 August of 2012, Century Aluminum of Kentucky General Partnership ("Century") notified Big
5 Rivers that it was terminating its electric service agreement for its aluminum smelter in
6 Hawesville, Kentucky (the "Hawesville Smelter"), which necessitated Big Rivers filing Case No.
7 2012-00535 (the "535 Rate Case"). The Commission granted approximately seventy-nine
8 percent (79%) of Big Rivers' proposed revenue requirement in that case,⁴ and the ratings
9 agencies took temporary comfort in the Commission's findings that Big Rivers had taken
10 prudent steps to ensure its ongoing financial viability in the face of Century's contract
11 termination.

12 Five months after the Hawesville Smelter's contract termination notice, Alcan Primary
13 Products Corporation ("Alcan") notified Big Rivers, in January of 2013, that it was terminating
14 its electric service agreement for its aluminum smelter in Sebree, Kentucky (the "Sebree
15 Smelter"),⁵ necessitating the filing of the present case. All eyes are now turned to the
16 Commission's decision in this case, with lenders, ratings agencies, vendors, and potential new
17 customers anxious to see whether the Commission will support Big Rivers.

18 In recognition of the magnitude of the rate adjustments required as a result of the Smelter
19 contract terminations, Big Rivers is requesting only the bare minimum necessary for its
20 continued financial viability. For example, Big Rivers is requesting only a 1.24 times interest
21 earned ratio ("TIER"), which does not even approach the authorized TIER (rate of return)

³ Big Rivers' Members are Kenergy Corp. ("Kenergy"), Jackson Purchase Energy Corporation, and Meade County Rural Electric Cooperative Corporation.

⁴ \$54.2 million / \$68.6 million = 0.790 (not including the deferral of \$6.2 million of depreciation expenses).

⁵ Alcan's Sebree Smelter was subsequently purchased by Century. The Hawesville Smelter and the Sebree Smelter are hereinafter referred to as the "Smelters."

1 granted to most other electric utilities. In addition, Big Rivers' staff has exerted tremendous
2 effort and creatively evaluated all aspects of its operations to streamline costs and to maximize
3 the use of its existing generating resources for the continued benefit of its Members. However,
4 Big Rivers' plan to streamline its costs, ensure its financial viability through adequate rates, and
5 leverage its generating assets to mitigate the impact of the Smelter contract terminations (the
6 "Mitigation Plan"⁶) now relies on the Commission's regulatory support.

7 The Opposing Intervenors' response to the Smelter contract terminations is a knee-jerk
8 reaction asking the Commission to ignore its Constitutional mandate and to throw in the towel on
9 Big Rivers. Rather than afford Big Rivers the support and patience necessary to effectively
10 mitigate the Smelter contract terminations, the Opposing Intervenors advocate actions that
11 would – as Big Rivers' bankruptcy expert, Ralph R. Mabey, testified – "light the bankruptcy
12 fuse."⁷ Remarkably, and despite the prominence of this concern in the present case and in the
13 535 Rate Case, the Opposing Intervenors performed absolutely no analysis of the impact of a
14 bankruptcy on Big Rivers, its Members, or their retail customers. In every instance, the
15 Opposing Intervenors propose drastic and dangerous responses to Big Rivers' revenue request,
16 and those responses are made even more dangerous as a result of their complete failure to
17 account for the fact that adoption of any such proposals would likely cause third-parties to react
18 defensively, thereby undermining Big Rivers' financial viability even if it were not the
19 Commission's intent to do so.

20 The interests of Big Rivers, its Members, and their retail customers are best served by
21 allowing Big Rivers' management an opportunity to devote the full strength of its resources to
22 the implementation of the Mitigation Plan. Big Rivers' proposal to stabilize its finances, thereby

⁶ Load Concentration Analysis & Mitigation Plan, a copy of which was filed with Big Rivers' Response to Post-Hearing Request for Information No. 4.

⁷ Hearing Testimony of Ralph R. Mabey, Jan. 8, 2014, Tr. 15:11'48" ("Mabey Hearing Testimony").

1 enabling it to work toward future rate reductions, is the only workable solution proposed by any
2 party to this proceeding, and contrary to the Opposing Intervenors' suggestions that Big Rivers
3 has not tried to find a "creative solution" to its circumstances, the multifaceted strategy of the
4 Mitigation Plan is starting to work.⁸ This cannot effectively continue, however, in the face of
5 constant regulatory proceedings where intervenors continually adopt positions that will lead to
6 the ruination of Big Rivers and the abandonment of the benefits it will bring its Members. Big
7 Rivers needs time to pursue its mitigation strategies, and – because there are many factors that
8 can influence how the specific nature, magnitude, and term of any successes translate into
9 potential rate reductions to the Members – it needs latitude to control the return of Mitigation
10 Plan successes to the Members.

11 As a not-for-profit electric cooperative, Big Rivers has no operational incentive other
12 than to benefit its Members, and its every plan and action serve that goal. It has streamlined its
13 expenses; it has identified a multitude of load replacement targets; and it will be able to leverage
14 the Wilson and Coleman generating stations for the benefit of its Members. But it needs the
15 relief sought in this proceeding to have the time necessary to pursue its mitigation strategies.
16 Consequently, and for all the reasons detailed in this brief and throughout this proceeding, Big
17 Rivers respectfully requests that the Commission grant the relief summarized below.

18

19 **II. Summary of Big Rivers' Requests for Relief.**

20 Big Rivers requests⁹ that the Commission issue an order accomplishing the following:

⁸ Hearing Testimony of Robert W. Berry, Jan. 8, 2014, Tr. 17:30'05" ("Berry Hearing Testimony") (citing replacement load of 92 MW due to native load growth and recent bilateral sales); *id.* at Tr. 17:34'25" (acknowledging that the Wilson Station is near the "break-even point" economically, at which point it will be profitable to run).

⁹ See Big Rivers Electric Corporation's Application for a General Adjustment in Rates, P.S.C. Case No. 2013-00199 (the "Application"), pp. 4-5 (June 28, 2013).

- 1 1. Approve the tariff revisions and associated rate adjustments described in Tabs 4 and 5 of
2 Big Rivers’ Application, as adjusted by the revised exhibits attached to the Rebuttal
3 Testimony of Mr. John Wolfram, Big Rivers’ rate consultant;¹⁰
- 4 2. Approve the costs Big Rivers incurs in this case and grant authority to amortize those
5 costs over 36 months;¹¹
- 6 3. Grant authority to recover certain severance costs and amortize them over a period of 60
7 months;¹²
- 8 4. Approve Big Rivers’ 2012 depreciation study and grant authority to implement the
9 depreciation rates contained in that study on the first day of the month, either coincident
10 with or following the effective date of the new tariff rates in this case as ordered by this
11 Commission;¹³
- 12 5. Approve Big Rivers’ proposal to apply any transmission revenues to the Economic
13 Reserve fund;¹⁴
- 14 6. Deny all adjustments proposed by the Opposing Intervenors;¹⁵ and
- 15 7. Grant Big Rivers all other relief to which it may appear entitled.

16 III. Legal Standard.

17 Kentucky law permits Big Rivers to “receive fair, just and reasonable rates for the
18 services rendered or to be rendered by it to any person.”¹⁶ As Kentucky courts have explained,
19 “there is no litmus test for establishing fair, just and reasonable rates, and there is no single

¹⁰ See Rebuttal Testimony of John Wolfram (Dec. 17, 2013) (“Wolfram Rebuttal Testimony”) (attaching revised exhibits).

¹¹ See Section XV.

¹² See Section XVI.

¹³ See Section XIII.

¹⁴ See Section XII.F.

¹⁵ See Section XVIII.

¹⁶ KRS 278.030(1).

1 prescribed method for accomplishing that goal.”¹⁷ Rather, in order to “fairly balance the
2 conflicting interests of the producer of electricity and the consumer,”¹⁸ Kentucky follows the rule
3 set forth by the U.S. Supreme Court in *Federal Power Commission v. Hope Natural Gas*
4 *Company*, 320 U.S. 591 (1944). *Hope* made clear that, “[u]nder the statutory standard of ‘just
5 and reasonable’ it is the result reached not the method employed which is controlling.”¹⁹

6 The *Hope* doctrine gives the Commission “broad discretion in [the] factors to be
7 considered in rate-making.”²⁰ Contrary to the arguments advanced by many ratepayers over the
8 years, the Commission “is simply not shackled to a mechanical application of the used and useful
9 standard.”²¹ Instead, the Commission may consider a utility’s “history and development,” “debt
10 retirement,” “operating cost,” and need to maintain “excess capacity in order to insure
11 continuation of adequate service during periods of high demand and some potential for future
12 growth and expansion.”²² The Commission may also consider whether the utility’s “expansion
13 investments were prudently or imprudently made,” and “whether a particular utility is investor
14 owned or a cooperative operation.”²³ This final consideration is required in part because, as
15 explained by Mr. Mark A. Bailey, Big Rivers’ Chief Executive Officer, a cooperative’s
16 “Members are [its] owners.”²⁴ Consequently, the not-for-profit corporate structure of an electric

¹⁷ *Kentucky Indus. Util. Customers, Inc. v. Kentucky Utils. Co.*, 983 S.W.2d 493 (Ky. 1998). See also *National-Southwire Aluminum Co. v. Big Rivers Electric Corp.*, 785 S.W.2d 503 (Ky. Ct. App. 1990).

¹⁸ *National-Southwire*, 785 S.W.2d at 510.

¹⁹ *Fed. Power Comm’n v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944). This results-oriented approach has been reaffirmed several times. See, e.g., *Fed. Power Comm’n v. Memphis Light, Gas & Water Division*, 411 U.S. 458, 474 (1973) (“[U]nder *Hope Natural Gas* rates are ‘just and reasonable’ only if consumer interests are protected and if the financial health of the pipeline in our economic system remains strong”); *Colorado Interstate Gas Co. v. Fed. Power Comm’n*, 324 U.S. 581, 605 (1945) (adopting and applying “end result” test); *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) (ratemaker must ensure that individual components of ratemaking decision “do not together produce arbitrary or unreasonable consequences”).

²⁰ *National-Southwire*, 785 S.W.2d at 512-13.

²¹ *Id.* at 512.

²² *Id.* at 512.

²³ *Id.* at 512.

²⁴ Rebuttal Testimony of Mark A. Bailey, p. 9:13 (Dec. 17, 2013) (“Bailey Rebuttal Testimony”).

1 cooperative reinforces its objective “to safely deliver low-cost, reliable wholesale power
2 consistent with sound business practices and prudent management.”²⁵

3 The *Hope* Court also identified “the financial integrity of the company whose rates are
4 being regulated” as one of the major factors to be considered in ratemaking.²⁶ Indeed, the
5 Commission has recently argued that “[r]emaining financially viable would appear to be the very
6 purpose of having ‘fair, just, and reasonable rates.’”²⁷ The United States Supreme Court has also
7 suggested that rates “threatening [a utility’s] ‘financial integrity’” are considered to be “so unjust
8 as to be confiscatory.”²⁸ Confiscatory rates are an unconstitutional taking under the Fifth
9 Amendment.²⁹

10 More specifically, a utility’s rates must provide “enough revenue not only for operating
11 expenses but also for the capital costs of the business.”³⁰ This substantive consideration of a
12 utility’s “financial integrity” has been repeatedly reaffirmed.³¹ Its roots lie in the longstanding

²⁵ *Id.* at p. 9:14-16.

²⁶ *Hope*, 320 U.S. at 603.

²⁷ Reply Brief for the Kentucky Public Service Commission, Ky. Supreme Court Case No. 2009-SC-000134 (Dec. 15, 2009). See *PSC v. Commonwealth ex rel. Conway*, 324 S.W.3d 373 (Ky. 2010) (remanding to trial court with directions to reinstate the PSC orders at issue).

²⁸ *Verizon Communs., Inc. v. Fed. Commun. Comm’n*, 535 U.S. 467, 524 (2002) (quoting *Duquesne Light Co v. Barasch*, 488 U.S. 299, 307, 312 (1989)). See also *Public Service Commission of Kentucky v. Dewitt Water District*, 720 S.W.2d 725, 730 (Ky. 1986) (“Unreasonable has been construed in a rate-making sense to be the equivalent of confiscatory. This Court has equated an unjust and unreasonable rate to confiscation of utility property. We have declared that rates established by a regulatory agency must enable the utility to operate successfully and maintain its financial integrity in order to meet the just and reasonable nonconfiscatory tests.”);

²⁹ *Duquesne Light Co.*, 488 U.S. at 307-8 (“The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so ‘unjust’ as to be confiscatory.”) (citing *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 597 (1896) (A rate is too low if it is “so unjust as to destroy the value of [the] property for all the purposes for which it was acquired,” and in so doing “practically deprive[s] the owner of property without due process of law”). See also *Fed. Power Comm’n v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942) (“By long standing usage in the field of rate regulation, the ‘lowest reasonable rate’ is one which is not confiscatory in the constitutional sense.”).

³⁰ *Hope*, 320 U.S. at 603.

³¹ See, e.g., *Permian Basin*, 390 U.S. at 792 (factfinder “must determine” if rate will allow utility to “maintain financial integrity” and “attract necessary capital”); *Jersey Central Power & Light Co. v. Fed. Energy Regulatory Comm’n* (“*Jersey Central III*”), 810 F.2d 1168, 1175 (D.C. Cir. 1987) (superseded by statute in the context of the Telecommunications Act) (*Hope* makes clear that utilities have “an interest in maintaining access to capital markets, the ability to pay dividends, and general financial integrity” that must be considered in ratemaking even if the utility “is not clearly headed for bankruptcy”). In *Jersey Central III*, the court distinguished a previous decision on the grounds that the party in the previous case “never alleged that its financial integrity and its ability to maintain access

1 principle that a “return should be reasonably sufficient to assure confidence in the financial
2 soundness of the utility, and should be adequate, under efficient and economical management, to
3 maintain its credit and enable it to raise the money necessary for the proper discharge of its
4 public duties.”³²

5 Consequently, when setting rates that are fair, just, and reasonable, the Commission must
6 ensure that the resulting rates will, among other things, “enable the utility to operate
7 successfully, to maintain its financial integrity, [and] to attract capital.”³³ For the reasons stated
8 below, the rates Big Rivers proposes in this case are fair, just, and reasonable and should be
9 approved by the Commission.

10 **IV. Factual Background.**

11 **A. Big Rivers Before and After the Unwind Transaction.**

12 The Commission has recognized³⁴ that Big Rivers’ operations and ratemaking have long
13 been uniquely complicated³⁵ by the volatility of the aluminum smelting industry,³⁶ which (until
14 very recently) comprised approximately two-thirds of the native demand on Big Rivers’

to capital markets depends upon the rate it was requesting. *Id.* at 1172 (*distinguishing NEPCO Municipal Rate Comm’n v. FERC*, 668 F.2d 1327 (D.C. Cir. 1981), *cert. denied sub nom. New England Power Co. v. FERC*, 457 U.S. 1117 (1982)).

³² *Bluefield Waterworks*, 262 U.S. 679.

³³ *Commonwealth ex rel Stephens v. South Central Bell Telephone Co.*, 545 S.W.2d 927, 930-31 (Ky. 1976); *National-Southwire*, 785 S.W.2d at 512.

³⁴ *In the Matter of Big Rivers Elec. Corp.’s Notice of Changes in Rates and Tariffs for Wholesale Elec. Service and of a Financial Workout Plan* (the “1986 Rate Case”), P.S.C. Case No. 9613, Order, *13-14 (March 17, 1987) (the “9613 Order”) (acknowledging the ratemaking complications associated with “the fortunes of [Big Rivers’] major customers, the aluminum companies,” and recognizing that a previous downturn in the aluminum market put Big Rivers in a “nightmarish position.”).

³⁵ Bailey Rebuttal Testimony at pp. 4:24-5:1 (Big Rivers “to the best of my knowledge—is the only electric G&T in the country to simultaneously serve two aluminum smelters”).

³⁶ This volatility is due in part to the fact that aluminum is sold at prices dictated by global market forces, and the Smeiters assert that they have no ability to influence the price at which they sell the aluminum they produce. *In the Matter of: Application of Big Rivers for a General Adjustment in Rates* (the “2011 Rate Case”), Order, P.S.C. Case No. 2011-00036, *38 (Nov. 17, 2011) (the “2011 Rate Case Order”). Volatility in the aluminum market is not a new development. As just one example described by the Commission, “aluminum prices took an unexpectedly deep and prolonged drop” in 1982 to 1983, “returned to normal” by late 1983, then “again sharply declined in 1984.” 9613 Order at *7-8.

1 system.³⁷ Because of this volatility, the Smelters have historically vacillated between demanding
2 insulation from the wholesale energy market and demanding rates more closely tied to the
3 wholesale energy market.³⁸ In 1998, Big Rivers leased its generating assets to third parties,³⁹ and
4 the Smelters were carved out of Big Rivers' all-requirements obligation to Kenergy, which
5 serves both Smelters.⁴⁰ The Smelters agreed to purchase 70% of their power from LG&E
6 Energy Marketing at "fixed prices" and 30% from Kenergy through the wholesale market.⁴¹
7 These market power purchases were to increase to 100 percent by 2011,⁴² but by 2007 the
8 Smelters asserted that they could not stay in business if they had to pay market-based prices as
9 required by the 1998 agreements.⁴³ This concern was one of the primary drivers of the 2009
10 "Unwind Transaction," in which the Commission insulated the Smelters from the wholesale
11 energy market "in an effort to avoid the potential of an economic disaster for western Kentucky
12 if Century and Alcan were to close due to high market-based power prices."⁴⁴

³⁷ Bailey Rebuttal Testimony at p. 4:21-22 (describing the Smelters as "two customers who comprise approximately two-thirds of the total native demand on" Big Rivers' system).

³⁸ See, e.g., *In the Matter of Big Rivers Elec. Corp.'s Notice of Changes in Its Rates for Electricity Sold to Member Cooperatives*, Order, P.S.C. Case No. 9163 (May 6, 1985) (encouraging Big Rivers and the Smelters to negotiate a Smelter rate based on the prevailing market price of aluminum); 9613 Order at *44 (ordering Big Rivers and the smelters to "negotiate a flexible rate plan that recognizes the cyclical nature of the [aluminum] industry"); *In the Matter of An Investigation of Big Rivers Elec. Corp.'s Rates for Wholesale Elec. Service*, Order, P.S.C. Case No. 9885, *32 (Aug. 10, 1987) (approving "workout plan" that implemented rates for the Smelters "that vary with the market price of aluminum"); *In the Matter of National-Southwire Alum. Co. v. Big Rivers Elec. Corp. et al.*, Complaint, P.S.C. Case No. 89-376 (in which one of the Smelters filed a complaint seeking insulation from aluminum-market-based pricing); *National-Southwire Alum. Co.*, Order, P.S.C. Case No. 89-376 (March 23, 1990) (accepting a settlement that added a balancing account to the Smelter rate mechanism that had the effect of reducing the Smelters' rates).

³⁹ *In the Matter of the Applications of Big Rivers Elec. Corp. for: (1) Approval of Wholesale Tariff Additions for Big Rivers Elec. Corp., (2) Approval of Transactions, (3) Approval to Issue Evidences of Indebtedness, and (4) Approval of Amendments to Contracts; and of E.ON U.S., LLC, Western Kentucky Energy Corp. and LG&E Energy Marketing, Inc. for Approval of Transactions*, Order, P.S.C. Case No. 2007-00455, *6 (March 6, 2009) (the "Unwind Order").

⁴⁰ Berry Hearing Testimony, Jan. 8, 2014, Tr. 21:07'05"; *id.* at Tr. 21:09'15" (carve-out of the Smelters was part of Big Rivers' 1998 bankruptcy proceedings).

⁴¹ Unwind Order at *6.

⁴² *Id.* at *6.

⁴³ *Id.* at *14; 535 Rate Case, Order, *16-17 (October 29, 2013) (the "535 Rate Case Order").

⁴⁴ *Id.* at *17. See also Unwind Order at *14-18.

1 In the Unwind Transaction, Big Rivers took back operational responsibility of its
2 generating fleet,⁴⁵ a development the Commission “applaud[ed]”⁴⁶ In addition, third parties
3 contributed significant funds to Big Rivers and the Smelters, improving Big Rivers’ ability to
4 borrow money on a long-term secured basis.⁴⁷ Finally, Big Rivers, Kenergy, the Commission,
5 and the Smelters worked together to create a series of special contracts (the “Smelter
6 Agreements”) designed to provide the Smelters “with a long-term supply of power priced at
7 below market prices.”⁴⁸

8 The Commission acknowledged and explored certain risks of the Unwind Transaction—
9 especially the “worst-case scenario” that the Smelters might permanently close their operations
10 even with preferential pricing⁴⁹—and “proceeded very cautiously and deliberately” in the
11 proceeding.⁵⁰ The Unwind Transaction included important provisions to mitigate those potential
12 risks, including limitations on the Smelters’ ability to terminate the Smelter Agreements prior to
13 Big Rivers completing construction of transmission improvements designed to increase Big
14 Rivers’ power export capability, the establishment of “a Transition Reserve to be used as an
15 emergency fund to offset the loss of revenue should one or both Smelters close until alternative
16 buyers are found for the power,”⁵¹ and the establishment of a second reserve fund to offset future
17 wholesale power cost increases for the Rural and Large Industrial customer classes. Even with
18 those protective measures in place, the Commission determined that due to the projected rate
19 increases to the Rural customer class, the Unwind Transaction would not be fair, just, and

⁴⁵ *Id.* at *6-9.

⁴⁶ *In the Matter of: Application of Big Rivers for a General Adjustment in Rates, Order*, P.S.C. Case No. 2009-00040, *1-2 (Aug. 14, 2009) (in which the Commission “applauds Big Rivers’ successful efforts to regain operating control of its generating facilities”).

⁴⁷ Unwind Order at *22 (financial contribution improved Big Rivers’ equity and credit rating, thereby increasing its access to capital markets).

⁴⁸ *Id.* at *15.

⁴⁹ *Id.* at *18.

⁵⁰ *Id.*

⁵¹ *Id.* at *11-12.

1 reasonable without a third reserve fund to further offset those future rate increases.⁵² With the
2 addition of this third reserve fund, the Commission found that it was reasonable to anticipate that
3 the Unwind Transaction would “produce very significant benefits for Big Rivers, the Smelters,
4 and non-Smelter customers.”⁵³ Furthermore, as the Commission recognized: the Unwind
5 Transaction was “fully supported by Century and Alcan . . . [and] was not opposed by KIUC,
6 which was an intervenor”⁵⁴ And although opposed by the Attorney General, “no appeal
7 was filed in response to the Commission’s Order approving the transaction.”⁵⁵

8 The Unwind Transaction led to significant benefits, including restoring Big Rivers’
9 control of its generating assets, enabling Big Rivers to “access capital markets when necessary to
10 do so, such as to refinance existing high-interest rate pollution control bonds and to fund future
11 upgrades and replacements of existing facilities,” and making a “long-term supply of power . . .
12 available for the Smelters at prices below those in the market [which] should allow the Smelters
13 to maintain their operations in western Kentucky; preserve hundreds of good-paying jobs; and
14 avoid an erosion of the tax base, which would be devastating to area school districts and local
15 and state governments.”⁵⁶ Unfortunately, “neither Big Rivers, the smelters, KIUC, nor the
16 Commission was able to anticipate in 2009 that the economic recession that had started in 2008
17 would not now be behind us, that worldwide aluminum prices would still be depressed, or that
18 vast quantities of shale gas would now be sold at prices that allow market power to be priced
19 lower than Big Rivers’ rates under the Smelter Agreements.”⁵⁷

⁵² *Id.* at *25-26.

⁵³ *Id.* at *22.

⁵⁴ 535 Rate Case Order at *17.

⁵⁵ *Id.* at *17.

⁵⁶ Unwind Order at *18.

⁵⁷ 535 Rate Case Order at *18.

1 These market conditions caused a significant and unpredictable downturn in the
2 wholesale power market, which had a corresponding impact on Big Rivers' off-system sales
3 revenues.⁵⁸ As a not-for-profit cooperative, Big Rivers' off-system sales revenues offset
4 revenues that would otherwise need to come from ratepayers, and Big Rivers' participation in the
5 off-system market has allowed it to have some of the lowest rates in the country. The
6 deteriorating wholesale power market negatively impacted Big Rivers' ability to offset Member
7 rates with off-system sales revenues, and, ultimately, led Big Rivers to seek rate relief in the
8 2011 Rate Case.⁵⁹ The Commission awarded partial rate relief in that case, which left Big Rivers
9 with insufficient revenue and forced Big Rivers to take significant steps to maintain compliance
10 with its loan covenants, including continuing to defer maintenance outages.⁶⁰

11 **B. The Smelters Terminate Their 2009 Retail Agreements.**

12 The deteriorating market conditions after the Unwind Transaction also negatively
13 impacted the Smelters, which requested even more preferential treatment from the Commission.
14 In the 2011 Rate Case, “[t]he Smelters expressed deep concern that their economic viability
15 [would] be jeopardized as the price they pay for electricity continues to rise.”⁶¹ The
16 Commission, while “highly sympathetic,” declined to extend additional rate relief to the
17 Smelters.⁶² In early 2012, the Smelters met with state officials to apprise them of its financial
18 concerns.⁶³ Multi-lateral discussions involving Big Rivers, Kenergy, the Smelters, and state
19 officials proved fruitless in part because Century did not provide the information necessary to

⁵⁸ 2011 Rate Case Order at *12; 535 Rate Case Order at *18.

⁵⁹ 2011 Rate Case Order at *3 (“Big Rivers’ application in this proceeding indicates that lower-than-projected off-system sales revenues are a primary reason for having filed for a rate increase prior to the 2016 date as projected at the time of the Unwind proceeding.”).

⁶⁰ Hearing Testimony of Mark A. Bailey, Jan. 7, 2014, Tr. 16:51’28” (“Bailey Hearing Testimony”).

⁶¹ 2011 Rate Case Order at *38.

⁶² *Id.* at *40.

⁶³ See Bailey Hearing Testimony, Jan. 7, 2014, Tr. 12:16’12”.

1 validate its demand for \$150 million in rate relief.⁶⁴ During the negotiations, Big Rivers
2 proposed the maximum amount of rate relief it could reasonably offer given its contractual and
3 regulatory obligations,⁶⁵ including an offer to put the Smelters on cost-based rates.⁶⁶ The
4 Smelters rejected this offer.⁶⁷

5 Despite Big Rivers taking every reasonable action it could to avoid an adverse outcome,⁶⁸
6 the Hawesville Smelter notified Big Rivers on August 20, 2012, that it was terminating its 2009
7 Retail Service Agreement approved in the Unwind Transaction.⁶⁹ Following the Hawesville
8 Smelter's termination, the Sebree Smelter attempted to negotiate lower rates, and Big Rivers
9 worked to find a solution that would shield the Sebree Smelter from the rate increase in a manner
10 that was fair to Big Rivers' Members.⁷⁰ Big Rivers proposed rates for the Sebree Smelter around
11 \$49-50/MWh, but the Sebree Smelter rejected these rates and requested to be served at
12 \$43/MWh.⁷¹ After careful consideration, Big Rivers determined that entering into such a
13 transaction would place undue and unfair burdens and risks on the other retail customers of Big
14 Rivers' Members.⁷²

⁶⁴ Bailey Hearing Testimony, Jan. 7, 2014, Tr. 12:16'40". Throughout this process, Big Rivers' Board of Directors was advised on a regular basis on the Smelters' statements and activities. *Id.* at Tr. 13:50'53".

⁶⁵ *Id.* at Tr. 12:18'33". See also Big Rivers' Response to Item No. 75 of KIUC's First Data Requests.

⁶⁶ Bailey Hearing Testimony, Jan. 7, 2014, Tr. 12:19'52".

⁶⁷ *Id.* at Tr. 12:20'00".

⁶⁸ *Id.* at Tr. 13:44'38". See also *id.* at 17:09'37" (testifying that Big Rivers wanted the Smelters to stay on its system, as evidenced by the extensive negotiations and the numerous offers for fair rate relief Big Rivers extended to the Smelters).

⁶⁹ See Big Rivers' Response to Item No. 31 of the Attorney General's First Data Requests (providing notice of termination letter). The Hawesville Smelter's contract termination was made pursuant to Section 7.3.1 of the agreement, pursuant to which the Hawesville Smelter represented and warranted to Big Rivers and Kenergy that that it "made a business judgment in good faith to terminate and cease all aluminum smelting at the Hawesville smelter . . ." (*Id.*)

⁷⁰ Bailey Hearing Testimony, Jan. 7, 2014, Tr. 10:42'00"; 12:20'48".

⁷¹ *Id.* at Tr. 12:20'55".

⁷² *Id.* at Tr. 12:20'02" ("After the Century termination notice in the September timeframe . . . we had been communicating with Alcan because they and Century had different views on what their wants were, and whether market[-based pricing] might work, or whether market[-based pricing] wouldn't work. And so we communicated with Alcan at that point to see if there might be some arrangement that could be done with them since they had a little different view. And we again showed them what their rates would be under the forecasted filings that would be necessary after the Century departure. We talked with them about shielding them from the Century increase which

1 At the \$43/MWh price point for both Smelters, Big Rivers would have had to recover
2 approximately \$125 million in revenue from its Members,⁷³ more than it has sought in this
3 proceeding and the 535 Rate Case combined.⁷⁴ Just as troubling, the deal would have committed
4 Big Rivers' resources to serving the Smelters at a subsidized rate, limiting Big Rivers' ability to
5 mitigate any rate increases while simultaneously providing no guarantee that the Sebree Smelter
6 would stay on Big Rivers' system or not demand further rate concessions.⁷⁵

7 Consequently, Big Rivers rejected the offer. In spite of Big Rivers' negotiating efforts,
8 which continued all the way up to the notice of the contract termination,⁷⁶ the Sebree Smelter
9 notified Big Rivers on January 31, 2013, that it was terminating its 2009 Retail Service
10 Agreement.⁷⁷

11 It is difficult to overstate the impact of the Smelters' contract terminations. As Mr.
12 Bailey explains, "[t]he smelters contributed approximately \$360 million (\$205 million from
13 Century [Hawesville Smelter] and \$155 million from Alcan [Sebree Smelter]) in revenues to Big
14 Rivers in 2012."⁷⁸ This has led to a difficult transition period, but Big Rivers has worked
15 diligently to protect its Members from the effects of the contract terminations, and with adequate

left them with power at about [\$]49[/MWh] or [\$]50[/MWh], as it turned out it was [around \$48/MWh] after the year was over, what they actually paid. And it was on a one-time basis, shield them from that. That didn't work for them, they came back with a [\$]43[/MWh] counter that we heard mentioned yesterday and at other times. But at that point in time, the increase we would have needed to deal with that [\$]43[/MWh] offer would have put us up in the range of [\$]125 million total, which was where we were to begin with. So obviously that did not work for us. We were continuing to have dialogue, as was indicated in some of the correspondence from Alcan, right up almost until the time of the termination notice . . ."). See also Big Rivers' Response to Item No. 75 of KIUC's First Data Request.

⁷³ Bailey Hearing Testimony, Jan. 7, 2014, Tr. 17:10'30".

⁷⁴ *Id.* at Tr. 17:11'16".

⁷⁵ *Id.* at Tr. 17:10'39".

⁷⁶ *Id.* at Tr. 12:21'37".

⁷⁷ See Big Rivers' Response to Item No. 31 of the Attorney General's First Data Requests (providing notice of termination letter). The Sebree Smelter's contract termination was made pursuant to Section 7.3.I of the agreement, pursuant to which the Sebree Smelter represented and warranted to Big Rivers and Kenergy that that it "made a business judgment in good faith to terminate and cease all aluminum smelting at the Sebree smelter . . ." (*Id.*)

⁷⁸ Bailey Rebuttal Testimony at p. 6:1-3.

1 rate relief, it is confident about its future ability to continue providing safe, reliable, and
2 affordable electric service to its Members and their retail customers.⁷⁹

3 **C. Big Rivers Responds to the Smelter Retail Agreements Terminations.**

4 Meanwhile, Big Rivers' management had begun to formalize its existing strategy to
5 mitigate the risks the Smelter terminations would pose. This strategy included negotiating better
6 terms with creditors and implementing the Mitigation Plan, pursuant to which Big Rivers would
7 cut costs, seek necessary rate relief, and secure replacement load⁸⁰ or increase off-system sales.

8 **1. Big Rivers Negotiates with Its Creditors.**

9 In light of these developments, Big Rivers negotiated with its creditors to refinance
10 millions of dollars of debt to improve its financial situation.⁸¹ Through these refinancings, Big
11 Rivers was able to extend maturity dates,⁸² lower interest rates,⁸³ and reduce the number of
12 events that would constitute default.⁸⁴ In a later case, the Commission also enabled Big Rivers to
13 amend its CFC revolver to extend the maturity date, collateralize the loan, and establish fewer
14 events of default.⁸⁵ These refinancings were of tremendous benefit to Big Rivers and its

⁷⁹ Direct Testimony of Mark A. Bailey, Application Tab 60, p. 6:15-16 (June 28, 2013) ("Bailey Direct Testimony") ("although Big Rivers is in a difficult transition period, if it can secure the needed rate relief, Big Rivers will be well-positioned for the future").

⁸⁰ "Replacement load" includes any revenue-producing native and external load. Bailey Hearing Testimony, Jan. 7, 2014, Tr. 12:08'15".

⁸¹ See *In the Matter of: Application of Big Rivers Electric Corporation for Approval to Issue Evidences of Indebtedness*, Order, P.S.C. Case No. 2012-00119 (May 25, 2012); *In the Matter of Application of Big Rivers Elec. Corp. for Approval to Issue Evidences of Indebtedness* (the "2012 Refinancing Case"), Order, P.S.C. Case No. 2012-00492 (March 26, 2013) (the "2012 Refinancing Case Order").

⁸² 2012 Refinancing Case Order at *5 ("The transactions described herein would increase Big Rivers' liabilities by \$139,381,389 while, at the same time, would reduce Big Rivers' annual interest expense by \$1,421,349 for nine years and extend the length of its financings by 11 years.").

⁸³ *Id.* at *4 ("The financings are expected to be at an all-in interest rate that is below the rate of the existing RUS Note.").

⁸⁴ *Id.* at *6 ("The revised Section 9.06 [of the CoBank Secured Credit Agreement], which will be included in the executed version of the CoBank Secured Credit Agreement, clarifies that it is not an Event of Default if a Smelter contract expires by its own terms or is terminated pursuant to a notice of Smelter plant closure").

⁸⁵ See *In the Matter of: Application of Big Rivers Electric Corporation for Approval to Issue Evidences of Indebtedness*, P.S.C. Case No. 2013-00125 (the "2013 Refinancing Case"), Order of July 15, 2013 (the "2013 Refinancing Case Order"), *3-4.

1 Members even though they did not involve creditors writing down debt principal, and they were
2 accomplished because a principal reduction was not requested.⁸⁶

3 **2. Big Rivers Implements Its Mitigation Plan.**

4 When Big Rivers received the Hawesville Smelter's termination notice, it immediately
5 began to implement its Mitigation Plan.⁸⁷ That plan consists of several steps.⁸⁸

6 First, the Mitigation Plan calls for Big Rivers to address its immediate revenue
7 deficiencies by seeking rate relief from the Commission. In response to the Hawesville Smelter
8 contract termination, Big Rivers filed the 535 Rate Case (discussed in the next subsection),
9 requesting that its proposed rates be established by August 20, 2013, the effective termination
10 date of the Hawesville Smelter service contract.⁸⁹ In response to the Sebree Smelter contract
11 termination, Big Rivers filed the present case, requesting that its proposed rates be established by
12 January 31, 2014, the effective termination date of the Sebree Smelter service contract.⁹⁰

13 Second, the Mitigation Plan calls for Big Rivers to "market all excess power when the
14 market price is greater than marginal generation cost."⁹¹ Big Rivers has evaluated the off-system
15 sales market, and it anticipates that this will become an effective mitigation measure within the
16 next few years as wholesale energy prices further recover from their current depressed status.⁹²

17 Third, the Mitigation Plan calls for Big Rivers to "reduce costs and scale-back [its]
18 operations so that [it is] operating as leanly as possible while still satisfying [its] debt obligations,

⁸⁶ Rebuttal Testimony of Billie J. Richert, p. 10:15-16 (Dec. 17, 2013) ("Richert Rebuttal Testimony").

⁸⁷ Rebuttal Testimony of Robert W. Berry, p. 5:6-8 (Dec. 17, 2013) ("Berry Rebuttal Testimony").

⁸⁸ Direct Testimony of Robert W. Berry, Application Tab 63, p. 10:4-6 (June 28, 2013) ("Berry Direct Testimony").
See also Berry Rebuttal Testimony, p. 7:18-21 (Mitigation Plan includes "the rate increase requested in this proceeding, increased marketing of power (both on short-term and long-term bases), marketing of generation assets, economic development, and reduction of generation-related costs").

⁸⁹ Bailey Rebuttal Testimony at p. 5:1-3. *See also generally* Application, Case No. 2012-00535.

⁹⁰ Bailey Rebuttal Testimony at p. 5:3-5. *See also generally* Application, Case No. 2013-00199.

⁹¹ Berry Direct Testimony at p. 10:12-16. *See also* Hearing Testimony of John Wolfram, Jan. 9, 2014, Tr. 14:00'42" ("Wolfram Hearing Testimony") ("[W]hen it's economical to return the plants to service, Big Rivers will do so.").

⁹² Berry Direct Testimony at p. 10:12-16; Berry Rebuttal Testimony at p. 8:1-3, p. 9:6-19.

1 prudently operating and maintaining [its] generation fleet, and planning for the future.”⁹³ This
2 includes idling the Wilson and Coleman Stations (together, the “Stations”) “when the market
3 price does not support the cost of generating.”⁹⁴ These efforts are expected to result in
4 “approximately [\$238.5] million dollars of cost reduction to help mitigate the impact of these
5 rate adjustments”⁹⁵

6 Fourth, the Mitigation Plan calls for Big Rivers to “evaluate options to execute forward
7 bilateral sales agreements with counterparties, enter into wholesale power contracts, and/or
8 participate in capacity markets.”⁹⁶ This step includes pursuing economic development
9 opportunities,⁹⁷ responding to requests for proposals from other utilities, and exploring other
10 power marketing opportunities with third parties.⁹⁸ As discussed in Section VIII.B, Big Rivers
11 has already secured 92 MW of replacement load.⁹⁹

12 Fifth, Big Rivers has explored the possibility of selling or leasing generating units and
13 “would be willing to pursue such an option should it prove beneficial to Big Rivers and its
14 members.”¹⁰⁰ While Big Rivers would of course consider any legitimate offer it received,¹⁰¹ as
15 discussed in Section XVIII.C, Big Rivers is not willing to scuttle long-term assets in a knee-jerk

⁹³ Bailey Rebuttal Testimony at p. 6:10-13.

⁹⁴ Berry Direct Testimony at p. 10:17-20.

⁹⁵ Bailey Rebuttal Testimony at pp. 6:16-7:4 (“\$136.6 million of cost reduction was reflected in Case No. 2012-00535, and [\$102.1] million dollars of additional cost reduction is now reflected in the present case.”). *See* Bailey Hearing Testimony, January 7, 2014, Tr. 10:29’13” (updating cost reduction figures).

⁹⁶ Berry Direct Testimony at p. 11:1-16.

⁹⁷ *See* Hearing Testimony of Lindsay N. Barron, Jan. 9, 2014, Tr. 9:38’20” (“Barron Hearing Testimony”) (“We have actually had several meetings, several conversations with economic development groups within the footprint. We work with those folks on an ongoing basis and have always worked with those folks to try to attract new load to the territory. We support our Members in their economic development efforts. We actually met with the state economic development cabinet We discussed with them our proposed economic development incentive rate, and let them know kind of what we thought we had to offer and let them know that we were certainly interested and willing to work with them in any way we could.”).

⁹⁸ Berry Direct Testimony at p. 11:1-16.

⁹⁹ Berry Hearing Testimony, Jan. 8, 2014, Tr. 17:30’05”.

¹⁰⁰ Berry Direct Testimony at p. 11:12-16; Bailey Hearing Testimony, Jan. 7, 2014, 15:37’29”.

¹⁰¹ *See id.* at Tr. 15:41’50” (affirming that an offer for sale of a plant below book value would be analyzed to determine if it was in the best interests of the ratepayers if the price merited that discussion).

1 reaction to the Smelter contract terminations when doing so would jeopardize Big Rivers'
2 financial integrity.

3 From a broad perspective, “the Mitigation Plan does not assume the success of any one
4 element; rather, it outlines multiple mitigation strategies simultaneously” in order to allow Big
5 Rivers “the flexibility to respond to changing conditions” for the benefit of its Members.¹⁰² In
6 other words, “Big Rivers is not staking its long-term viability on the success of any element of
7 the Mitigation Plan” except rate relief.¹⁰³

8 **3. The Commission Grants Big Rivers a Base Rate Increase of**
9 **\$54,227,241 in the 535 Rate Case.**

10 On October 29, 2013, the Commission issued its final order¹⁰⁴ in the 535 Rate Case,
11 which Big Rivers filed in response to the Hawesville Smelter contract termination. The
12 Commission granted Big Rivers a base rate increase of \$54,227,241 and found it “reasonable to
13 afford Big Rivers the time to pursue its mitigation strategies, including operational changes to
14 reduce costs, seeking to acquire replacement load, increasing off-system sales, and attempting to
15 sell or lease its generating facilities.”¹⁰⁵ The Commission expressed concern about Big Rivers’
16 current reserve margin and required Big Rivers to record certain depreciation expenses as a
17 regulatory asset; however, it also found that the volume of Big Rivers’ current available capacity
18 “is not a result of any imprudent decisions by Big Rivers, but is a direct result of Big Rivers’

¹⁰² Berry Rebuttal Testimony at p. 7:15-21.

¹⁰³ *Id.* at p. 5:4.

¹⁰⁴ The Commission granted rehearing on the limited issue of “when the amount of SSR revenues [related to the Coleman Station] was determined and known to Big Rivers and whether any such additional revenues should be recognized in establishing Big Rivers’ revenue requirement.” 535 Rehearing Order at *6. As Mr. Bailey and Mr. Berry testified in this proceeding, the Opposing Intervenors’ concerns about the SSR revenue (both the timing of its determination and its effect on revenues) are a simple misunderstanding. (See Bailey Rebuttal Testimony at pp. 14:17-15:18; Berry Rebuttal Testimony at pp. 25:1-27:8.) That rehearing is currently pending.

¹⁰⁵ 535 Rate Case Order at *19.

1 actions to reacquire its generating facilities in an effort to keep the smelters operating in western
2 Kentucky.”¹⁰⁶

3 **D. The New Smelter Transactions.**

4 **1. The Commission Approves the Hawesville Smelter Transaction in**
5 **Case No. 2013-00221.**

6 On June 12, 2013, Kenergy and Big Rivers jointly filed an application in Case No. 2013-
7 00221 for the Commission’s approval of a series of contracts with Century related to the
8 Hawesville Smelter (the “Hawesville Smelter Transaction”). The Commission recognized that
9 the Hawesville Smelter Transaction was “an effort to preserve almost 700 direct jobs at the
10 Hawesville smelter,” and that it was “designed to provide Century Kentucky an opportunity to
11 continue operating the Hawesville smelter, which will provide significant benefits to the western
12 Kentucky economy”¹⁰⁷ The Commission then found that the Hawesville Smelter
13 Transaction is “reasonable and all of the agreements should be approved as filed.”¹⁰⁸

14 **2. The Commission Approves the Sebree Smelter Transaction in Case**
15 **No. 2013-00413.**

16 On November 19, 2013, Kenergy and Big Rivers jointly filed an application in Case No.
17 2013-00413 for the Commission’s approval of a series of contracts with Century related to the
18 Sebree Smelter (the “Sebree Smelter Transaction”). The Sebree Smelter Transaction was closely
19 based on the Hawesville Smelter Transaction,¹⁰⁹ and the central premise of the agreements was,

¹⁰⁶ *Id.* at *16, 19.

¹⁰⁷ *In the Matter of: Joint Application of Kenergy Corp. and Big Rivers Electric Corporation for Approval of Contracts and for a Declaratory Order*, Order at *26, P.S.C. Case No. 2013-00221 (August 14, 2013) (the “221 Order”).

¹⁰⁸ 221 Order at *26. All of the variable and incremental fixed costs associated with serving the Hawesville Smelter have been addressed in the agreements approved in the Hawesville Smelter Transaction, and those expected costs have not been included in the new rates Big Rivers seeks to implement in this proceeding. Bailey Hearing Testimony, Jan. 7, 2014, Tr. 10:51’18”.

¹⁰⁹ *In the Matter of: Joint Application of Kenergy Corp. and Big Rivers Electric Corporation for Approval of Contracts and for a Declaratory Order*, Order at *17, P.S.C. Case No. 2013-00413 (January 30, 2013) (the “413 Order”) (“[W]ith the exception of the Load Curtailment Agreement, the Century Sebree Transaction Agreements are

1 similarly, to allow the Sebree Smelter to continue operating, retaining the facility's benefit to the
2 western Kentucky economy without imposing additional costs on Big Rivers' Members beyond
3 those necessitated by the termination of the 2009 Smelter Agreements. Similar to the
4 Commission's findings regarding the Hawesville Smelter Transaction, the Commission
5 recognized that the Sebree Smelter Transaction was "an effort to preserve almost 500 direct jobs
6 at the Sebree smelter" and that this transaction, too, was "designed to provide Century Sebree an
7 opportunity to continue operating the Sebree smelter, which will provide significant benefits to
8 the western Kentucky economy" ¹¹⁰ The Commission then found that the Sebree Smelter
9 Transaction is "reasonable and all of the agreements should be approved as filed." ¹¹¹ The details
10 of the Sebree Smelter Transaction, though discussed briefly in Section XI, are not the subject of
11 this case, and, except as detailed in the Rebuttal Testimony of John Wolfram, approval of the
12 transaction does not change the rate relief Big Rivers needs in this case. ¹¹²

13
14 **V. Big Rivers' Proposed Rates Are Fair, Just, and Reasonable.**

15 Big Rivers' proposal in this proceeding is but an extension of the rate strategies
16 previously approved by the Commission in the 535 Rate Case. Big Rivers asks only that the
17 Commission continue its regulatory support. Big Rivers' proposal includes adjusting rates no
18 more than necessary, ¹¹³ significant cost-cutting through the idling of generation assets, and a
19 reasonable plan for future rate mitigation. Most importantly, it provides the only reasonable path
20 toward providing ongoing benefits to Big Rivers' Members. The Opposing Intervenors'

substantially identical to the set of agreements we approved last year relating to the Century Hawesville smelter in Case No. 2013-00221.").

¹¹⁰ 413 Order at *17.

¹¹¹ *Id.* at *17.

¹¹² See Bailey Hearing Testimony, Jan. 7, 2014, Tr. 16:44'35".

¹¹³ *Id.* at Tr. 14:22'50" ("We are a member-owned not-for-profit, we want the rates to be as low as they can and be adequately able to provide service. . . . [W]e're not looking for more money than we feel we need. We're trying to be as accurate as we can be.").

1 proposals, in contrast, would undermine Big Rivers' financial viability in pursuit of unrealistic
2 options, ultimately leading to bankruptcy and the reckless disposal of valuable assets at extreme
3 cost and risk for Big Rivers' Members, their retail customers, and all of western Kentucky. In
4 light of the unique circumstances presented in this proceeding, the Commission should exercise
5 its "broad discretion"¹¹⁴ to approve Big Rivers' proposed \$71,227,047 rate adjustment¹¹⁵ as "fair,
6 just, and reasonable."¹¹⁶

7 As explained by Mr. Bailey, Big Rivers is not trying to "pass the buck' from the smelter
8 contract terminations by recovering those lost revenues from the remaining customers"¹¹⁷
9 In fact, Big Rivers' requested revenue is dramatically less than the estimated \$155 million of
10 revenue that it will not receive as a result of the Sebree Smelter's unilateral service contract
11 termination.¹¹⁸ Mr. Bailey best describes Big Rivers' strategies and goals in this proceeding:

12 No one—Big Rivers included—wants electric rates to go up. Big
13 Rivers has a skilled and savvy management team that takes pride
14 in their service to our Members and their retail customers, and they
15 are working hard to help ensure that Big Rivers will not have to
16 adjust its rates any more than necessary. We are taking all
17 reasonable steps to reduce our costs, and we are actively pursuing
18 numerous rate mitigation strategies to help create long-term
19 benefits for our Members and their retail customers. This
20 proceeding is intended to simultaneously accomplish two equally
21 important objectives: (i) keep electric rates at a level that remains
22 fair, just, and reasonable; and (ii) protect the company's financial
23 integrity during this period of transition to a 'smelter-less'
24 system.¹¹⁹

¹¹⁴ *National-Southwire*, 785 S.W.2d at 512-13 (recognizing the Commission's "broad discretion in [the] factors to be considered in rate-making").

¹¹⁵ Wolfram Rebuttal Testimony at p. 36:7-8.

¹¹⁶ See KRS 278.030(1) (permitting Big Rivers to "receive fair, just and reasonable rates for the services rendered or to be rendered by it to any person."); *Hope*, 320 U.S. at 602 ("[u]nder the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling").

¹¹⁷ Bailey Rebuttal Testimony at p. 6:3-8.

¹¹⁸ *Id.* at p. 6:2-3.

¹¹⁹ *Id.* at pp. 3:19-4:3. See also Berry Direct Testimony at p. 23:18-20 (Big Rivers' proposed rates are carefully calculated to provide "only the revenue it needs to continue to safely operate and maintain its plants prudently in the future, maintain the value of its generating assets, and meet its financial covenants.").

1 Big Rivers has kept its proposed rate adjustments to a minimum in part by reducing its costs by
2 more than \$238 million to help mitigate the impact of these rate adjustments on its Members and
3 their retail customers.¹²⁰ Unfortunately this involves the reduction in over 180 positions, and in
4 fact, Big Rivers is the only company that is laying off employees as a result of the Smelter
5 contract terminations.¹²¹

6 Big Rivers' proposed rate adjustment was developed through a sound process, and the
7 financial forecast and cost of service study on which Big Rivers relied are reasonable and
8 reliable.¹²² The proposed rate adjustment is necessary for Big Rivers' financial viability. While
9 the requested TIER of 1.24 is "lower than Big Rivers needs for the long-term now that the
10 Century and Alcan contracts are terminated,"¹²³ and lower than is typical for a generation and
11 transmission cooperative,¹²⁴ it will be sufficient for Big Rivers to "start the recovery process."¹²⁵

12 The resulting rates will place Big Rivers on stable financial footing, which will help
13 reassure the credit agencies, lenders, and potential counterparties for sales transactions that Big
14 Rivers will remain a viable operation. This, in turn, will permit Big Rivers to place its undivided

¹²⁰ Bailey Rebuttal Testimony at p. 6:17-7:4 ("\$136.6 million of cost reduction was reflected in Case No. 2012-00535, and [\$102.1] million of additional cost reduction is now reflected in the present case."). See Bailey Hearing Testimony, Jan. 7, 2014, Tr. 10:30'20" (providing revised figures for cost reduction).

¹²¹ *Id.* at Tr. 10:34'11 ("We're the only business that has announced any employment reductions. . .").

¹²² See Section XII (relating to Big Rivers' forecasting methodology) and Section XIV (relating to Big Rivers' cost of service study).

¹²³ Direct Testimony of Billie J. Richert, Application Tab 61, p. 11:8-9 (June 28, 2013) ("Richert Direct Testimony"); see Direct Testimony of Daniel M. Walker, Application Tab 65, p. 14:20-23 (June 28, 2013) ("Walker Direct Testimony").

¹²⁴ *Id.* at pp. 13:24-14:2 ("In order to attract capital in the capital markets and retain an investment grade rating, I believe a G&T should set rates to earn, on a consistent basis, a TIER in the range of 1.40x to 1.60x."); Walker Direct Testimony at Exhibit Walker-1 (showing TIER for other G&T cooperatives); Hearing Testimony of Daniel M. Walker, Jan. 8, 2014, 16:53'55" ("Walker Hearing Testimony") (identifying East Kentucky Power Cooperative's target TIER as 1.5); Walker Hearing Testimony, Jan. 8, 2014, Tr. 16:52'35" ("If you look at the other G&T's that are rate-regulated, you've got Arkansas [Electric Cooperative Corporation] – their target TIER is 1.50. You've got Chugach [Electric Association, Inc.] in Alaska . . . 1.30.").

¹²⁵ Walker Direct Testimony at p. 14:20-23 ("An authorized TIER of 1.24x with its current debt rating will not allow Big Rivers to finance its capital needs at reasonable cost and terms and conditions in the capital markets. However, a TIER at this level if earned on a consistent basis will start the recovery process."). Big Rivers is seeking to maintain the 1.24 TIER in consideration of mitigating the impact of the proposed rate increase on member billings. Richert Direct Testimony at p. 8:15-17.

1 attention on fulfilling its mission, improving the business, and implementing the Mitigation Plan
2 discussed in Section VIII. Although the success of the load replacement elements of the
3 Mitigation Plan are not necessary for Big Rivers' ongoing financial viability, success in those
4 endeavors will enable Big Rivers to reduce its Members' rates in the future, thus mitigating the
5 future impact of the rate adjustment proposed in this proceeding.

6 In the recent 535 Rate Case—which addressed the Hawesville Smelter's service contract
7 termination—the Commission found it “reasonable to afford Big Rivers the time to pursue its
8 mitigation strategies, including operational changes to reduce costs, seeking to acquire
9 replacement load, increasing off-system sales, and attempting to sell or lease its generating
10 facilities.”¹²⁶ In order for the Commission to maintain the course it established in the 535 Rate
11 Case and for Big Rivers to have the time to fulfill its Mitigation Plan, it is crucially important for
12 Big Rivers to recover the full adjustment it is seeking in this case, including recovering
13 depreciation expense for the Wilson Station in its rates. In the 535 Rate Case, the Commission
14 ordered Big Rivers to defer the Coleman Station depreciation expense.¹²⁷ In this proceeding, a
15 similar approach could prove disastrous because “deferring the Wilson Station depreciation
16 expense, which is approximately \$21 million annually, would have a much greater impact on Big
17 Rivers' cash flow than deferring the Coleman Station depreciation expense of approximately \$6
18 million.”¹²⁸ As discussed in Section VII. below, recovery of the Wilson Station depreciation
19 expense is necessary to ensure Big Rivers' ongoing financial viability, and the proposed recovery

¹²⁶ 535 Rate Case Order at *19. *See also* Bailey Hearing Testimony, Jan. 7, 2014, Tr. 16:20'02” (“I believe there's been some efforts made to recharacterize this from a rate case to a resource planning case and some sort of validation of the [Mitigation Plan]. It is a rate case, there will be plenty of opportunities to monitor how we're doing going forward, and as the load mitigation is successful, to hopefully jointly work out how those revenues are handled. I think we all have the same objective there.”).

¹²⁷ 535 Rate Case Order at *30-33.

¹²⁸ Richert Rebuttal Testimony at pp. 12:23-31:2.

1 is consistent with both accounting standards and the principles underlying the Commission's
2 decision in the 535 Rate Case.

3 Likewise, it is crucially important for Big Rivers' rates to be set in this case on a 1.24
4 TIER. In the 535 Rate Case, the Commission allowed only a 1.20 TIER. While the lower TIER
5 did not threaten Big Rivers' survival in the short duration that the rates approved in that case
6 were in effect, a similar approach in this case could prove disastrous because, even with the full
7 rate relief sought, including a 1.24 TIER, Big Rivers projects that it will earn only a 1.11 TIER in
8 the test year.¹²⁹ The difference between the 1.11 TIER and a 1.10 margins for interest ratio
9 ("MFIR") for the test period is only about \$633,000.¹³⁰

10 Big Rivers' "outlook remains hopeful"¹³¹ despite the difficulty of the transition to a
11 system without the Smelters. The Commission should not reverse course and should continue to
12 afford Big Rivers time to fully implement its Mitigation Plan by approving Big Rivers' proposed
13 rates as fair, just, and reasonable.

14

15 **VI. Granting Big Rivers' Proposed Rate Relief Would Signal the Regulatory Support**
16 **Critical to Big Rivers' Ongoing Financial Viability.**

17 Adoption of Big Rivers' proposed rates is necessary not only because it will meet Big
18 Rivers' revenue requirement, but also because it will signal the Commission's regulatory support
19 of Big Rivers—one of the most critical factors to preserving Big Rivers' ongoing financial
20 viability.

21 The Opposing Intervenors' approach to this proceeding is to ask the Commission to grant
22 rates that are intentionally insufficient for Big Rivers to satisfy its loan covenants based on

¹²⁹ Richert Direct Testimony at pp. 7:22-8:1.

¹³⁰ *Id.* at p. 8:8-10.

¹³¹ Bailey Rebuttal Testimony at p. 4:4-5.

1 nothing more than an unfounded hope that Big Rivers' creditors will cave to such financial arm
2 twisting.¹³² Adopting that approach would leave Big Rivers with no real alternative except
3 bankruptcy. Although KIUC's and the AG's rate proposals are more straightforward in their
4 objectives, the Sierra Club's proposal has the same end result. Despite its inexplicable assertions
5 that the rates it proposes would be "sufficient to keep the Company afloat . . .," Sierra Club
6 proposes rates intentionally designed to be less than Big Rivers needs to cover its operating
7 expenses,¹³³ which will clearly lead to bankruptcy.¹³⁴ This approach misses the point.

8 Ensuring "fair, just, and reasonable" rates as required by law¹³⁵ is not simply a matter of
9 granting insufficient revenues and hoping that everything will work out in the end. Many factors
10 must be taken into consideration.¹³⁶ Big Rivers is transitioning its entire system to adapt to the
11 Smelters' unilateral contract terminations, and many non-parties—creditors, ratings agencies,
12 potential purchasers of market energy or generation assets, and more—are watching this
13 proceeding closely to determine if the Commission will support Big Rivers and its management
14 team. It is no exaggeration to say that the Commission's continued regulatory support is
15 necessary for Big Rivers' survival.¹³⁷

¹³² See, e.g., Direct Testimony of Frank Ackerman, p. 5:17-19 (Oct. 29, 2013) ("Ackerman Direct Testimony") (recommending a rate adjustment "sufficient to allow the Company to recalculate the costs and benefits of selling or closing Wilson and Coleman, and to modify its plans accordingly"); *id.* at p. 6:6-8 (Big Rivers should recover only the "minimum necessary to pay its outstanding debts"); Direct Testimony of Larry W. Holloway, pp. 13:6-19:8 (Oct. 29, 2013) ("Holloway Direct Testimony") (describing Member Benefit Analysis, which purports to show that the Commission should "simply offset the shortfall of benefits to cover the costs of Wilson and Coleman ownership by adjusting Big Rivers revenue requirements . . . to bring the current negative net present values of Wilson and Coleman . . . to zero.").

¹³³ Sierra Club's Response to Item No. 1 of Big Rivers' First Data Requests (explaining that the Sierra Club's seek disallowance of the fixed costs of the Coleman Station and the Wilson Station).

¹³⁴ Mabey Hearing Testimony, Jan. 8, 2014, Tr. 15:53'00" (testifying that adopting any of the Intervenor's proposals would light "the bankruptcy fuse.").

¹³⁵ KRS 278.030(1).

¹³⁶ See *National-Southwire*, 785 S.W.2d at 512.

¹³⁷ See Bailey Hearing Testimony, Jan. 7, 2014, Tr. 11:58'17" ("We appreciate the PSC's support, you know, and confidence in management, as was reflected in the last rate case. We don't take that for granted by any means.").

1 The importance of regulatory support was recently demonstrated when the Commission
2 issued the 535 Rate Case Order. Ms. Richert explained that the 535 Rate Case Order “was well-
3 received by the investment and creditor communities, in part, because not all of the
4 Commission’s adjustments will impact the MFIR and TIER calculations,”¹³⁸ whereas proposals
5 of the intervenors in that proceeding would have had devastating effects on those important
6 financial metrics.¹³⁹ She also testified that the fact that “creditors and rating agencies saw the
7 [535 Rate Case Order] as a signal of ongoing regulatory support” likely prevented those entities
8 from “tak[ing] actions that could lead to a Big Rivers’ bankruptcy.”¹⁴⁰ Mr. Walker similarly
9 testified that the 535 Rate Case Order was “‘a breath of fresh air’ to the rating agencies and
10 banks that have a stake in Big Rivers’ credit profile.”¹⁴¹

11 These conclusions are based on actual public statements by non-party stakeholders. For
12 example, Moody’s Investor Service issued a “Credit Positive” comment after the 535 Rate Case
13 Order was issued in which it noted “several supportive comments made by the KPSC in the rate
14 order about prudent steps made by BREC, which we believe factored into the recent decision,
15 and should bode well for BREC as it awaits another decision in a separate pending rate case
16 expected in the early part of 2014.”¹⁴² In other words, Moody’s response was informed not just
17 by the financial impact of the 535 Rate Case Order, but also by its implications for the
18 Commission’s ongoing support in this proceeding and its belief that management is taking
19 “prudent steps” to ensure the ongoing financial viability of Big Rivers.

¹³⁸ Richert Rebuttal Testimony at p. 8:5-7.

¹³⁹ *See, e.g.*, 535 Rate Case Order at *14 (The Attorney General “recommended that Big Rivers be granted none of the \$63 million increase . . .”).

¹⁴⁰ Richert Rebuttal Testimony at p. 8:17-19.

¹⁴¹ Rebuttal Testimony of Daniel M. Walker, p. 5:19-20 (Dec. 17, 2013) (“Walker Rebuttal Testimony”). *See also* Walker Rebuttal Testimony, Exhibit Walker Rebuttal-2.

¹⁴² *See id.*; Walker Hearing Testimony, Jan. 8, 2014, Tr. 16:56’08” (quoting an S&P Direct report that stated that “[s]ometimes regulators provide protection that exceed their mandate. East KY Power provides an example of a regulatory credit-supportive action that positively influenced our rating. . . . We cite financial improvements that flowed from the regulatory oversight as a key factor underlying the positive outlook on the utility.”).

1 Withdrawing that regulatory support in this proceeding—by denying rate relief, by
2 disallowing the recovery of depreciation expense for the Wilson Station, by granting a TIER that
3 is insufficient on a long-term basis, by ordering a management audit or other onerous studies, or
4 by forcing the sale or retirement of generating assets—would “dramatically extend the regulatory
5 uncertainty surrounding Big Rivers’ financial future”¹⁴³ to the detriment of Big Rivers, its
6 Members, and their retail customers.

7 First, it would “scare off potential lenders that Big Rivers will need in the future to
8 continue operations”¹⁴⁴ and would likely cause “the creditors and rating agencies . . . [to]
9 withdraw their support of Big Rivers and leave Big Rivers with no realistic option but to enter
10 bankruptcy.”¹⁴⁵ Big Rivers is already in a precarious position because, since its credit rating fell
11 below investment grade, RUS has had the right at any moment to trigger a lockbox provision,
12 which would allow RUS to capture Big Rivers’ revenue and eventually leave Big Rivers with
13 insufficient capital to fund its operations.¹⁴⁶ Thus far, RUS has taken a “wait-and-see”
14 approach—in other words, it is waiting to see whether the order in this proceeding supports Big
15 Rivers’ efforts at restoring financial stability.¹⁴⁷ As explained by Mr. Mabey, “adoption of the
16 Opposing Intervenors’ positions that little or no rate relief should be granted would signal to
17 current and potential lenders and creditors that Big Rivers has lost its critical regulatory support
18 and, therefore, doing business with Big Rivers is an unmanageable risk.”¹⁴⁸ Creditors would

¹⁴³ Richert Rebuttal Testimony at p. 35:4-5. *See also* Mabey Hearing Testimony, Jan. 8, 2014, 15:36’30” (“Under the Sierra proposal, the push is to make Big Rivers sell its two stations – Coleman and Wilson – or decommission them almost irrespective of the return that would be available under the sale. Then it seems to me it sends this adverse signal that I’ve been talking about . . .”).

¹⁴⁴ Richert Rebuttal Testimony at p. 35:7-8.

¹⁴⁵ *Id.* at pp. 8:22-9:2. Bailey Hearing Testimony, Jan. 7, 2014, Tr. 14:05’09” (“In the cases we’ve been involved with, defaulting on our loan covenants has been a real possibility.”).

¹⁴⁶ *Id.* at Tr.16:59’44”.

¹⁴⁷ *Id.* at Tr.16:59’54”.

¹⁴⁸ Rebuttal Testimony of Ralph R. Mabey, p. 16:8-11 (Dec. 17, 2013) (“Mabey Rebuttal Testimony”). *See also* Mabey Hearing Testimony, Jan. 8, 2014, Tr. 15:20’32” (“Because of the signal which the testimony of Mr. Kollen

1 then take defensive actions, which could include the triggering of the lockbox by RUS.¹⁴⁹ In the
2 present circumstances, that would “light the bankruptcy fuse.”¹⁵⁰

3 This scenario has been borne out in the past. In Case No. 9613, which Mr. Kollen relies
4 on to support KIUC’s proposal, “the Commission denied the rate relief Big Rivers was seeking
5 and ordered Big Rivers to work with stakeholders to develop a revised workout plan.”¹⁵¹ At that
6 time, Big Rivers was in foreclosure and was already attempting to implement a workout plan.¹⁵²
7 The REA (which is now the RUS) responded to that lack of regulatory support by “suspend[ing]
8 all loan and loan guarantee approvals and advances on loans and loan guarantees already
9 approved to all electric and telephone borrowers in Kentucky.”¹⁵³ The fallout from that denial of
10 rate relief also demonstrates that a lack of regulatory support would not only adversely impact
11 Big Rivers—it would negatively affect utilities throughout the Commonwealth.¹⁵⁴ It is in no
12 one’s best interest to recreate that situation.

13 Second, a withdrawal of regulatory support would “likely scare off potential load
14 replacement customers and suppress regional economic development to the detriment of Big

makes very clear is to be sent, the signal to creditors that repayment of the debt is at issue here and that compromise needs to be made – and this isn’t a question of fairness as to who gets relief, and who doesn’t, and sharing the pain – it’s a question of how you cross to safety for Big Rivers. And I believe that crossing to safety is by taking the prudent steps of postponing bankruptcy, deferring it, keeping it off the table while the Mitigation Plan is being pursued, and not undermining the confidence of financial parties and creditors.”)

¹⁴⁹ *Id.* at Tr. 15:32’45” (“We know already that because Big Rivers is not investment grade that the RUS could impose a lockbox, and hasn’t because the company is communicating with them, making progress, has filed a corrective plan that will get it back to investment grade. But if one undermines that confidence, then I suggest that creditors will begin to take defensive actions. We’ve certainly seen that in the past with the RUS, they’ve been very aggressive in defending their principal due in other cases.”).

¹⁵⁰ *Id.* at Tr. 15:53’00” (“Insofar as the signal is sent that Big Rivers is not going to become financially viable again and may not be able to pay its creditors, then that bankruptcy fuse is kind of lighted because in all my experience, I don’t believe the RUS has ever compromised on principal outside of bankruptcy.”).

¹⁵¹ Walker Rebuttal Testimony at p. 11:18-20.

¹⁵² 9613 Order at * 9-10.

¹⁵³ See Walker Rebuttal Testimony, Exhibit Walker Rebuttal-4, April 9, 1987 Letter from Harold V. Hunter, Administrator, Rural Electrification Association to Hon. Richard D. Heman, Jr., Chairman, Kentucky Public Service Commission (the “Embargo Letter”). A lack of support from the Commission in this proceeding would send the same signal to creditors that all other jurisdictional utilities are operating under the risks associated with a negative state regulatory environment. See Bailey Hearing Testimony, Jan. 7, 2014, Tr. 14:42’00”.

¹⁵⁴ *Id.* at Tr. 14:’23’12”.

1 Rivers' Mitigation Plan."¹⁵⁵ In the face of an unsupportive—or uncertain—regulatory
2 environment, "it is highly unlikely that any third parties will be willing to enter into power
3 purchase agreements, asset purchase agreements, or other agreements that are key elements of
4 the Mitigation Plan."¹⁵⁶ For example, as Mr. Mabey testified, KIUC's rate plan would adversely
5 affect Big Rivers' Mitigation Plan because it would cause potential contract parties to question
6 Big Rivers' stability and long-term viability.¹⁵⁷ In fact, as Mr. Berry noted during the hearing,
7 Big Rivers is in negotiations with potential customers who are awaiting the outcome of this rate
8 proceeding to determine whether or not Big Rivers will be financially viable.¹⁵⁸ A lack of
9 ongoing regulatory support would likely ensure the failure of Big Rivers' efforts to implement its
10 Mitigation Plan, thereby destroying the likeliest opportunities for Big Rivers to mitigate these
11 rate adjustments in the future.

12 Big Rivers does not seek the Commission's ongoing support in order to become passive
13 about its rates. Instead, Big Rivers will use the Commission's ongoing support as a tool to
14 pursue creative solutions to benefit its Members, and thus create pathways for future rate
15 reductions, as outlined in the Mitigation Plan. In the hearing, Mr. Mabey discussed various ways
16 that Big Rivers could actively capitalize on the Commission's support: "[Big Rivers] would take

¹⁵⁵ Richert Rebuttal Testimony at p. 35:5-7. See also Bailey Hearing Testimony, Jan. 7, 2014, Tr. 16:47'40" ("Potential customers are just going to sit back and say 'Gosh, I don't think I'm going to have anything to do with that particular area or utility until there's some clarity there. Let's move on to other options.' And the same with, you know, other utilities and other buyers outside of your native territory."); *Id.* at Tr. 17:22'10" ("If we're in a state of disarray, or destabilized, I don't see much opportunity for success in the economic development area.").

¹⁵⁶ Mabey Rebuttal Testimony at p. 16:12-14; Berry Hearing Testimony, Jan. 8, 2014, Tr. 19:54'50" (citing two examples of a potential industrial customer that is awaiting the outcome of this rate proceeding to determine whether or not Big Rivers will be financially viable and whether or not it will accept Big Rivers' bid); Bailey Hearing Testimony, Jan. 7, 2014, Tr. 11:25'16" (testifying that Opposing Intervenors' proposals would negate "any possibility of" successfully implementing the Mitigation Plan, in part because third parties would not want to enter into contracts with Big Rivers in such uncertain circumstances).

¹⁵⁷ Mabey Hearing Testimony, Jan. 8, 2014, Tr. 15:22'40" ("I think that the Mitigation Plan would be impaired because the whole thrust, as I understand the KIUC proposal, is that everything's on the table, debts may not be repaid, and therefore the Mitigation Plan, which is parties agreeing to contract with Big Rivers going forward, they're going to ask the question: 'Is there stability here? Is there long-term viability?' I think that it does adversely affect the Mitigation Plan.").

¹⁵⁸ See Big Rivers' Response to Post-Hearing Request for Information No. 4.

1 this security that can be given to the rating agencies and to the creditors and they would be able
2 to use it to bring other parties, other purchasers of electricity, other contracting parties under the
3 tent and let them know that there's a future here that could mitigate this rate increase."¹⁵⁹ As Ms.
4 Richert testified, Big Rivers is already prepared to leverage a favorable order in this case to
5 negotiate improved terms for its existing RUS loan and the CFC bridge loan for MATS
6 compliance.¹⁶⁰ Those kinds of solutions are only possible if the Commission supports Big
7 Rivers' efforts to respond productively to the Smelters' contract terminations. As Mr. Mabey put
8 it, the Commission's support enables Big Rivers to approach stakeholders in the "context of
9 confidence that there's a viable company," rather than in the "context of crisis" that would be
10 engendered if the Opposing Interveners' proposals were adopted.¹⁶¹

11 Because ongoing regulatory support is one of the most critical factors to Big Rivers'
12 financial viability, the Opposing Interveners' proposals would be disastrous and should be
13 rejected. Instead, the Commission should approve Big Rivers' proposed rates and take the
14 opportunity to make clear to non-parties that it continues to support Big Rivers, its management
15 team, and its mitigation efforts.

16
17 **VII. Recovery of Depreciation Expense on the Wilson Station Is Necessary to Ensure Big**
18 **Rivers' Ongoing Financial Viability, Is Consistent with Well-Established Accounting**
19 **Principles, and Is Consistent with the Commission's Reasoning Requiring Deferral of the**
20 **Coleman Station Depreciation Expense.**

21 The Commission should permit recovery of the \$21 million of Wilson Station
22 depreciation expense because it is necessary to allow sufficient cash flow to cover Big Rivers'

¹⁵⁹ Mabey Hearing Testimony, Jan. 8, 2014, Tr. 15:25'41".

¹⁶⁰ Hearing Testimony of Billie J. Richert, Jan. 8, 2014, Tr. 12:10'24" ("Richert Hearing Testimony") (Explaining that one goal is to extend the overall term of the RUS loan: "rather than having 20 years left on the loan, we would want to extend that."); Richert Direct Testimony at pp. 6:18-7:7.

¹⁶¹ Mabey Hearing Testimony, Jan. 8, 2014, Tr. 15:34'25".

1 debt principal payments, to maintain adequate debt service coverage ratios, to enable ongoing
2 capital expenditures, and to ensure Big Rivers' ongoing financial viability. Indeed, excluding or
3 deferring this expense "would have a much greater impact on Big Rivers' cash flow than
4 deferring the [\$6 million of] Coleman Station depreciation,"¹⁶² as was done in the 535 Rate
5 Case.¹⁶³ In addition, continued depreciation of temporarily idled generation assets is consistent
6 with all relevant accounting standards, and full recovery of that expense for Wilson Station
7 remains consistent with the rationales underlying the Commission's deferral of the Coleman
8 Station depreciation expense in the 535 Rate Case.

9 **A. Recovery of Depreciation Expense on the Wilson Station Is Necessary to**
10 **Ensure Big Rivers' Ongoing Financial Viability.**

11 Recovery of the Wilson Station depreciation expense "is a critical issue for Big Rivers at
12 this juncture and a key factor to its ongoing viability."¹⁶⁴ As Ms. Richert explained, the recovery
13 of the Wilson Station depreciation expense is critically important to Big Rivers' financial
14 stability:

15 "Without the ability to include 100% of Big Rivers' approved
16 depreciation expense for Wilson in base rates, Big Rivers is at a
17 distinct disadvantage in collecting cash flows necessary to meet its
18 debt obligations and in internally financing its capital expenditures.
19 This could jeopardize Big Rivers' ability to regain its investment
20 grade ratings, to access the credit markets, undermine Big Rivers'
21 ongoing financial viability, and, ultimately, lead to a bankruptcy
22 that would bring increased uncertainty and risk, yet with no
23 counterbalancing guarantee of rates lower than those proposed by
24 Big Rivers."¹⁶⁵

25 In short, recovery of the Wilson Station depreciation expense is crucial to stabilizing Big Rivers'
26 finances.

¹⁶² Richert Rebuttal Testimony at pp. 12:23-13:2.

¹⁶³ 535 Rate Case Order at *30-33.

¹⁶⁴ Richert Rebuttal Testimony at p. 13:3-7.

¹⁶⁵ *Id.* at p. 18:6-13.

1 Not only is the depreciation of Wilson Station consistent with all relevant accounting
2 standards, recovery of depreciation expense on the Wilson Station is also crucial to Big Rivers’
3 ongoing operation because “although depreciation expense is a non-cash expense item, the
4 inclusion of depreciation expense in base rates represents the mechanism by which cash flow is
5 generated” to make “debt principal payments”¹⁶⁶ that will recover Big Rivers’ “investment in its
6 plant over the useful lives of the underlying plant assets.”¹⁶⁷ Without recovery of the Wilson
7 Station depreciation expense, Big Rivers would be forced to divert other cash to fulfill its debt
8 obligations.¹⁶⁸ This, in turn, would leave Big Rivers without sufficient cash to make capital
9 improvements necessary for its ongoing operations.¹⁶⁹ Big Rivers would then be forced to turn
10 to the capital market to fund its operations and capital improvements,¹⁷⁰ but would be unable to
11 access that market because of the likely creditor response to an exclusion or deferral of the
12 Wilson Station depreciation expense.¹⁷¹ In other words, excluding or deferring Wilson Station
13 depreciation expense could trigger a chain reaction of cash flow crises while simultaneously
14 rendering Big Rivers impotent to overcome them, ultimately leaving Big Rivers with no realistic
15 option other than bankruptcy.¹⁷² Excluding the Wilson Station depreciation expense by reducing
16 the depreciation rate on the Wilson Station to zero, which KIUC proposes, is also inconsistent
17 with Big Rivers’ loan covenants to RUS, as discussed in Section XIII.

¹⁶⁶ *Id.* at p. 18:3-6.

¹⁶⁷ *Id.* at p. 17:21-22.

¹⁶⁸ *Id.* at p. 18:6-9. Bailey Hearing Testimony, Jan. 7, 2014, Tr. 14:46’44” (“A loss of depreciation is a loss of the cash necessary to service that debt.”).

¹⁶⁹ Richert Rebuttal Testimony at p. 18:6-9. Richert Hearing Testimony, Jan. 8, 2014, Tr. 13:11’55” (denial of Wilson Station depreciation expense could impact Big Rivers’ ability to borrow for MATS compliance costs due in part to the adverse impact to its debt service coverage ratio). *See also* Richert Hearing Testimony, Jan. 8, 2014, Tr. 13:11’06” (describing the likely adverse effects of denying or deferring the Wilson Station depreciation expense).

¹⁷⁰ Richert Rebuttal Testimony at p. 13:18-23.

¹⁷¹ *Id.* at p. 18:9-11.

¹⁷² *Id.* at p. 18:6-13.

1 In fiscal year 2014, Big Rivers will require approximately \$55.4 million in total cash to
2 service its debt.¹⁷³ Big Rivers expects to meet this obligation through the combination of interest
3 expense ([\$43.7] million for fiscal year 2014) and depreciation expense ([\$42.5] million for
4 fiscal year 2014¹⁷⁴) included in the proposed rates.¹⁷⁵ The Wilson Station accounts for \$21
5 million annually of Big Rivers' total depreciation expense of [\$42.5] million.¹⁷⁶ This amount is
6 significantly larger than the \$6 million of Coleman Station depreciation expense addressed in the
7 535 Rate Case.¹⁷⁷ Consequently, deferring or excluding the Wilson Station depreciation expense
8 "would have a much greater impact on Big Rivers' cash flow than deferring the Coleman Station
9 depreciation expense . . ."¹⁷⁸ This impact includes decreased cash flow, a negative signal to the
10 ratings agencies, a decreased debt service coverage ratio (which is considered by lenders, rating
11 agencies, etc.), and a decreased ability to borrow for any necessary capital projects.¹⁷⁹

12 No party disputes the impact of depreciation expense on cash flow. KIUC expressly
13 acknowledges that Big Rivers would experience a "lower cash flow resulting from the cessation
14 of depreciation on the Wilson and Coleman plants . . ."¹⁸⁰ However, KIUC bases its proposal to
15 exclude depreciation expense in part on its assumption that the resulting cash flow reduction
16 would be "offset by the elimination of the capital expenditures for MATS compliance during that
17 same period . . ."¹⁸¹ That assumption is incorrect; there will be no such offset.¹⁸² Any MATS
18 capital expenditures would be financed; therefore, deferring those expenditures would not "free

¹⁷³ *Id.* at p. 13:7-11.

¹⁷⁴ This number excludes the deferred Coleman Station depreciation expense. *Id.* at p. 13:11-13.

¹⁷⁵ *Id.* at p. 13:11-23. *See also* Richert Hearing Testimony, Jan. 7, 2014, Tr. 17:29'30" (providing revised figures for interest expense and depreciation expense).

¹⁷⁶ Richert Rebuttal Testimony at p. 12:23. *See also* Richert Hearing Testimony, Jan. 7, 2014, Tr. 17:29'30" (providing revised figures for depreciation expense).

¹⁷⁷ Richert Rebuttal Testimony at pp. 12:23-13:2.

¹⁷⁸ *Id.* at pp. 12:23-13:2; Richert Hearing Testimony, Jan. 7, 2014, Tr. 17:31'26".

¹⁷⁹ *Id.* at Tr. 13:11'24".

¹⁸⁰ Direct Testimony of Lane Kollen, p. 57:5-6 (Oct. 29, 2013) ("Kollen Direct Testimony").

¹⁸¹ *Id.* at p. 57:6-7.

¹⁸² Richert Rebuttal Testimony at p. 14:5.

1 up any cash” but would simply mean that “Big Rivers will not borrow the funds” in the first
2 place.¹⁸³ In short, deferring or excluding the Wilson Station depreciation expense would
3 negatively impact Big Rivers’ cash flow by the full \$21 million, with potentially catastrophic
4 consequences.

5 Without the cash flow attributable to the Wilson Station depreciation expense, Big Rivers
6 would have to repurpose other cash to meet its debt principal obligations, thus reducing its cash-
7 on-hand to fund critical capital improvements.¹⁸⁴ Big Rivers would then be forced to “borrow
8 these amounts and incur increased interest expense.”¹⁸⁵ Unfortunately and for reasons
9 previously noted, creditors would likely be unwilling to lend the necessary funds to Big Rivers in
10 such a regulatory environment.

11 Additionally, deferral of Wilson Station depreciation expense would negatively impact
12 Big Rivers’ debt service coverage ratio (“DSC Ratio”), which is one of the most important
13 factors to Big Rivers’ financial health in the eyes of ratings agencies and potential lenders.¹⁸⁶ If
14 Big Rivers recovers the Wilson Station depreciation expense, it will have a DSC Ratio of [1.4],
15 which is in line with the DSC Ratios of G&Ts that have adequate credit ratings.¹⁸⁷ If Big Rivers
16 does not recover the Wilson Station depreciation expense, but is granted all of the other rate
17 relief requested in this proceeding, it will have a DSC Ratio of only [1.11], which is significantly
18 lower than what is likely required for it to regain a positive credit rating and attract future

¹⁸³ *Id.* at p. 14:5-10.

¹⁸⁴ *Id.* at p. 13:18-20 (excluding Wilson Station depreciation expense “would leave Big Rivers with only [\$9.8] million” in cash to fund necessary capital improvements).

¹⁸⁵ *Id.* at p. 13:16-18.

¹⁸⁶ *See* Walker Direct Testimony at p. 13:7-20.

¹⁸⁷ *See* Big Rivers’ Response to Item No. 22(b) of the Attorney General’s First Data Requests, Attachment (Fitch Ratings U.S. Public Power Peer Study); Exhibit Walker-2 (showing G&Ts DSC Ratio); Exhibit Richert-4 (“Debt service coverage of 1.45x in 2010 and 1.65x in 2011 was strong for a cooperative utility”).

1 lenders.¹⁸⁸ The consequence of such a low DSC Ratio is straightforward: Big Rivers would
2 likely fail to recover its credit rating, and lenders would likely refuse to loan it additional
3 capital.¹⁸⁹ Without access to the credit market, Big Rivers would be unable to obtain the cash
4 necessary to meet its operational requirements, and Big Rivers would be forced down a path
5 toward bankruptcy simply from the exclusion or deferral of the Wilson Station depreciation
6 expense.¹⁹⁰ Denying Big Rivers the ability to access the capital markets is not consistent with
7 fair, just, and reasonable rates.

8 In light of the critical importance of the Wilson Station depreciation expense to Big
9 Rivers' cash flow and, by extension, its ongoing financial viability, the Commission should
10 authorize Big Rivers to recover all of the Wilson Station's depreciation expenses as set forth in
11 the 2012 depreciation study.

12 **B. The Continued Depreciation of the Wilson Station Is Consistent with Well-**
13 **Established Accounting Principles.**

14 Although Big Rivers is aware that—and will address why—its proposed treatment of
15 depreciation for Wilson Station differs from the deferral authorized for Coleman Station in the
16 535 Rate Case, it is important to first note that the Commission “agree[d] with Big Rivers that
17 there are valid reasons for not discontinuing depreciation when a plant is temporarily idled.”¹⁹¹

18 The “Accounting Requirements for RUS Electric Borrowers” set forth in the Code of
19 Federal Regulations require utilities to “use a method of depreciation that allocates in a
20 systematic and rational manner the service value of depreciable property over the service life of

¹⁸⁸ Richert Hearing Testimony, Jan. 7, 2014, Tr. 17:59’36” (“Unfortunately, excluding depreciation on both plants will be a detriment to Big Rivers, not only from a cash flow perspective but also on our DSC Ratio which is one of the financial metrics that the rating agencies look at to determine whether or not we should be investment grade [rated]. And also it’s something that our creditors, our lenders look at. And if our DSC Ratio falls – right now it’s around 1.58 and that’s excellent, and that means that we can cover our principal and interest payments one and a half times – and if we lose the depreciation on Wilson, that’s going to drop to 1.1.”).

¹⁸⁹ Mabey Rebuttal Testimony at p. 17:17-20.

¹⁹⁰ Richert Rebuttal Testimony at pp. 8:19-19:2.

¹⁹¹ 535 Rate Case Order at *32.

1 the property,”¹⁹² and they define the “service life” of a plant as “the time between the date
2 electric plant is includible in electric plant in service . . . and the date of its retirement.”¹⁹³ In
3 other words, RUS requires a utility to allocate depreciation over the entire time between when
4 the plant is first in service and when it is finally retired—it makes no exception for stopping
5 depreciation during phases of temporary idling.¹⁹⁴

6 Big Rivers and its experts evaluated these RUS Uniform System of Accounts (“USOA”)
7 provisions as well as other accounting standards which are non-binding (yet instructional¹⁹⁵)—
8 including the Financial Accounting Standards Board (“FASB”), the United States Code of
9 Federal Regulations (“CFR”), the International Accounting Standards Board (“IASB”), and the
10 Internal Revenue Service (“IRS”)—and found that they “are consistent with[] our conclusion that
11 depreciation expense should continue on the Wilson and Coleman generating stations while they
12 are idled.”¹⁹⁶ For example, the IASB “concluded that, whether idle or not, it is appropriate to
13 depreciate an asset with a limited useful life so that the financial statements reflect the
14 consumption of the asset’s service potential that occurs while the asset is held.”¹⁹⁷ Similarly, the
15 IRS has concluded that a company should “[c]ontinue to claim a deduction for depreciation on
16 property used in your business or for the production of income even if it is temporarily idle.”¹⁹⁸

¹⁹² 7 CFR § 1767.15.

¹⁹³ 7 CFR § 1767.10.

¹⁹⁴ See also Big Rivers’ Response to Item No. 89 of the Attorney General’s First Data Requests (“Big Rivers depreciates its utility plant using the straight-line method of depreciation over the estimated remaining service lives, as approved by the RUS and KPSC. Unless an output-based (i.e. units of production) method of depreciation is used, depreciation expense should continue to be charged on idle property, plant, and equipment that is not abandoned.”).

¹⁹⁵ See Richert Rebuttal Testimony at p. 17:10-13 (“The simple truth is that all depreciation policies and standards (including those of the International Accounting Standards Board . . . have instructional value regardless of whether they are formally binding on Big Rivers.”).

¹⁹⁶ Rebuttal Testimony of Ted. J. Keily, pp. 35:20-36:4 (Dec. 17, 2013) (“Kelly Rebuttal Testimony”). See also Big Rivers’ Response to Item No. 89 of the Attorney General’s First Data Requests.

¹⁹⁷ IASB’s Basis for Conclusions on IAS 16 – Property, Plant, and Equipment (BC 30-31) (emphasis added).

¹⁹⁸ IRS Publication 946, “How to Depreciate Property” (2012) at p. 7 (emphasis added).

1 KIUC disputes these standards and argues that depreciation standards require a utility to
2 “cease all depreciation expense on the plants after they are shutdown,”¹⁹⁹ but its analysis is
3 flawed and must be disregarded. As an initial matter, neither Wilson Station nor Coleman
4 Station are being “shutdown.” Quite simply, the plants are not being shut down; they are being
5 temporarily idled pending success in the Mitigation Plan.

6 This factual mischaracterization runs throughout Mr. Kollen’s testimony regarding the
7 appropriate accounting treatment for Wilson Station and Coleman Station. Mr. Kollen argues
8 that the Stations must be categorized as “Plant Held for Future Use” pursuant to the RUS
9 requirements; however, that accounting treatment applies only to property not yet used or
10 property retired but held pending future reuse.²⁰⁰ The Stations have been used for years, and
11 they are not being retired. Therefore, they cannot be accounted for as KIUC suggests.²⁰¹
12 Furthermore, KIUC bases its conclusion in this respect on “a general statement” from a National
13 Association of Regulatory Utility Commissioners Manual “that expenses should be allocated to
14 periods where the related assets provide benefits”; yet, this “general statement” does not purport
15 to address the situation of idled plant,²⁰² nor does KIUC account for the numerous benefits
16 provided by the Wilson Station even when idled.²⁰³

17 KIUC’s position is not even supported by the authorities upon which it purports to rely.
18 For example, KIUC cites RUS USOA’s definition of depreciation as a “loss in service value”
19 which encompasses factors in addition to and not affected by operating hours, including “decay,
20 action of the elements, inadequacy, obsolescence, changes in the art, changes in demand and

¹⁹⁹ Kollen Direct Testimony at p. 45:1-16 (emphasis added).

²⁰⁰ Richert Rebuttal Testimony at p. 16:4-8. *See also* 7 CFR § 1767.18.

²⁰¹ Richert Rebuttal Testimony at p. 16:4-11.

²⁰² Kelly Rebuttal Testimony at p. 35:9-15.

²⁰³ *Id.* at p. 35:15-17. *See also* Section X.A.

1 requirements of public authorities.”²⁰⁴ However, KIUC does not even address the fact that the
2 Wilson Station “in its temporarily idled status will experience a loss in service value for several
3 of those reasons” and that its continued depreciation is consequently consistent with RUS
4 USOA’s definition.²⁰⁵ Similarly, KIUC attempts to rely on a Minnesota regulatory proceeding²⁰⁶
5 to support its assertion that both GAAP and RUS USOA standards prohibit any continuing
6 depreciation of temporarily idled assets.²⁰⁷ However, the regulatory authority in that case made
7 no such finding, but instead simply permitted the utility to record depreciation to a regulatory
8 asset (demonstrating exactly the opposite of the point that KIUC intends to make).²⁰⁸

9 Finally, KIUC’s position is contrary to the opinion of Burns & McDonnell, who prepared
10 the 2012 depreciation study. Ted Kelly, Principal for Burns & McDonnell, testified that he
11 agrees with Big Rivers’ interpretation and application of the relevant accounting principles and
12 concluded, “I believe that depreciation expense should not be reduced on the Wilson and
13 Coleman generating stations while they are idled”²⁰⁹ At the hearing, Mr. Kelly elaborated
14 that idling a generating plant may have an impact on the remaining life of that plant, but whether
15 idling the plant extends or shortens the life of the plant would not be known until a new
16 engineering assessment and depreciation study was performed.²¹⁰ The reason depreciation
17 studies are performed periodically is to determine how the remaining life of a plant has been
18 affected since the last depreciation study.²¹¹ Until a new depreciation study shows how idling

²⁰⁴ Kollen Direct Testimony at p. 48:19-28.

²⁰⁵ Richert Rebuttal Testimony at p. 16:16-20.

²⁰⁶ *Application of Northern States Power d/b/a Xcel Energy for Increase in Electric Rates*, Minnesota Public Utilities Commission, Docket No. OAH 68-2500-30266 PUC E-002/GR-12-961.

²⁰⁷ See Kollen Direct Testimony at p. 56:1-7.

²⁰⁸ Richert Rebuttal Testimony at pp. 16:21-17:9.

²⁰⁹ Kelly Rebuttal Testimony at p. 34:13-15.

²¹⁰ Hearing Testimony of Ted J. Kelly, Jan. 8, 2014, Tr. 14:44’31” (“Kelly Hearing Testimony”).

²¹¹ See *Id.* at Tr. 14:42’35” (testifying that RUS requires a depreciation study at least once every five years and that the effect of idling would be “hard to determine” until a new study is performed).

1 Wilson Station impacts its remaining life, there is no basis for changing depreciation expense,²¹²
2 and so, “depreciation expense should continue on the Wilson and Coleman generating stations
3 while they are idled.”²¹³ KIUC has not shown that Mr. Kollen’s opinion about how accounting
4 principles should be interpreted is more reliable than the interpretation of those same accounting
5 principles by Mr. Kelly, who has “prepared and supervised the preparation of numerous
6 depreciation rate studies and useful life analyses for cooperative utilities and publicly-owned
7 utilities.”²¹⁴

8 Well-established accounting principles prescribed by various authoritative accounting
9 sources and regulatory agencies—including Burns & McDonnell, the RUS, FASB, IASB, and
10 IRS—support the continued depreciation of temporarily idled assets. Consequently, the question
11 becomes not whether depreciation is appropriate (as KIUC argues) but whether the Wilson
12 Station should be treated differently than the Coleman Station. For the following reasons, it
13 should.

14 **C. Recovery of Depreciation Expense on the Wilson Station Is Consistent with**
15 **the Commission’s Deferral of Coleman Station Depreciation Expenses in the**
16 **535 Rate Case.**

17 In the 535 Rate Case, the Commission ordered “depreciation on the Coleman Station to
18 be recorded in a regulatory asset account and excluded from rate recovery at this time.”²¹⁵ The
19 intent of this decision was not to deny recovery for Coleman Station depreciation expense, but to
20 defer it so that it can be “considered for amortization at some future point in time if and when the
21 facility is needed to serve customers, is sold, or is permanently closed.”²¹⁶ Here, Big Rivers
22 seeks permission to recover depreciation on the Wilson Station, rather than to defer it to a

²¹² *Id.* at Tr. 14:44’28” (testifying that the impact of idling cannot be quantified without a new depreciation study).

²¹³ Kelly Rebuttal Testimony at p. 36:1-3.

²¹⁴ *Id.* at p. 7:8-9.

²¹⁵ 535 Rate Case Order at *33.

²¹⁶ *Id.* at *33.

1 regulatory account as the Commission ordered for the Coleman Station. For the reasons
2 discussed below, Big Rivers' proposal to recover Wilson Station depreciation expense as set
3 forth in its proposed rates remains consistent with the principles enunciated in the Commission's
4 decision in the 535 Rate Case Order to defer recovery of Coleman Station depreciation expense.

5 As an initial matter, the Commission's order deferring Coleman Station depreciation
6 expense stated a concern that it is "not fair to require ratepayers to pay all of costs of the excess
7 capacity"²¹⁷ on Big Rivers' system resulting from the Smelters' unilateral contract terminations.
8 By "exclud[ing Coleman Station depreciation expense] from rate recovery at this time," the
9 Commission has addressed that concern by ensuring that ratepayers will not "pay all of" the
10 costs of Big Rivers' available capacity. This remains true if the Commission authorizes the
11 current recovery of depreciation expenses for the Wilson Station.

12 In addition, the financial consequences of denying current recovery of depreciation
13 expense on Wilson Station are more pronounced than they were for Coleman Station. The
14 Commission's deferral of the \$6 million Coleman Station depreciation expense in the 535 Rate
15 Case was consistent with its decision to "afford Big Rivers the time to pursue its mitigation
16 strategies."²¹⁸ Specifically, the Commission found that "test-year depreciation expense was
17 more than double [Big Rivers'] required principal [debt] payments," and so concluded that
18 deferring the Coleman Station depreciation expense would not risk default or otherwise lead to
19 adverse consequences.²¹⁹ In the present proceeding, that would not be true.

20 Excluding or deferring the \$21 million of Wilson Station depreciation expense "would
21 have a much greater impact on Big Rivers' cash flow than deferring the Coleman Station

²¹⁷ *Id.* at *19.

²¹⁸ *Id.* at *19.

²¹⁹ *Id.* at *33.

1 depreciation expense of approximately \$6 million.”²²⁰ The ratemaking treatment of the two
2 Stations need not be identical because the impacts of the two amounts are not equivalent.
3 Excluding or deferring the Wilson Station depreciation expense would “jeopardize Big Rivers’
4 ability to regain its investment grade ratings, to access the credit markets, undermine Big Rivers’
5 ongoing financial viability, and, ultimately, lead to a bankruptcy that would bring increased
6 uncertainty and risk.”²²¹ It would also destroy any effort to “afford Big Rivers the time to pursue
7 its mitigation strategies.”²²²

8 Furthermore, the Commission’s decision to defer the Coleman Station depreciation
9 expense was motivated in part by “the expected length of time that the Coleman Station will be
10 idled”²²³ However, because “[t]he Wilson Station has a lower per unit operating cost than
11 the Coleman Station, . . . the Wilson Station is more likely to return to service sooner.”²²⁴ In
12 fact, as testified by Mr. Berry, “[a]t current prices, the margins on generation from Big Rivers’
13 Wilson station are very close to equaling the fixed cost savings from idling the plant.”²²⁵ Once
14 those fixed cost savings from idling no longer exceed generation margins, Big Rivers does not
15 expect to continue idling the Wilson Station.²²⁶ In other words, the Wilson Station will not be
16 idled as long as the Coleman Station, and so that concern motivating the deferral of the Coleman
17 Station depreciation expense is less applicable with respect to the Wilson Station.

18 For these reasons, although the Commission deferred Big Rivers’ recovery of Coleman
19 Station depreciation expense in the 535 Rate Case, that decision does not compel the

²²⁰ Richert Rebuttal Testimony at pp. 12:23-13:2.

²²¹ *Id.* at p. 18:6-13.

²²² 535 Rate Case Order at *19.

²²³ *Id.* at *32.

²²⁴ Richert Rebuttal Testimony at p. 14:16-20.

²²⁵ Berry Rebuttal Testimony at p. 9:15-17.

²²⁶ *Id.* at p. 9:12-15 (“The only reason Big Rivers anticipates idling its Wilson and Coleman generating plants is because the fixed cost savings of idling the plants exceeds the margins currently made on off-system sales from those plants. However, even a small increase in power prices could reverse that equation.”).

1 Commission to take the same approach with the Wilson Station depreciation expense. In fact, as
2 explained in the sections above, the Commission should permit recovery of all Wilson Station
3 depreciation expense because it is necessary to ensure Big Rivers' cash flow, adequate DSC
4 Ratios, and ongoing financial viability, it is consistent with all relevant accounting standards, and
5 it is consistent with the reasoning underlying the Commission's deferral of the Coleman Station
6 depreciation expense.

7

8 **VIII. The Commission Should Support Big Rivers' Mitigation Plan by Allowing Time for**
9 **It to Provide the Expected Benefits.**

10 Big Rivers is not seeking approval of the Mitigation Plan in this proceeding. Big Rivers
11 is seeking approval of fair, just, and reasonable rates – rates that will ensure its financial
12 viability, allow it to service its debt and pay its expenses, allow it to recover for prudent
13 investments, and allow it to achieve a financial position that will enable it to access the capital
14 markets and to be able to continue to be a viable utility. The Opposing Intervenors have not
15 shown why their criticisms of the Mitigation Plan should mean that all other regulated utilities
16 are allowed reasonable rates and even a return on their investments, but Big Rivers should be put
17 in a position where it cannot satisfy its debt covenants and is not permitted to recover the prudent
18 investments in the Wilson and Coleman Stations.

19 Although Big Rivers is not seeking approval of the Mitigation Plan in this case, Big
20 Rivers does not contend that the Commission cannot consider the reasonableness of the
21 Mitigation Plan.²²⁷ In fact, Big Rivers discussed the Mitigation Plan throughout its testimony in
22 this case. As Big Rivers has explained throughout this proceeding and as summarized below, the
23 Mitigation Plan is reasonable, and Big Rivers should be provided time to execute that plan.

²²⁷ Wolfram Rebuttal Testimony at p. 6:4-15.

1 Even while devoting the significant amount of time necessary for this case, the 535 Rate
2 Case, the two Smelter contract cases, and operating an electric utility, with Big Rivers' team
3 working tirelessly in pursuit of those ends,²²⁸ the Mitigation Plan has already started to bear fruit.
4 Since the final order in the 535 Rate Case, Big Rivers has reached agreement with a Nebraska
5 consortium for 67 MW of replacement load beginning in 2018 and has seen a growth of another
6 25 MW in native load.²²⁹ It is also actively negotiating agreements with other businesses,
7 including other Kentucky-based utilities and multiple out-of-state prospects. In light of the
8 Mitigation Plan's demonstrated success, Big Rivers respectfully requests that the Commission
9 support Big Rivers' Mitigation Plan by granting the requested rate relief. Further, it is important
10 for Big Rivers to not be given only enough revenue to barely survive, for that will continue to
11 drain the resources of Big Rivers' management and staff away from mitigation efforts.

12 **A. Big Rivers' "History and Development" Shows That the Commission Should**
13 **Afford Big Rivers Time to Implement Its Mitigation Plan.**

14 Kentucky courts have held that it is appropriate for the Commission to consider "the
15 history and development of the utility and its property" when setting rates.²³⁰ Here, the "history
16 and development" of Big Rivers supports the conclusion that the Commission should allow Big
17 Rivers a reasonable opportunity to implement its Mitigation Plan.

18 Big Rivers' generating fleet, which enables the available capacity that is central to the
19 Mitigation Plan,²³¹ was prudently constructed.²³² Indeed, the Commission recently
20 acknowledged that the current available capacity is "not the result of improper planning or
21 unneeded construction,"²³³ nor the "result of any imprudent decisions by Big Rivers."²³⁴ These

²²⁸ Berry Hearing Testimony, Jan. 8, 2014, Tr. 21:12'05".

²²⁹ See *id.* at Tr. 20:35'31"; Barron Hearing Testimony, Jan. 9, 2014, Tr. 9:45'00".

²³⁰ *Nat'l-Southwire*, 785 S.W.2d at 512-13.

²³¹ See generally Berry Direct Testimony pp. 10-14.

²³² See Section X.B.

²³³ 535 Rate Case Order at *16.

1 power plants have long provided benefits and continue to have value for Big Rivers' Members
2 and their retail customers.²³⁵ In light of this history, the Commission should afford Big Rivers
3 the opportunity to utilize the full value of its generating fleet for the long-term benefit of its
4 Members, rather than force Big Rivers to abandon still-valuable assets, as the Opposing
5 Intervenors propose.²³⁶

6 In addition, Big Rivers' Mitigation Plan has its origins in the Unwind Transaction, in
7 which the Commission anticipated that part of the appropriate response to a smelter closure
8 would be an increase in Big Rivers' market sales, just as Big Rivers now proposes.²³⁷ The
9 Commission approved certain additions and improvements to Big Rivers' transmission system,
10 finding that "Big Rivers has presented substantial evidence that the need for the ability to export
11 850 MW of excess generating capacity, in the event the smelters terminate their prospective
12 service contracts with Big Rivers, requires the construction of the proposed transmission line."²³⁸
13 Because the Mitigation Plan is consistent in this regard with both the Unwind Order and the 2007
14 CPCN Order, the Commission should support the Mitigation Plan and afford Big Rivers the
15 opportunity to fully implement it.

16 Finally, the Mitigation Plan was a central point of discussion in the 535 Rate Case, where
17 the Commission found "it reasonable to afford Big Rivers the time to pursue its mitigation
18 strategies, including operational changes to reduce costs, seeking to acquire replacement load,

²³⁴ *Id.* at *19.

²³⁵ Bailey Rebuttal Testimony at pp. 7:21-8:1.

²³⁶ See Section XVIII.C.

²³⁷ Unwind Order, App. A, ¶ 22 (requiring Big Rivers to "commit[] to complete construction of the transmission system additions and improvements for which the Commission issued a Certificate of Public Convenience and Necessity in P.S.C. Case No. 2007-00177").

²³⁸ See also *In the Matter of: Application of Big Rivers Elec. Corp. for a Certificate of Public Convenience and Necessity to Construct a 161 KV Transmission Line in Ohio County, Kentucky* (the "2007 CPCN Case"), Order, P.S.C. Case No. 2007-00177, *10 (Oct. 30, 2007) ("2007 CPCN Order") (emphasis added).

1 increasing off systems sales, and attempting to sell or lease its generating facilities.”²³⁹ Given
2 that a little over three months has elapsed since the entry of that order, and for the same reasons
3 set forth in that case, the Commission should reaffirm its finding that in light of the applicable
4 history and unique circumstances of this case, it is “reasonable to afford Big Rivers the time to
5 pursue its mitigation strategies”

6 Withdrawing regulatory support for the Mitigation Plan in this proceeding would
7 disregard the “history and development of [Big Rivers] and its property”²⁴⁰ and contradict the
8 Commission’s support of the Mitigation Plan. Such an abrupt shift in methodologies would
9 constitute a violation of Big Rivers’ due process rights.²⁴¹

10 **B. Big Rivers’ Mitigation Plan Is Reasonable, Well-Supported, and Likely to**
11 **Yield Benefits.**

12 Kentucky courts have held that it is appropriate for the Commission to consider the
13 utility’s “potential for growth and expansion” when setting rates.²⁴² Here, Big Rivers has
14 developed a “reasonable and viable”²⁴³ Mitigation Plan that it “fully expect[s] . . . will benefit
15 Big Rivers’ Members in the future,”²⁴⁴ and which has already led to Big Rivers successfully
16 securing 92 MW of replacement load.²⁴⁵ While using the rate case as a “spring board” for its
17 mitigation efforts,²⁴⁶ Big Rivers is pursuing “multiple mitigation strategies simultaneously” in

²³⁹ 535 Rate Case Order at *19.

²⁴⁰ *Nat’l-Southwire*, 785 S.W.2d at 512-13 (Commission should consider “history and development of utility and its property”).

²⁴¹ *See Duquesne Light Co.*, 488 U.S. 299 (“A State’s decision to arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some times while denying them the benefits of good investments at others would raise serious constitutional questions.”).

²⁴² *Nat’l-Southwire*, 785 S.W.2d at 512-13.

²⁴³ Berry Rebuttal Testimony at p. 16:12-13. *See also* Bailey Hearing Testimony, Jan. 7, 2014, Tr. 14:45’14” (“In my heart of hearts I’m confident [that plants will be brought back to service] and based on the success we’re having with [the] Mitigation Plan, I’m even more confident.”).

²⁴⁴ Berry Rebuttal Testimony at p. 21:4-5.

²⁴⁵ Berry Hearing Testimony, Jan. 8, 2014, Tr. 17:30’05”. This is in addition to various short-term bilateral agreements (around six months) that were executed in the summer of 2013. *Id.* At Tr. 17:13’26”.

²⁴⁶ Bailey Hearing Testimony, Jan. 7, 2014, 16:58’02”. *See also* Berry Rebuttal Testimony at p. 8:14-15 (Big Rivers’ long-term financial integrity is not “dependent upon obtaining the replacement load projects”); Richert

1 order to increase the overall chance that the Mitigation Plan will benefit its Members and their
2 retail customers.²⁴⁷ By taking this “multi-pronged approach,” Big Rivers has the “flexibility to
3 respond to changing conditions” and pursue the most likely and beneficial opportunities.²⁴⁸ This
4 “potential for growth and expansion” could allow the Coleman and Wilson Stations to be
5 brought back online in 2019, although perhaps as early as 2016,²⁴⁹ and it supports the conclusion
6 that the Commission should allow Big Rivers a reasonable opportunity to implement its
7 Mitigation Plan.

8 Big Rivers’ Mitigation Plan has already started to succeed, despite the regulatory
9 uncertainty still surrounding this proceeding. In January of 2014, Big Rivers reached agreement
10 with a Nebraska consortium for Big Rivers to serve a total of 67 MW of load.²⁵⁰ An agreement
11 for an additional 44 MW of load with the same consortium has been proposed.²⁵¹ Big Rivers has
12 also experienced a 25 MW increase in native load notwithstanding the rate adjustments sought in
13 this case and the 535 Rate Case.²⁵² Big Rivers remains on a short-list to serve 1,500 MW of
14 demand.²⁵³ These developments are especially encouraging in light of continued uncertainty

Rebuttal Testimony at p. 6:5-7 (“If the requested rate adjustment is granted, Big Rivers’ financial stability will not depend on increasing off-system sales or any other element of its Mitigation Plan.”).

²⁴⁷ Berry Rebuttal Testimony at p. 7:18-19.

²⁴⁸ *Id.* at p. 8:3-4 (Big Rivers is pursuing “a multi-pronged approach because Big Rivers believes a diversified solution is in the best interest of its Members.”) *See also* Mabey Hearing Testimony, Jan. 8, 2014, 15:44’55” (“The Mitigation Plan is many-faceted, and that’s one facet of the plan.”).

²⁴⁹ *See* Big Rivers’ Response to Item No. 14 of Commission Staff’s Second Data Requests (“In these sensitivities, the Wilson Station and Coleman Station become economically viable in 2016.”); Attachments to Big Rivers’ Response to Item No. 14 of Commission Staff’s Second Data Requests (sensitivity spreadsheets). *See also generally* Berry Rebuttal Testimony at p. 6:1-4 (“Additional analyses will be performed in the future when circumstances appear to justify bringing the plants back online; that decision will be based on an analysis of the circumstances at the time.”); Wolfram Rebuttal Testimony at p. 9:9-12.

²⁵⁰ Berry Hearing Testimony, Jan. 8, 2014, Tr. 20:35’19”. This load is the result of a firm sale, and will carry a load factor of 72%. *Id.* at Tr. 17:16’11”. These contracts will be provided to the Commission when they have all been executed, and Big Rivers expects them to improve its bottom line by \$106 million, to the ratepayers’ benefit. *Id.* at Tr. 17:24’13”.

²⁵¹ *Id.* at Tr. 17:43’58”.

²⁵² *Id.* at Tr. 20:35’32”; Barron Hearing Testimony, Jan. 9, 2014, Tr. 9:44’58”.

²⁵³ Berry Hearing Testimony, Jan. 8, 2014, Tr. 17:14’22”. *See also, e.g.*, Berry Direct Testimony at p. 11:9-12 (“Big Rivers has provided formal responses to four Requests for Proposals . . . from other utilities.”); Berry Rebuttal

1 related to Big Rivers' rate proceedings, rumored legislative proposals, and the fact that Big
2 Rivers' management has been required to attend to the company's pressing regulatory issues
3 while simultaneously pursuing these mitigation efforts.²⁵⁴ But these developments are not mere
4 happenstance.

5 There are strong fundamentals underlying Big Rivers' ability to successfully achieve the
6 goals of its Mitigation Plan. For example, because Big Rivers' generating units "are some of the
7 lowest cost generators in the country,"²⁵⁵ they "clear the market about 90% of the time, even in
8 this era of low-priced natural gas and a depressed economy."²⁵⁶ The low cost of Big Rivers'
9 generation means that Big Rivers "makes margins on the power it sells into the market."²⁵⁷ As
10 Mr. Berry explains, "it would be unreasonable to think its current ability to sell its generation
11 output into the market in competition with other generators . . . would not translate into
12 opportunities for replacement load."²⁵⁸

13 Mr. Berry's conclusion is more than just common sense based on years of experience; it
14 is also rooted in specific empirical studies developed by Navigant Consulting which
15 "determine[d] the competitiveness of [Big Rivers'] generating units compared to other
16 utilities."²⁵⁹ Navigant's studies, the results of which are reflected in Exhibit Berry Rebuttal-3,
17 evaluated three time periods: five years, three years, and one year.²⁶⁰ The results show that "the
18 Wilson unit is very competitive in all supply portfolios."²⁶¹ Its total operating cost was in the
19 "best quartile compared to natural gas combined cycle units" in the five-year and three-year data

Testimony at p. 16:18-20 ("Customers currently served by TVA have approached Big Rivers because TVA's rates are projected to exceed the rates that Big Rivers can provide. Big Rivers continues to pursue those opportunities.")

²⁵⁴ Bailey Hearing Testimony, Jan. 7, 2014, Tr. 11:49'49".

²⁵⁵ Berry Direct Testimony at p. 12:1-3.

²⁵⁶ Berry Rebuttal Testimony at p. 9:8-10. *See also* Bailey Hearing Testimony, Jan. 7, 2014, Tr. 11:31'21".

²⁵⁷ Berry Rebuttal Testimony at p. 9:11-12.

²⁵⁸ *Id.* at p. 15:10-13.

²⁵⁹ *Id.* at p. 15:13-15.

²⁶⁰ *Id.* at p. 15:15-18.

²⁶¹ *Id.* at p. 15:22.

1 sets, and it was better than the median in the one-year data set.²⁶² In other words, the generating
2 assets that the Opposing Intervenors want Big Rivers to retire or sell at depressed prices are the
3 very things that give Big Rivers a unique competitive edge in its efforts to mitigate the impact of
4 the Smelters' service contract terminations.

5 In addition to the competitive advantages Big Rivers enjoys because of the low-cost
6 operating characteristics of its generating fleet, there are certain opportunities for which Big
7 Rivers is uniquely suited because of the amount of its newly available generation capacity.
8 Specifically, Big Rivers "is very favorably positioned in the context of potential long-term
9 purchase power sale agreements or all-requirements contracts."²⁶³ These types of arrangements
10 "are an important part of Big Rivers' strategy,"²⁶⁴ and there is a demonstrated demand for them.
11 At least five Kentucky utilities "have issued requests for proposal for this type of power
12 arrangement," and the multiple RFPs issued in the state of Kentucky alone seek "long term
13 power contracts for over 1,500 MW's."²⁶⁵ Furthermore, because of Big Rivers' participation in
14 MISO and its rights to 100 MW of transmission over the Tennessee Valley Authority ("TVA")
15 system, Big Rivers "also has opportunities to enter similar arrangements with other
16 counterparties outside of Kentucky."²⁶⁶

17 The possibility of identifying counterparties outside of Kentucky highlights another
18 important consideration demonstrating the reasonableness of Big Rivers' Mitigation Plan. The
19 market in which Big Rivers competes is diverse and big—much bigger than the Opposing

²⁶² *Id.* at p. 15:18-21.

²⁶³ Berry Direct Testimony at p. 12:5-7. *See also* Bailey Hearing Testimony, Jan. 7, 2014, Tr. 17:21'38" ("Even in the worst-case scenario . . . based on the surrounding utility cost comparisons that Mr. Wolfram provided, we're still the middle of the pack in Kentucky, which is a low cost state. So I would think that alone, would keep us in the running.").

²⁶⁴ Berry Direct Testimony at p. 12:17.

²⁶⁵ *Id.* at p. 12:8-14 (East Kentucky Power Cooperative, Duke Kentucky, Louisville Gas & Electric, Kentucky Utilities Company, and American Electric Power Company d/b/a Kentucky Power have all issued RFPs). *See also* Berry Rebuttal Testimony at p. 16:8-13.

²⁶⁶ Berry Direct Testimony at p. 12:14-17.

1 Intervenor seem to understand. The Opposing Intervenors criticize Big Rivers' load
2 replacement forecasts in part by relying on comparisons to native load growth and discussions of
3 local demand.²⁶⁷ For example, Sierra Club asserts that "Big Rivers would have to capture one-
4 sixth of all Kentucky or Indiana industrial electricity sales" to replace the Smelters' load.²⁶⁸
5 However, the Opposing Intervenors disregard the significant number of multistate opportunities
6 for load growth identified and pursued by Big Rivers. The Mitigation Plan calls for "not only
7 internal economic development opportunities, but it also involves seeking bilateral contracts with
8 other entities, such as other utilities and municipalities beyond its own border and even beyond
9 the MISO footprint."²⁶⁹ As Big Rivers' recent agreements to provide power to Nebraska
10 counterparties evidences, there is a demonstrated demand for energy sales outside of Kentucky,
11 where electricity prices are higher. Big Rivers is also currently negotiating with an Oklahoma
12 company to provide power and capacity.²⁷⁰ Somewhat closer to home, "customers currently
13 served by TVA have approached Big Rivers because TVA's rates are projected to exceed the
14 rates that Big Rivers can provide."²⁷¹

15 To the extent that there are concerns that Big Rivers' transacting with out-of-state
16 counterparties could lead to a situation in which FERC could assume jurisdiction over Big
17 Rivers, denying the Commission the power to regulate Big Rivers' operations or rates if Big
18 Rivers paid off its RUS debt, those concerns have no grounding in law or fact. Under the
19 Federal Power Act ("FPA"), the Federal Energy Regulatory Commission ("FERC") has
20 exclusive jurisdiction over the rates, terms, and conditions of interstate electric transmission and

²⁶⁷ See, e.g., Direct Testimony of Philip Hayet, pp. 14-16, 19-24 (Oct. 29, 2013) ("Hayet Direct Testimony"); Ackerman Direct Testimony at pp. 7-10.

²⁶⁸ *Id.* at pp. 7:19-8:3.

²⁶⁹ Berry Rebuttal Testimony at p. 16:3-6.

²⁷⁰ *Id.* at p. 16:6-8; *id.* at Exhibit Berry Rebuttal-4.

²⁷¹ *Id.* at p. 16:18-20.

1 the sale of wholesale electric energy by a “public utility.”²⁷² However, the FPA definition of
2 public utility, *inter alia*, specifically exempts cooperatives that (1) receive financing from the
3 RUS under the Rural Electrification Act or (2) are wholly owned, directly or indirectly, by such
4 cooperatives, or (3) sell less than 4,000,000 megawatt hours of electricity per year.²⁷³ Big Rivers
5 has RUS debt and is therefore exempt from the FPA definition of a public utility. However,
6 even if it paid off all of its RUS debt, Big Rivers still would be exempt from the FPA definition
7 of a public utility and FERC’s jurisdiction over wholesale rates, because Big Rivers is wholly
8 owned by member distribution cooperatives with RUS financing.²⁷⁴ Given Big Rivers’ financial
9 and operational characteristics, this Commission will continue to hold jurisdiction over Big
10 Rivers, and any speculation that FERC will usurp this Commission’s authority with respect to
11 sales to out-of-state parties is unfounded.

12 The Opposing Intervenors level other misguided criticisms of Big Rivers’ projected load
13 replacement forecast.²⁷⁵ In particular, they overlook the fact that Big Rivers is simultaneously
14 pursuing different approaches in order to ensure that it can generate as many benefits for its
15 Members as possible.²⁷⁶ For example, KIUC argues that Big Rivers “would have to find the
16 equivalent of 28 new Aleris-sized plants that it could serve,” then states that “[i]t would simply
17 be too far-fetched to expect” that economic development efforts could be so successful.²⁷⁷ Even
18 setting aside KIUC’s erroneous assumption that mitigation requires increases in native load only,

²⁷² See 16 U.S.C. §§ 824d, 824e; see also *Penn. Power & Light Co.*, 23 FERC ¶ 61,006, 61,018, *reh'g denied*, 23 FERC ¶ 61,325 (1983); *So. Co. Servs., Inc.*, 37 FERC ¶ 61,256, 61,652 (1986); *Aquila Merchant Servs., Inc.*, 125 FERC ¶ 61,175, 61,927 (2008). A “public utility” is defined under the FPA as an entity that “owns or operates facilities subject to the jurisdiction of [FERC]” under Part II of the FPA. 16 U.S.C. § 824(e) (2006).

²⁷³ See 16 U.S.C. § 824(f) (2006).

²⁷⁴ See *id.*; see also *Dynegy Holdings, Inc.*, 127 FERC ¶ 62,080 (2009) (finding that a FERC jurisdictional public utility ceased to be a public utility subject to FERC jurisdiction when it became wholly owned by an entity receiving REA financing).

²⁷⁵ See, e.g., Ackerman Direct Testimony at pp. 6-10.

²⁷⁶ Berry Rebuttal Testimony at p. 8:18-20 (“The Opposing Intervenors appear to believe that if Big Rivers does not achieve the replacement load assumed in some long-term modeling, Big Rivers will have no additional revenues.”).

²⁷⁷ Hayet Direct Testimony at pp. 19:4-20:4.

1 KIUC's example demonstrates its fundamental misunderstanding of the Mitigation Plan, which
2 does not hinge on the total success of any one strategy.

3 This type of misunderstanding leads the Opposing Intervenors to drastically understate
4 the Mitigation Plan's likelihood of success. For example, Mr. Holloway offers a net present
5 value analysis but completely omits any consideration of revenues from future MISO capacity
6 auctions²⁷⁸ which, as discussed below, are very likely. Mr. Holloway's sensitivity study is
7 likewise flawed in assuming that Big Rivers would bring generating assets back on-line at a loss,
8 before replacement load was realized and the plants became efficient to operate, which Big
9 Rivers does not plan to do.²⁷⁹ The Opposing Intervenors implicitly argue that if Big Rivers is not
10 able to achieve 800 MW of load replacement then there is no benefit to the Members. In reality,
11 every megawatt of new sales that contributes to Big Rivers' fixed costs benefits the Members.²⁸⁰
12 The Opposing Intervenors "also largely ignore the possibility of increased off-system sales."²⁸¹
13 Any energy that Big Rivers is not selling to replacement load will be available to sell into the
14 market, which will provide benefits to the Members even if Big Rivers is not able to acquire any
15 additional load replacement. Because of these significant omissions, the analyses offered by the
16 Opposing Intervenor witnesses do not reflect the reality of Big Rivers' situation. Consequently,
17 they serve only to confuse and misrepresent the true goals of the Mitigation Plan and its chances
18 of success.

²⁷⁸ Attorney General's Response to Item No. 28 of Big Rivers' First Data Requests (when asked "whether Mr. Holloway's analysis incorporates any revenues from Big Rivers participating in future MISO capacity auctions," the Attorney General confirmed that "[t]he analysis does not include capacity auction revenues"). *See also* Berry Rebuttal Testimony at pp. 8:21-9:5 ("By excluding all revenues from capacity auctions, Mr. Holloway's analysis is seriously flawed.").

²⁷⁹ Wolfram Hearing Testimony, Jan. 9, 2014, Tr. 13:59'25".

²⁸⁰ Bailey Hearing Testimony, Jan 7, 2014, Tr. 11:16'51" ("Rates that make a contribution to fixed costs, if they're high enough to make a contribution to fixed costs, should benefit the remaining Members.").

²⁸¹ Berry Rebuttal Testimony at p. 9:6-7.

1 The Opposing Intervenors also myopically focus on Big Rivers' rate adjustments from
2 2012 to 2015, assuming that Big Rivers' rates after the expiration of the reserve funds will hinder
3 its ability to secure replacement load and/or additional off-system sales. However, the argument
4 implicit in this approach (i.e., that Big Rivers' post-reserve rates are uncompetitive), incorrectly
5 assumes that potential new customers' decisions will be driven primarily by comparing Big
6 Rivers' post-reserve rates to Big Rivers' rates at the beginning of 2012. In reality, "a comparison
7 of Big Rivers' proposed rates to the rates of *other utilities* is the meaningful comparison."²⁸²
8 Although the Opposing Intervenors largely ignore Big Rivers' comparative rates, Big Rivers
9 "compared its rates to those of other utilities in Kentucky," as well as "Kentucky's resultant rates
10 to those of other states," and provided those comparisons with its Application in this
11 proceeding.²⁸³ Despite this, none of the Opposing Intervenors mentioned the comparative rate
12 data in their testimony;²⁸⁴ this is no doubt because the comparison "does not corroborate the dire
13 circumstances portrayed by the Opposing Intervenors, particularly for the industrial customer
14 segment."²⁸⁵ In fact, Big Rivers' comparison (which compares the 2014 retail rates for the Large
15 Industrial customers on the Big Rivers system and the 2015 retail rates for the Rural customers
16 on the Big Rivers system to 2011 rates for other utilities)²⁸⁶ establishes that Big Rivers' new
17 rates net of the Member Rate Stability Mechanism will still be in the top quartile in Kentucky,
18 and Kentucky's average utility rates will still remain among the top ten lowest in the nation, even
19 after the reserve funds are exhausted.²⁸⁷ The comparisons Sierra Club offered at the hearing
20 between Big Rivers' average system 2014 retail rates with the 2012 average rates of entire states

²⁸² Wolfram Rebuttal Testimony at pp. 14:22-15:2. *See also* Berry Rebuttal Testimony at pp. 18:18-19:7.

²⁸³ Wolfram Rebuttal Testimony at p. 14:16-1; Direct Testimony of John Wolfram, Application Tab 70 (June 28, 2013) ("Wolfram Direct Testimony"), Exhibit Wolfram-8.

²⁸⁴ Wolfram Rebuttal Testimony at p. 14:20-21; Berry Rebuttal Testimony at p. 19:4-5.

²⁸⁵ Wolfram Rebuttal Testimony at p. 15:2-6. *See also* Berry Rebuttal Testimony at p. 19:5-7.

²⁸⁶ Wolfram Direct Testimony, Exhibit Wolfram-8; Wolfram Hearing Testimony, Jan. 9, 2014, Tr. 14:37'20".

²⁸⁷ Wolfram Direct Testimony, Exhibit Wolfram-8.

1 are invalid and do not properly compare Big Rivers to other utilities on an “apples-to-apples”
2 basis.²⁸⁸ For this reason, Big Rivers’ rates are competitive even after the rate adjustments in the
3 535 Rate Case and this proceeding, and its comparative rates support Big Rivers’ reasonable
4 belief that it “can successfully attract load.”²⁸⁹

5 Moreover, because Big Rivers’ generating costs are so competitive, Big Rivers is able to
6 offer rates lower than its proposed tariff rates to new customers, at least for a period of time, in
7 order to attract incremental load.²⁹⁰ This makes load replacement even more likely, and it will
8 benefit existing ratepayers because any new sales will contribute to Big Rivers’ fixed costs and
9 will thus help to reduce the rates of existing ratepayers.

10 Even if Big Rivers’ efforts to develop new native load, bilateral contracts, and similar
11 arrangements do not succeed as soon as Big Rivers believes they will, Big Rivers “will be able to
12 replace some or all of the smelter load through off-system sales when off-system market prices
13 increase to a level that would justify returning idled units to operational status.”²⁹¹ Relying in
14 part on price studies provided by its experienced and qualified consultants ACES and Wood
15 Mackenzie,²⁹² Big Rivers “currently projects that market prices will return to such a level in
16 2019.”²⁹³ This projection is driven in part by the expectation that “most merchants will likely
17 decommission their coal plants and not replace that supply” in order to cut MATS compliance

²⁸⁸ Wolfram Hearing Testimony, Jan. 9, 2014, Tr. 14:56’52”.

²⁸⁹ Berry Rebuttal Testimony at p. 19:5-7 (“The comparative rate data provided in [Exhibit Wolfram-8], particularly for the industrial rate class, supports my contention that Big Rivers can successfully attract load.”).

²⁹⁰ Wolfram Hearing Testimony, Jan. 9, 2014, Tr. 15:34’57” (discussing economic development rates to attract new load).

²⁹¹ Berry Direct Testimony at p. 13:19-21.

²⁹² Berry Rebuttal Testimony at p. 11:7-8.

²⁹³ Berry Direct Testimony at p. 13:21-22.

1 costs.²⁹⁴ This future change to the regional generation profile is widely accepted—even Sierra
2 Club agrees that “some coal plants will retire to avoid the costs of MATS compliance.”²⁹⁵

3 In contrast, the Wilson Station “is fully compliant with all current and proposed
4 environmental regulations except some potential CO₂ regulations,”²⁹⁶ in part because, as long as
5 the Coleman Station is temporarily idled (but not retired or sold), Big Rivers will have sufficient
6 SO₂ and NO_x credits to obviate the need for an expensive new scrubber at the Wilson Station.²⁹⁷
7 As competing coal plants are decommissioned around the country, the resulting “decline in
8 supply should place upward pressure on wholesale market prices.”²⁹⁸ Prices are likely to be
9 further pushed upward by a national economic turnaround leading to an increase in demand.²⁹⁹

10 Although Sierra Club criticizes the energy price studies developed by ACES and Wood
11 McKenzie, it has not provided any energy price forecast of its own.³⁰⁰ Furthermore, it has not
12 demonstrated that Big Rivers’ consultants are unqualified, nor has it demonstrated that Big
13 Rivers’ studies are incorrect.³⁰¹

14 Similarly, although the Opposing Intervenors criticize Big Rivers’ projection that
15 replacement load will have a 75% load factor,³⁰² those criticisms are not supported by the facts.
16 Big Rivers based its projection on the informed belief that “replacement load would likely take
17 many forms,” ranging from market agreements likely to have a 100% load factor, to residential
18 load likely to have a 60-65% load factor, to economic development load likely to have a load

²⁹⁴ Berry Rebuttal Testimony at p. 13:4-10. *See also* Bailey Hearing Testimony, Jan. 7, 2014, Tr. 11:30’45” (“I believe MISO itself issued a report in July of this year that forecast 6-9 GW of power will be retired by 2016.”); *id* at Tr. 11:31’09” (“I think MISO took into consideration [plans for combined cycle gas generation] when they issued their report.”).

²⁹⁵ Ackerman Direct Testimony at p. 12:17-19.

²⁹⁶ Berry Rebuttal Testimony at p. 19:19-20.

²⁹⁷ Berry Hearing Testimony, Jan. 8, 2014, Tr. 17:40’25”. These allowances would not be available if Big Rivers was forced to retire the Coleman Station. *See id.* at Tr. 17:58’27” (pollution allowances are unit-specific).

²⁹⁸ Berry Rebuttal Testimony at p. 13:10-11.

²⁹⁹ *Id.* at p. 13:11-12.

³⁰⁰ *Id.* at p. 10:14-16.

³⁰¹ *Id.* at p. 10:14-16.

³⁰² *Id.* at pp. 17:20-18:17.

1 factor greater than 90%.³⁰³ Big Rivers' informed estimate has thus far proved quite accurate.

2 "[T]he Nebraska loads that Big Rivers is in negotiations with have an average load factor of
3 72%."³⁰⁴

4 Even if none of Big Rivers' efforts discussed above succeed to the expected degree, Big
5 Rivers can still "add Member value just by taking advantage of the [MISO] market, to which it
6 has ready access."³⁰⁵ Big Rivers' expectation of success in that capacity market is well-founded
7 on the "supplied projected MISO capacity values from two reputable energy consulting firms:
8 Wood Mackenzie and IHS Global."³⁰⁶ It is also supported by the fact that Big Rivers'
9 "generating units routinely achieve a 90% dispatch rate in the MISO market, which validates the
10 competitive marginal production cost of these units."³⁰⁷

11 Once again, Sierra Club criticizes the studies developed by well-qualified consultants,³⁰⁸
12 but once again, Sierra Club fails to substantiate those criticisms and fails to provide any
13 alternative forecast of MISO capacity values.³⁰⁹ The forecasts Big Rivers relied on are "relied
14 upon by numerous other utilities throughout the country for planning purposes," and they are
15 reasonable.³¹⁰

16 Finally, the Opposing Intervenors suggest that the fact that Big Rivers has not already
17 secured huge volumes of replacement load demonstrates that the Mitigation Plan is
18 unreasonable.³¹¹ This argument has no foundation in reality. As explained by Mr. Berry, "any
19 realistic alternative for finding sizable, long-term sales options will take at least three years, and

³⁰³ *Id.* at p. 18:6-11.

³⁰⁴ *Id.* at p. 18:14-16.

³⁰⁵ *Id.* at p. 8:4-8.

³⁰⁶ *Id.* at p. 9:1-4; *id.* at Exhibit Berry Rebuttal-1.

³⁰⁷ Berry Direct Testimony at p. 12:2-3.

³⁰⁸ See Ackerman Direct Testimony at pp. 12-15.

³⁰⁹ Berry Rebuttal Testimony at p. 21:5-21.

³¹⁰ *Id.* at p. 12:2-5.

³¹¹ See, e.g., Ackerman Direct Testimony at pp. 7:11-8:14.

1 perhaps more, to be fully realized.”³¹² Furthermore, as Big Rivers has explained, “uncertainty
2 surrounding Big Rivers’ financial and regulatory situation has made obtaining replacement load
3 more difficult, especially given that the . . . intervenors in the Big Rivers rate cases have taken
4 positions that would lead to Big Rivers’ bankruptcy.”³¹³ If the Commission grants Big Rivers’
5 proposed rate relief, “this uncertainty will be removed,” and a major obstacle to the success of
6 Big Rivers’ Mitigation Plan will be eliminated.³¹⁴

7 While the Opposing Intervenor seem to believe that there can be no success that does
8 not completely replace the Smelter load at the Smelter rates, the evidence demonstrates that Big
9 Rivers’ Mitigation Plan is “reasonable and viable,”³¹⁵ and the Opposing Intervenor’s criticisms
10 of it are unfounded. In light of this demonstrated “potential for growth and expansion,”³¹⁶ the
11 Commission should allow Big Rivers a reasonable opportunity to implement its Mitigation Plan.

12 **C. Big Rivers’ Implementation of the Mitigation Plan Has Allowed It To Reduce**
13 **Costs and Scale Back Its Operations.**

14 Big Rivers’ Mitigation Plan encompasses more than the rate relief proposed in this
15 proceeding and the long-term strategies for generating new revenue discussed above. It also
16 includes a “reduction of generation-related costs”³¹⁷ in order to offset some effects of the
17 Smelters’ contract terminations without affecting rates. As Mr. Bailey explains, Big Rivers has
18 “worked diligently to reduce costs and scale-back [its] operations so that [it is] operating as
19 leanly as possible while still satisfying [its] debt obligations, prudently operating and

³¹² Berry Direct Testimony at p. 13:12-14. See also Berry Rebuttal Testimony at p. 17:14-16 (“Big Rivers has repeatedly stated that load replacement will not occur overnight. To assume that 850 MW of load replacement could occur overnight is unreasonable and short-sighted.”).

³¹³ *Id.* at p. 17:10-13. See also Richert Rebuttal Testimony at p. 35:4-7 (Sierra Club’s proposal would extend regulatory uncertainty and “scare off potential load replacement customers and suppress regional economic development to the detriment of Big Rivers’ Mitigation Plan”).

³¹⁴ Berry Rebuttal Testimony at p. 17:13-14.

³¹⁵ *Id.* at pp. 16:12-13, 17:17-19 (the “Mitigation Plan is reasonable and will result in replacement loads, and Big Rivers continues to see positive signs that the Mitigation Plan will reap future benefits for Big Rivers’ Members.”).

³¹⁶ *Nat’l-Southwire*, 785 S.W.2d at 512-13.

³¹⁷ Berry Rebuttal Testimony at p. 7:17-21.

1 maintaining [its] generation fleet, and planning for the future.”³¹⁸ These are not speculative
2 future benefits; Big Rivers has already “engaged in corporate-wide cost cutting”³¹⁹ and
3 “dramatically” reduced expenses.³²⁰ In the present case, Big Rivers’ cost-cutting efforts have
4 “turn[ed] a \$155 million dollar per year revenue loss from the Sebree smelter into a revenue
5 request of only \$71.2 million dollars per year.”³²¹

6 For all of these reasons, the Commission should afford Big Rivers the opportunity to
7 implement its Mitigation Plan, including its successful cost-cutting strategies, by approving Big
8 Rivers’ proposed rate relief in this proceeding.

9

10 **IX. Denial of the Full Rate Relief Will Likely Force Big Rivers to File for Bankruptcy or**
11 **Cease Operations.**

12 Big Rivers has worked hard to “help ensure that Big Rivers will not have to adjust its
13 rates any more than necessary.”³²² It “is requesting only the revenue it needs to continue to
14 safely operate and maintain its plants prudently in the future, maintain the value of its generating
15 assets, and meet its financial covenants.”³²³ The Opposing Intervenors’ proposals, in contrast,
16 would cause Big Rivers to default on its obligations, thereby “light[ing] the bankruptcy fuse.”³²⁴

17 **A. Big Rivers is Obligated to Achieve a 1.10 MFIR to Avoid Default.**

18 The Commission has recognized that Big Rivers operates under “unique
19 circumstances”³²⁵ because of the 1.10 MFIR “floor”³²⁶ established as the “absolute minimum
20 threshold that Big Rivers must achieve pursuant to its financial obligations and debt

³¹⁸ Bailey Rebuttal Testimony at p. 6:11-13.

³¹⁹ Bailey Direct Testimony at p. 14:14-15.

³²⁰ Bailey Rebuttal Testimony at p. 6:16-16.

³²¹ *Id.* at p. 6:19-21.

³²² *Id.* at p. 3:19-22.

³²³ Berry Direct Testimony at p. 23:18-20.

³²⁴ Mabey Hearing Testimony, Jan. 8, 2014, 15:11’15”.

³²⁵ 2011 Rate Case Order at *8.

³²⁶ Richert Direct Testimony at p. 9:20-22.

1 covenants.”³²⁷ As the Commission found in the 535 Rate Case, Big Rivers’ contractual
2 obligations “[create] a greater need for the use of a coverage ratio that will produce margins
3 above the minimum needed so that an unexpected event, such as a drop in projected revenues or
4 an increase in expenses, does not result in a mortgage default.”³²⁸ Big Rivers’ proposed rates
5 were carefully designed to achieve that goal, as explained in Section V.

6 If Big Rivers fails to achieve an MFIR of 1.10, the consequences will range from “having
7 to pay higher interest rates on debt, to being unable to find sources of credit and defaulting under
8 its credit agreement covenants.”³²⁹ Notably, it will lose the right to secure additional debt under
9 its existing Indenture until after Big Rivers has achieved a 1.10 MFIR for a 12-month period
10 described in the Indenture.³³⁰ For ratemaking purposes, authorizing anything less than a 1.24
11 TIER³³¹ “puts Big Rivers at risk of defaulting on its loan obligations because it would leave Big
12 Rivers an unreasonably narrow window in which to operate.”³³² Big Rivers’ proposed rates are
13 calculated based upon an authorized TIER of 1.24, and for the reasons stated above, the
14 Commission should approve Big Rivers’ proposed rates in order to provide a sufficient cushion
15 for it to satisfy its existing contractual obligations, have access to the capital markets, and focus
16 on the Mitigation Plan.³³³

³²⁷ Richert Rebuttal Testimony at p. 26:21-13.

³²⁸ 535 Rate Case Order at *42.

³²⁹ Richert Direct Testimony at p. 12:3-6.

³³⁰ *Id.* at p. 7:4-6.

³³¹ Although TIER and MFIR are conceptually different, they are equivalent for Big Rivers because it pays no income taxes. *See id.* at pp. 10:19-11:4; Direct Testimony of Bion C. Ostrander, p. 9:5-7 (“Ostrander Direct Testimony”).

³³² Richert Direct Testimony at p. 11:12-14. *See also* Walker Hearing Testimony, Jan. 8, 2014, Tr. 16:51’25” (“I think that that was 1.20 and what they’re requesting is 1.24 those four basis points as I point out in my testimony is four basis points different. I think if you came back with a rate order of 1.20, that would provide regulatory certainty which everyone is looking for, and when I say everyone I mean the rating agencies and the lenders are looking for regulatory certainty. I could argue that those four basis point would send a signal that says not only is the Commission supportive, but they’re supportive in the right direction and they recognize that maybe that four basis points would send a signal that they could in the future provide . . . higher TIER coverage.”).

³³³ As discussed in Section V, a TIER of 1.20 would not provide a sufficient cushion for Big Rivers to satisfy its existing contractual obligations.

1 **B. The Opposing Intervenors' Recommendations Would Cause Big Rivers to**
2 **Default on Its Obligations.**

3 The rates proposed by Big Rivers will produce revenues that will meet Big Rivers'
4 revenue requirements and enable Big Rivers to satisfy its minimum MFIR requirements.³³⁴ The
5 Opposing Intervenors, in contrast, recommend actions that would render Big Rivers unable to
6 meet its minimum MFIR requirements, causing it to default on its obligations to creditors.³³⁵
7 This would lead to severe consequences, including heightening the likelihood of RUS triggering
8 the "lock box," of Big Rivers "having to pay higher interest rates on debt, losing the contractual
9 ability to borrow money on a secured basis, having its existing loans accelerated, having its lines
10 of credit terminated, having its ability to obtain letters of credit under its existing credit
11 agreements terminated,"³³⁶ and, ultimately, being forced down a path to bankruptcy.

12 On behalf of the Attorney General, Mr. Ostrander proposes an authorized TIER of 1.10
13 for ratemaking purposes.³³⁷ This is, of course, the same basic proposal that Mr. Ostrander
14 advanced in the 535 Rate Case,³³⁸ and which the Commission rejected because it would "not
15 provide a 'cushion' in the event of either an unexpected decline in revenues or unavoidable
16 increase in expenses."³³⁹ The Commission should once again reject Mr. Ostrander's proposal.³⁴⁰

17 For the test period in this case, the difference in net margins between 1.24 TIER and a
18 1.10 TIER is only about \$6.1 million.³⁴¹ For a generation and transmission cooperative with a

³³⁴ Richert Direct Testimony at pp. 7:19-8:1 ("The calculation of MFIR for the test year of February 1, 2014, through January 31, 2015, assuming the proposed rates are in effect, produces an MFIR of 1.11.").

³³⁵ Richert Rebuttal Testimony at p. 9:3-12.

³³⁶ Richert Direct Testimony at p. 6:4-8.

³³⁷ Ostrander Direct Testimony at p. 9:4.

³³⁸ Richert Rebuttal Testimony at p. 26:16-17.

³³⁹ 535 Rate Case at *42.

³⁴⁰ See Richert Rebuttal Testimony at p. 25:10-11 ("Mr. Ostrander proposes setting Big Rivers' TIER at 1.10, but he has no expertise in such matters, and his proposal is unsupported and unsupportable.").

³⁴¹ Bailey Direct Testimony at p. 8:19-21.

1 forecasted \$371 million annual cost of service, this is already a slim margin for error.³⁴² The use
2 of a 1.10 TIER for ratemaking purposes is inappropriate because it leaves no margin of error for
3 ordinary business fluctuations³⁴³ or simple margin attrition.³⁴⁴ Without a TIER “‘cushion’ in the
4 event of either an unexpected decline in revenues or unavoidable increase in expenses,”³⁴⁵ Big
5 Rivers would end up defaulting on its obligations and be forced down a path to bankruptcy.³⁴⁶
6 Accordingly, the Attorney General’s proposed TIER of 1.10 is inappropriate.³⁴⁷

7 Big Rivers’ revenue requirement is “‘based on Big Rivers’ total test period revenues and
8 expenses—analyzed from the bottom up—not on an estimate of the revenue impact of the
9 smelter contract termination, from the top down.”³⁴⁸ Big Rivers has carefully projected its TIER
10 and margins in this case and determined that the proposed rate adjustment will allow it to satisfy
11 the minimum 1.10 TIER requirement.³⁴⁹ However, these proposed rates provide only a slim \$6.1
12 million margin³⁵⁰ for Big Rivers “to meet its debt service, continue funding an appropriately
13 reduced scale of operations, and still have access to reasonable interest rates in the credit
14 markets.”³⁵¹ Anything less than the rates proposed by Big Rivers will shrink that already slim
15 cushion and directly jeopardize Big Rivers’ ability to meet its obligations.

16 Furthermore, the elimination of a contractually-mandated TIER ceiling after the
17 Smelters’ contract terminations does not mean that—as Mr. Ostrander asserts—Big Rivers’

³⁴² *Id.* at p. 8:21-22.

³⁴³ Richert Rebuttal Testimony at pp. 26:20-27:1.

³⁴⁴ Walker Rebuttal Testimony at p. 4:19-20.

³⁴⁵ See 535 Rate Case Order at *42.

³⁴⁶ Richert Rebuttal Testimony at p. 27.

³⁴⁷ Walker Rebuttal Testimony at p. 3:19-21.

³⁴⁸ Wolfram Rebuttal Testimony at p 31:13-17.

³⁴⁹ Richert Direct Testimony at p. 7:19-8:5 (“The calculation of MFIR for the test year of February 1, 2014, through January 31, 2015, assuming the proposed rates are in effect, produces an MFIR of 1.11.”); *id.*, Exhibit Richert-2.

³⁵⁰ Bailey Direct Testimony at p. 8:19-21.

³⁵¹ Rebuttal Testimony of DeAnna M. Speed, p. 5:19-22 (Dec. 17, 2013) (“Speed Rebuttal Testimony”).

1 TIER should be set at the absolute minimum.³⁵² Again, the TIER used for ratemaking must
2 provide at least some level of “cushion,”³⁵³ and the presence or absence of a cap does not affect
3 that basic function.³⁵⁴ Big Rivers’ requested TIER of 1.24—only four basis points higher than
4 that authorized by the Commission in the 535 Rate Case—is certainly reasonable in comparison to
5 other investment grade-rated generation and transmission cooperatives.³⁵⁵

6 The Opposing Intervenors’ other TIER-related proposals are also flawed. On behalf of
7 KIUC, Mr. Kollen proposes repurposing the reserve funds to allow Big Rivers “to achieve a 1.24
8 TIER each month;”³⁵⁶ however, Mr. Kollen intends for that relief to be temporary, and
9 acknowledges that the KIUC rate plan would cause Big Rivers to have insufficient revenues as
10 early as December of 2014.³⁵⁷ This would result in Big Rivers cannibalizing its reserve funds
11 with no guarantee of ongoing viability.³⁵⁸ It would also necessitate immediate efforts to prepare
12 and file another rate case to establish new rates that would be effective no later than January 1,
13 2015.³⁵⁹ Notwithstanding this, Mr. Kollen indicates that the purpose of the temporary TIER
14 support and the “denial of the requested rate relief [is to establish] the foundation for a ‘workout’
15 process between Big Rivers and its four major lenders.”³⁶⁰ However, as explained further in the
16 rebuttal testimony of Mr. Mabey and described in more detail at Section IX. below, “the

³⁵² Ostrander Direct Testimony at p. 10:5-9. *See also* Richert Rebuttal Testimony at p. 27:6-7.

³⁵³ 535 Rate Case Order at *42.

³⁵⁴ Richert Rebuttal Testimony at p. 27:7-9.

³⁵⁵ Walker Rebuttal Testimony at p. 10:1-5; *see also id.* at p. 8:14-9:12 (testifying that Big Rivers performed a rigorous analysis typical of that used in the industry and concluded that Big Rivers’ TIER performance of 1.17x for 2010-2012 as well as the requested TIER of 1.24 was below the financial performance of other investment grade-rated, state-regulated generation and transmission cooperatives).

³⁵⁶ Kollen Direct Testimony at p. 23:6-10.

³⁵⁷ *Id.* at pp. 10:22-11:2; KIUC’s Response to Item No. 25 of Big Rivers’ First Data Requests; Richert Rebuttal Testimony at p. 29:9-15.

³⁵⁸ Mabey Hearing Testimony, Jan. 8, 2014, Tr. 15:17’40”.

³⁵⁹ *Id.* at Tr. 15:24’07” (KIUC’s plan “would put management right back in rate case preparation now, essentially, sending this signal of instability instead of focusing on the Mitigation Plan.”).

³⁶⁰ Mabey Rebuttal Testimony at p. 8:1-2.

1 consensual workout path will fail and a bankruptcy filing will be a highly probable result. . . .”³⁶¹
2 Similarly, Sierra Club’s proposal that the Commission grant Big Rivers only a “short-term rate
3 increase”³⁶² in order to keep Big Rivers afloat while it sheds generating assets would likewise
4 “[force] Big Rivers toward likely bankruptcy.”³⁶³ In short, these approaches are simply not
5 realistic.

6 Regardless of how the Opposing Intervenors characterize their goals and regardless of
7 whether they actually use the word “bankruptcy,” their proposals would lead to a cascade of
8 negative effects as creditors and stakeholders take defensive measures:

- 9 • RUS could implement the lock box;³⁶⁴
- 10 • Big Rivers would be prevented from accessing its remaining line of credit because it
11 could not do so under the credit agreement and the required forms for any draw;³⁶⁵
- 12 • Creditors would likely accelerate all amounts owed by Big Rivers under certain credit
13 agreements;³⁶⁶
- 14 • Creditors would likely impose increased default interest rates;³⁶⁷
- 15 • The credit ratings agencies would likely take further negative action against Big
16 Rivers, thus undermining Big Rivers’ ability to access the credit market it needs for
17 long-term viability;³⁶⁸

³⁶¹ *Id.* at p. 8:9-11.

³⁶² Ackerman Direct Testimony at pp. 5:16-6:6.

³⁶³ Richert Rebuttal Testimony at p. 35:10-12.

³⁶⁴ *Id.* at p. 31:20-22.

³⁶⁵ *Id.* at p. 9:12-13. See also *In the Matter of: The Application of Big Rivers Elec. Corp. for Approval to Issue Evidences of Indebtedness*, Application, P.S.C. Case No. 2013-00125, pp. 53-54, p. 73 (March 28, 2013) (The proposed Amended and Restated Revolving Line of Credit Agreement between Big Rivers and CFC, in which Big Rivers certifies that “all of the representations and warranties contained in the Credit Agreement are true and correct on and as of the date hereof” and further represents that “[t]here has been no material adverse change in the business, assets, liabilities (actual or contingent), operations, condition (financial or otherwise) of the Borrower and its subsidiaries taken as a whole from that set forth in said financial statements except changes disclosed in writing to CFC prior to the date hereof.”) Read together, these provisions provide that access to further credit under the agreement can only be obtained by certifying that there has been no material adverse change. If CFC deems denial of the proposed rates as a material adverse change, Big Rivers would be unable to make that certification and would thus be refused any additional requested draws on the line of credit.

³⁶⁶ Richert Direct Testimony at p. 6:6-7.

³⁶⁷ *Id.* at p. 6:5-6.

³⁶⁸ See Big Rivers’ Response to Item No. 7 of the Attorney General’s First Data Requests (providing “Issuer Comment: Big Rivers Electric Corporation—Credit Opinion,” Moody’s Investors Service (July 15, 2013) (further

- 1 • Coal suppliers would likely demand credit support, likely to be a cash deposit equal
2 to deliveries during a billing cycle;³⁶⁹
- 3 • Vendors would likely place Big Rivers on “C.O.D.” or “cash in advance”;³⁷⁰
- 4 • If Big Rivers fails to achieve at least 1.10 TIER, it would be unable to issue
5 Additional Obligations secured by the Indenture;³⁷¹ and
- 6 • Prospective medium- and long-term buyers for power would likely shun Big Rivers in
7 favor of generation and transmission companies viewed as more reliable, thus
8 crippling Big Rivers’ Mitigation Plan.³⁷²

9 Each of these actions would have immediate and dire effects on Big Rivers’ ability to
10 fulfill its existing obligations, its ability to obtain credit for operating purposes, and, more
11 importantly, its liquidity – the cash flow that enables it to pay current bills, obtain the fuel,
12 supplies, and vendor support needed to operate, properly maintain its system, and fulfill service
13 obligations to its Members.³⁷³ Big Rivers would then quickly face default and bankruptcy.

14 The Opposing Intervenor’s admit they have not even studied the issue of bankruptcy,³⁷⁴
15 but yet they accuse Big Rivers of exaggerating the risks of bankruptcy.³⁷⁵ This is not true. Big
16 Rivers is not “crying wolf,”³⁷⁶ and as Mr. Bailey clarified in response to Commissioner Breathitt,
17 Big Rivers has in each case believed in good faith that the Opposing Intervenor’s proposals

downgrading the senior secured rating for Big Rivers’ Ohio County Pollution Control Bonds to Ba2 from Ba1 following the hearing in the 535 Rate Case)).

³⁶⁹ Mabey Rebuttal Testimony p. 33:4-7.

³⁷⁰ *Id.* at p. 33:4-7.

³⁷¹ Richert Direct Testimony at p. 7:4-6; Walker Rebuttal Testimony at p. 4:16-17.

³⁷² See Mabey Rebuttal Testimony at p. 33:11-13.

³⁷³ See Walker Direct Testimony at p. 7:16-19 (“A utility must be able to attract capital at a reasonable cost in order to build and maintain physical plants and to meet its public service obligations.”).

³⁷⁴ See, e.g., Hearing Testimony of Larry W. Holloway, Jan. 9, 2014, Tr. 18:32’28” (“Holloway Hearing Testimony”); Attorney General’s Response to Item No. 35 of Big Rivers’ First Data Requests (explaining that the Attorney General performed no bankruptcy analysis); Hearing Testimony of David Brevitz, Jan. 9, 2014, Tr. 18:44’51” (“Brevitz Hearing Testimony”) (confirming); Sierra Club’s Response to Item No. 6 of Big Rivers’ First Data Requests (failing to identify and provide any studies analyzing how bankruptcy would affect Big Rivers’ retail rates); Richert Rebuttal Testimony at p. 24:14-18 (“[N]one of the Opposing Intervenor’s witnesses are experts in utility bankruptcy, and none of them conducted any analyses or studies about the possible effects of bankruptcy (including whether bankruptcy would result in lower rates for Big Rivers’ Members).”).

³⁷⁵ See, e.g., Statement of Michael Kurtz, Jan. 7, 2014, Tr. 14:04’57” (suggesting Big Rivers’ statements about bankruptcy are merely a “tactic”).

³⁷⁶ Bailey Hearing Testimony, Jan. 7, 2014, Tr. 16:54’02”.

1 would have led Big Rivers to bankruptcy.³⁷⁷ None of the cases cited by KIUC show that Big
2 Rivers' fear was unfounded, and none of them show that the Commission's granting reduced rate
3 relief was harmless.

4 Big Rivers' 2009 request for rate relief—only filed because the status of the Unwind
5 Transaction was uncertain at the time of filing³⁷⁸—was dismissed shortly before the closure of
6 the Unwind Transaction, at which time the requested relief became unnecessary.³⁷⁹ Those
7 unique circumstances do not demonstrate that Big Rivers was insincere about the consequences
8 of not receiving rate relief if the Unwind Transaction failed. The need for rate relief was simply
9 mooted. Neither do the outcomes of Big Rivers' 2011 Rate Case and the 535 Rate Case support
10 KIUC's accusation. In neither case did the Commission adopt the Opposing Intervenors' plans.
11 Big Rivers was forced to take significant measures after the 2011 Rate Case, including deferring
12 maintenance outages, simply to be able to meet its loan covenants.³⁸⁰ Similarly, Big Rivers
13 believes that it did not experience more serious repercussions from the reduced rate relief granted
14 in the 535 Rate Case Order largely because some of the reduced items were deferred until this
15 proceeding³⁸¹ and because Big Rivers' creditors interpreted the order on the whole as a signal of
16 the Commission's ongoing support for Big Rivers.³⁸² Neither of those situations remotely
17 suggests that Big Rivers is overstating the consequences of an adverse decision in this
18 proceeding.

³⁷⁷ *Id.* at Tr. 14:05'10".

³⁷⁸ *Id.* at Tr. 16:49'54".

³⁷⁹ See 2009 Rate Case Order; Bailey Hearing Testimony, Jan. 7, 2014, Tr. 16:50'15".

³⁸⁰ Bailey Hearing Testimony, Jan. 7, 2014, Tr. 16:51'25". See also *id.* at Tr. 14:11'54".

³⁸¹ *Id.* Tr. 16:52'55".

³⁸² Richert Rebuttal Testimony at p. 8:17-19 (because "creditors and rating agencies saw the [535 Rate Case Order] as a signal of ongoing regulatory support," they did not "take actions that could lead to a Big Rivers' bankruptcy.").

1 The dangers of an adverse decision in this proceeding are very real, as Mr. Mabey
2 testified.³⁸³ And importantly, these dangers are not reduced because of Big Rivers' atypical
3 margins calculated at the time of the hearing.³⁸⁴ As an initial matter, Big Rivers' preliminary
4 end-of-year margins are \$8,639,490.98 with a 1.20 TIER—significantly lower than the margins
5 at the time of the hearing in this proceeding.³⁸⁵ Furthermore, this financial performance
6 discussed at the hearing is not projected to be repeated because it resulted largely from one-time
7 circumstances which have already been adjusted out for 2014.³⁸⁶ These circumstances include
8 the effects of the Commission order on the 2011 Rate Case rehearing, stronger wholesale
9 margins (resulting in part because Big Rivers deferred the Coleman Station's maintenance
10 outage), reduced labor costs due to staff attrition, and more.³⁸⁷

11 For these reasons, the denial of Big Rivers' proposed rates would leave it with
12 insufficient revenue to meet its service obligations to its Members and its payment obligations to
13 its creditors. Big Rivers would quickly fall below its contractual TIER requirement, deplete its
14 available cash, have its revenues "lockboxed," and be cut-off from access to the capital it needs
15 in order to continue operations and protect its ongoing financial viability. With no liquidity, no
16 sufficient revenue, and no access to credit, Big Rivers would be forced into bankruptcy.

³⁸³ Mabey Hearing Testimony, Jan. 8, 2014, Tr. 15:12'17" (testifying that the Opposing Intervenor's proposals would "light the bankruptcy fuse," and that bankruptcy would not be a prudent path forward at this time).

³⁸⁴ Bailey Hearing Testimony, Jan. 7, 2014, Tr. 15:31'49".

³⁸⁵ See Big Rivers' Updated Response to Item No. 43 of Commission Staff's First Data Requests (Jan. 31, 2014).

³⁸⁶ Bailey Hearing Testimony, Jan. 7, 2014, Tr. 15:32'17".

³⁸⁷ See *id.* at Tr. 15:32'51"; Richert Hearing Testimony, Jan. 8, 2014, Tr. 12:29'01" (attributing the high margins, as of September 2013, to various unique circumstances including: \$7 million in reduced labor expense due to unfilled, reduced staff not reflected in the original budget; \$3 million reduction due to the deferred Coleman Station outage; \$4.2 million in positive margins from off-system sales; \$700,000 in favorable patronage income; and \$2.3 million reduction of interest expense because of pollution control bonds that were paid off).

1 **C. It Is Not Reasonable to Believe that Big Rivers' Creditors Will Grant**
2 **Concessions to Stave off Bankruptcy.**

3 Despite the serious risks of the sequence of events outlined above, the Opposing
4 Intervenors still propose denying all or substantially all of the requested rate relief on the
5 speculative theory that a denial of rate relief would be a foundation for a “workout” process
6 between Big Rivers and its four major lenders that would eliminate almost any need for rate
7 adjustments.³⁸⁸ This speculation is unrealistic for several reasons.

8 As an initial matter, KIUC justifies its argument that Big Rivers' creditors should “share”
9 responsibility for Big Rivers' revenue requirement by falsely claiming that Big Rivers “refuses
10 to discuss debt restructuring with its creditors.”³⁸⁹ In fact, as discussed in Section IV.C.1, Big
11 Rivers already negotiated with its creditors to refinance \$442 million in debt, saving Big Rivers'
12 Members and their retail customers millions of dollars each year in interest and generating
13 tremendous additional benefits.³⁹⁰ By negotiating in good faith with its creditors, Big Rivers
14 already appropriately restructured its debt and obtained all the “concessions” its creditors are
15 likely to extend absent a supportive order in this case. Furthermore, if Big Rivers' finances are
16 stabilized by a supportive order in this proceeding, it intends to and should be able to negotiate
17 additional beneficial terms with RUS.³⁹¹ But it is only through a supportive order that this might
18 be possible.

³⁸⁸ See, e.g., Brevitz Direct Testimony at p. 40:5-7 (proposing that Big Rivers work “with its creditors on a plan to reduce its excess scale of operations”); *id.* at p. 43:4-7 (“Creditors which knowingly extended credit to Big Rivers should carry Big Rivers' transition through temporary forgiveness of debt principal and interest payments . . .”); Kollen Direct Testimony at p. 17:24-25 (speculating that KIUC's plan would “provid[e] a reasonable incentive for the creditors to work with Big Rivers in a cooperative manner prior to the depletion of the ratepayer Reserve Funds”); *id.* at p. 25:17-18 (proposing that Big Rivers “obtain concessions from its creditors either voluntarily or involuntarily.”). See also Mabey Rebuttal Testimony at pp. 7:17-8:2.

³⁸⁹ Kollen Direct Testimony at p. 9:11-12.

³⁹⁰ See *In the Matter of: Application of Big Rivers Electric Corporation for Approval to Issue Evidences of Indebtedness*, Order, P.S.C. Case No. 2012-00119 (May 25, 2012); 2012 Refinancing Case Order.

³⁹¹ Richert Hearing Testimony, Jan. 8, 2014, Tr. 12:11'16”.

1 Yet the Opposing Intervenors are not satisfied. They argue that the Commission should
2 intentionally undermine Big Rivers' financial stability and create a risk of catastrophic default,
3 thereby forcing the creditors to make major concessions "either voluntarily or involuntarily."³⁹²
4 As Mr. Mabey testified, this approach is illogical and doomed to failure.

5 Big Rivers holds nearly \$1 billion in secured debt.³⁹³ Absent its proposed rate
6 adjustment, the only way that Big Rivers would be able to continue operations is through
7 forgiveness of a significant portion of this amount.³⁹⁴ However, Big Rivers' creditors have long
8 demonstrated an unwillingness to write down debt principal.³⁹⁵ Indeed, Mr. Mabey testified that
9 in his experience as a federal bankruptcy judge, a practitioner, and a professor of law, he is not
10 aware of a single instance in which RUS has ever compromised significantly on principal.³⁹⁶
11 Moreover, given the minimal rate adjustment proposed by KIUC and Sierra Club (and the
12 complete lack of rate relief proposed by the Attorney General), the magnitude of the principal
13 debt reduction required would be too great for the creditors to accept even if they were suddenly
14 open to such an arrangement (which the evidence shows they will not be).³⁹⁷ Especially in light
15 of the fact that the creditors already agreed to significant refinancings,³⁹⁸ they would be

³⁹² Kollen Direct Testimony at p. 25:17-18. *See also* Mabey Hearing Testimony, Jan. 8, 2014, Tr. 15:11'49" (testifying that the KIUC Rate Plan seems designed to send a message to the creditors that they need to compromise)

³⁹³ Mabey Rebuttal Testimony at p. 9:7.

³⁹⁴ *Id.* at p. 9:13-15.

³⁹⁵ *See* Richert Rebuttal Testimony at p. 10:16-18 ("[N]one of the creditors involved in the refinancing wrote down any principal as a concession."); Mabey Rebuttal Testimony at pp. 12:19-13:11 (in Big Rivers' 1996 bankruptcy, "the RUS did not agree to any principal reduction during the pre-bankruptcy discussions, and no such reduction resulted under the Big Rivers chapter 11 plan—only the interest rate and term of the RUS loan were modified.") (emphasis original). *See also* Mabey Hearing Testimony, Jan. 8, 2014, Tr. 15:12'16" (testifying that creditors will not compromise on principal owed outside of bankruptcy, and precipitating bankruptcy at this time would not be prudent).

³⁹⁶ *Id.* at Tr. 15:53'35".

³⁹⁷ Mabey Rebuttal Testimony at p. 8:12-13.

³⁹⁸ *See* Mabey Rebuttal Testimony at p. 10:9-15.

1 extremely unlikely to make principal reductions of this magnitude outside of a bankruptcy
2 proceeding.³⁹⁹

3 Complicating matters further is the fact that, due to Big Rivers' cooperative status, it is
4 unable to offer anything meaningful to creditors in exchange for concessions.⁴⁰⁰ In the for-profit
5 context, a "quid pro quo may consist of granting the lenders an equity stake in the company, to
6 give them an opportunity to share in the 'upside' of the company's success that may be realized
7 as a result of the implementation of the proposed debt relief."⁴⁰¹ As a Member-owned
8 cooperative and a not-for-profit entity, however, Big Rivers is not in a position to offer equity in
9 exchange for debt concessions.⁴⁰²

10 Creditors would also likely expect any "workout" to include concessions from other
11 stakeholders (such as suppliers and organized labor).⁴⁰³ However the sheer number of parties
12 that would be required to cooperate would, alone, likely doom the Opposing Intervenors'
13 suggestions of a "workout." Indeed, history has shown that the kind of mass consensus expected
14 by the Opposing Intervenors is extremely unlikely to happen. In 1996, "the lack of constituent
15 consent is part of what ultimately landed Big Rivers in bankruptcy"⁴⁰⁴

16 Therefore, a forced workout involving various stakeholders that are not parties to this
17 action is not just unrealistic, even pursuing it would "seriously impede or even destroy Big

³⁹⁹ *Id.* at p. 9:16-17. *See also* Richert Rebuttal Testimony at p. 31:19-22 ("Big Rivers' creditors would not react as KIUC suggests, nor would they agree to abandon debt principal. Instead, they would rationally act to protect their interests; for example, RUS would likely implement the lock box to capture Big Rivers' revenues, including those from the Reserve Funds.").

⁴⁰⁰ Mabey Rebuttal Testimony at p. 8:26-27.

⁴⁰¹ *Id.* at p. 15:8-11.

⁴⁰² *Id.* at p. 15:11-14.

⁴⁰³ *Id.* at pp. 8:18-20, 12:9-17.

⁴⁰⁴ *Id.* at p. 12:21-22.

1 Rivers' ability to attract capital in the future."⁴⁰⁵ It is likely that "not a single cooperative
2 institution would agree to advance funds if it felt it would have to take a 'hair cut' or experience
3 a loss of principal."⁴⁰⁶ Indeed, such a hostile approach to creditors could divert lending capital to
4 utilities in more supportive regulatory environments.⁴⁰⁷

5 This is not speculation; it has happened before. In 1987, the Commission ordered Big
6 Rivers to develop a revised "workout" plan that was "not contingent upon an immediate rate
7 increase and guaranteed full repayment of debt," with the goal of ensuring "an equitable sharing
8 of the risk by the creditors."⁴⁰⁸ In response, the REA issued a letter to the Commission
9 announcing that, because the Commission denied rate relief to Big Rivers, it would "suspend all
10 loan and loan guarantee approvals and advances on loans and loan guarantees already approved
11 to all electric and telephone borrowers in Kentucky."⁴⁰⁹

12 Finally, not only is the Opposing Intervenors' plan substantively unrealistic, it is also
13 impractical. In order to continue operating without its proposed rate adjustment, Big Rivers
14 would require concessions from multiples creditors, one of which is a governmental entity with
15 onerous approval processes.⁴¹⁰ Each of the four lenders has "its own financial forecasting
16 models, decision-making structure, and political considerations."⁴¹¹ Given this complexity, the
17 approach proposed by the Opposing Intervenors would simply take too long to execute, even if it

⁴⁰⁵ Walker Rebuttal Testimony at p. 10:20-21. *See also* Richert Rebuttal Testimony at pp. 31:22-32:1 ("It is very unlikely that any lender would agree to loan Big Rivers additional monies if Big Rivers seeks to have its current lenders share in operational costs to reduce a rate increase.").

⁴⁰⁶ *See* Walker Rebuttal Testimony at p. 10:23-25.

⁴⁰⁷ *Id.* at p. 11:4-6. *See also* Section VI.

⁴⁰⁸ *In the Matter of An Investigation of Big Rivers Electric Corporation's Rates for Wholesale Electric Service, Case No. 9885, Order dated March 17, 1987 at * 1, 3.*

⁴⁰⁹ *See* Walker Rebuttal Testimony, Exhibit Walker Rebuttal-4, the Embargo Letter.

⁴¹⁰ Mabey Rebuttal Testimony at p. 8:14-17.

⁴¹¹ *Id.* at p. 10:6-8.

1 was realistic (which, as discussed above, it is not).⁴¹² Without rate relief in place by January 31,
2 2014, Big Rivers will begin to experience the chain-reaction of adverse events discussed in the
3 previous subsection. Once the bankruptcy fuse is lit, it likely cannot be extinguished.

4 For these reasons, a denial of Big Rivers' proposed rates would almost certainly lead to
5 bankruptcy, not the creditor bail-out imagined by the Opposing Intervenors. The threat of
6 default will not incentivize Big Rivers' lenders to negotiate concessions; it would only encourage
7 them to quickly force Big Rivers into a liquidity crisis. At that point, Big Rivers' only option
8 would be the Chapter 11 process, which is disruptive, expensive, and unpredictable.

9 **D. Bankruptcy Would Have Disastrous Consequences for Big Rivers, Its**
10 **Members, and Its Members' Retail Customers.**

11 While devoid of analysis or factual support, the express or implicit premise of the
12 Opposing Intervenors' position is that a Chapter 11 proceeding could benefit Big Rivers'
13 Members. These suggestions are "misleading and potentially dangerous."⁴¹³ The Chapter 11
14 "process is unpredictable, burdensome, and expensive in terms of both cash and human
15 capital."⁴¹⁴

16 As has been noted throughout, third-party stakeholders could have significant control
17 over Big Rivers' fate in the event of an unsupportive order in this case, and those stakeholders
18 would have a variety of negative reactions to a Chapter 11 filing by Big Rivers. As noted, Big
19 Rivers' creditors can "limit Big Rivers' access to capital for ongoing operations."⁴¹⁵ Creditors
20 may also assert claims attempting to prevent the use of the Economic Reserve and Rural

⁴¹² *Id.* at p. 13:18-21. *See also* Mabey Hearing Testimony, Jan. 8, 2014, Tr. 16:03'39" (testifying that preparations to meet with lenders to propose a workout plan would take an entire staff of experts more than 6-8 weeks).

⁴¹³ Mabey Rebuttal Testimony at p. 17:10-12.

⁴¹⁴ *Id.* at p. 17:12-14.

⁴¹⁵ *Id.* at p. 17:17-18.

1 Economic Reserve for the full benefit of the Members' retail customers.⁴¹⁶ There could also be
2 blowback from contract counter-parties and the market that "could be equally damaging by
3 creating additional liquidity issues."⁴¹⁷ Fuel suppliers and other vendors could refuse to do
4 business with Big Rivers, or agree to do so only upon onerous conditions such as requiring cash
5 in advance or cash on delivery.⁴¹⁸ These circumstances will impair Big Rivers' ability to
6 compete for power supply contracts or sell its energy at optimal prices,⁴¹⁹ and they would
7 accordingly impose a major obstacle to the full implementation of the Mitigation Plan.⁴²⁰

8 In addition, bankruptcy could lead to adverse regulatory complications. In particular,
9 bankruptcy would likely involve disputes "to sort out the overlapping authority of the bankruptcy
10 court, the federal district court, Kentucky state courts, and the Commission," potentially limiting
11 the Commission's authority to regulate Big Rivers' operations.⁴²¹ A bankruptcy would also
12 likely divest the Commission of control over matters that would otherwise clearly fall within its
13 state law jurisdiction, such as assumption and rejection of contracts with vendors and retail
14 customers, changes in corporate structure, the transfer of assets (including any generation assets),
15 and the form and content of instruments of indebtedness.⁴²² Any reorganization plan likely
16 would be placed largely in the hands of a potential Chapter 11 trustee, creditors, and other
17 parties-in-interest—entities with no sensitivity (unlike the Commission or Big Rivers) for the
18 retail customers' best interests.⁴²³

⁴¹⁶ *Id.* at p. 17:19-20. *See also* Mabey Hearing Testimony, Jan. 8, 2014, Tr. 16:10'12" (responding to Commission Gardner's questions about reserves and suggesting that creditors are likely to argue that the reserve accounts are cash collateral and they are therefore at risk in a bankruptcy proceeding).

⁴¹⁷ Mabey Rebuttal Testimony at p. 17:20-21.

⁴¹⁸ *Id.* at p. 33:2-7.

⁴¹⁹ *Id.* at p. 18:1-3.

⁴²⁰ *See id.* at p. 33:8-20.

⁴²¹ *Id.* at p. 18:4-16. *See also id.* at pp. 24:3-27:8; Mabey Hearing Testimony, Jan. 8, 2014, Tr. 15:27'12" (discussing the importance of avoiding "jurisdictional chaos" that would result from bankruptcy).

⁴²² Mabey Rebuttal Testimony at p. 24:9-13.

⁴²³ *Id.* at p. 24:17-19.

1 There are also several operational issues that would make the bankruptcy process highly
2 impracticable and dangerous. The parties might have to work for “[s]everal years to formulate a
3 confirmable bankruptcy plan,”⁴²⁴ with the creditors adopting an “adversarial approach to Big
4 Rivers and the Commission on many of the significant issues that would arise.”⁴²⁵ Even then,
5 once a plan is formulated, history shows that it could then take as long as three years to get the
6 plan confirmed.⁴²⁶ All throughout this process, Big Rivers would need to spend “[t]ens of
7 millions of dollars on professional fees and related expenses,”⁴²⁷ expenses that would be
8 “unavoidable in a bankruptcy case of this size.”⁴²⁸ These would include not only Big Rivers’
9 professional expenses, but also those of the official committee of unsecured creditors and any
10 other committees that the U.S. Trustee may appoint to ensure that various interests are
11 adequately represented.⁴²⁹ The total cost Big Rivers would incur is estimated to be “between \$20
12 million and \$40 million.”⁴³⁰ What is clear is that “even under the best of circumstances, Chapter
13 11 would be a traumatic event” for Big Rivers, its Members, and the retail customers.⁴³¹

14 While the various stakeholders are spending years in a federal bankruptcy court incurring
15 professional fees at an astronomical rate, Big Rivers’ management and staff will be forced to
16 divert substantial time away from serving Big Rivers’ Members and their retail customers and
17 toward the reorganization effort.⁴³² Personnel would be “involved in prosecuting or objecting to
18 dozens of motions and participating in multiple litigation matters and adversary proceedings that

⁴²⁴ *Id.* at p. 18:17-18.

⁴²⁵ *Id.* at p. 19:14-15.

⁴²⁶ *See id.* at p. 18:15-16 (noting the length of the confirmation process for Cajun Electric Power Cooperative). *See also id.* at p. 21:18-24:2.

⁴²⁷ *Id.* at p. 18:18-19.

⁴²⁸ *Id.* at p. 19:1-2.

⁴²⁹ *Id.* at p. 28:3-7.

⁴³⁰ *Id.* at p. 29:3.

⁴³¹ *Id.* at p. 18:21-22.

⁴³² *Id.* at p. 30:13-20.

1 would be brought before the bankruptcy court.”⁴³³ On top of that, management “would need to
2 expend many days constructing, negotiating and possibly litigating a plan of reorganization.”⁴³⁴
3 Employee morale would sink, and key employee attrition would be virtually certain.⁴³⁵ In
4 addition, the unavoidable and continuing distraction from Big Rivers’ mission of providing safe,
5 reliable, low cost service would harm Big Rivers’ Members and their retail customers.

6 Finally, there is a genuine risk that the bankruptcy process will be a total failure. After
7 suffering the immediate negative consequences from filing a bankruptcy petition and undergoing
8 the time and expense of preparing and executing a bankruptcy plan, “Big Rivers could
9 nevertheless fail to reorganize.”⁴³⁶ The results of such a failure would be ruinous for Big Rivers,
10 its Members, and their retail customers. Big Rivers could even face the liquidation of all of its
11 assets in order to satisfy its creditors.⁴³⁷ In that event, the Members and their retail customers
12 would lose their energy independence, face “further rate instability”⁴³⁸ and have no other options
13 but to “source their energy from other providers, at unknown costs.”⁴³⁹

14 In summary, gambling on the success of the bankruptcy process is the antithesis of a
15 prudent strategy. The only certainties of the process are that it will be disruptive, time-
16 consuming, risky, and expensive. A successful restructuring is far from assured. Big Rivers’
17 proposed rates and its Mitigation Plan provide the best chance to avoid the certain negative
18 consequences of that scenario and to achieve a positive result in these difficult circumstances.

⁴³³ *Id.* at p. 30:22-31:2. *See also id.* at p. 31:3-13.

⁴³⁴ *Id.* at p. 31:16-17.

⁴³⁵ *Id.* at p. 32:4-18.

⁴³⁶ *Id.* at p. 18:19-20. *See also id.* at pp. 34:18-35:10.

⁴³⁷ *Id.* at p. 18:20.

⁴³⁸ *Id.* at p. 18:20.

⁴³⁹ *Id.* at p. 19:4-5.

1 **E. Confiscatory Rates, Like Those Proposed by the Opposing Intervenors, Are**
2 **Unlawful and Unconstitutional.**

3 As set forth in the subsections above, the denial or material reduction of Big Rivers’
4 proposed rates would undermine Big Rivers’ financial viability by triggering an accelerating
5 cascade of adverse events, including the capture of Big Rivers’ revenues in a lockbox, that would
6 force Big Rivers into bankruptcy. Because rates “threatening [a utility’s] ‘financial integrity’”
7 are “so unjust as to be confiscatory,”⁴⁴⁰ this result would be unconstitutional and the Commission
8 should reject the Opposing Intervenors proposals.

9 A fair, just, and reasonable rate, by definition, is one that allows a utility to operate.⁴⁴¹
10 The Supreme Court has suggested that rates “threatening [a utility’s] ‘financial integrity’” are
11 considered to be “so unjust as to be confiscatory.”⁴⁴² Confiscatory rates are an unconstitutional
12 taking under the Fifth Amendment.⁴⁴³ As the Commission recently argued, “Remaining
13 financially viable would appear to be the very purpose of having ‘fair, just, and reasonable
14 rates.’”⁴⁴⁴

15 This substantive consideration of a utility’s “financial integrity” has been repeatedly
16 reaffirmed,⁴⁴⁵ and it has its roots in the longstanding principle that a “return should be reasonably

⁴⁴⁰ *Verizon Communs., Inc.*, 535 U.S. at 524; *Duquesne Light Co.*, 488 U.S. at 307-8.

⁴⁴¹ *Hope*, 320 U.S. at 603 (rates must provide “enough revenue not only for operating expenses but also for the capital costs of the business”).

⁴⁴² *Verizon Communs., Inc.*, 535 U.S. at 524 (quoting *Duquesne Light Co.*, 488 U.S. at 307, 312).

⁴⁴³ *Duquesne Light Co.*, 488 U.S. at 307-8 (“The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so ‘unjust’ as to be confiscatory.”) (citing *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 597 (1896) (A rate is too low if it is “so unjust as to destroy the value of [the] property for all the purposes for which it was acquired,” and in so doing “practically deprive[s] the owner of property without due process of law”). *See also FPC v. Natural Gas Pipeline Co.*, 315 U.S. at 585 (“By long standing usage in the field of rate regulation, the ‘lowest reasonable rate’ is one which is not confiscatory in the constitutional sense.”).

⁴⁴⁴ Reply Brief for the Kentucky Public Service Commission, Ky. Supreme Court Case No. 2009-SC-000134 (Dec. 15, 2009).

⁴⁴⁵ *See, e.g., Permian Basin*, 390 U.S. at 792 (factfinder “must determine” if rate will allow utility to “maintain financial integrity” and “attract necessary capital”); *Jersey Central III*, 810 F.2d at 1175 (*Hope* makes clear that utilities have “an interest in maintaining access to capital markets, the ability to pay dividends, and general financial integrity” that must be considered in ratemaking even if the utility “is not clearly headed for bankruptcy”).

1 sufficient to assure confidence in the financial soundness of the utility, and should be adequate,
2 under efficient and economical management, to maintain its credit and enable it to raise the
3 money necessary for the proper discharge of its public duties.”⁴⁴⁶ Consequently, when setting
4 rates that are fair, just, and reasonable, the Commission must ensure that the resulting rates will,
5 among other things, “enable [Big Rivers] to operate successfully, to maintain its financial
6 integrity, [and] to attract capital.”⁴⁴⁷

7 As established above, denying or materially reducing the proposed rate adjustment would
8 not only threaten Big Rivers’ financial viability, it would destroy it. Debt repayments would be
9 accelerated. Access to credit would dry up. Physical plant would deteriorate. Big Rivers would
10 be forced into bankruptcy court, leading to enormous costs, possible liquidation, and great
11 uncertainty for the Members and their member-owners, including the potential for higher rates
12 and a loss of energy independence. Because Big Rivers seeks the minimum adjustment
13 necessary to maintain its financial integrity, the Commission should find that its proposed rates
14 are fair, just, and reasonable.

15

16 **X. The Remaining Fixed Costs of the Wilson and Coleman Stations Should Be**
17 **Recovered in Rates.**

18 As part of its Mitigation Plan, Big Rivers planned at the time of the hearing to
19 temporarily idle the Wilson Station in February of 2014 and temporarily idle the Coleman
20 Station in June of 2014 (or earlier, if the Hawesville Smelter installs certain equipment prior to
21 that time).⁴⁴⁸ These plants are not being retired or “shutdown”—they are simply being

⁴⁴⁶ *Bluefield Waterworks*, 262 U.S. 679.

⁴⁴⁷ *Stephens v. South Central*, 545 S.W.2d at 930-31 (Ky. 1976); *National-Southwire*, 785 S.W.2d at 512.

⁴⁴⁸ Berry Direct Testimony at p. 16:1-16.

1 temporarily idled for the benefit of Big Rivers' Members "in order to reduce costs while
2 wholesale market conditions recover or other sales options develop."⁴⁴⁹

3 The Wilson and Coleman Stations were prudently constructed, remain used and useful,
4 and are critical to Big Rivers' financial viability. Consistent with the 535 Rate Case Order, in
5 which the Commission allowed recovery of all fixed costs associated with the Coleman Station
6 except for depreciation expenses⁴⁵⁰ (which the Commission ordered deferred and which Big
7 Rivers has removed from its revenue requirement in this proceeding),⁴⁵¹ it is appropriate to
8 continue including the fixed costs associated with the Wilson and Coleman Stations in Big
9 Rivers' rates. Because Big Rivers has reduced its system-wide costs by temporarily idling the
10 Stations,⁴⁵² however, the Opposing Intervenors claim that the Stations are now nothing more
11 than wasteful "excess," that they are no longer "used and useful," and that their costs therefore
12 should not be recoverable.⁴⁵³ Those arguments are incorrect, both as a matter of law and as a
13 matter of fact.

14 As explained in Section III, the Commission "is simply not shackled to a mechanical
15 application of the used and useful standard," as advocated by the Opposing Intervenors.⁴⁵⁴
16 Instead, the Commission follows the Supreme Court's *Hope* doctrine, pursuant to which "it is the
17 result reached not the method employed which is controlling."⁴⁵⁵ By narrowly focusing on the
18 rate treatment of temporarily idled generation assets in a manner that would undermine Big

⁴⁴⁹ Richert Rebuttal Testimony at p. 15:8-10.

⁴⁵⁰ See generally 535 Rate Case Order.

⁴⁵¹ See Wolfram Rebuttal at p. 32:18-21.

⁴⁵² Although the Coleman Station continues to operate as a System Support Resource, for purposes of the forecasted test period, it is effectively idled.

⁴⁵³ See, e.g., Direct Testimony of David Brevitz, p. 40:5-7 (Oct. 29, 2013) ("Brevitz Direct Testimony"); Kollen Direct Testimony at pp. 8:5-6, 15:9-20.

⁴⁵⁴ *National-Southwire*, 785 S.W.2d 503. This holding echoes the affirmed Commission decision in the underlying Big Rivers rate case, in which the Commission stated that "it is under no statutory obligation to apply a used and useful standard exclusively, or any other single, rigid standard." 9613 Order at *36.

⁴⁵⁵ *Hope*, 320 U.S. at 602.

1 Rivers' financial viability, the Opposing Intervenors attempt an end-run around the results-
2 oriented *Hope* doctrine. In diametric opposition to *Hope*, their tactic is to distract from the
3 totality of circumstances largely by waging a series of isolated attacks on individual assumptions
4 in Big Rivers' long-term financial forecast and Mitigation Plan. The law, however, is not so
5 myopic. The Supreme Court has held that a ratemaker must ensure that individual components
6 of a ratemaking decision "do not together produce arbitrary or unreasonable consequences."⁴⁵⁶
7 Thus, any discussion of removing prudently-incurred costs associated with idled assets must, as a
8 matter of law, be considered in light of the overall effect anticipated from the exclusion of those
9 costs.

10 In the present case, Big Rivers has requested "only the revenue it needs to continue to
11 safely operate and maintain its plants prudently in the future, maintain the value of its generating
12 assets, and meet its financial covenants."⁴⁵⁷ Mr. Bailey explains that "[w]ithout the revenues
13 necessary to cover the fixed costs of the idled plants, Big Rivers will have little choice but to file
14 a bankruptcy petition."⁴⁵⁸

15 In addition to their significant financial importance to Big Rivers' operations, the Stations
16 were prudently constructed, provide ongoing benefits to Big Rivers' Members and their retail
17 customers even if temporarily idled, and are a necessary part of Big Rivers' ongoing Mitigation
18 Plan. Therefore, the Commission should approve the recovery of the fixed costs of the Wilson
19 and Coleman Stations—including the depreciation expenses of the Wilson Station⁴⁵⁹—as part of
20 Big Rivers' proposed fair, just, and reasonable rates.

⁴⁵⁶ *Permian Basin*, 390 U.S. 747.

⁴⁵⁷ Berry Rebuttal Testimony at p. 23:18-20.

⁴⁵⁸ Bailey Rebuttal Testimony at p. 7:17-18. *See also* Wolfram Rebuttal Testimony at p. 9:19-10:10 ("After the Sebree smelter contract termination becomes effective on January 31, 2014, Big Rivers will continue to be subject to the plant fixed costs that cannot be avoided by idling the plants."). The financial importance of the Wilson and Coleman Stations are discussed further in Section XVIII.C.

⁴⁵⁹ *See* Section VII.

1 **A. The Wilson and Coleman Stations Are Used and Useful.**

2 The Wilson and Coleman Stations provide ongoing benefits to Big Rivers’ Members and
3 their retail customers and, therefore, are used and useful even if temporarily idled.⁴⁶⁰

4 Accordingly, allowing Big Rivers to recover the Wilson and Coleman Stations’ fixed costs—
5 interest expense, depreciation, property tax, and property insurance—is fair, just, and reasonable.

6 First, the Stations provide benefits beyond simple generation capacity—they are
7 important to the overall reliability of Big Rivers’ and MISO’s transmission systems.⁴⁶¹ This is
8 confirmed by MISO’s recent designation of the Coleman Station as a “must run” System Support
9 Resource.⁴⁶² MISO similarly indicated that the Wilson Station may also be required for system
10 reliability purposes in the future.⁴⁶³ Thus, the Wilson and Coleman Stations are both “used and
11 useful” because they are important for the ongoing reliability of Big Rivers’ entire transmission
12 system, including those portions of Big Rivers’ system serving retail customers other than the
13 Smelters.

14 Second, the Wilson and Coleman Stations’ available generation capacity provide a
15 unique opportunity for growth.⁴⁶⁴ This “potential for future growth and expansion” is expressly
16 cited by Kentucky courts as an important factor to consider in the ratemaking process.⁴⁶⁵ As
17 discussed in Section VIII above, Big Rivers’ Mitigation Plan includes a reasonable and attainable
18 business plan for acquiring replacement load and increasing off-system sales, and Big Rivers has

⁴⁶⁰ Berry Rebuttal Testimony at p. 20:11-13.

⁴⁶¹ *Id.* at p. 20:13-16.

⁴⁶² *Id.* at p. 20:13-15.

⁴⁶³ *Id.* at p. 20:15-16 (“In the Wilson Y2 report, MISO suggested Wilson may also be needed in a few years for reliability purposes.”). See also Big Rivers’ Response to Item No. 108 of the Attorney General’s First Data Requests (providing “Attachment Y-2 Study Report Final June 12, 2013” regarding potential SSR status for Big Rivers’ Wilson Unit 1).

⁴⁶⁴ Berry Rebuttal Testimony at p. 20:20-22 (“One of the benefits the Wilson and Coleman generating stations continue to provide . . . is the opportunity to mitigate the smelter contract terminations.”); Bailey Rebuttal Testimony at p. 20:13-16.

⁴⁶⁵ *National-Southwire*, 785 S.W.2d at 512.

1 already started pursuing that business plan for the benefit of its Members and their retail
2 customers. As Mr. Berry explains, “[w]ithout these plants, Big Rivers would have no
3 opportunity to seek replacement load or increase additional off-system sales revenues to mitigate
4 the rate impact of the smelter terminations.”⁴⁶⁶ Consequently, Big Rivers’ available generation
5 capacity is not mere “excess,” as the Opposing Intervenors dismissively claim.⁴⁶⁷ It is a prudent
6 investment that is actively being used for the benefit of Big Rivers’ Members through Big
7 Rivers’ active marketing of its power.⁴⁶⁸ As an added benefit to Big Rivers’ Members and their
8 retail customers, the available capacity made possible by the Wilson and Coleman Stations gives
9 Big Rivers an excellent “opportunity for economic development and an opportunity for Big
10 Rivers to diversify its load concentration.”⁴⁶⁹ While Big Rivers would not, today, seek to
11 construct the Stations merely to have the capacity they provide,⁴⁷⁰ the existing capacity remains a
12 benefit to the Members. It would be unreasonable to abandon those facilities at this time,
13 thereby depriving the Members of the investment they have already made.

14 Third, the Wilson and Coleman Stations can “afford Big Rivers the ability to comply
15 with potential CO₂ regulations, if and when they become effective.”⁴⁷¹ As discussed in Section
16 VIII.B, Big Rivers’ continued ownership of the idled Coleman Station can serve to keep the
17 Wilson Station CSAPR compliant when it returns to operation. These potential benefits are not
18 limited to Big Rivers—for example, if the EPA imposes a statewide emission limit, as Kentucky

⁴⁶⁶ Berry Rebuttal Testimony at p. 20:22-24.

⁴⁶⁷ See, e.g., Kollen Direct Testimony at pp. 8:5-6, 15:9-20.

⁴⁶⁸ See Section VIII.B.

⁴⁶⁹ Berry Rebuttal Testimony at pp. 20:24-21:1. See also Bailey Rebuttal Testimony at p. 8:14-16 (“These assets also allow us a previously unavailable opportunity to encourage additional economic development in the region”); Bailey Hearing Testimony, Jan. 7, 2014, Tr. 11:09’35” (“We commonly have conversations with loads that are of that size or larger, and are now, as part of the mitigation. And while it’s a negative, the fact that now we have some capacity available actually makes it much easier to do that than previously when we were unable to finance new additions or add the extra capacity.”).

⁴⁷⁰ Nor does Big Rivers seek to justify its rates on these grounds. Mr. Bailey explains: “Including the cost of temporarily idled generating plants in rates is justified not by the fact that it would be reasonable to construct those facilities at this time” Bailey Rebuttal Testimony at p. 13:4-5.

⁴⁷¹ *Id.* at p. 21:1-2.

1 has advocated, Big Rivers' continued ownership of the temporarily idled Stations would
2 "produce[] allowance credits [that] could have significant value for Big Rivers and its Members
3 and possibly other portions of the State."⁴⁷² Consequently, the temporarily idled generation
4 assets would be tremendously valuable in any potential future regulatory regime that relies on
5 allowance credits.

6 Fourth, the Wilson and Coleman Stations serve as an "insurance policy" to protect Big
7 Rivers' Members and their retail customers against outages and uncertain fluctuations in the
8 energy markets.⁴⁷³ The energy independence they provide protects Big Rivers' Members and
9 their retail customers from periodic spikes in electric market rates, energy shortages, catastrophic
10 plant shutdowns, and similar future exigencies.⁴⁷⁴ These attributes are similar in nature to those
11 recognized in the *National-Southwire* case as making the Wilson Station used and useful even
12 though it made Big Rivers "capable of producing more electric energy than [was] presently being
13 marketed"⁴⁷⁵

14 The Michigan Public Service Commission also took this approach to permit recovery in
15 even more extreme circumstances, when it permitted a utility to recover on a mothballed natural
16 gas plant after finding that "the fact that [the utility] has not in the past ten years and may not in
17 the foreseeable future need to rely on its Marysville SNG plant for its gas supply requirements

⁴⁷² Bailey Hearing Testimony, January 7, 2014, Tr. 14:37'59" ("There's other benefits that these plants could provide. For example, the State of Kentucky is advocating with the EPA now that rather than having a rate-based CO2 limit that there be an emission limit across the state, meaning that the state could comply based on 'puts and takes,' If you will, from various resources [I]f at some point in time, keeping those plants offline produced allowance credits, they could have significant value for Big Rivers and its Members and possibly other portions of the State.")

⁴⁷³ Berry Rebuttal Testimony at p. 21:6-7.

⁴⁷⁴ *Id.* at p. 21:8-10. See also Bailey Rebuttal Testimony at p. 8:16-17.

⁴⁷⁵ *National-Southwire*, 785 S.W.2d at 510-14.

1 does not necessarily mean that retail customers are not realizing a benefit from continuing the
2 plant as an insurance policy against another supply shortage.”⁴⁷⁶

3 In the context of the present case, this kind of broader market uncertainty can be found in
4 the Smelters’ historical vacillation between wanting to benefit from the wholesale electrical
5 energy market and, alternatively, wanting to be insulated from the volatility of that market.⁴⁷⁷

6 Other, unforeseeable future developments could similarly make the Wilson and Coleman
7 Stations critically important to Big Rivers’ Members and their retail customers.

8 Accordingly, allowing Big Rivers to recover the Wilson and Coleman Stations’ fixed
9 costs results in fair, just, and reasonable rates.

10 **B. The Wilson and Coleman Stations Were Prudent Investments.**

11 Recovery of the fixed costs of the Wilson and Coleman Stations is appropriate not only
12 because they remain used and useful, as described above, but also because they were prudent
13 investments at the time they were built.⁴⁷⁸ The Commission recently recognized this when it
14 found that Big Rivers’ current available capacity is “not the result of improper planning or
15 unneeded construction,”⁴⁷⁹ nor the “result of any imprudent decisions by Big Rivers.”⁴⁸⁰

⁴⁷⁶ *In the Matter of the Rates and Tariffs of Consumers Power Co. Regarding Gas Transportation Service and Related Matters, the Application of Consumers Power Co. for Authority to Increase Its Rates for the Sales of Gas, and the Application of Consumers Power Co. for Accounting and Ratemaking Approval of Depreciation Practices for Gas Utility Plant*, Order, Mich. P.S.C. Case Nos. U-8678, U-8924, U-9197, *95 (Dec. 7, 1989).

⁴⁷⁷ Bailey Rebuttal Testimony at p. 8:14-20 (the Wilson and Coleman Stations give Big Rivers “some measure of insurance . . . against any possibility that the smelters’ historically vacillating power purchasing preferences could ever result in them attempting to seek a return to the system, despite their contractual acknowledgements that they will not do so.”). See also Berry Rebuttal Testimony at p. 21:10-13 (“This flexibility may prove to be especially important in light of the unpredictability of the smelters and their uncertain future in the region.”). See also Section VI.A (discussing the Smelters’ historical vacillation).

⁴⁷⁸ Bailey Rebuttal Testimony at p. 7:21-22. See also *id.* at p. 13:6-9 (“Those facilities were prudent when constructed.”).

⁴⁷⁹ 535 Rate Case Order at *16.

⁴⁸⁰ *Id.* at *19. See also Bailey Hearing Testimony, Jan. 7, 2014, Tr. 11:26’03” (“The most recent plant was built in the mid ‘80’s, over 25 years ago. Our lenders funded those plants with the view they would last for many, many years. And they have benefited the ratepayers for that period of time, with some of the lowest rates in Kentucky.”).

1 Ratemakers have regularly permitted the recovery of costs where the utility’s actions
2 leading to those costs were prudent “based on all it knew or should have known at the time” they
3 were incurred.⁴⁸¹ In this case, Big Rivers built power plants, including the Wilson and Coleman
4 Stations, specifically to satisfy its legal obligations to meet its Members’ dramatically increased
5 generation needs as a result of the increased demand attributable to the Smelters.⁴⁸² For this
6 reason, the investments in Wilson and Coleman were prudent and reasonable at the time they
7 were made.⁴⁸³

8 The prudence of Big Rivers’ investment in the Stations is beyond dispute, and it is not
9 affected by the current status of the plants even if the Commission were to determine that the
10 Stations are not currently used and useful despite the present benefits they provide.
11 Consequently, Big Rivers’ recovery of its prudent investment costs for those prudently-
12 constructed assets remains fair, just, and reasonable. This conclusion is especially true where, as
13 here, intervening circumstances beyond the control of the utility necessitate a temporary change
14 in the power plants’ operational status in order to reduce costs until it is economically
15 advantageous to restart them for the Members’ benefit.

16 Much of the present circumstance is the result of market forces unquestionably beyond
17 Big Rivers’ control and the Smelters’ unilateral decisions to terminate their retail service
18 contracts. “[N]either Big Rivers, the smelters, KIUC, nor the Commission was able to anticipate
19 in 2009 that the economic recession that had started in 2008 would not now be behind us, that

⁴⁸¹ *In re Western Mass. Elec. Co.*, 80 P.U.R. 4th 479, 520 (Mass. 1986). See also, e.g., *Duquesne Light Co.*, 488 U.S. 299 (recognizing prudent investment test); *Violet v. FERC*, 800 F.2d 280 (1st Cir. 1987) (discussing application of the prudent investment test in Rhode Island and Massachusetts).

⁴⁸² See, e.g., P.S.C. Case No. 7557, Order of June 17, 1980 (granting Big Rivers CPCN to construct Wilson units 1 and 2); see also 9613 Order at *7 (Big Rivers “decided to continue construction of Wilson Unit No. 1 . . . based on the potential increase in loads due primarily to the addition of a fourth potline by ARCO [predecessor of Alcan]” at the Sebree Smelter).

⁴⁸³ See *Duquesne Light Co.*, 488 U.S. at 317 (Scalia, concurring) (defining “prudent investment” as “capital reasonably expended to meet the utility’s legal obligation to assure adequate service”).

1 worldwide aluminum prices would still be depressed, or that vast quantities of shale gas would
2 now be sold at prices that allow market power to be priced lower than Big Rivers' rates under the
3 Smelter Agreements."⁴⁸⁴ All of these events were outside of Big Rivers' control.

4 In light of Big Rivers' prudent investment in the Wilson and Coleman Stations and Big
5 Rivers' ongoing mitigation efforts, it would be inequitable to deny Big Rivers recovery of the
6 Stations' fixed costs simply because changes in the wholesale energy and aluminum markets
7 beyond Big Rivers' control forced operational changes.⁴⁸⁵ This seems particularly true when the
8 operational changes are designed to reduce costs until market opportunities dictate that the plants
9 should no longer be idled.⁴⁸⁶ Moreover, disallowing these costs—as suggested by the Opposing
10 Intervenors—despite the uncontested prudence of Big Rivers' investment in the Stations would
11 mark an unconstitutionally arbitrary shift in the Commission's previous decisions involving Big
12 Rivers and the Smelters.⁴⁸⁷ It would also signal to all other regulated utilities in Kentucky, as
13 well as to investors, lenders, and ratings agencies, that prudent investment decisions in facilities
14 that have forty- and fifty-year useful lives are always subject to second guessing due to relatively
15 short-term market fluctuations, even after decades of those investments being used and useful in
16 providing utility service.

17 Because Big Rivers' investment in the Wilson and Coleman Stations was prudent, it is
18 fair, just, and reasonable for Big Rivers to continue to recover the fixed costs of the Wilson and
19 Coleman Stations.

20

⁴⁸⁴ 535 Rate Case Order at *18.

⁴⁸⁵ Richert Rebuttal Testimony at p. 15:5-7 ("It would be unreasonable and inequitable to remove the Wilson Station depreciation expense, particularly given that the circumstances leading to the Wilson Station's idling were brought about by a third party's unilateral contract termination.").

⁴⁸⁶ Berry Rebuttal Testimony at pp. 13:20-14:2 ("Any decision to return a plant to service will be based upon appropriate analyses that show doing so is economically beneficial to Big Rivers and its Members at that time.").

⁴⁸⁷ See *Duquesne Light Co.*, 488 U.S. 299.

1 **XI. The Sebree Smelter Transaction That Is the Subject of Case No. 2013-00413 Will**
2 **Not Impose Additional Costs on Big Rivers or Its Members.**

3 The Sebree Smelter Transaction should have no effect on this rate case for a simple
4 reason: Big Rivers and Kenergy worked diligently to ensure that all costs associated with
5 allowing Century to purchase electricity at market-based rates for the Sebree Smelter will not be
6 passed on to Big Rivers, its Members, or their member-owners.⁴⁸⁸ The Sebree Smelter
7 Transaction is closely modeled on the Century Hawesville Smelter Transaction, which was
8 approved by the Commission on August 14, 2013 in Case No. 2013-00221. Indeed, in its Order
9 approving the Century Sebree Smelter Transaction, the Commission found that:

10 Like the transaction agreements relating to the Century Hawesville
11 smelter, the Century Sebree Transaction Agreements ‘were a
12 product of extensive and good faith negotiations among Big
13 Rivers, Kenergy, Century [Sebree], and Century Aluminum with
14 the goal of keeping the [Sebree] smelter viable while not
15 subjecting the remaining customers to any additional incremental
16 costs after [January 31, 2014] due to Kenergy’s continuing to serve
17 Century [Sebree] or Big Rivers serving as the Market
18 Participant.’⁴⁸⁹

19 Under an existing cost reimbursement agreement, Century is reimbursing, on a monthly
20 basis, Big Rivers’ costs associated with negotiating and securing approval of the Sebree Smelter
21 Transaction. Additionally, pursuant to the Sebree Smelter Transaction documents, Century has
22 agreed to pay the costs of arranging, procuring, and delivering electricity for its Sebree Smelter.
23 Century has agreed to indemnify Big Rivers and Kenergy against various potential costs and
24 liabilities, including tax liabilities incurred as part of the transaction. Century’s parent
25 corporation has also agreed to backstop all of these payments and indemnification obligations
26 with an unconditional guarantee to Big Rivers and Kenergy.

⁴⁸⁸ See Bailey Hearing Testimony, Jan. 7, 2014, Tr. 16:44’50” (confirming to the best of his knowledge that no variable costs associated with serving Century are included in Big Rivers’ revenue requirement).

⁴⁸⁹ 413 Order at *17-18 (quoting 221 Order at *23).

1 In short, Big Rivers and Kenergy went to great lengths to ensure that Century will bear
2 all costs associated with its decision to purchase electricity at market-based rates for the Sebree
3 Smelter, just as they successfully did in the Hawesville Smelter Transaction.⁴⁹⁰ None of these
4 costs will be passed on to retail customers, and thus the Commission need not and should not
5 consider them as part of this rate proceeding.

6 To the extent that Big Rivers may receive some transmission revenues from Century
7 related to the Sebree Smelter Transaction, and as discussed in more detail at Section XII.F, Big
8 Rivers has proposed using all such revenues to supplement the Economic Reserve fund for the
9 benefit of its Members and their retail customers.⁴⁹¹ Consequently, those possible benefits have
10 already been properly accounted for and the Commission does not need to adjust for them.

11 To the extent that Big Rivers will be reimbursed by Century for costs associated with the
12 Sebree facility that are included in the test period revenue requirement, Big Rivers proposes that
13 those costs be removed from the revenue requirement. This would be a similar adjustment to the
14 adjustment Big Rivers made to address certain costs related to the Hawesville Smelter for which
15 Century will reimburse Big Rivers.⁴⁹² Now that the Commission has approved the Sebree
16 Smelter Transaction, Big Rivers' revenue requirement should be reduced by \$1,103,149, as
17 noted in Exhibit Berry Rebuttal-6.⁴⁹³

18

⁴⁹⁰ Bailey Hearing Testimony, Jan. 7, 2014, Tr. 10:51'50" ("To the extent we have been able to identify [variable costs associated with serving the Hawesville Smelter], we have dealt with that risk through the contracts that have been presented to the Commission [in Case No. 2013-00221]."); *id.* at Tr. 10:54'45" ("We made pro forma adjustments for the portion of ACES fees, NERC fees, PSC Assessment, taxes and insurance, as well as NERC fees related to what Century will be paying as the result of [the agreements approved in Case No. 2013-00443].").

⁴⁹¹ See Section XII.F.

⁴⁹² See Wolfram Rebuttal Testimony at pp. 33:16-34:10.

⁴⁹³ *Id.*; Berry Rebuttal Testimony, Exhibit Berry Rebuttal-6.

1 **XII. Big Rivers' Forecast Methodology Is Reasonable.**

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

4 Big Rivers' use of a fully forecasted test period, which reflects the twelve months ended
5 January 31, 2015,⁴⁹⁴ is reasonable and appropriate for setting rates in this case. Kentucky law
6 provides that an application requesting a general adjustment in existing rates shall be supported
7 by either a "historical test period that may include adjustments for known and measurable
8 changes; or [a] fully forecasted test period"⁴⁹⁵ As the Commission has recognized,
9 "[b]udgeting a forecasted test period is an inexact science."⁴⁹⁶ An applicant in a "future test-
10 period" case therefore may carry its burden by providing the Commission with at least "some
11 assurance that the expense will be incurred."⁴⁹⁷

12 The use of a fully forecasted test year is particularly appropriate where, as here, a major
13 future change will render historical revenue information obsolete.⁴⁹⁸ Indeed, in the 535 Rate
14 Case, which addressed factual circumstances similar to those at issue in this proceeding, the
15 Commission found "Big Rivers' use of the proposed forecasted test period to be reasonable."⁴⁹⁹

16 Here, both the methodology used by Big Rivers and its reasons for using a forecasted test
17 period—the termination of a Smelter service contract, resulting in major, imminent changes to Big

⁴⁹⁴ Wolfram Direct Testimony at p. 7:22-23.

⁴⁹⁵ 807 KAR 5:001(16). *See also* Wolfram Rebuttal Testimony at p. 23:9-14; Hearing Testimony of Bion C. Ostrander, Jan. 9, 2014, Tr. 18:18'43" ("Ostrander Hearing Testimony").

⁴⁹⁶ *In the Matter of Application of Kentucky-American Water Co. to Increase Its Rates*, Order, P.S.C. Case No. 97-034, *32 (Sep. 30, 1997).

⁴⁹⁷ *In the Matter of Alternative Rate Filing Adjustment for Delaplain Disposal Co.*, Order, P.S.C. Case No. 2010-00349, *19 (June 29, 2011).

⁴⁹⁸ *See* LOWELL E. ALT, JR., *ENERGY UTILITY RATE SETTING*, pp. 25-26 (2006) ("[T]he test period used in a rate case should be the one that best reflects the conditions that a public utility will encounter during the period when the rates set by the commission will be in effect."); *see also* LEONARD SAUL GOODMAN, *THE PROCESS OF RATEMAKING I*, pp. 141-42, pp. 269-70 (1998) (discussing the use of projected test periods in special circumstances).

⁴⁹⁹ 535 Rate Case Order at *6 ("The Commission finds Big Rivers' use of the proposed forecasted test period to be reasonable.").

1 Rivers' finances and operations—are the same as in the 535 Rate Case.⁵⁰⁰ Once again, the
2 Opposing Intervenors “have had the opportunity to conduct discovery for the purpose of
3 analyzing the proposed test period,”⁵⁰¹ and Big Rivers produced in discovery a thorough
4 description of its budget development process and information about the test period and
5 supporting data (the majority of which was provided in response to numerous data requests from
6 the Attorney General).⁵⁰² The Commission should rely on Big Rivers' forecasted test period.

7 One of the critical underlying principles that govern rate proceedings is the effort to
8 match capital, expenses, and revenues in the test period.⁵⁰³ Regulatory lag is a serious problem
9 when a massive downward trend in revenue is expected in the foreseeable future.⁵⁰⁴ Basing rates
10 on a test period that does not reflect the period when the rates will be effective would put Big
11 Rivers in a situation where it cannot make up for its revenue deficiency even through increased
12 efficiencies and cost saving measures.

13 Here, as in the 535 Rate Case, a historic test year is simply not a viable option. The use
14 of a historical test period requires the assumption that the actual test period revenues and
15 expenses can be adjusted such that they will be representative of those expected for the period of
16 time in which the proposed rates will be in effect. In this case, a fully forecasted test period is
17 the most appropriate way to reflect the significant changes to Big Rivers' operations and
18 financials that will result from the Sebree Smelter's contract termination. Although the Attorney
19 General appears to oppose forecasted test years on principle, as evidenced by Mr. Ostrander's
20 wholesale duplication of several pages of his testimony on the issue from the 535 Rate Case,⁵⁰⁵

⁵⁰⁰ Wolfram Rebuttal Testimony at p. 22:22-24.

⁵⁰¹ 535 Rate Case Order at *6.

⁵⁰² Wolfram Rebuttal Testimony at pp. 23:15-24:12.

⁵⁰³ See LOWELL E. ALT, JR., ENERGY UTILITY RATE SETTING, pp. 32-33 (2006).

⁵⁰⁴ *Id.* at p. 33.

⁵⁰⁵ See Ostrander Hearing Testimony, Jan. 9, 2014, Tr. 18:21'19" (confirming duplication of several pages of testimony).

1 even the research he relies on recognizes that forecasting may be appropriate in “[a] dynamic
2 environment in which the future is unlike the past and might deviate substantially from the past
3 in terms of utility cost, operating and demand conditions.”⁵⁰⁶

4 Big Rivers exercised great diligence to ensure the reasonableness of its forecasted test
5 period. When Big Rivers developed the forecast for this rate case, it included all information
6 that was known and available to it at that time.⁵⁰⁷ Data fed into the financial model underwent
7 several levels of review before being finalized.⁵⁰⁸ The financial forecast used for the test period
8 is the same forecast Big Rivers uses for its operations. The Commission has recognized that
9 forecasted test periods, by their nature, have some uncertainties,⁵⁰⁹ but its recent approval of a
10 forecasted test period in the 535 Rate Case demonstrates that these inherent uncertainties do not
11 invalidate the use of forecasted test periods.

12 Thus, Big Rivers’ use of a fully forecasted test period satisfies two objectives: it best
13 reflects the conditions in the rate-effective period, and it provides Big Rivers with a reasonable
14 opportunity to fully recover the revenue deficiency resulting from the Sebree Smelter’s contract

⁵⁰⁶ Wolfram Rebuttal Testimony at pp. 24:19-25:23 (citing Ostrander Direct Testimony at p. 19:1-4, *Future Test Years: Challenges Posed for State Utility Commissions*, author Ken Costello Principal Researcher, Energy and Environment, National Regulatory Research Institute, Briefing Paper No. 13-08, dated July 2013.).

⁵⁰⁷ *Id.* at p. 22:2-4.

⁵⁰⁸ Direct Testimony of Lindsay N. Barron, Application Tab 67, p. 5:12-14 (June 28, 2013) (“Barron Direct Testimony”) (“Big Rivers is required . . . to update its load forecast every two years and to submit the forecast to RUS for review and approval”); *Id.* at p. 8:11-12 (“Big Rivers’ members provide feedback during the development of the load forecast and provide a review of the results prior to finalization.”); Berry Direct Testimony at p. 8:1-2 (“The scope and expense for planned outages are developed from a rigorous review of multiple reports and documents.”); *id.* at p. 8:20-21 (“Big Rivers’ non-outage O&M budget is developed through an arduous process of line by line review by each respective department.”).

⁵⁰⁹ See *In the Matter of: The Application of the Union Light, Heat and Power Company for a Certificate of Public Convenience to Acquire Certain Generation Resources and Related Property; for Approval of Certain Accounting Treatment, and for Approval of Deviation From Requirements of KRS 278.2207 and 278.2213(6)*, Interim Order, P.S.C. Case No. 2003-00252, *20 (Dec. 5, 2003) (recognizing “the uncertainty attendant to forecasting off-system sales”); *In the Matter of: Application of Kentucky-American Water Company to Increase Its Rates*, Order, P.S.C. Case No. 95-554, *53 (Sept. 11, 1996) (a forecasted budget “requires a review of the historical relationship between budgets and actual results to determine if the method used to develop the forecast is reasonable”).

1 termination without exposure to the regulatory lag inherent in historical test year rate cases.
2 Accordingly, Big Rivers' use of a fully forecasted test period in this proceeding is appropriate.

3 **B. Big Rivers' Financial Model Is Reasonable.**

4 In developing its financial model to support its forecast, Big Rivers prepared a
5 spreadsheet model that compiles information related to production costs, long-term debt,
6 revenues by rate class, and other operating and financial parameters.⁵¹⁰ For the reasons
7 discussed below, Big Rivers' financial model is reasonable.

8 Big Rivers produced this forecast by combining several sources of information into the
9 financial model, beginning with the budget and financial plan that was approved by the Board of
10 Directors in November 2012 and used and approved by the Commission in the 535 Rate Case.⁵¹¹
11 The financial model integrates a number of inputs and data sets from multiple categories of
12 information, including member base rates, labor data (such as headcount and wages), capital
13 items, load forecasts, demand and energy forecasts, production cost model outputs, fuel costs,
14 debt payment schedules, depreciation and amortization, capital expenditures, and all expense
15 items captured by the budget.⁵¹² Outputs of the financial model include total revenues, expenses,
16 margins, TIER, and information included in the statement of operations, balance sheet, and cash
17 flow statement.⁵¹³ It also determines the appropriate charges for other rate mechanisms—the
18 fuel adjustment clause ("FAC"), the environmental surcharge ("ES"), and the non-FAC Purchase
19 Power Agreement ("Non-FAC PPA") for each of the rate classes—⁵¹⁴and accounts for the
20 reserve funds and their associated tariff riders.⁵¹⁵ The financial model further reflects the terms

⁵¹⁰ Direct Testimony of Jeffrey R. Williams, Application Tab 66, p. 6:6-11 ("Williams Direct Testimony").

⁵¹¹ *Id.* at p. 6:15-17; Direct Testimony of Christopher A. Warren, Application Tab 69, p. 5:9-13 (June 28, 2013) ("Warren Direct Testimony").

⁵¹² Williams Direct Testimony at pp. 7:10-9:12.

⁵¹³ Warren Direct Testimony at p. 5:15-17.

⁵¹⁴ *Id.* at p. 6:10-16.

⁵¹⁵ *Id.* at pp. 6:20-7:3.

1 and conditions of the 2009 Smelter Agreements, though the forecasted values are zero because
2 Big Rivers is not serving the Smelters under those contracts in the time period beyond the dates
3 of their termination.⁵¹⁶

4 In an effort to ensure transparency, Big Rivers provided a great deal of information
5 during this proceeding and in the prior rate case, which used the same model, to explain how
6 particular elements of the financial model work.⁵¹⁷ Despite these efforts, the Attorney General's
7 witnesses cast a number of unsupported aspersions about the transparency of the financial model
8 and about Big Rivers' motives in designing and using the model in this case to prepare the
9 forecasted test period. These allegations are baseless and, in some cases, suggest a fundamental
10 misunderstanding of the financial model.

11 Mr. Ostrander criticizes Big Rivers for failing to identify amounts that are "known and
12 measurable" as opposed to "not known and measurable."⁵¹⁸ In doing so, he erroneously seeks to
13 apply the same "known and measurable" standard that is applicable to a historical test period to a
14 fully forecasted test period. That standard does not apply in this proceeding. When the entire
15 test period is based on a forecast, the values cannot be "known and measurable" in the same way
16 or to the same extent that would be applicable to a historical test period.⁵¹⁹

17 Mr. Ostrander's complaint that Big Rivers did not include a "User Manual" with its
18 financial model similarly misses the mark.⁵²⁰ Big Rivers did produce a user's manual for the
19 financial model in response to AG 1-155 that describes the function of each worksheet in the

⁵¹⁶ *Id.* at 7:9-15.

⁵¹⁷ Wolfram Rebuttal Testimony at p. 27:18-22. *See also, e.g.*, Big Rivers' Responses to AG 1-155, PSC 2-14, AG 1-98, AG 2-28, KIUC 1-18, KIUC 1-34, KIUC 1-64, KIUC 2-20, KIUC 2-21, KIUC 2-24, KIUC 2-27, KIUC 2-28, SC 1-13, and SC 1-14. *See also* Big Rivers' Responses in the 535 Rate Case to PSC 1-57, PSC 2-13, AG 1-7, AG 1-8, AG 1-17, AG 1-97, AG 1-131, AG 1-190, AG 1-236, AG 1-239, AG 1-240, AG 1-241, AG 1-242, and AG 1-267.

⁵¹⁸ Ostrander Direct Testimony at p. 14:2-20.

⁵¹⁹ Wolfram Rebuttal Testimony at p. 24:13-18.

⁵²⁰ Ostrander Direct Testimony at pp. 15:17-16:18.

1 model, the inputs to and outputs of the model, and the checks to ensure its accuracy.⁵²¹ Big
2 Rivers also provided a significant amount of information in the prior rate case that explained
3 how particular elements of the model work; that information is equally applicable to the model
4 here, as the same model was used in both cases.⁵²² Plus, the financial model itself has
5 calculations, formulas, and links to supporting worksheets. Big Rivers provided the equivalent
6 of hundreds of thousands of pages of supporting information, including the load forecast and
7 production cost model outputs. Accordingly, it is unclear how Mr. Ostrander can testify that the
8 Attorney General did not receive “the underlying assumptions and calculations for BREC’s
9 projected amounts.”⁵²³ Even the Attorney General’s own witness acknowledges that the
10 availability of spreadsheet formulas for review render the need for a manual unnecessary.⁵²⁴
11 Therefore, the Attorney General’s suggestion that it is impossible to analyze or test the projected
12 amounts without a “manual” is without merit.

13 The Attorney General makes a more serious accusation when it implies that the absence
14 of a manual means the underlying assumptions can be “subjective” or “subject to
15 manipulation.”⁵²⁵ Notably, none of the Attorney General’s witnesses offers a shred of evidence
16 to support this insinuation. The financial model run that was used in this case is the same one
17 that Big Rivers uses for decision-making purposes in the ordinary course of business⁵²⁶ and is the
18 same one approved by the Commission in the previous rate case.⁵²⁷ Big Rivers has been
19 transparent about its use and development of the financial model and has even laid bare the
20 financial model’s inner workings by providing a full electronic copy with all links and formulae

⁵²¹ Wolfram Rebuttal Testimony at p. 27:13-17.

⁵²² *Id.* at p. 27:18-22.

⁵²³ Ostrander Direct Testimony at p. 16:17-19.

⁵²⁴ Wolfram Rebuttal Testimony at p. 28:10-15. *See also* Attorney General’s Response to Item No. 31 of Big Rivers’ First Data Requests.

⁵²⁵ Ostrander Direct Testimony at p. 16:13-15.

⁵²⁶ Williams Direct Testimony at p. 18:19-21.

⁵²⁷ *Id.* at p. 6:16-17.

1 intact. In light of that transparency, and in light of the Commission's prior approval of Big
2 Rivers' financial model, the Commission should reject this inappropriate accusation.

3 Throughout this case, Big Rivers has filed monthly budget variance reports.⁵²⁸ These
4 reports indicate where the budgeted financial results contained in the financial model differ from
5 actual results. The differences largely relate to events out of Big Rivers' control (like off-system
6 sales prices).⁵²⁹ In no case had the reason for the budget to actual variance been an error in the
7 financial model,⁵³⁰ and the Attorney General has not identified any actual errors in the model.

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

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

13 Big Rivers provided a reasonable budget forecast consistent with its annual budgeting
14 process.⁵³¹ Because the Sebree Smelter issued its termination notice in January 2013, which
15 prevented Big Rivers from adhering to the typical budget calendar to develop the fully forecasted
16 test period in this filing, Big Rivers examined the steps ordinarily undertaken in budget
17 development and streamlined the process to complete the forecast for this filing.⁵³² Big Rivers
18 considered the steps in the budget process and, to the fullest extent possible, adjusted the timing
19 associated with those tasks so that significant information updates were incorporated into the

⁵²⁸ See, e.g., Application, Tab 35 and subsequent monthly updates.

⁵²⁹ Berry Hearing Testimony, Jan. 8, 2014, Tr. 20:48-15" ("[W]e had . . . improvements in fuel and reagent, we had the Coleman outage that we deferred, so that generator was not offline. We had all the output of that generator now to sell into the market that was not budgeted. And actually the market has been slightly higher than it was budgeted as well.").

⁵³⁰ See, e.g., Application, Tab 35 and subsequent monthly updates.

⁵³¹ Williams Direct Testimony at p. 18:16-17.

⁵³² *Id.* at p. 5:1-16; Richert Direct Testimony at p. 15:4-9.

1 forecast.⁵³³ Where updates were not possible, necessary, or significant, the values from the most
2 recent financial plan last approved by the Board of Directors in November 2012 and relied upon
3 by Big Rivers in the previous rate case were retained.⁵³⁴ In this way, Big Rivers developed a
4 forecast using the steps from the usual budgeting process but in a more expedited manner,
5 consistent with the timing needs of the instant filing.⁵³⁵

6 Big Rivers uses Hyperion, a budgeting and reporting software application, for budget and
7 forecast development purposes.⁵³⁶ Data from a number of sources⁵³⁷ are first analyzed for
8 reasonableness and then integrated into Big Rivers' in-house financial model to develop a
9 comprehensive preliminary forecast for the company.⁵³⁸ Where expenses are included, Big
10 Rivers has "a definite basis" for including those expenses.⁵³⁹ That preliminary budget is then
11 assessed in light of various financial metrics that are relevant to Big Rivers' debt covenants and
12 other requirements to determine what adjustments need to be made.⁵⁴⁰ After several rounds of
13 review and revision by budget analysts, department managers, and senior management, the
14 budget is presented for Board approval.⁵⁴¹ The budget information incorporated in Big Rivers'
15 fully forecasted test period relies on the same process, data, assumptions, and results that Big
16 Rivers' management team uses in the ordinary course of business.⁵⁴²

⁵³³ Williams Direct Testimony at p. 5:16-19.

⁵³⁴ *Id.* at p. 5:19-22.

⁵³⁵ *Id.* at pp. 5:22-6:2.

⁵³⁶ *See id.* at p. 6:5-7.

⁵³⁷ *See id.* at pp. 6:15-16:20 for a detailed discussion about the process each department uses to prepare the data sets it submits for inclusion in Big Rivers' budget forecast. *See also* Direct Testimony of David G. Crockett, Application Tab 64, p. 5:13-16 (June 28, 2013) ("Crockett Direct Testimony") ("Engineering and transmission field supervision provided the budget accounting staff with labor estimates based on both the 2014 and 2015 capital project requirements and the historical capitalized labor amounts.").

⁵³⁸ Williams Direct Testimony at p. 7:2-5. *See* Section XI.B for a discussion of Big Rivers' financial model.

⁵³⁹ Richert Hearing Testimony, Jan. 8, 2014, Tr. 12:55'31".

⁵⁴⁰ Williams Direct Testimony at p. 7:5-7.

⁵⁴¹ *Id.* at p. 4:21-23.

⁵⁴² *Id.* at p. 18:19-22.

1 Big Rivers has repeatedly demonstrated that it engages in a comprehensive budgeting
2 process that relies on a wealth of sound data to produce a budget that is reviewed on multiple
3 levels. Moreover, Big Rivers has used this methodology to deal with significant events outside
4 of its control and, yet, remain within the very narrow window of financial performance in which
5 historically has had to operate. In light of that success, Big Rivers should not be criticized for its
6 budgeting process.

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

8 Big Rivers' load forecast "is reasonable, reliable, made in good faith, . . . based on
9 assumptions that are justified," and relies on "the same load forecasting process, assumptions,
10 and results that are used in the IRP process and that are used by Big Rivers' management in the
11 ordinary course of business."⁵⁴³ For these reasons, discussed in detail below, the Commission
12 should accept the load forecast⁵⁴⁴ used in the modeling of Big Rivers' financials for the fully
13 forecasted test period.⁵⁴⁵

14 Big Rivers, with assistance from qualified consultants and in collaboration with its
15 Members, updates its load forecast study every two years and submits it to RUS for review and
16 approval.⁵⁴⁶ To develop the April 2013 load forecast study, the scope of which included a price
17 elasticity study,⁵⁴⁷ Big Rivers retained GDS Associates, Inc. ("GDS").⁵⁴⁸ GDS is a qualified and

⁵⁴³ Barron Direct Testimony at p. 15:15-19. *See also* Barron Hearing Testimony, Jan. 9, 2014, Tr. 9:51'28" ("We forecasted using sophisticated models; we actually utilized GDS, a very reputable company, to do that.").

⁵⁴⁴ *See* Exhibit Barron-3.

⁵⁴⁵ Barron Direct Testimony at p. 16:1-2.

⁵⁴⁶ Barron Direct Testimony at p. 5:12-15.

⁵⁴⁷ Rebuttal Testimony of Lindsay N. Barron, p. 8:3-4 (Dec. 17, 2013) ("Barron Rebuttal Testimony"). *See also* Barron Direct Testimony at pp. 12:14-13:3 ("Price elasticity was incorporated into the underlying models used to forecast the Big Rivers' Rural customer class to reflect impacts of the proposed rate increase on demand and energy.").

⁵⁴⁸ *Id.* at p. 5:19-22.

1 reputable company.⁵⁴⁹ GDS and Big Rivers then worked in close collaboration with the staff of
2 Big Rivers' Members, whose "input is an integral part of the load forecast development
3 process."⁵⁵⁰ The Members provided "feedback during the development of the load forecast and
4 provide[d] a review of the results prior to finalization."⁵⁵¹

5 The load forecast, which is the "same basic load forecast . . . used for budgeting, the IRP
6 and other day-to-day functions at Big Rivers,"⁵⁵² was designed to reflect the Smelters' service
7 contract terminations as well as "changes in demand and energy resulting from the associated
8 rate increases."⁵⁵³ The price elasticity coefficient used in the load forecast was developed "to
9 reflect an elasticity specifically for Rural customers located in Big Rivers' Members' service
10 areas."⁵⁵⁴ The results of the analysis were then "compared to industry norms and to the results of
11 price elasticity studies performed by the Energy Information Administration and by the National
12 Renewable Energy Laboratory, which is operated for the Department of Energy."⁵⁵⁵ RUS
13 approved the load forecast work plan⁵⁵⁶ and the load forecast.⁵⁵⁷

14 The Opposing Intervenors challenge certain aspects of Big Rivers' load forecast and price
15 elasticity studies, but most of those criticisms relate to Big Rivers' long-term planning horizon

⁵⁴⁹ Barron Rebuttal Testimony at p. 4:19-20. *See also* Barron Hearing Testimony, Jan. 9, 2014, Tr. 10:46'20" ("GDS actually went out and looked through all types of information to see if they could find any good information about large industrial customers' response [to energy price increases].").

⁵⁵⁰ Barron Direct Testimony at p. 8:9-10. *See also* Barron Hearing Testimony, Jan. 9, 2014, Tr. 9:37'01" ("The replacement load forecast was developed with several members of our senior staff, we actually had multiple conversations about what our expectations might be regarding replacement load. That forecast was based on professional judgment of essentially myself, Mr. Berry, and Mr. Bailey as well as a few of my staffers who have been involved in the energy services arena for a number of years.").

⁵⁵¹ Barron Direct Testimony at p. 8:11-12.

⁵⁵² *Id.* at p. 8:15-16.

⁵⁵³ *Id.* at pp. 5:22-6:3.

⁵⁵⁴ Barron Rebuttal Testimony at p. 4:20-22. *See also* Barron Hearing Testimony, Jan. 9, 2014, Tr. 11:13'33" ("We haven't seen any price response from our customers in response to previous increases that we have had in the Large Industrial Class that we could quantify.").

⁵⁵⁵ Barron Rebuttal Testimony at p. 8:4-7. *See also id.* at p. 4:17-19 ("The price elasticity coefficient used in the load forecast in this case was developed in accordance with standard industry practices.").

⁵⁵⁶ Barron Direct Testimony at p. 6:7-9.

⁵⁵⁷ Barron Hearing Testimony, Jan. 9, 2014, Tr. 11:04'01".

1 and therefore do not affect Big Rivers' proposed rates, which are based on its forecasted test
2 year.⁵⁵⁸ For example, Sierra Club expresses skepticism about Big Rivers' projections for
3 obtaining new load, but as Big Rivers has reiterated throughout this case, "the test period in this
4 case does not include any assumptions for replacement load."⁵⁵⁹ Furthermore, as discussed in
5 Section VIII.B, Big Rivers' projections for obtaining replacement load in the course of
6 implementing its Mitigation Plan are reasonable. Sierra Club similarly criticizes Big Rivers'
7 estimate of price elasticity for the Rural rate class, suggesting that "blending" a combination of
8 short-run and long-run elasticities would be appropriate because "[t]he projections presented in
9 this case . . . extend for more than a decade beyond the proposed rate increases."⁵⁶⁰ However, it
10 is appropriate for Big Rivers to rely on a short-run elasticity for the forecasted test year on which
11 its rates are based.⁵⁶¹ Even Sierra Club acknowledges that "[i]n the year of a rate increase, a
12 utility should use the short-run estimate."⁵⁶² Sierra Club also acknowledges that the short-run
13 elasticity Big Rivers used is consistent with published estimates of short-run estimates.⁵⁶³ Even
14 aside from Sierra Club's admissions on this issue, it was reasonable to rely on the short-run
15 elasticity for the test period because arbitrarily using a longer-run elasticity would have only

⁵⁵⁸ See, e.g., Barron Rebuttal Testimony at p. 6:10-14 (discussing the difference between the short-term forecasts used for the forecasted test period and longer-term forecasts).

⁵⁵⁹ *Id.* at p. 14:18-19.

⁵⁶⁰ Ackerman Direct Testimony at pp. 16:25-17:2, 20:3-5.

⁵⁶¹ Barron Rebuttal Testimony at p. 5:12-17. See also Barron Hearing Testimony, Jan. 9, 2014, Tr. 10:22'22" ("[T]he regression models that we run utilize a short-run elasticity [coefficient]. . . . The way that long-run price elasticity is factored into the model is by implementing into the model changes that occur, by things like fuel-switching, changes in efficiencies (folks upgrading their appliances to make them more efficient.); *id.* at Tr. 10:46'42" ("I know that in a couple of the exhibits that were produced in this case from the [Opposing] [I]ntervenors there was some Large Industrial price elasticity information quoted, but it was based on real-time pricing. As we all know, an industry's ability, or an industry's response to price elasticity in a real-time pricing situation is very different than not in a real-time pricing situation. And our customers are not in real-time pricing."); *id.* at Tr. 10:47'25" ("([The studies that Dr. Ackerman referred to] are not applicable.").

⁵⁶² Ackerman Direct Testimony at p. 16.

⁵⁶³ Barron Rebuttal Testimony at p. 6:1-7.

1 resulted in a request for higher rates.⁵⁶⁴ Additionally, Big Rivers did incorporate long-run
2 elasticities in the long-term load forecast, it just did not use the long-run elasticities in the
3 determination of the test period revenue requirement.⁵⁶⁵

4 The Opposing Intervenors also challenge Big Rivers' conclusion that "Large Industrial
5 customers will not reduce their demand in the short run"⁵⁶⁶ However, Big Rivers'
6 assumption is reasonable because "Large Industrial loads have generally already invested in cost
7 effective energy efficiency measures, and they generally maintain low technological
8 obsolescence."⁵⁶⁷ Because of this, Large Industrial customers do not "have a significant
9 opportunity for [further] load reduction based on increasing efficiency."⁵⁶⁸

10 Big Rivers' conclusions on this issue are consistent with the available evidence, including
11 the testimony of Large Industrial customers on its system.⁵⁶⁹ Aleris's representative testified that
12 "Aleris already undertakes significant energy efficiency efforts to protect our bottom line and
13 will continue to do so," and that "Aleris will not be able to reduce its load requirements
14 anywhere near the total amount needed to offset a significant portion of the rate increase."⁵⁷⁰

⁵⁶⁴ See, e.g., Barron Rebuttal Testimony at p. 15:16-22; Barron Hearing Testimony, Jan. 9, 2014, Tr. 9:55'42" ("I believe that in the test year period that our industrial customers have very little opportunity to respond by reducing their consumption. And as I have said repeatedly in my rebuttal testimony, had we come forward in this case and said that we believe that our Large Industrial customers would use significantly less, we would have only asked for more and we would have increased our Member rates more."); Hearing Testimony of Frank Ackerman, Jan. 9, 2014, Tr. 17:06'58" ("Ackerman Hearing Testimony") (confirming that price elasticity should be based on retail rates and not wholesale rates).

⁵⁶⁵ Barron Rebuttal Testimony at p. 6:8-14.

⁵⁶⁶ *Id.* at p. 8:14-16. See, e.g., Ackerman Direct Testimony at p. 18; Brevitz Direct Testimony at pp. 29-30.

⁵⁶⁷ Barron Rebuttal Testimony at p. 8:16-18. See also Barron Hearing Testimony, Jan. 9, 2014, Tr. 10:27'50" ("[The three Large Industrial customers represented by KIUC] said that they were very sophisticated users of energy and that they spend a tremendous amount of time and effort on improving their efficiency because it hit their bottom line. They all three indicated that they had already made significant investments. They have qualified professionals, in many cases they have corporate professionals who look to improve their efficiency and they all said that their ability to significantly reduce their consumption really didn't exist.")

⁵⁶⁸ Barron Rebuttal Testimony at p. 9:5-7. See also Barron Hearing Testimony, Jan. 9, 2014, Tr. 9:55'42" ("I believe that in the test year period that our industrial customers have very little opportunity to respond by reducing their consumption."); *Id.* at Tr. 11:06'41" (affirming in response to a question from Commissioner Gardner that Large Industrial customers will have little time to respond to price increases in the short forecasted test year).

⁵⁶⁹ Barron Rebuttal Testimony at p. 8:16-19.

⁵⁷⁰ Direct Testimony of Kelly Thomas, p. 7:18-22 (Oct. 29, 2013) ("Thomas Direct Testimony").

1 Kimberly-Clark's representative testified that the company has identified numerous energy
2 efficiency projects, but that even if all projects were completed they "will reduce energy
3 consumption by only 4%."⁵⁷¹

4 Big Rivers' conclusions on Large Industrial rate class elasticity are also consistent with
5 the experience of Vectren Corporation ("Vectren"), a utility situated in close proximity to Big
6 Rivers and one that "shares significant regional characteristics with Big Rivers and its
7 Members."⁵⁷² Vectren's rates increased by 49.3% between 2001 and 2006 and by 27.5% from
8 2007 to 2012, but during that time the average energy consumption of its large power customers
9 increased.⁵⁷³ This counterexample demonstrates the fallacy of Sierra Club's claims that it is
10 "simply implausible" that Large Industrial customers would not immediately decrease their load
11 demand in response to rate adjustments.⁵⁷⁴ In short, the testimony of KIUC's own witnesses and
12 the experience of Vectren both support Big Rivers' informed conclusion that "it is reasonable to
13 assume that electricity consumption is likely to remain level, during the test period, for existing
14 large power facilities."⁵⁷⁵

15 The Opposing Intervenors offer no compelling evidence to contradict Big Rivers'
16 conclusion. For example, Sierra Club cites two studies purportedly related to industrial

⁵⁷¹ Direct Testimony of Bill Cummings, p. 6:13-15 (Oct. 29, 2013) ("Cummings Direct Testimony").

⁵⁷² Barron Rebuttal Testimony at pp. 9:19-10:19; Barron Hearing Testimony, Jan. 9, 2014, Tr. 10:02'29" ("If you look at the Vectren territory, they are as close to our territory as possible. They have the same climate, they have the same access to workforce, they have the same access to transportation, they have the same access to natural resources. Vectren is the closest proxy for our territory that you have."); *Id.* at Tr. 10:03'31" ("Vectren has very many similar industries to what we have, as well as their commercial base [which is] very comparable to what we have.").

⁵⁷³ Barron Rebuttal Testimony at p. 10:2-12; Barron Hearing Testimony, Jan. 9, 2014, Tr. 10:01'00" ("Vectren experienced tremendous rate increases, both in their large industrial and commercial ranks, and [those customers] actually did not decrease their consumption at all.").

⁵⁷⁴ Ackerman Direct Testimony at p. 17:3-7 ("I find it simply implausible to assume that industrial customers are unaffected by price increases. Yet that is the implicit assumption BREC made by excluding industrial price elasticity effects."). *See also* Barron Hearing Testimony, Jan. 9, 2014, Tr. 11:13'11" ("We did not rely on the Vectren information, the Vectren information I only used to rebut their testimony. I didn't actually utilize that [to develop the load forecast].").

⁵⁷⁵ Barron Rebuttal Testimony at p. 10:16-19.

1 elasticity, but those studies only involve demand response scenarios that are “not applicable to
2 Big Rivers’ current situation.”⁵⁷⁶ Kimberly-Clark hypothesizes that the proposed rate adjustment
3 will cause industrial and commercial employers to close, but provides no factual basis for its
4 speculation.⁵⁷⁷ KIUC makes a similar suggestion, citing a study generalizing that electric price
5 increases may force closures or slow job growth; however, that high-level study does not address
6 Big Rivers’ unique situation, nor does it address the serious negative consequences for Big
7 Rivers’ Members and their retail customers if Big Rivers’ necessary rate adjustment is denied.⁵⁷⁸
8 The Attorney General also speculates that Large Industrial customers will explore alternatives to
9 higher rates, but in support of his argument simply defers to KIUC witnesses and cites articles
10 that discuss specific companies (not on the Big Rivers’ system) that are working to become more
11 energy self-sufficient.⁵⁷⁹ None of these criticisms provide any actual evidence that Big Rivers’
12 proposed rate adjustments will decrease Large Industrial customer consumption. And again,
13 even if Big Rivers had assumed reduced consumption, the assumption would have only resulted
14 in a request for higher rates in this proceeding, to the detriment of the Members.

15 Big Rivers relied on a reputable and qualified company (GDS), and it has used a detailed
16 and rigorous process to develop its load forecast and the incorporated price elasticity. The
17 Opposing Intervenors, in contrast, offer only speculation and a handful of studies and articles
18 that do not apply to Big Rivers’ system. Big Rivers’ load forecast is reasonable, and the
19 Commission should accept it as used in the modeling of Big Rivers’ financials for the fully
20 forecasted test period.

⁵⁷⁶ *Id.* at p. 9:8-14. *See also* Ackerman Direct Testimony at pp. 17:20-18:12.

⁵⁷⁷ Barron Rebuttal Testimony at p. 12:5-19; Cummings Direct Testimony at p. 8:8-9 (basing his speculation on a highly-inflated hypothetical percentage rate increase).

⁵⁷⁸ Barron Rebuttal Testimony at pp. 12:20-13:10; Hayet Direct Testimony at pp. 26-27.

⁵⁷⁹ Barron Rebuttal Testimony at p. 14:3-16.

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

2 Big Rivers' production cost modeling methodology for the test period is reasonable,
3 accurate, and appropriate for setting rates. Big Rivers' energy services and production personnel
4 worked with ACES, a third-party consulting and energy marketing firm, to prepare the
5 production cost modeling used in the financial model supporting the application.⁵⁸⁰ Big Rivers
6 provided ACES with certain inputs for the model, including fuel contract information, Big
7 Rivers' load forecast, and generating unit operating characteristics such as heat rates, capacity,
8 and outage rates.⁵⁸¹ ACES, in turn, provided price forecasts for energy and emission allowances
9 and integrated all of the inputs in its Planning and Risk model.⁵⁸² The appropriate outputs from
10 this model were then incorporated into Big Rivers' financial model,⁵⁸³ and all outputs have been
11 provided in this proceeding.⁵⁸⁴

12 This process has given Big Rivers accurate, reliable production cost data based on the
13 best information available. The production cost model is reasonable.

14 **F. Big Rivers Appropriately Accounted for Its Reserve Funds in Its Forecast,**
15 **and the Commission Should Approve Big Rivers' Proposal to Apply Any**
16 **Transmission Revenues to the Economic Reserve.**

17 In preparing its forecast and revenue requirement for this case, Big Rivers appropriately
18 accounted for its two remaining reserve funds (the Economic Reserve and the Rural Economic
19 Reserve). Furthermore, Big Rivers' proposals to accelerate the use of those funds and direct
20 transmission revenues to the Economic Reserve are reasonable, benefit Big Rivers' Members
21 and their retail customers, and should be approved.

⁵⁸⁰ Berry Direct Testimony at p. 20:8-10; Williams Direct Testimony at p. 10:20-22.

⁵⁸¹ Berry Direct Testimony at p. 20:15-18.

⁵⁸² *Id.* at p. 20:18-21.

⁵⁸³ *Id.* at p. 20:20-23; Williams Direct Testimony at p. 11:1-3.

⁵⁸⁴ See Big Rivers' Response to Item No. 57 of Commission Staff's First Data Requests.

1 As part of the Unwind Transaction, Big Rivers established the Economic Reserve (“ER”)
2 and the Rural Economic Reserve (“RER”) (together, the “Reserve Funds”).⁵⁸⁵ The ER helps
3 “cushion the effects of future rate increases for fuel and environmental expenses” on the Rural
4 and Large Industrial customer classes.⁵⁸⁶ The RER serves an identical purpose, but only for the
5 Rural rate class, and it is activated upon exhaustion of the ER.⁵⁸⁷ Both are modeled to mirror
6 their respective tariff provisions (the Member Rate Stability Mechanism (“MRSM”) and the
7 Rural Economic Reserve Rider (“RER Rider”)), and amounts drawn from those funds are
8 booked as revenue⁵⁸⁸ and tracked in the financial model.⁵⁸⁹

9 Big Rivers proposes “accelerat[ing] the use of the Economic Reserve and the Rural
10 Economic Reserve funds, such that the entire amount of the increase sought in this case is
11 effectively, although only temporarily, offset.”⁵⁹⁰ This would be accomplished by modifying the
12 MRSM and the RER Rider so that they will “offset[] the base rate adjustments proposed in this
13 filing”⁵⁹¹ This acceleration would not “change the intended purposes or intended
14 beneficiaries of those funds,”⁵⁹² contrary to KIUC’s original proposal to give some of the RER to
15 the Large Industrial customers, which was rejected in the 535 Rate Case Order.⁵⁹³

⁵⁸⁵ Richert Direct Testimony at p. 13:8-11.

⁵⁸⁶ *Id.* at p. 13:11-14.

⁵⁸⁷ *Id.* at p. 13:14-16.

⁵⁸⁸ Warren Direct Testimony at pp. 6:21-7:3.

⁵⁸⁹ *Id.* at p. 6:20-21.

⁵⁹⁰ Bailey Direct Testimony at p. 7:11-13. *See also* Richert Direct Testimony at p. 13:19-21 (“Big Rivers proposes to accelerate the use of the Economic Reserve and Rural Economic Reserve to fully offset the rate increase proposed in this case until the reserve accounts are exhausted.”); Warren Direct Testimony at p. 7:3-5 (Big Rivers has proposed “changes to the MRSM and Rural Economic Reserve Rider . . . to accelerate the use of the reserve funds to also fully offset the increased proposal in this case until the reserve funds are depleted.”).

⁵⁹¹ Wolfram Direct Testimony at pp. 31:2-4, 30:9-16. *See also id.* at p. 30:21-31:2 (“Big Rivers is proposing that the amount of the MRSM credit provided to each member system during a month equals the total amount of FAC and ES charges billed to the member during the month, plus a new term which equals the amount of the base rate adjustment awarded in this proceeding, less those other terms described in the MRSM tariff. The same is true for the RER.”).

⁵⁹² Richert Rebuttal Testimony at p. 20:17-23; Richert Hearing Testimony, Jan. 8, 2014, Tr. 11:04’10”.

⁵⁹³ 535 Rate Case Order at *50-51 (rejecting KIUC’s proposal to “amend[] the established purpose of the RER fund” for the benefit of the Large Industrial class).

1 Accelerating the Reserve Funds would increase the amount of time between the 535 Rate
2 Case rate adjustment and the date when the Members' retail customers will be affected by the
3 rate adjustment proposed in this case. As explained by Ms. Richert, "spreading the two increases
4 apart as far as possible minimizes rate shock while preserving the funds for the exclusive
5 application to the Rural and Large Industrial classes."⁵⁹⁴ It also affords Big Rivers more time to
6 implement its Mitigation Plan in an effort to "minimize the amount of time that retail customers
7 are subject to the full impact of both" rate adjustments.⁵⁹⁵ If Big Rivers' proposal is adopted, the
8 full effects of the rate adjustment from this proceeding would be offset "until April of 2015 for
9 the Rural class and until July of 2014 for the Large Industrial class."⁵⁹⁶

10 Big Rivers also proposes "direct[ing] any transmission revenue received from the
11 smelters to replenish the Economic Reserve."⁵⁹⁷ As Mr. Berry explains, "there remains
12 uncertainty with respect to when Big Rivers will receive transmission revenues;" therefore, if the
13 Commission includes transmission revenues in Big Rivers' revenue requirement "and those
14 transmission revenues do not come to pass, Big Rivers will be at risk of default in its financial
15 obligation."⁵⁹⁸ Any number of scenarios—including an idling of potlines or a closure of the

⁵⁹⁴ Richert Direct Testimony at p. 14:15-25.

⁵⁹⁵ *Id.*

⁵⁹⁶ Bailey Rebuttal Testimony at pp. 11:24-:12:2.

⁵⁹⁷ *Id.* at p. 11:8-9; Bailey Hearing Testimony, Jan. 7, 2014, Tr. 10:47'55" ("As [the transmission revenues] accumulate, they will be allocated to the reserve account.")

⁵⁹⁸ Berry Rebuttal Testimony at p. 23:6-11. *See also* Berry Hearing Testimony, Jan. 8, 2014, Tr. 21:09'45" (acknowledging that, given the difference between 1.10 and 1.24 is about \$6M, if revenue reduced to include transmission revenues but revenues don't happen, the entire financial cushion provided by a 1.24 TIER would be wiped out); Bailey Hearing Testimony, Jan. 7, 2014, Tr. 16:32'00" ("We're not sure, in the case of the Hawesville facility, whether those revenues will ever materialize because, as you know, it's in [SSR] status. We credit those revenues back to Century as part of the costs they will bear. . . . Obviously, those are big dollars, when you think about our margin requirements. Put it together - \$12 million can swamp the boat, particularly when you're struggling in the \$10 million range just to stay afloat.").

1 Smelter—could result in this dangerous scenario.⁵⁹⁹ In addition, if such a scenario came to pass,
2 Big Rivers would not have time to react in the form of an emergency rate case.⁶⁰⁰

3 Given Big Rivers' already slim margins and the significant risks associated with guessing
4 wrong as to the reliability and amount of transmission revenues,⁶⁰¹ the Commission should
5 approve routing any transmission revenues through the Economic Reserve. As Mr. Bailey
6 explains, routing transmission revenues to the Economic Reserve would “ensure that the
7 Members realize the benefit of any and all transmission revenue Big Rivers receives from either
8 Century Smelter, eliminating the uncertainties about when and in what amounts any such
9 revenues will be received.”⁶⁰² This proposal thus protects Big Rivers in the event that
10 transmission revenues do not come to pass or they end, and it benefits the Members and their
11 retail customers while the revenues are realized.⁶⁰³ It would also further the original purpose of

⁵⁹⁹ Berry Hearing Testimony, Jan. 8, 2014, Tr. 20:54'10” (“If [the Sebree Smelter] decides to change the volume of energy they’re taking – my correction is a good example, originally it was 368 [MW] it went to 385 [MW] – this is not ceasing but if it goes back to 368 [MW] that amount is going to reduce. If they decide that the aluminum market is not profitable and they want to idle a potline, which we’ve seen Century do in the past, and they take one of the potlines off or they close the smelter completely, they’ll be able to close that smelter before we can actually get a rate case process approved.”); *Id.* at Tr. 20:56'20” (“Every year we file a new Attachment O with MISO, which basically is our cost of maintaining our transmission system. And that’s how that rate is actually determined. So it can vary from year to year from that perspective. Or if they decide to take a potline off, they’ve done potline reductions before. I have concerns with the large amount of load that Century Hawesville is using on this SPS. If you’ve looked at any of that document, that SPS system can trip up that entire plant instantly under certain transmission reliability constraints.”).

⁶⁰⁰ *Id.* at Tr. 20:53'50”.

⁶⁰¹ *Id.* at Tr. 21:09'45” (acknowledging that, given the difference between 1.10 and 1.24 is about \$6M, if revenue reduced to include transmission revenues but revenues don’t happen, the entire financial cushion provided by a 1.24 TIER would be wiped out).

⁶⁰² Bailey Rebuttal Testimony at p. 11:9-12. *See also* Berry Rebuttal Testimony at p. 23:12-16 (“This will allow Big Rivers the opportunity to pass the revenue on to its Members by offsetting a portion of the rate increase as long as it continues to receive the transmission revenue” and “mitigate the need for Big Rivers to file an emergency rate case if the transmission revenue ceased abruptly.”); Richert Hearing Testimony, Jan. 8, 2014, Tr. 13:16'44” (confirming that, if Big Rivers’ revenue requirement were reduced by the forecasted amount of transmission revenue, Big Rivers will be in the same position if the full amount is realized and in a worse position if the full amount is not realized).

⁶⁰³ Berry Hearing Testimony, Jan. 8, 2014, Tr. 21:14'51”; Wolfram Hearing Testimony, Jan. 9, 2014, Tr. 14:24'05”; Bailey Hearing Testimony, Jan. 7, 2014, Tr. 10:47'08” (“We’re a little uncertain about these transmission revenues: when they will begin, how long they will last, and what the amounts will be. So, we’re concerned about having the rates adjusted on a permanent basis based on those. Therefore, by proposing to put it in the reserves, it does allow the Members to benefit to the extent they actually materialize, but yet does not subject Big Rivers to adverse consequences if they don’t realize or they terminate all of a sudden, which they could do.”).

1 the ER because “the Economic Reserve would continue to benefit the same retail customers it
2 currently benefits—it would simply be supplemented with additional funds”⁶⁰⁴

3 KIUC alleges that Big Rivers’ proposed modifications to the MRSM and the RER Rider
4 “substantially ratchet up the explosive impact of the time-bomb rate increases once each of the
5 Reserve funds are depleted”⁶⁰⁵ This allegation grossly mischaracterizes the effect and
6 purpose of accelerating the Reserve Funds. If the Commission grants Big Rivers’ rate
7 adjustment in this proceeding, the impact of that adjustment will happen whenever the Reserve
8 Funds become depleted. It is only a question of timing. Big Rivers’ approach best serves the
9 interests of Big Rivers, its Members, and their retail customers by lengthening the time between
10 rate adjustments and giving the Mitigation Plan additional time to succeed.

11 KIUC’s proposals regarding the Reserve Funds are unworkable or inappropriate and
12 should be denied. KIUC first proposes granting Big Rivers minimal rate relief and instead
13 relying on the “Reserve Funds to provide the additional revenues necessary for the Company to
14 meet its 1.24 TIER target on a monthly basis.”⁶⁰⁶ However, as explained in Section XIII.E, that
15 proposal is fleeting and relies entirely on the fallacy that Big Rivers’ creditors will make
16 significant concessions to keep Big Rivers out of bankruptcy.⁶⁰⁷ Because that aspect of KIUC’s
17 proposal will fail, its attendant request related to the use of the Reserve Funds should likewise be
18 denied.

19 KIUC also complains that the RER “results in disparate rate treatment between the Rural
20 and Large Industrial customers,” and it proposes redirecting some RER funds away from the

⁶⁰⁴ Bailey Hearing Testimony, Jan. 7, 2014, Tr. 10:46’42”. See Richert Rebuttal Testimony at p. 4:18-21. See also *id.* at p. 4:22-5:13 (describing details of proposed accounting treatment of transmission revenue and clarifying that Big Rivers’ “auditors have approved the proposed accounting treatment provided that the Commission grants its approval.”).

⁶⁰⁵ Kollen Direct Testimony at p. 20:19-20.

⁶⁰⁶ *Id.* at pp. 10:13-15, 23:6-10.

⁶⁰⁷ To the extent any revenue deficiency exists after these hypothetical creditor concessions, KIUC would have Big Rivers requesting new rates as early as the end of 2014. See n. 359, *supra*.

1 Rural class for the benefit of the Large Industrial class.⁶⁰⁸ Although first proposed only on the
2 final day of the hearing, KIUC’s new proposal would involve creating a de facto “Rural
3 Business” customer class for the purposes of diverting the funds away from a largely undefined
4 “business” subset of Rural customers and into the pockets of the Large Industrial customers.⁶⁰⁹
5 KIUC did not identify in its direct testimony the need for an additional rate class or take issue
6 with the use of two rate classes (Rural and Large Industrial) in Big Rivers’ cost of service study.
7 Moreover, KIUC’s proposal would—as KIUC admits—constitute a “change in the policy that
8 was discussed in the Unwind Order,”⁶¹⁰ and KIUC has not shown any justification for such a
9 change.

10 KIUC’s last-day proposal relies heavily on its incorrect conclusion that the Commission
11 is “unreasonably discriminating against Large Industrial customers and/or giving an
12 unreasonable preference to Rural customers.”⁶¹¹ This allegation is particularly odd in light of the
13 fact that “the total rates granted in Case No. 2012-00535 and requested in this rate case are not
14 larger for Large Industrial customers than Rural customers”⁶¹² Indeed, Big Rivers’
15 proposed rates are based on an unchallenged cost-of-service study, and they are designed to have
16 no cost-of-service disparity between rate classes.⁶¹³ Furthermore, to the extent that the

⁶⁰⁸ Kollen Direct Testimony at p. 21:5-20. *See also generally* Direct Testimony of Stephen J. Baron, pp. 8-25 (Oct. 29, 2013) (“Baron Direct Testimony”).

⁶⁰⁹ *See* Hearing Testimony of Stephen J. Baron, Jan. 9, 2014, Tr. 16:00’30” (“Baron Hearing Testimony”) (“In my testimony I had talked about the concern of equalizing the treatment of the 16,000 business customers who are Rural with the 20 Large Industrial customers. And the proposal was to apply to RER to both Rural customers and LI customers.”); Hearing Testimony of Steve Henry, Jan. 9, 2014, Tr. 17:41’31” (“Henry Hearing Testimony”) (acknowledging that a “business class” subset of Rural customers would receive a smaller share of the Rural Economic Reserve under KIUC’s revised plan for the use of that reserve).

⁶¹⁰ Baron Hearing Testimony, Jan. 9, 2014, 16:21’41” (“To the extent that [the Rural Economic Reserve] would apply in this fashion that KIUC is now proposing, to Large Industrials as well, I would guess that would be a change in the policy that was discussed in the Unwind Order. And we are requesting that.”)

⁶¹¹ Baron Direct Testimony at p. 10:11-13.

⁶¹² Richert Rebuttal Testimony at pp. 21:19-22:2 (emphasis original).

⁶¹³ Bailey Direct Testimony at p. 11:1-2 (“The proposed rates are designed so that there are no cost-of-service subsidies received or provided by either of Big Rivers’ remaining two rate classes.”); Wolfram Direct Testimony at

1 Commission has long treated the Large Industrials and Rurals differently, those differences are
2 not “unreasonable discrimination” but legitimate distinctions between “different classes of
3 customers with different needs.”⁶¹⁴ For example, Large Industrials are direct-served, whereas
4 Rural customers are not.⁶¹⁵

5 As another example, due to higher load factors, Large Industrial customers enjoy the
6 benefit of all-in rates lower than those applied to the Rural class.⁶¹⁶ KIUC admits this
7 distinction,⁶¹⁷ but does not address in its proposal the fact that Large Industrial customers will
8 have a significantly lower demand charge than Rural customers,⁶¹⁸ thus disproving KIUC’s
9 assertion that its goal is to provide equal treatment to business customers regardless of rate class.
10 When the Commission created the RER, it looked at the projected all-in rates to the Rural class
11 and found that the Unwind Transaction “will result in rate increases for Rural Customers that are
12 simply too high,” absent the additional rate mitigation provided to the Rurals by the RER.⁶¹⁹
13 Notably, the Commission did not find that the projected all-in rates to the Large Industrials
14 required additional mitigation. Under KIUC’s revised proposal, Rural business customers will
15 not only pay higher all-in rates than the Large Industrials, some of their share of the RER, which
16 the Commission created for them to offset future rate increases, would be taken away from them
17 and given to the Large Industrials, further increasing the rate disparity between the Rural

p. 25:13-14 (“[T]he proposed rates are designed to eliminate interclass subsidization for the fully forecasted test period.”).

⁶¹⁴ Richert Rebuttal Testimony at p. 22:6-13.

⁶¹⁵ See Big Rivers Electric Corporation Tariff P.S.C. Ky. 25, Sheet No. 22 (issued Nov. 15, 2013) (describing service to Large Industrials at dedicated delivery points).

⁶¹⁶ See Big Rivers Electric Corporation Tariff P.S.C. Ky. 25, Sheet 1 and Sheet 22 (scheduling lower rates for the Large Industrial Class than those for the Rural class) (issued Nov. 15, 2013). Baron Hearing Testimony, Jan. 9, 2014, Tr. 16:10’11”.

⁶¹⁷ *Id.* at Tr. 16:10’11”.

⁶¹⁸ See Wolfram Rebuttal Testimony, Exhibit Wolfram 5-2 (listing proposed demand charges for Rural and Large Industrials).

⁶¹⁹ Unwind Order at pp. 24-25.

1 business customers and the Large Industrial customers, who already benefit from a lower
2 demand charge.

3 KIUC raised this same basic discrimination argument in the 535 Rate Case, and the
4 Commission rejected it.⁶²⁰ As the Commission explained, KIUC was an intervenor in the
5 Unwind Transaction case and never once claimed that “the Unwind Transaction would result in
6 rate increases that would be too high for” Large Industrials.⁶²¹ In addition, KIUC “chose not to
7 seek a rehearing or file an appeal”⁶²² Ultimately, the Commission found that KIUC’s
8 proposal to repurpose the RER amounted to “trying to relitigate our 2009 findings” in the
9 Unwind Transaction, and found that “[t]he time for KIUC to raise its challenge to the RER
10 expired over four years ago.”⁶²³ For these reasons, the Commission should again deny Domtar’s,
11 Aleris’s, and Kimberly-Clark’s attempt to take RER funds from the Rural class for their own
12 financial benefit.⁶²⁴

13 The Attorney General points out that in Big Rivers’ cost of service study, transmission
14 costs are allocated to the rate classes based on the 12 CP demand allocator, but that the MRSM
15 allocates credits to the rate classes based on Energy.⁶²⁵ The Attorney General indicated that this
16 inconsistency results in a subsidization of the Large Industrial class by the Rural class and is
17 therefore not just and reasonable.⁶²⁶ However, because there is no assurance that the 12 CP
18 allocators in the test period will be maintained at the future point in time when Big Rivers may
19 receive transmission revenues, and because there is no other existing mechanism that permits the

⁶²⁰ 535 Rate Case Order at * 49-50.

⁶²¹ *Id.* at *48-49.

⁶²² *Id.* at *49.

⁶²³ *Id.* at *51.

⁶²⁴ See Richert Rebuttal at pp. 21:1-24:5.

⁶²⁵ See Attorney General’s Hearing Exhibit 8.

⁶²⁶ See Statement of Larry Cook, Jan. 9, 2014, Tr. 14:19’10”; Attorney General’s Hearing Exhibit 8.

1 return of such revenues to Big Rivers' members in near real-time, the use of the MRSM for this
2 purpose is reasonable.⁶²⁷

3 Big Rivers' proposals to accelerate the use of the Reserve Funds and to direct any
4 transmission revenues from the Smelters to the ER are both reasonable and should be approved.

5
6 **XIII. The Commission Should Approve the Depreciation Rates Set Out in Big Rivers'**
7 **2012 Depreciation Study.**

8 Big Rivers proposes that the Commission approve the Report on the Comprehensive
9 Depreciation Study (November 2012) prepared by the engineering and consulting firm Burns &
10 McDonnell (the "2012 Depreciation Study").⁶²⁸ Although the Commission did not adopt the
11 proposed depreciation rates from the 2012 Depreciation Study in the 535 Rate Case, the
12 Commission specifically deferred consideration of the proposed rates until this case:

13 In light of the temporary nature of the rates awarded herein, the
14 Commission will reflect an adjustment to reduce Big Rivers' test-
15 year O&M expenses by \$1,778,761 and require it to continue using
16 the depreciation rates that are currently in use and that were
17 authorized by the Commission in Case No. 2011-00036. Big
18 Rivers' new depreciation study has already been filed in its new
19 rate case, Case No. 2013-00199, and will be considered in that
20 case.⁶²⁹

21
22 The 2012 Depreciation Study was ordered by the Commission and was conducted to
23 analyze the service life characteristics, net salvage indications, and depreciation reserve status
24 based on historical data from Big Rivers' Continuing Property Records ("CPR") system data,
25 and then to determine appropriate depreciation rates for Big Rivers' system plant.⁶³⁰ This

⁶²⁷ Wolfram Hearing Testimony, Jan. 9, 2014, Tr. 15:28'41".

⁶²⁸ The 2012 Depreciation Study was provided as an attachment to Big Rivers' Response to Item No. 55 of Commission Staff's First Data Requests.

⁶²⁹ 535 Rate Case Order at * 39-40 (footnote omitted).

⁶³⁰ Kelly Rebuttal Testimony at p. 7:26-8:2.

1 analysis was based on Big Rivers' historical plant records as of July 31, 2012,⁶³¹ and it was
2 performed for all of Big Rivers' facilities and accounted for in accordance with RUS Bulletin
3 1767B-1, Uniform System of Accounts.⁶³²

4 The Commission has recognized that "a depreciation study involves the analysis of a
5 significant amount of information and the preparer's judgment and experience."⁶³³ In this case,
6 Burns & McDonnell used methodologies similar to the process utilized in completing the last
7 depreciation rate study approved by RUS and approved by the Commission in the 2011 Rate
8 Case (the "2010 Depreciation Study").⁶³⁴ The average service lives are the same in both studies
9 for all accounts; thus the remaining services lives in the 2012 study merely reflect the passage of
10 time between the two studies.⁶³⁵

11 Although Big Rivers acknowledges that the Commission has independent authority to
12 review and establish Big Rivers' depreciation rates for ratemaking, it bears noting that a
13 covenant in Big Rivers' loan agreement with RUS only permits use of depreciation rates
14 approved by RUS. Because the RUS approved the 2012 Depreciation Study rates, Big Rivers
15 risks defaulting on that loan obligation if denied permission to use the proposed rates.⁶³⁶

16 The Opposing Intervenors do not provide evidence that casts any meaningful doubt on
17 the 2012 Depreciation Study. Big Rivers' proposed depreciation rates and the resulting
18 adjustment in depreciation expense will produce rates that are fair, just, and reasonable.

⁶³¹ *Id.* at p. 6:18-19.

⁶³² *Id.* at p. 6:16-18.

⁶³³ *In the Matter of: An Adjustment of the Gas Rates of the Union Light, Heat, and Power Company*, Order, P.S.C. Case No. 2005-00042, *32 (Dec. 22, 2005).

⁶³⁴ Kelly Rebuttal Testimony at p. 26:20-22. *See also id.* at pp. 7:11-13, 9:8-11; 2011 Rate Case Order at *20 (in which the Commission "authorize[d] and approve[d] Big Rivers' use, on a going-forward basis," of the 2010 depreciation rates).

⁶³⁵ Kelly Rebuttal Testimony at p. 27:17-19.

⁶³⁶ Richert Rebuttal at p. 17:15-20 (describing loan covenant); *id.* at p. 18:18-23 (noting that covenant does not give RUS regulatory authority, but the need for RUS approval of rates is still a practical consideration that the Commission should take into account).

1 Accordingly, the Commission should accept the depreciation rates set forth in the 2012
2 Depreciation Study.

3

4 **XIV. The Commission Should Accept Big Rivers' Cost of Service Study.**

5 As in its prior rate cases, Big Rivers has supported its application in this proceeding with
6 a cost of service study designed "to assess Big Rivers' overall rate of return on rate base and to
7 determine the relative rates of return that Big Rivers is earning from each rate class."⁶³⁷ This
8 study "provides an indication as to whether each class is contributing its appropriate share" of
9 Big Rivers' cost of providing service⁶³⁸ and forms the basis for Big Rivers' proposed allocation
10 of the rate adjustment among its Rural and Large Industrial rate classes.⁶³⁹

11 The cost of service study used in this proceeding employs the same methodology
12 approved by the Commission in each of Big Rivers' last two rate cases.⁶⁴⁰ As it did in previous
13 studies, Big Rivers has again followed the standard methodology for creating an embedded cost
14 of service study. Under those industry standard practices, the study was carried out by (1)
15 assigning costs to Big Rivers' major functional groups (i.e., production or transmission costs);
16 (2) classifying the costs as energy-related or demand-related; and then (3) allocating the costs to
17 the rate classes.⁶⁴¹

18 The Opposing Intervenors point to no fixed costs that were inappropriately assigned to
19 the demand charge, and they identify no variable costs that were inappropriately assigned to the
20 energy charge. Big Rivers' cost of service study is grounded in a well-recognized methodology
21 that has been approved by the Commission, and it should be approved.

⁶³⁷ Wolfram Direct Testimony at p. 18:23-19:2.

⁶³⁸ *Id.* at p. 19:2-4.

⁶³⁹ *Id.* at p. 25:6-7 ("Big Rivers relied on the results of the cost of service study to determine the allocation of the proposed revenue adjustment to the classes of service.").

⁶⁴⁰ *See Id.* at p. 19:14-16; 535 Rate Case Order at * 43-44.

⁶⁴¹ *See* Wolfram Direct Testimony at p. 19:7-10.

1 In addition, the Commission should accept Big Rivers' proposed revenue allocation
2 methodology. In the 2011 Rate Case, the Commission made clear that it wished to eliminate
3 interclass subsidies, explicitly acknowledging a goal of "moving to cost-of-service-based rates
4 for all classes."⁶⁴² In the 535 Rate Case, the Commission eliminated the Rural rate class subsidy
5 in its entirety.⁶⁴³ In accordance with these orders, Big Rivers' "proposed allocation of the
6 revenue adjustment eliminates all of the subsidization between rate classes"⁶⁴⁴ and the "rate of
7 return is calculated in this manner to provide a clear representation of the contribution that each
8 rate class is making toward providing a return on Big Rivers' total rate base."⁶⁴⁵

9 Big Rivers' proposed revenue allocation methodology is consistent with the 535 Rate
10 Case Order, and therefore, it should be adopted.

11
12 **XV. Big Rivers' Rate Case Expenses Are Fair, Just, and Reasonable and Should Be**
13 **Included in Big Rivers' Revenue Requirement and Amortized Over 36 Months.**

14 It is a well-settled principle of utility law that rate case expenses "must be included
15 among the costs of operation in the computation of a fair return."⁶⁴⁶ Big Rivers is entitled in this
16 proceeding "to recover all prudent and reasonable rate case costs."⁶⁴⁷ The Commission has also
17 held that "any request for recovery of rate case expenses must be supported by unredacted copies
18 of invoices," and that "there must be a showing that the use of highly compensated counsel was

⁶⁴² 2011 Rate Case Order at *47.

⁶⁴³ 535 Rate Case Order at *44-45 ("the Commission finds that the Rural subsidy should be eliminated in its entirety").

⁶⁴⁴ Wolfram Direct Testimony at p. 26:8-9. *See also id.* at p. 25:13-14 ("Other than the negligible effects of rounding, the proposed rates are designed to eliminate interclass subsidization for the fully forecasted test period.").

⁶⁴⁵ *Id.* at p. 26:5-7.

⁶⁴⁶ *In the Matter of: Application of Kentucky-American Water Company for an Adjustment of Rates Supported By a Fully Forecasted Test Year*, Order, P.S.C. Case No. 2010-00036, *73 (Dec. 14, 2010) (citing *West Ohio Gas Co. v. Public Utilities Comm'n*, 294 U.S. 63, 74 (1935)).

⁶⁴⁷ *See In the Matter of: Application of Kentucky-American Water Company to Increase Its Rates*, P.S.C. Case No. 97-034, Order of Sep. 30, 1997, *32.

1 essential for the particular tasks being performed.”⁶⁴⁸ As the Commission has repeatedly stated,
2 its “typical practice for many years has been to allow [a] utility to amortize its rate case expenses
3 over a three-year period and include the annual amortization expense in determining the utility’s
4 required revenue increase.”⁶⁴⁹

5 Big Rivers’ rate case expenses satisfy this “prudent and reasonable” standard and should
6 be approved. As explained previously, this case is a necessary element in Big Rivers’ Mitigation
7 Plan,⁶⁵⁰ and it is essential to securing Big Rivers’ ongoing viability.⁶⁵¹ Consequently, the
8 associated costs are a necessary and prudent investment in Big Rivers’ future.

9 The Commission has previously recognized that, due to “the additional work necessitated
10 by the use of a future test year,” rate case expenses will likely be higher in forecasted test period
11 cases than in historical test period cases.⁶⁵² Furthermore, the Commission has held that:

12 “[p]ursuant to KRS 278.180, a utility has the discretion to choose
13 the timing of its rate case applications. There is nothing in KRS
14 278 that authorizes the Commission to adopt a disincentive to, in
15 effect, penalize a utility for exercising its right to seek rate relief.’
16 It would be a disincentive to [a utility] if its shareholders are
17 denied the opportunity to recover all prudent and reasonable rate
18 case costs.”⁶⁵³

19 Here, Big Rivers’ reliance on a forecasted test period was necessitated by the significant future
20 impact of the Smelter contract terminations and the costs incurred in connection with this case
21 were prudent.

22 In addition to these generally-recognized factors, the actions of the Opposing Intervenors

⁶⁴⁸ 2011 Rate Case Rehearing Order at *6

⁶⁴⁹ *Id.* at *3 n.2. *Accord* 535 Rate Case Order at *27 (“Consistent with the Commission’s normal ratemaking practices, Big Rivers proposed to amortize [its rate case expenses] over three years.”).

⁶⁵⁰ Section VII.B.

⁶⁵¹ Speed Rebuttal Testimony at p. 16:10-11.

⁶⁵² *Kentucky-American Water*, Order, P.S.C. Case No. 97-034 at *32. *See also* Speed Rebuttal Testimony at p. 7:16-17 (explaining “that a rate case based on a fully forecasted test year is more factually complicated than a rate case based on a historical test year”).

⁶⁵³ *Kentucky-American Water*, Order, P.S.C. Case No. 97-034 at *32.

1 directly contributed to a significant portion of Big Rivers' expenses in this proceeding. Most
2 notably, Big Rivers was required to respond to approximately 1,700 data requests, counting
3 subparts, from the Opposing Intervenors. The marked increase in the number of data requests in
4 this case is attributable in large part to the Attorney General, who is single-handedly responsible
5 for more than 1,000 data requests and then, remarkably, argues against Big Rivers' recovery of
6 the costs necessary to respond to those requests in the short timeframes allotted to do so.⁶⁵⁴

7 Even in the face of these difficult circumstances, Big Rivers has remained attentive
8 throughout to the issue of legal and professional costs. Although Big Rivers does not have in-
9 house counsel or rate analysts on staff (and therefore does not have to bear those costs full-
10 time),⁶⁵⁵ Big Rivers has relied where possible on in-house employees to ensure filing compliance
11 and to perform document production tasks.⁶⁵⁶ Big Rivers secured lower blended rates for its
12 limited use of highly-compensated counsel.⁶⁵⁷ As in the 535 Rate Case, Big Rivers has also
13 adopted "a common sense approach to the division of labor that has allowed it to efficiently
14 perform all necessary work and provide all requested information on the timeline established by
15 the Commission."⁶⁵⁸

16 For preparation of its rate filings, Big Rivers turned primarily to regional counsel at
17 Sullivan, Mountjoy, Stainback & Miller PSC ("SMSM") and Dinsmore & Shohl LLP
18 ("Dinsmore").⁶⁵⁹ These firms have significant expertise representing Big Rivers before the

⁶⁵⁴ Speed Rebuttal Testimony at p. 9:14-17.

⁶⁵⁵ 535 Rate Case Order at *29.

⁶⁵⁶ Speed Rebuttal Testimony at pp. 13:20-14:3.

⁶⁵⁷ See, e.g., Mabey Hearing Testimony, Jan. 8, 2014, Tr. 15:54'17" ("[F]or this matter we have compromised the rate to a blended rate not to exceed \$600/hr."); *id.* at Tr. 16:04'12" ("I know that through the end of November, and here we agreed to a melded rate of \$600/hr so I'm going to have to use dollars, the amount of hours amounted to about \$95,000 which was then reduced by me to \$65,000."); Big Rivers' Response to Item No. 45 of Commission Staff's First Data Requests, Attachment p. 225 (Haynes and Boone LLP engagement letter detailing discounted blended rate).

⁶⁵⁸ Speed Rebuttal Testimony at p. 13:17-19.

⁶⁵⁹ *Id.* at p. 14:8-17.

1 Commission, they are located near Big Rivers' and the Commission's offices, and they bill at
2 rates commensurate with or lower than other Kentucky firms.⁶⁶⁰

3 Big Rivers relied upon national and specialized counsel only where it was essential to the
4 particular task being performed and reasonable under the circumstances. For example, Big
5 Rivers has used counsel from Orrick, Herrington & Sutcliffe only in a limited capacity to advise
6 it about issues related to Big Rivers' financing transactions—highly specialized subjects on
7 which Orrick has represented, or currently is representing, Big Rivers.⁶⁶¹ Similarly, Big Rivers
8 engaged Haynes Boone solely to advise it on the highly specialized restructuring and bankruptcy
9 issues raised by the Opposing Intervenors.⁶⁶² Big Rivers has not used highly-compensated
10 counsel from Hunton & Williams in this case,⁶⁶³ which has lowered the overall hourly rate for
11 this proceeding.⁶⁶⁴

12 Big Rivers has also been diligent about providing invoices for legal and professional
13 services on an ongoing basis. In addition to providing significant cost information in its
14 responses to data requests, Big Rivers files monthly supplements.⁶⁶⁵ Thus, all charges for legal
15 fees for this rate case are supported by detailed, unredacted invoices.

16 Big Rivers also required other professional services for this rate filing. As in the 535
17 Rate Case, Big Rivers relied heavily on Catalyst Consulting to assist in the preparation of the

⁶⁶⁰ *Id.* at p. 14:8-17.

⁶⁶¹ *Id.* at p. 16:2-8.

⁶⁶² *Id.* at pp. 14:22-15:2.

⁶⁶³ *Id.* at p. 15:5-7;

⁶⁶⁴ *See generally* 535 Rate Case Order at *29 (recognizing the decrease in the overall hourly rate attributable to the decrease use of national counsel).

⁶⁶⁵ Big Rivers' Response to PSC 1-54 (July 12, 2013); Big Rivers' First Updated Response to PSC 1-54 (July 24, 2013); Big Rivers' Second Updated Response to PSC 1-54 (August 21, 2013); Big Rivers' Third Updated Response to PSC 1-54 (Sept. 23, 2013); Big Rivers' Fourth Updated Response to PSC 1-54 (Oct. 22, 2013); Big Rivers' Fifth Updated Response to PSC 1-54 (Nov. 26, 2013); Big Rivers' Sixth Updated Response to PSC 1-54 (Dec. 23, 2013); Big Rivers' Seventh Updated Response to PSC 1-54 (Jan. 31, 2014).

1 rate filing.⁶⁶⁶ As with Big Rivers' legal fees, Catalyst Consulting's hourly rates are reasonable,
2 and all Catalyst Consulting's charges for this rate case are supported by detailed invoices.⁶⁶⁷

3 This case has featured a lengthy and comprehensive application process, extensive
4 procedural activity, more than 1,700 data requests (more than 1,900, including the Commission's
5 requests), over 900 pages of testimony and exhibits, and a long three-day evidentiary hearing.
6 As was explained in greater detail by Ms. DeAnna M. Speed, Big Rivers' Director Rates and
7 Budgets, all of Big Rivers' rate case expenses are prudent and reasonable under the
8 circumstances.⁶⁶⁸ Consistent with the Commission's standard practice, Big Rivers should
9 therefore be permitted "to amortize its rate case expenses over a three-year period and include
10 the annual amortization expense in determining the . . . required revenue increase."⁶⁶⁹

11
12 **XVI. Big Rivers' Severance Costs Are Fair, Just, and Reasonable and Should Be Included**
13 **in Big Rivers' Revenue Requirement and Amortized Over 60 Months.**

14 Big Rivers has included in its revenue requirement \$8.3 million of severance expenses
15 related to the idling of the Wilson Station and the Coleman Station.⁶⁷⁰ It should be granted the
16 authority to include in its rates those severance expenses amortized over a sixty-month period.⁶⁷¹

⁶⁶⁶ Speed Rebuttal Testimony at p. 17:5-6.

⁶⁶⁷ See *supra* n. 665.

⁶⁶⁸ See Speed Rebuttal Testimony at pp. 12:19-18:22.

⁶⁶⁹ 2011 Rate Case Rehearing Order at *3 n.2. *Accord* 535 Rate Case Order at *27 ("Consistent with the Commission's normal ratemaking practices, Big Rivers proposed to amortize [its rate case expenses] over three years.").

⁶⁷⁰ See Big Rivers Response to Item No. 37 of KIUC's First Data Requests, Attachment p. 3. Richert Hearing Testimony, Jan. 8, 2014, Tr. 12:14'43" ("What we're asking for in our revenue requirements is to be allowed to amortize the severance cost over 60 months, so we've included 1/5 of the severance costs for Coleman and 1/5 of the severance costs for Wilson in our revenue requirements.").

⁶⁷¹ See *Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company for an Order Approving Proposed Deferred Debits and Declaring the Amortization of the Deferred Debits to be Included in Earnings Sharing Mechanism Calculations*, Order, P.S.C. Case No. 2001-00169 (Dec. 3, 2001) (permitting a five year amortization period for "VDT" workforce reduction costs); *The Application of East Kentucky Power Cooperative, Inc. for an Order Approving Accounting Practices to Establish a Regulatory Asset Related to Certain Replacement Power costs Resulting from Generation Forced Outages*, Order, P.S.C. Case No. 2008-00436, *4 (Dec. 23, 2008) (indicating that extraordinary or nonrecurring expense that over time will result in a savings that fully offsets the cost should be recovered over a five-year period).

1 In 2013, Big Rivers accrued \$3.7 million of Wilson Station severance costs and \$4.6
2 million of Coleman Station severance costs.⁶⁷² When calculating those costs, Big Rivers
3 accounted for a number of factors, including the age and union status of employees, employee
4 base pay, and latest known net-premium rate for employees' insurance coverage.⁶⁷³ As
5 explained in the Direct Testimony of James V. Haner, Big Rivers' calculation of its severance
6 costs is reasonable and should be accepted.

7 For ratemaking purposes, Big Rivers' budget amortizes those costs over 60 months
8 beginning in February 2014.⁶⁷⁴ KIUC argues that amortization should be denied because Big
9 Rivers withdrew the 535 Rate Case request to accrue severance costs in a regulatory asset.⁶⁷⁵
10 However, KIUC provides no support for this argument. Commission precedent is replete with
11 instances in which the Commission allowed amortization of costs without an explicit finding that
12 a regulatory asset is needed.⁶⁷⁶ Accordingly, the Commission should grant Big Rivers the
13 authority to include its severance costs, on an amortized basis, in its rates.

14

⁶⁷² Direct Testimony of James V. Haner, Application Tab 68, p. 9:1-2 (June 28, 2013) ("Haner Direct Testimony"); Big Rivers Response to Item No. 37 of KIUC's First Data Requests, Attachment p. 3; Williams Direct Testimony at p. 14:10-16; Amended Direct Testimony of Jeffrey R. Williams (Aug. 23, 2013), p. 14:16 (correcting amortization of severance costs related to the Wilson Station to \$76,667.00 per month); Richert Rebuttal Testimony at p. 5:14-21.
⁶⁷³ See Haner Direct Testimony at p. 9:5-22. See also *id.*, Exhibit Haner-2.
⁶⁷⁴ *Id.* at p. 14:10-13; Big Rivers Response to Item No. 37 of KIUC's First Data Requests, Attachment p. 3. This includes amortization of severance costs related to the Wilson Station layup associated with Case No. 2012-00535. See Williams Direct Testimony at p. 14:14-16.
⁶⁷⁵ Hearing Testimony of Lane Kollen, Jan. 9, 2014, Tr. 19:10'56" ("Kollen Hearing Testimony"). See also Richert Rebuttal Testimony at p. 5:18-20.
⁶⁷⁶ See, e.g., *In the Matter of: Application of Center Ridge Water District, Inc., for an Adjustment of Rates Pursuant to the Alternative Rate Filing Procedure for Small Utilities*, P.S.C. Case No. 2010-00397, Order of Aug. 11, 2011, *13-14 (approving amortization of water testing for periods of three and five years without establishing a regulatory asset); *In the Matter of: Application of Farmdale Dev't Corp. for an Adjustment In Rates Pursuant to the Alternative Rate Filing Procedure for Small Utilities*, P.S.C. Case No. 2007-00436, Order of May 5, 2008 (noting amortization of expense to survey manholes); 535 Rate Case Order at *29-30 (approving amortization of rate case expenses already accrued).

1 **XVII. Big Rivers' Proposed Pro Forma Adjustments to the Calculation of Its Revenue**
2 **Requirement Produce Fair, Just, and Reasonable Rates.**

3 Pursuant to the Commission's regulations, "the financial data for the forecasted period
4 shall be presented in the form of pro forma adjustments to the base period."⁶⁷⁷ These
5 adjustments have been properly limited to the twelve months immediately following the
6 suspension period.⁶⁷⁸ For the reasons described below, Big Rivers' pro forma adjustments to the
7 calculation of its revenue requirement produce fair, just, and reasonable rates and should be
8 accepted by the Commission.

9 **A. The Adjustments Made to Account for Revenues and Expenses Addressed in**
10 **the 535 Rate Case Produce Fair, Just, and Reasonable Rates.**

11 Big Rivers submitted its application for a rate adjustment in this proceeding on June 28,
12 2013, using the rates it proposed in the 535 Rate Case as the "starting point."⁶⁷⁹ At that time, the
13 Commission had not yet issued a decision regarding Big Rivers' Application in the 535 Rate
14 Case. Consequently, Big Rivers acknowledged that it would need to adjust the rates it proposed
15 in this proceeding if the Commission established base rates different from the rates proposed by
16 Big Rivers.⁶⁸⁰

17 On October 29, 2013, the Commission issued its Order in the 535 Rate Case, granting
18 Big Rivers a base rate increase of \$54,227,241.⁶⁸¹ In an updated response to PSC 3-1, and as a
19 result of the 535 Rate Case Order, Big Rivers filed new versions of nine separate exhibits and
20 revised its proposed rates.⁶⁸² Big Rivers later revised those exhibits and its proposed rates

⁶⁷⁷ 807 KAR 5:001(16)(11)(a).

⁶⁷⁸ See 807 KAR 5:001(16)(11)(b).

⁶⁷⁹ Wolfram Direct Testimony at pp. 35:22-36:1.

⁶⁸⁰ *Id.* at pp. 35:20-36:1.

⁶⁸¹ 535 Rate Case Order at *2.

⁶⁸² Wolfram Rebuttal Testimony at pp. 34:15-35:1; Updated Response to Item No. 1 of Commission Staff's Third Data Requests (Nov. 12, 2013).

1 slightly when it filed its rebuttal testimony to reflect items not accounted for in the updated
2 response to PSC 3-1.⁶⁸³

3 First, Big Rivers removed from its revenue requirement in this case depreciation
4 expenses of \$6,466,191 associated with the Coleman Station.⁶⁸⁴ Second, Big Rivers removed
5 from its revenue requirement in this case \$450,000 of labor expenses associated with 2014 pay
6 increases for non-bargaining employees.⁶⁸⁵ Third, Big Rivers included in the revenue
7 requirement in this case the difference between the 535 Rate Case rate case costs approved by
8 the Commission in the 535 Rate Case Order and the amount Big Rivers originally included in the
9 test period in this filing.⁶⁸⁶ This resulted in the addition of \$16,331 in amortized expenses.⁶⁸⁷

10 As a result of these filings, Big Rivers has appropriately adjusted for all revenue
11 requirement changes necessitated by the 535 Rate Case Order. These adjustments to remove
12 revenues and expenses addressed in the 535 Rate Case Order produce fair, just, and reasonable
13 rates and should be accepted by the Commission.

14 **B. The Adjustments Made to Account for Revenues and Expenses Addressed in**
15 **Case No. 2013-00221 Produce Fair, Just, and Reasonable Rates.**

16 When Big Rivers filed its Application for a rate adjustment in this case on June 28, 2013,
17 the Commission had not yet issued a final order regarding the Century Hawesville Smelter
18 Transaction submitted for Commission approval in Case No. 2013-00221. The Commission
19 approved this transaction by order dated August 14, 2013, and the transaction was subsequently
20 executed and became effective on August 20, 2013. Consequently, Big Rivers proposes

⁶⁸³ See Wolfram Rebuttal Testimony at p. 33:4-5.

⁶⁸⁴ *Id.* at p. 32:18; see 535 Rate Case Order at *33. The value used differs slightly from that in the 535 Rate Case Order because the test period in this case differs from that in Case No. 2012-00535.

⁶⁸⁵ Wolfram Rebuttal Testimony at p. 32:22-23; see 535 Rate Case Order at *23. The value used differs slightly from that in the 535 Rate Case Order because the test period in this case differs from that in Case No. 2012-00535.

⁶⁸⁶ Wolfram Rebuttal Testimony at p. 33:7-10; 535 Rate Case Order at *30.

⁶⁸⁷ This only relates to the on-going amortization of Case No. 2012-00535 costs; no changes are required for the proposed amortization of the rate case costs related to the instant proceeding.

1 adjustments to reduce the revenue requirement for items that were previously included in the
2 revenue requirement, but for which Big Rivers now expects to be reimbursed as a result of the
3 Commission's approval of the Century Hawesville Smelter Transaction. Accordingly, Big
4 Rivers has removed from the test period revenue requirement the portion of the ACES expenses,
5 NERC dues, National Renewables Cooperative dues, the PSC Assessment, SERC dues, and the
6 portion of the Coleman Station's property taxes and insurance attributable to the Hawesville
7 Smelter that were included in the test period revenue requirement but for which Big Rivers will
8 be reimbursed by Century.⁶⁸⁸

9 Big Rivers has appropriately adjusted for all rate base changes introduced by the
10 Hawesville Smelter Transaction. Thus, the adjustments to remove revenues and expenses
11 addressed in the Case No. 2013-00221 produce fair, just, and reasonable rates and should be
12 accepted by the Commission. A similar adjustment for reimbursements Big Rivers will receive
13 from Century related to the Sebree Smelter is addressed in Section IX.

14 **C. The Adjustments Made to Account for Fuel Cost Expenses and Revenues**
15 **Included in the Fuel Adjustment Clause, to Remove the Environmental**
16 **Surcharge, and to Remove Non-FAC PPA Revenues Produce Fair, Just, and**
17 **Reasonable Rates.**

18 Consistent with standard Commission practice of eliminating the revenues and expenses
19 associated with full-recovery cost trackers,⁶⁸⁹ Big Rivers has made adjustments to remove all
20 revenues and expenses that are addressed in various other rate mechanisms.⁶⁹⁰ Specifically, Big
21 Rivers has made adjustments to remove fuel expenses and revenues addressed by the FAC rate

⁶⁸⁸ Wolfram Rebuttal Testimony at p. 33:18-22; Berry Rebuttal Testimony, Exhibit Berry Rebuttal-6.

⁶⁸⁹ Wolfram Direct Testimony at p. 12:14-16.

⁶⁹⁰ *Id.* at p. 11:21-22.

1 mechanism, to remove the environmental surcharge, and to remove non-FAC PPA revenues.⁶⁹¹

2 No party has disputed these adjustments.

3 The revenue and expense values associated with the FAC mechanism adjustment are
4 identical because Big Rivers based its application on a fully forecasted test year and assumes
5 perfect rate treatment for the FAC rate mechanism.⁶⁹² Because these adjustments account only
6 for revenues and expenses accounted for in the separate FAC rate mechanism, they produce fair,
7 just, and reasonable rates and should be accepted by the Commission.

8 Big Rivers similarly has projected zero net impact to its fully forecasted rates from the
9 environmental surcharge. Since 2009, the Commission has allowed Big Rivers the authority to
10 collect an “Environmental Surcharge.”⁶⁹³ Because that surcharge “provides for full recovery of
11 approved environmental costs that qualify for the surcharge,” Big Rivers properly made an
12 adjustment “to eliminate ES revenues and expenses during the test year.”⁶⁹⁴ Accordingly, these
13 adjustments produce fair, just, and reasonable rates and should be accepted by the Commission.

14 For the same reason, Big Rivers made an adjustment to eliminate from its proposed base
15 rates any projected revenues and expenses associated with the Non-FAC PPA. As with the
16 Environmental Surcharge, the Commission has permitted Big Rivers to recover Non-FAC fuel
17 recovery costs through a full-recovery cost tracker.⁶⁹⁵ Therefore, “an adjustment was made to

⁶⁹¹ Wolfram Direct Testimony at pp. 12:3-13:3; *see id.*, Exhibit Wolfram-2.

⁶⁹² *Id.* at p. 12:8-10. *See also* Wolfram Rebuttal Testimony, Exhibit Wolfram 2.2, p. 2, Reference Schedule 1.01.

⁶⁹³ *See, e.g., In the Matter of: An Examination by The Public Service Commission of The Environmental Surcharge Mechanism of Big Rivers Electric Corporation For The Six-Month Billing Periods Ending January 31, 2012 and July 31, 2012 and The Pass Through Mechanism of Its Three Member Distribution Cooperatives*, Order, P.S.C. Case No. 2012-00534, *1 n.1 (May 6, 2013).

⁶⁹⁴ Wolfram Direct Testimony at p. 12:14-17. *See also* Wolfram Rebuttal Testimony, Exhibit Wolfram-2.2, p. 3, Reference Schedule 1.02; Big Rivers’ Response to Item No. 7 of Commission Staff’s Third Data Requests.

⁶⁹⁵ *See* Wolfram Direct Testimony at p. 16:5-7; 2011 Rate Case Order at *51 (describing Big Rivers’ Non-FAC PPA recovery mechanisms for smelter and non-smelter customers).

1 eliminate Non-FAC PPA revenues and expenses during the test year.”⁶⁹⁶ This adjustment
2 produces fair, just, and reasonable rates and should be approved by the Commission.

3 **D. The Adjustments to Remove Certain Revenues and Expenses Consistent with**
4 **Commission Practice Produce Fair, Just, and Reasonable Rates.**

5 Big Rivers made additional adjustments to remove certain expenses that are not
6 “includable in a gas or electric utility’s cost of service for rate-making purposes” pursuant to 807
7 KAR 5:016 and Commission precedent. First, Big Rivers adjusted its operating expenses to
8 remove \$55,756 in promotional advertising expenses.⁶⁹⁷ Second, Big Rivers adjusted its
9 expenses to exclude \$71,023 in political lobbying expenses, including the “costs for an outside
10 firm,” “the portions of Big Rivers’ internal expenses related to lobbying,” and “the portion of
11 National Rural Electric Cooperative Association (“NRECA”) dues that NRECA specifies on its
12 invoices as lobbying-related.”⁶⁹⁸ Third, Big Rivers adjusted its operating expenses to remove
13 \$144,568 in annual economic development payments to its Members.⁶⁹⁹ Fourth, Big Rivers
14 adjusted its operating expenses to eliminate \$63,328 in donations expenses.⁷⁰⁰ Fifth, Big Rivers
15 adjusted its operating expenses to eliminate \$132,766 in Touchstone Energy dues.⁷⁰¹ No party
16 has disputed these adjustments. These adjustments, which are consistent with standard
17 Commission practice, result in rates that are fair, just, and reasonable rates and should be
18 approved by the Commission.

⁶⁹⁶ Wolfram Direct Testimony at p. 13:2-3. *See also* Wolfram Rebuttal Testimony, Exhibit Wolfram 2.2 at p. 4, Reference Schedule 1.03.

⁶⁹⁷ Wolfram Direct Testimony at p. 13:6-7; Wolfram Rebuttal Testimony, Exhibit Wolfram-2.2, p. 5, Reference Schedule 1.04.

⁶⁹⁸ Wolfram Direct Testimony at p. 13:10-15; Wolfram Rebuttal Testimony, Exhibit Wolfram-2.2, p. 6, Reference Schedule 1.05.

⁶⁹⁹ Wolfram Direct Testimony at p. 13:18-21; Wolfram Rebuttal Testimony, Exhibit Wolfram-2.2, p. 7, Reference Schedule 1.06.

⁷⁰⁰ Wolfram Direct Testimony at p. 14:1-2; Wolfram Rebuttal Testimony, Exhibit Wolfram-2.2, p. 8, Reference Schedule 1.07.

⁷⁰¹ Wolfram Direct Testimony at p. 14:5-7; Wolfram Rebuttal Testimony, Exhibit Wolfram-2.2, p. 9, Reference Schedule 1.08.

1 **E. The Adjustment to Account for the Revenue Credits That Correspond to the**
2 **Smelter Surcharge Payments Produces Fair, Just, and Reasonable Rates.**

3 Big Rivers made an adjustment to account for the revenue credit provided to the Rurals
4 and Large Industrials by virtue of Section 4.11 of the now-terminated Smelter Agreements.⁷⁰²
5 Because the Smelters will no longer pay the surcharge as a result of their terminations of the
6 Smelter Agreements, the pass-through of those funds to the Rural and Large Industrial customer
7 classes will cease.⁷⁰³ The Sebree Smelter will provide the surcharge up to and including the
8 service month of January 2014; but the surcredit, which is applied after the surcharge is
9 collected, will cease in 2015.⁷⁰⁴ Because both will be eliminated as a result of the termination of
10 the Smelter Agreements, and in order to satisfy the matching principle, neither the surcharge
11 amounts nor the surcredit amounts should remain in the test period revenue requirement.⁷⁰⁵ The
12 adjustment to remove the nonrecurring Smelter surcredit amounts thus produces fair, just, and
13 reasonable rates and should be approved by the Commission.

14 **F. The Adjustment to Eliminate Certain Non-Recurring Labor Expenses at the**
15 **Coleman Station Produces Fair, Just, and Reasonable Rates.**

16 Big Rivers proposes an adjustment to eliminate certain expenses associated with the
17 anticipated lay-up of the Coleman Station.⁷⁰⁶ The adjustment was calculated to eliminate the
18 burdened labor expenses for the Coleman plant and plant-related staff included in the 2014
19 forecast in February, March, and April when the anticipated lay-up is to occur.⁷⁰⁷ The burdened
20 labor expenses for the affected departments were scaled by the ratio of “pre-lay-up” headcount to
21 “post-lay-up” headcount in order to adjust the plant-related burdened labor in total to a

⁷⁰² Wolfram Direct Testimony at p. 14:10-12.

⁷⁰³ *Id.* at p. 14:14-16.

⁷⁰⁴ *Id.* at p. 14-16-19.

⁷⁰⁵ Big Rivers’ Response to Item No. 4 of Commission Staff’s Third Data Requests.

⁷⁰⁶ Wolfram Direct Testimony at p. 15:14-16.

⁷⁰⁷ Wolfram Rebuttal Testimony, Exhibit Wolfram-2.2, p. 11, Reference Schedule 1.10.

1 representative level on a forecasted, prospective basis.⁷⁰⁸ Because these costs are non-recurring
2 from a ratemaking standpoint, they should be excluded from the revenue requirement.
3 Accordingly, Big Rivers' adjustment to eliminate these non-recurring expenses produces fair,
4 just, and reasonable rates and should be approved by the Commission.

5 **G. The Adjustments Normalizing Annual Expenses for Outside Professional**
6 **Services Produce Fair, Just, and Reasonable Rates.**

7 Big Rivers proposed an adjustment to normalize annual expenses for certain outside
8 professional services.⁷⁰⁹

9 Big Rivers normalizes expenses incurred for three different initiatives that require the use
10 of outside professional services into a single adjustment.⁷¹⁰ First, Big Rivers budgets \$445,000
11 to prepare an IRP every three years.⁷¹¹ Due to timing issues, \$60,000 is included in the test
12 period, while the remaining costs for the upcoming IRP were budgeted to be incurred prior to the
13 test period.⁷¹² This adjustment normalizes the full cost for the professional services related to the
14 IRP over three years.⁷¹³

15 Second, Big Rivers prepares a load forecast every two years for which it budgets
16 \$65,000.⁷¹⁴ Due to timing issues, only \$17,240 for the load forecast is included in the test
17 period.⁷¹⁵ The proposed adjustment normalizes the full cost for the professional services related
18 to the load forecast over two years.⁷¹⁶

⁷⁰⁸ Wolfram Direct Testimony at pp. 15:21-16:2.

⁷⁰⁹ Wolfram Rebuttal Testimony, Exhibit Wolfram-2.2, p. 12, Reference Schedule 1.11.

⁷¹⁰ Wolfram Direct Testimony at p. 17:10-11.

⁷¹¹ *Id.* at p. 16:18-19.

⁷¹² *Id.* at p. 16:20-21.

⁷¹³ *Id.* at p. 16:21-23.

⁷¹⁴ *Id.* at p. 17:1-2.

⁷¹⁵ *Id.* at p. 17:2-3.

⁷¹⁶ *Id.* at p. 17:3-4.

1 Finally, from time to time, Big Rivers initiates a Transient Stability Study for
2 transmission system reliability purposes.⁷¹⁷ Big Rivers budgeted \$30,000 for this initiative in the
3 test period.⁷¹⁸ Because this study is undertaken only as system conditions warrant, and there is
4 no set periodicity for this study, the proposed adjustment removes this cost from the revenue
5 requirement.⁷¹⁹

6 No party has disputed this adjustment. This adjustment produces fair, just, and
7 reasonable rates and it should be approved by the Commission.

8 **H. The Adjustments to the Revenue Requirements to Account for Demand Side**
9 **Management Programs Produce Fair, Just, and Reasonable Rates.**

10 Big Rivers proposes an adjustment to ensure that expenses of \$1 million for Demand Side
11 Management (“DSM”) and energy efficiency programs are included in the revenue requirement
12 and allocated only to the Rural rate class.⁷²⁰

13 Big Rivers sought and was granted a \$1 million pro forma adjustment for its DSM
14 programs in the 2011 Rate Case,⁷²¹ and it currently offers twelve DSM programs to Rural
15 customers.⁷²² In 2013, Big Rivers budgeted over \$1.3 million on its DSM programs.⁷²³
16 Consistent with the Commission’s findings in the 2011 Rate Case, the proposed rates assign all
17 of the DSM expenses to the Rural rate class.⁷²⁴

18 This adjustment removes the amounts that exceed \$1 million from the test period revenue
19 requirement because these amounts are non-recurring.⁷²⁵ No party has disputed this adjustment.

⁷¹⁷ *Id.* at p. 17:5-6.

⁷¹⁸ *Id.* at p. 17:7.

⁷¹⁹ *Id.* at p. 17:6-9.

⁷²⁰ *Id.* at p. 17:14-16; Wolfram Rebuttal Testimony, Exhibit Wolfram-2.2, p. 13, Reference Schedule 1.12.

⁷²¹ 2011 Rate Order at *22.

⁷²² Barron Direct Testimony at pp. 9:6-12:3

⁷²³ See *Tariff Filing of Big Rivers Electric Corporation to Revise and Implement Demand-Side Management Programs*, Order, P.S.C. Case No. 2013-00099 (June 6, 2013).

⁷²⁴ Wolfram Direct Testimony at p. 37:6-8.

⁷²⁵ *Id.* at p. 18:2-4.

1 The adjustment produces fair, just, and reasonable rates and should be approved by the
2 Commission.

3 **I. The Adjustment to Recover Certain Nonrecurring, Non-Labor Expenses**
4 **Related to the Coleman Plant Layup, Amortized Over 60 Months, Produces**
5 **Fair, Just and Reasonable Rates.**

6 Big Rivers proposes an adjustment that removes the nonrecurring non-labor costs in the
7 forecast related to the Coleman plant lay-up⁷²⁶ but includes the amortization of these prudently-
8 incurred costs over 60 months in Big Rivers' revenue requirement. These costs are for materials
9 and outside professional services attributable to preparing the Coleman facilities to idle for an
10 extended period.⁷²⁷ It is appropriate for the Commission to allow Big Rivers to recover the
11 amortized portion of the non-recurring non-labor expenses related to the Coleman Station layup
12 as an extraordinary expense because such treatment is consistent with the Commission's practice
13 of amortizing prudently-incurred "extraordinary" expenses over a five-year period. This is an
14 expense "which could not have been reasonably anticipated or included in the utility's planning"
15 because the one-time expense of \$2,909,526 for these costs in the test period is prudent, material,
16 and could not have been reasonably anticipated by Big Rivers before the Smelter contract
17 termination notice was provided.⁷²⁸ No party has disputed this adjustment. The adjustment
18 produces fair, just, and reasonable rates and should be approved by the Commission.

19 **J. The Adjustment to Recover Certain Non-Recurring Costs Related to the**
20 **MISO-Administered Annual Resource Adequacy Auction, Amortized Over**
21 **60 Months, Produces Fair, Just and Reasonable Rates.**

22 Big Rivers proposes an adjustment that removes certain nonrecurring costs related to the
23 MISO-administered Annual Resource Adequacy Auction associated with the idling of generation

⁷²⁶ *Id.* at p. 18:7-8; Wolfram Rebuttal Testimony, Exhibit Wolfram-2.2, p. 14, Reference Schedule 1.13.

⁷²⁷ Wolfram Direct Testimony at p. 8:9.

⁷²⁸ *See id.*, Exhibit Wolfram-2, Reference Schedule 1.13.

1 facilities⁷²⁹ but includes the amortization of these prudently-incurred costs over 60 months in Big
2 Rivers' revenue requirement. MISO requires that generators who idle resources within the
3 resource adequacy planning year (June-May) replace any capacity which was offered into the
4 annual auction.⁷³⁰ Because Big Rivers was responsible for covering the load of both Smelters
5 during the time of MISO's annual peak (August 2013), Big Rivers will be required to replace the
6 capacity for any months in which units are idled.⁷³¹ It is appropriate for the Commission to
7 allow Big Rivers to recover the amortized portion of the non-recurring capacity charges as an
8 extraordinary expense because such treatment is consistent with the Commission's practice of
9 amortizing prudently-incurred "extraordinary" expenses over a five-year period. This is an
10 expense "which could not have been reasonably anticipated or included in the utility's planning"
11 because the one-time expense of \$510,522 for these costs in the test period is prudent, material,
12 and could not have been reasonably anticipated by Big Rivers before the Smelter contract
13 termination notice was provided.⁷³² No party has disputed this adjustment. Because the
14 adjustment produces fair, just, and reasonable rates, it should be approved by the Commission.

15

16 **XVIII. The Opposing Intervenors' Proposed Adjustments Are Not Fair, Just, and**
17 **Reasonable and Should Be Rejected.**

18 Big Rivers discusses, above, the disastrous consequences of the Opposing Intervenors'
19 positions. The following subsections address the specific adjustments proposed by each
20 Opposing Intervenor, and explain why those proposed adjustments should be rejected.

⁷²⁹ *Id.* at p. 18:13-14.

⁷³⁰ Barron Direct Testimony at p. 14:10-12.

⁷³¹ *Id.* at p. 14:12-15.

⁷³² Big Rivers' Response to Item No. 40(e) of KIUC's Second Data Requests.

1 **A. Big Rivers' Management Decisions Have Been Reasonable, and the Opposing**
2 **Intervenors Have Not Shown Otherwise.**

3 Many of the Opposing Intervenors' proposals hinge on unsubstantiated allegations of
4 poor decision-making, bad faith, or bad character on the part of Big Rivers.⁷³³ As established
5 above, Big Rivers' management has at all times acted in good faith and engaged in reasonable
6 decision-making.⁷³⁴ Additionally, the law has a long-established presumption that a utility's
7 management decisions are reasonable. The Opposing Intervenors have offered nothing but
8 speculative suspicions in support of their inappropriate accusations. They have not, and cannot,
9 overcome the law's presumption of reasonableness. Consequently, the Opposing Intervenors'
10 proposed adjustments should be rejected.

11 It is a longstanding principle of law that utility "[m]anagement decisions are presumed to
12 be reasonable."⁷³⁵ As explained by the Commission, "[t]he burden of overcoming the
13 presumption of managerial good faith falls on the party challenging it."⁷³⁶ A decision-maker
14 cannot rely on hindsight to judge management's actions; rather, "[m]anagement must be judged
15 on what was known or should have been known at the time of its decision."⁷³⁷

16 Here, as discussed in detail in the subsections below, the Opposing Intervenors have
17 uniformly failed to substantiate the allegations that underlie their proposed adjustments, and they
18 have thus failed to meet their burden of proof to overcome the presumption of managerial good

⁷³³ Ostrander Direct Testimony at p. 19:20 (characterizing Big Rivers' forecasting incorrect and improper); Baron Direct Testimony at p. 10:24 (referring to a Big Rivers proposal as "unreasonable"); Ackerman Direct Testimony at p. 11:16 (describing Big Rivers' methodology as "unreasonable."). *See also, e.g.*, Richert Rebuttal Testimony at p. 24:12-13.

⁷³⁴ Bailey Rebuttal Testimony at p. 14:18-19. *See also, e.g.*, 535 Rate Case Order at *1 (available generating capacity "is not the result of any imprudent decisions by Big Rivers").

⁷³⁵ *West Ohio Gas Co. v. Ohio Pub. Util. Comm'n*, 294 U.S. 63 (1935).

⁷³⁶ *In the Matter of Proposed Adjustment of the Wholesale Water Service Rates of the City of Pikeville, Kentucky*, Order, P.S.C. Case No. 2002-00022, *15-16 (Oct. 18, 2002) (finding that utility's decisions were reasonable despite certain "concerns" of the Commission).

⁷³⁷ *Id.* at *15 (internal citations omitted).

1 faith. Moreover, as set forth throughout the brief above, Big Rivers' decisions were reasonable
2 and well-supported.

3 For these reasons, the Commission should reject all of the Opposing Intervenors'
4 proposals based on unsubstantiated allegations of bad faith and poor decision-making.

5 **B. The Opposing Intervenors Make the Same Basic Proposals the Commission**
6 **Rejected in the 535 Rate Case.**

7 The Opposing Intervenors in this proceeding present a number of proposals that largely
8 echo the approaches they took in the 535 Rate Case.⁷³⁸ The Commission should reject these
9 proposals for the same reasons it rejected them in the 535 Rate Case Order.

10 The Attorney General proposes removing the entire revenue deficiency calculated by Big
11 Rivers, a position that Commission rejected in the 535 Rate Case.⁷³⁹ The Attorney General also
12 proposes authorizing a 1.10 TIER,⁷⁴⁰ which the Commission also rejected in the 535 Rate
13 Case.⁷⁴¹ Consequently, the Commission should reject the Attorney General's proposals.

14 KIUC explicitly admits it is proposing essentially the same plan the Commission rejected
15 in the 535 Rate Case. Mr. Kollen argues that "the Commission should adopt the KIUC Rate Plan
16 proposed in the Century rate case and that I propose again in this case, modified only to include
17 certain 'reasonable increase[s].'"⁷⁴² Similarly, Sierra Club continues to offer proposals in line
18 with the narrow set of special interests advanced by the organization⁷⁴³ and which would have
19 functionally the same effects as its recommendations in the 535 Rate Case, as well as the KIUC's
20 and Attorney General's recommendations in this case.⁷⁴⁴

⁷³⁸ Richert Rebuttal Testimony at p. 28:14-15; *id.* at pp. 32:23-33:2.

⁷³⁹ See 535 Rate Case Order at *2 ("[T]he Commission is granting Big Rivers a base rate increase of \$54,227,241").

⁷⁴⁰ Ostrander Direct Testimony at pp. 7:4-9:15.

⁷⁴¹ 535 Rate Case Order at *41-42. See also Richert Rebuttal Testimony at p. 33:5-8.

⁷⁴² Kollen Direct Testimony at p. 10:4-7.

⁷⁴³ Richert Direct Testimony at p. 35:16-17 ("[The Sierra Club's] position is consistent with Sierra Club's political opposition to fossil fuel-fired power plants.").

⁷⁴⁴ Richert Rebuttal Testimony at p. 26:20-21.

1 In short, the Opposing Intervenors have not raised any arguments or shown any evidence
2 that demonstrates that the Commission was incorrect in previously rejecting these proposals. As
3 set forth in Section IX above, the Opposing Intervenors' recommendations turn a blind eye to the
4 economic reality that Big Rivers faces and would require Big Rivers to expend still more
5 resources to prosecute a case for additional rate relief or seek bankruptcy protection. In the 535
6 Rate Case, the Commission properly rejected the same basic proposals that the Opposing
7 Intervenors advance in this proceeding, and the Commission would be correct to do so again.

8 **C. The Commission Should Reject Proposals to Retire Generation Assets or to**
9 **Force Sale Below Book Value as Imprudent and Wasteful.**

10 Suggestions that Big Rivers should be required to retire generation assets or sell them at a
11 price below book value are misguided and should be rejected. Retiring a plant or selling a plant
12 at "fire sale" prices is tantamount to throwing away the valuable assets that undergird the
13 feasibility of Big Rivers' Mitigation Plan.⁷⁴⁵ This approach would undermine the equity
14 necessary for Big Rivers to access the capital market.⁷⁴⁶ It would also constitute permanent
15 waste, because the plants would be unlikely to ever be rebuilt.⁷⁴⁷

16 There are numerous flaws in the suggestion that Big Rivers retire or sell its generating
17 assets at less than book value.⁷⁴⁸ First, retirement or a sale at rock-bottom prices "would reduce
18 Members' equity and the collateral that those plants provide."⁷⁴⁹ It is vitally important for Big
19 Rivers to maintain its equity, especially now that all three of its credit ratings are below

⁷⁴⁵ See Section VIII.A.

⁷⁴⁶ Richert Rebuttal Testimony at pp. 34:22-35:1, 35:17-20. Bailey Hearing Testimony, Jan. 7, 2014, Tr. 16:58'52".

⁷⁴⁷ See Bailey Rebuttal Testimony at p. 4:14-15 ("Electric generation plants are extremely expensive, and they take a long time to construct."). Additionally, Big Rivers would first be required to engage in the lengthy and expensive process of seeking regulatory approval from state and federal authorities.

⁷⁴⁸ Ackerman Direct Testimony at p. 5:28-29.

⁷⁴⁹ Berry Rebuttal Testimony at p. 29:20-21; see also Richert Rebuttal Testimony at p. 35:17-20; Bailey Hearing Testimony, Jan. 7, 2014, 15:37'42" ("However, if [the Wilson and Coleman Stations] were to be sold significantly below book value, it would be an earnings hit which would obviously affect our TIER and MFIR, and also a balance sheet hit, where our equity could become such that we may not be able to continue to attract capital.").

1 investment grade, because Big Rivers' equity is one of the few remaining positives recognized
2 by the credit agencies.⁷⁵⁰

3 Second, by retiring a plant or selling below book value, Big Rivers would still be forced
4 to pay the remaining principal and interest expense attributable to the financing that was needed
5 to construct it; and yet, it would be unable to enjoy the benefits of that plant in support of its
6 Mitigation Plan.⁷⁵¹

7 Third, once either Coleman or Wilson is sold, it becomes factored into the calculation of
8 Bondable Additions available for the issuance of additional Obligations and certain other actions
9 under the Indenture. Because of the net book value of Wilson Station and Coleman Station as of
10 December 31, 2008, as compared to possible sales prices of those assets under current market
11 conditions, it is possible that all of Big Rivers' Bondable Additions would be wiped out, which
12 would leave Big Rivers no room to borrow additional funds under the Indenture.

13 Finally, retirement or sale of the plants at less than net book value would eliminate the
14 expected benefits of Big Rivers' Mitigation Plan, in which Big Rivers has already sunk
15 significant costs, without any counterbalancing benefit. The Mitigation Plan was developed as
16 an extension of the measures Big Rivers undertook to mitigate the risks of the Unwind
17 Transaction approved by the Commission, including the transmission system upgrades designed
18 to increase Big Rivers' ability to export energy "in the event the smelters terminate their
19 prospective service contracts with Big Rivers . . ."⁷⁵² A forced sale or retirement would
20 dramatically decrease Big Rivers' available capacity, reducing its ability to mitigate the effects

⁷⁵⁰ Richert Rebuttal Testimony at p. 35:20-36:3. See also Bailey Hearing Testimony, Jan. 7, 2014, Tr. 13:38'56" (citing negative financial consequences of selling assets below book value); Mabey Hearing Testimony, Jan. 8, 2014, Tr. 15:37'18" ("[I]f you eliminate from the rate base something well below book value, these assets, then I think then everyone would understand that the Commission could not guarantee the repayment . . .").

⁷⁵¹ Bailey Hearing Testimony, Jan. 7, 2014, Tr. 14:48'16".

⁷⁵² 2007 CPCN Order at *10 (emphasis added).

1 of the Smelters' contract terminations, as well as its ability to reduce the rate adjustments from
2 this case and the 535 Rate Case.

3 In addition to these substantive problems, there is no evidence that Big Rivers' creditors
4 would give the approvals necessary for Big Rivers' to sell the Stations at the amounts proposed
5 by the Opposing Intervenors. The RUS Loan Contract and the Big Rivers Indenture both place
6 constraints on the sale by Big Rivers of either the Coleman or Wilson generating station.

7 The RUS Loan Contract offers alternate paths for RUS scrutiny of a major Big Rivers
8 asset sale. The RUS Loan Contract provides that Big Rivers will not, without complying with
9 certain requirements, "sell, convey, transfer, . . . or otherwise dispose of . . . Capital Assets . . . or
10 request the release of or release any Capital Assets from the lien of the Indenture . . . except in
11 compliance with all applicable RUS Regulations, including, without limitation, RUS Bulletin
12 1717M-2 [the "Bulletin"], . . ." ⁷⁵³ Section 3 of the Bulletin requires all sales to meet the
13 following requirements, among others: (i) the selling price shall not be less than the fair market
14 value of the capital asset; (ii) the sale must be in the best interests of the mortgagees (RUS and
15 other secured lenders); and (iii) unless the seller, as an existing RUS borrower, is dissolved, its
16 electric system after the sale will constitute a satisfactory operating unit and the sale will not
17 jeopardize the repayment of the seller's RUS and other loans.

18 Although there are instances in which RUS would not need to approve a sale in which a
19 lien release is required, that can only be the case on the condition that, among other things, "the
20 aggregate value of assets sold, leased or transferred in any 12-month period is . . . no more than
21 \$5 million for power supply borrowers." ⁷⁵⁴ Here, the value of a sale of either the Coleman or

⁷⁵³ See RUS Loan Contract, Sections 5.3, 8.1.

⁷⁵⁴ See Bulletin, Section 4a(1).

1 Wilson Stations would be in excess of the \$5 million threshold, and RUS approval for the sale
2 would be required under the Bulletin.

3 If Big Rivers alternately proceeds under Section 8.1 of the RUS Loan Contract, it must
4 give notice to RUS of the transaction together with drafts of any documents to effectuate the
5 transaction. RUS then has 60 days to give Big Rivers notice that it cannot complete the sale
6 without express RUS approval. The Section 8.1 procedure presents a potential “chicken-and-
7 egg” dilemma in which a possible buyer is unwilling to undertake the effort and expense to
8 negotiate a transaction and all of the transaction documents with no indication if RUS will allow
9 the transaction, but RUS cannot make a decision without knowing the details of the transaction,
10 and perhaps seeing substantially complete transaction documents. If RUS approval is required,
11 Big Rivers would work diligently with RUS, but it cannot predict whether RUS would give its
12 approval, the factors that may be considered for purposes of such approval, or the time frame for
13 reaching any such decision. The entire process would be further complicated by: (i) Big Rivers’
14 failure to have maintained two investment grade credit ratings as required by Section 4.23 of the
15 RUS Loan Contract; and (ii) the fact that the sale was being forced by Commission action at the
16 urging of intervenors, signaling a loss of regulatory support.

17 Big Rivers would have no control over how long this process might take and the nature of
18 any RUS requirements for the sale to proceed.

19 In addition, both the Coleman and Wilson Stations are subject to the lien of the Indenture
20 and must be released from the lien of the Indenture in order to be sold. Section 5.2 of the
21 Indenture permits releases of property only if its requirements are met. These requirements
22 include a resolution of the Board of Big Rivers and an Officers’ Certificate (the “Release

1 Certificate”) which would include certain findings by an Independent Engineer and other
2 findings by an Independent Engineer or an Independent Appraiser.

3 In the Release Certificate, the Independent Engineer will be required to make a finding
4 that “. . . such release is desirable in the conduct of the business and such property is not
5 reasonably necessary in the conduct of the business of the Company.” The Certificate also needs
6 to contain statements made by Officers of Big Rivers that no Event of Default under the
7 Indenture exists and the proposed release will not impair the security for the Indenture, a
8 statement that could be problematic at that time. The Independent Engineer or Appraiser is
9 required to certify the fair value of the property to be released and that the proposed release will
10 not impair the security under the Indenture.

11 For these reasons, it would be imprudent, difficult, and wasteful for Big Rivers to dispose
12 of physical plant in a forced liquidation and lose the benefits those generating assets provide to
13 Big Rivers’ Members, western Kentucky, and the Commonwealth. Furthermore, the proposed
14 fire sales likely would not even meet the basic requirements necessary for the approval of Big
15 Rivers’ creditors. Instead of pursuing the destruction of valuable assets, the Commission should
16 grant Big Rivers’ proposed rate relief and enable Big Rivers to temporarily idle a plant, maintain
17 its value, and preserve its ability to benefit Big Rivers’ Members, their retail customers, and,
18 indeed, the entire Commonwealth long into the future.

19 **D. The Commission Should Reject the Attorney General’s Proposals.**

20 **1. The Commission should reject proposed adjustment OAG-1-DB,**
21 **removing lost margins due to the impact of the Sebree Smelter**
22 **termination.**

23 The Attorney General proposes removing the full amount of Big Rivers’ revenue
24 requirement to “remove the impact of ‘lost margins’ from the departure” of the Sebree Smelter

1 from Big Rivers' system.⁷⁵⁵ This adjustment is functionally identical to the adjustment proposed
2 by the Attorney General in the 535 Rate Case to remove the lost margins forecasted to result
3 from the Hawesville Smelter contract termination.⁷⁵⁶ The Commission rejected this proposed
4 adjustment in the 535 Rate Case, and it should do so again in this proceeding. The Attorney
5 General's proposal is premised on a gross mischaracterization of the Unwind Transaction, and it
6 would lead directly to the disastrous financial consequences described in Section IX.

7 The Attorney General apparently intends this adjustment to be punitive. According to
8 Attorney General witness David Brevitz, the fact that the Unwind Transaction was a "bargained-
9 for exchange" means that under no circumstances should any class of retail customers pay any
10 costs that were once paid by the Sebree Smelter.⁷⁵⁷ This argument inaccurately frames the
11 Unwind Transaction as a guarantee against future rate adjustments to respond to a smelter
12 closure. Mr. Brevitz completely ignores the fact that the Sebree Smelter terminated its contract
13 pursuant to the very agreements approved by the Commission as part of that "bargained-for
14 exchange." Big Rivers, its Members, and the Members' retail customers should not be punished
15 for the Sebree Smelter's unilateral contract termination.

16 Moreover, as set forth in Section IV.A, all stakeholders, including the Commission,
17 recognized that the Unwind Transaction could not guarantee that the Smelters would stay on Big
18 Rivers' system forever. Although Big Rivers took appropriate measures to help protect its
19 Members from the consequences of a possible smelter closure, neither Big Rivers nor the
20 Commission could guarantee that Big Rivers' Members would be completely insulated from all

⁷⁵⁵ Brevitz Direct Testimony at p. 45:11-14; see Ostrander Direct Testimony, Exhibit BCO-2, Schedule A-2.

⁷⁵⁶ See 535 Rate Case Order at *14 ("[The Attorney General] recommended that Big Rivers be granted none of the \$63 million increase" related to the Hawesville Smelter termination.)

⁷⁵⁷ Brevitz Direct Testimony at 45:4-8.

1 financial consequences of such a closure.⁷⁵⁸ The termination of the 2009 Smelter Agreements
2 was recognized and accepted by the Commission and the stakeholders as a possible risk at the
3 time of the Unwind Transaction. The proper course forward now is to respond in the best
4 interests of Big Rivers' Members in the manner contemplated for years:⁷⁵⁹ through the
5 implementation of what evolved into Big Rivers' Mitigation Plan.

6 Furthermore, the Attorney General does not suggest how Big Rivers could possibly
7 survive with a \$0 revenue increase, nor, as discussed in Section IX above, does the Attorney
8 General establish any reasonable basis for believing that Big Rivers' bankruptcy is in anyone's
9 best interests. In fact, the Attorney General did not even evaluate the potential consequences of a
10 Big Rivers bankruptcy.⁷⁶⁰ Its proposal would only result in unconstitutionally confiscatory rates
11 designed to intentionally undermine Big Rivers' financial integrity.

12 Finally, the Attorney General rehashes the same "known and measurable" and "used and
13 useful" arguments it made with respect to this same basic adjustment in the 535 Rate Case. Mr.
14 Ostrander once again argues that the adjustment should be granted because the revenue
15 deficiency is not "known and measurable,"⁷⁶¹ while Mr. Brevitz again alleges that generating
16 facilities are no longer "used and useful."⁷⁶² The Commission should again reject this
17 adjustment for the same reasons it did in the 535 Rate Case.

⁷⁵⁸ See Unwind Order at *15 ("[I]t would not be possible to guarantee the future financial health of the Smelters"); *id.* at *18 ("While the Commission cannot predict the future economic viability of the Smelters, the power prices set forth in the new service agreements should provide a reasonable opportunity for the Smelters to continue operating in Kentucky for the long term and to preserve the jobs and tax base which support the economy of western Kentucky.")

⁷⁵⁹ As discussed in Section IV.A, Big Rivers' Mitigation Plan had its origins in the Unwind Transaction, which required Big Rivers' to upgrade its transmission system to allow for the export of available capacity.

⁷⁶⁰ Holloway Hearing Testimony, Jan. 9, 2014, Tr. 18:32'27"; Brevitz Hearing Testimony, Jan. 9, 2014, Tr. 18:45'05"; Attorney General's Response to Item No. 35 of Big Rivers' First Data Requests.

⁷⁶¹ Ostrander Direct Testimony at p. 27:8-12 ("In the prior rate case 2012-00535, I also took issue with BREC's 'estimated' \$63 million impact of its lost margins related to the Century smelter departure.")

⁷⁶² Brevitz Direct Testimony at p. 45:15-18; 535 Rate Case Order at *14 ("[T]he [Attorney General] claimed the Wilson Station was not 'used and useful' and that ratepayers should not be burdened with the costs of such a facility.").

1 For these reasons, the Attorney General's proposed adjustment does not produce fair,
2 just, and reasonable rates and should be denied.

3 **2. The Commission should reject proposed adjustment OAG-2-DB,**
4 **removing expenses related to the idling of the Wilson and Coleman**
5 **plants.**

6 In the event the Commission rejects OAG-1-DB, the Attorney General proposes a series
7 of alternative adjustments that achieve the same end. First, the Attorney General proposes an
8 adjustment to “remove the additional incremental expenses related to the idling of both Wilson
9 and Coleman, which consist of depreciation expense, interest expense, property tax, property
10 insurance, and other expenses.”⁷⁶³ This adjustment is inappropriate because, as discussed in
11 Section VII.A, recovery of these costs—including the \$21 million associated with Wilson Station
12 depreciation expense—is critical to Big Rivers’ financial viability. Furthermore, the Wilson and
13 Coleman Stations were prudently constructed, and contrary to the allegations of Mr. Brevitz,⁷⁶⁴
14 they remain used and useful.⁷⁶⁵ In the 535 Rate Case Order, the Commission allowed recovery
15 of all fixed costs associated with the Coleman Station except for depreciation expenses, which it
16 directed should be deferred into a regulatory account for consideration at a later date.⁷⁶⁶
17 Therefore, it is appropriate to continue including the fixed costs associated with the Wilson and
18 Coleman Stations in Big Rivers’ rates. In addition, and for the reasons described in Section VII,
19 it is also appropriate to allow recovery of the Wilson Station depreciation expense.

20 Accordingly, the Attorney General’s proposed adjustment OAG-2-DB does not produce
21 fair, just, and reasonable rates, and the Commission should reject it.

⁷⁶³ Ostrander Direct Testimony at p. 30:5-8; *id.*, Exhibit BCO-2, Schedule A-3.

⁷⁶⁴ Brevitz Direct Testimony at p. 45:18.

⁷⁶⁵ See Section X.A.

⁷⁶⁶ See generally 535 Rate Case Order.

1 **3. The Commission should reject proposed adjustment OAG-3-LH,**
2 **increasing transmission revenues in the revenue requirement.**

3 The Attorney General next proposes adjustment OAG-3-LH to include “transmission
4 revenues of \$13,248,779 in the revenue requirement,”⁷⁶⁷ based on its assertion that “Big Rivers
5 failed to include any adjustments for MISO transmission revenues.”⁷⁶⁸ This assertion and the
6 resulting proposed adjustment are now moot and should be disregarded.

7 As Big Rivers explained previously, MISO transmission revenues related to the Century
8 Hawesville Smelter Transaction and Century Sebree Smelter Transaction were not included in
9 the Application in this proceeding because the contracts were not yet executed and approved, and
10 any attempt to account for these revenues would be inappropriately speculative.⁷⁶⁹ Those
11 transactions have now been approved in Case Nos. 2013-00221 and 2013-00413. Accordingly,
12 Big Rivers has proposed in Section XII.F above to use all transmission revenues actually
13 received from both Smelters⁷⁷⁰ and apply them to the Economic Reserve fund for the benefit of
14 its Members and their retail customers.

15 Because MISO transmission revenues are already being addressed in an appropriate
16 manner, the Commission should deny this proposed adjustment as moot.

17 **4. The Commission should reject proposed adjustment OAG-4-BCO,**
18 **reducing forecasted test period payroll expenses.**

19 The Attorney General also proposes an adjustment to remove forecasted test period
20 payroll expenses.⁷⁷¹ This adjustment is based on a number of misunderstandings about how Big
21 Rivers calculated its projected payroll expenses.⁷⁷² Big Rivers’ payroll expenses are

⁷⁶⁷ Ostrander Direct Testimony at p. 30:12-18.

⁷⁶⁸ Holloway Direct Testimony at p. 19:13.

⁷⁶⁹ See Berry Direct Testimony at p. 17:4-7.

⁷⁷⁰ In the case of the transmission revenues related to the Century Hawesville Smelter, those amounts would be received only after the SSR status terminates. See Section XII.F.

⁷⁷¹ Ostrander Direct Testimony at p. 31:6-10; *id.*, Exhibit BCO-2, Schedule A-5.

⁷⁷² See, e.g., *id.* at p. 32:10-15.

1 reasonable,⁷⁷³ and it has accurately accounted for all forecasted payroll expenses and provided
2 the requested information and documentation unless unavailable. The Commission should reject
3 proposed adjustment OAG-4-BCO because it does not produce fair, just, and reasonable rates.

4 First, Big Rivers appropriately budgeted the payroll expense in its forecast.⁷⁷⁴ Big Rivers
5 has a thorough budget process for labor which examines pay rates for each position and confirms
6 the number of off-duty hours with payroll.⁷⁷⁵ Management evaluates expected overtime
7 percentages, and headcount and any pay raises are approved by both human resources and senior
8 management.⁷⁷⁶ Additionally, Big Rivers also removed non-recurring costs associated with the
9 idling of Coleman using pro forma adjustments to the revenue requirement in this case.⁷⁷⁷ Mr.
10 Ostrander's misunderstanding stems from the fact that he "fail[ed] to account for the pro forma
11 adjustment removing non-recurring labor/labor overheads from the revenue requirement."⁷⁷⁸
12 Additionally, Mr. Ostrander did not recognize that "Big Rivers' forecast that fewer labor dollars
13 will be capitalized in the test period is reasonable because two facilities will be idled during that
14 time period."⁷⁷⁹ Big Rivers' payroll expenses "have been diligently calculated, are reasonable
15 and appropriate, and should be relied upon by the Commission."⁷⁸⁰

16 Second, any alleged inaccuracies presented by Mr. Ostrander have been corrected or are
17 based on a misunderstanding of Big Rivers' application. Mr. Ostrander asserts that the first six
18 months of Big Rivers' base period included fewer straight time hours due to positions being
19 vacated and unfilled, and that these hours increased to 651,382 in the second six months of the

⁷⁷³ See Rebuttal Testimony of Thomas W. Davis, p. 5:3-4 (Dec. 17, 2013) ("Davis Rebuttal Testimony").

⁷⁷⁴ *Id.* at p. 4:14-15.

⁷⁷⁵ *Id.* at p. 5:6-7.

⁷⁷⁶ *Id.* at p. 5:7-9.

⁷⁷⁷ *Id.* at p. 5:12-14.

⁷⁷⁸ *Id.* at p. 4:16-20.

⁷⁷⁹ *Id.* at p. 5:3-4.

⁷⁸⁰ *Id.* at p. 5:15-17.

1 base period.⁷⁸¹ However, “[i]n its August 29, 2013, update of Tab 50 of its Application, Big
2 Rivers corrected the hours worked during the base period and provided an explanation for the
3 correction. The historical portion of the base period did not include paid time off, so it was not
4 comparable to the other periods on the schedule.”⁷⁸² (This update occurred nearly two months
5 prior to the filing of Mr. Ostrander’s testimony.) Mr. Ostrander also professes to be confused
6 about how the hours set forth in Big Rivers’ base period translate to labor dollars.⁷⁸³ Big Rivers
7 provided still more information on this issue through its post-hearing data request responses.⁷⁸⁴
8 As Mr. Davis clarified, while the total labor hours (discussed earlier) show labor hours gross of
9 projected open positions, the labor dollars are adjusted down by the amount of any actual savings
10 expected.⁷⁸⁵

11 Finally, although the Attorney General continues to assert that Big Rivers has not
12 provided all necessary information, it bears noting that Big Rivers responded to over 1,900 data
13 requests, including subparts, and has provided additional information where requested. For
14 example, although the Attorney General asserted in subparts (a) and (b) of AG 2-71 that Big
15 Rivers did not provide certain payroll information allegedly requested in AG 1-239,⁷⁸⁶ that
16 earlier data request “only sought information about officer payroll, and Big Rivers provided the
17 requested information with respect to each individual identified as an officer in Big Rivers’
18 bylaws or explained why the information was not available.”⁷⁸⁷ The only new information
19 requested in AG 2-71 was sought in subpart (c), and Big Rivers’ response to that subpart

⁷⁸¹ Ostrander Direct Testimony, p. 32:10-15.

⁷⁸² Davis Rebuttal Testimony at p. 6:3-6. *See also id.* at pp. 6:8-7:5.

⁷⁸³ Ostrander Direct Testimony at p. 32:13-15.

⁷⁸⁴ *See* Big Rivers’ Response to Post-Hearing Request for Information No. 3.

⁷⁸⁵ Davis Rebuttal Testimony at p. 7:10-12.

⁷⁸⁶ *Id.* at p. 8:4-6.

⁷⁸⁷ *Id.* at p. 8:6-9.

1 provided the information that was available.⁷⁸⁸ Where information was not available, this was
2 due to Big Rivers' transition to a different accounting system.⁷⁸⁹ Throughout this proceeding,
3 Big Rivers' responses to data requests were thorough and accurate to the best of Big Rivers'
4 knowledge; Mr. Ostrander's allegations to the contrary should be disregarded.

5 For these reasons, Big Rivers' forecasted payroll expenses are reasonable, and Big Rivers
6 has accurately accounted for those expenses. Proposed adjustment OAG-4-BCO does not
7 properly reflect payroll expenses to be incurred in the forecasted test period, does not produce
8 fair, just, and reasonable rates, and should be rejected by the Commission.

9 **5. The Commission should reject proposed adjustment OAG-5-BCO,**
10 **removing the estimated expense portion of Big Rivers' forecasted test**
11 **period pay increases.**

12 The Attorney General proposes an adjustment to remove forecasted test period general
13 pay increases.⁷⁹⁰ This adjustment is intended to remove the estimated expense portion of Big
14 Rivers' forecasted test period pay increases.⁷⁹¹ Mr. Ostrander divides the estimated expense
15 portion into three categories: (i) the Non-bargaining pay increase effective January 2, 2015; (ii)
16 the Bargaining-Generation wage increases effective September 15, 2014; and (iii) the
17 Bargaining-Transmission wage increases effective October 15, 2014.⁷⁹² However, Mr.
18 Ostrander's justifications for the proposed adjustment all fail, and the Commission should reject
19 proposed adjustment OAG-5-BCO because it does not produce fair, just, and reasonable rates.

20 As an initial matter, Big Rivers has already adjusted its revenue requirement to remove
21 the non-bargaining pay increase effective January 2, 2015, in line with the 535 Rate Case

⁷⁸⁸ *Id.* at p. 8:12-13.

⁷⁸⁹ Big Rivers' Response to Item No. 71 of the Attorney General's Second Requests for Information.

⁷⁹⁰ Ostrander Direct Testimony at p. 37:6-15; *id.*, Exhibit BCO-2, Schedule A-6.

⁷⁹¹ *Id.* at p. 37:8-13.

⁷⁹² *Id.* at p. 37:8-13; Davis Rebuttal Testimony at p. 9:10-16.

1 Order.⁷⁹³ Therefore, the first category of Mr. Ostrander’s proposed adjustment is moot and
2 should be denied.

3 The other categories of Mr. Ostrander’s adjustment should be denied because they fail to
4 recognize certain basic realities. First, Mr. Ostrander continues to ignore the fact that the
5 “known and measurable” concept does not apply to future test year cases in the same way it does
6 to historical test year cases.⁷⁹⁴ Second, the budgeted increases for generation bargaining unit
7 employees are determined by Big Rivers’ collective bargaining agreement with the union;⁷⁹⁵ that
8 agreement will be effective until approximately eight months (September of 2015) after the end
9 of the future test year, and it is therefore appropriate to include them in the revenue
10 requirement.⁷⁹⁶ Third, the budgeted increases for transmission bargaining unit employees are
11 determined by Big Rivers’ collective bargaining agreement with the union, and that agreement
12 will remain effective until more than a year beyond (October of 2016) the end of the future test
13 year.⁷⁹⁷ Accordingly, these wage increases should be included in the revenue requirement.

14 Mr. Ostrander’s proposed adjustment is improper, does not produce fair, just and
15 reasonable rates, and should be rejected by the Commission.

16 **6. The Commission should reject proposed adjustment OAG-6-BCO,**
17 **reducing rate case costs included in Big Rivers’ revenue requirement.**

18 The Attorney General further proposes reducing total rate case expenses by
19 \$1,027,929.⁷⁹⁸ Mr. Ostrander readily acknowledges that “[s]ome of the reasons for adjusting rate
20 case expense for consultants and outside attorneys remain the same as in [the 535 Rate Case],

⁷⁹³ *Id.* at p. 10:4-5; Wolfram Rebuttal Testimony at pp. 32:22-33:2; 535 Rate Case Order at *23.

⁷⁹⁴ Ostrander Direct Testimony at p. 37:13-15; *see also* Davis Rebuttal Testimony at pp. 9:23-10:1; Wolfram Rebuttal Testimony at pp. 21:19-22:24.

⁷⁹⁵ Haner Direct Testimony at p. 5:21-6:2.

⁷⁹⁶ Davis Rebuttal Testimony at p. 10:14-17.

⁷⁹⁷ *Id.* at p. 10:18-23.

⁷⁹⁸ Ostrander Direct Testimony at p. 40:1; *id.*, Exhibit BCO-2, Schedule A-7.

1 except” for a new argument he raises regarding alleged duplicity of expenses.⁷⁹⁹ Mr. Ostrander
2 argues that some rate case expenses should be removed because they are some combination of:
3 excessive,⁸⁰⁰ unspent,⁸⁰¹ not known and measurable,⁸⁰² unsupported by actual documentation,⁸⁰³
4 duplicative,⁸⁰⁴ and unreasonable.⁸⁰⁵ The Commission has already rejected many of these
5 allegations.⁸⁰⁶ Mr. Ostrander’s arguments are wholly unsupported by the record, and his
6 proposed adjustment would result in rates that are not fair, just, and reasonable. The
7 Commission should reject it.

8 First, Mr. Ostrander argues that the total rate case expenses accrued in this proceeding,
9 when combined with expenses for the 535 Rate Case, are excessive.⁸⁰⁷ However, the
10 Commission already approved Big Rivers’ rate case expenses in the 535 Rate Case.⁸⁰⁸ Those
11 expenses are simply not at issue in this proceeding. Furthermore, Big Rivers’ rate case expenses
12 in this proceeding are reasonable and well-documented.

13 To support his claim of excessiveness, Mr. Ostrander argues that Big Rivers “could have
14 hired its own specialized employees for a certain contractual time frame” to perform the work
15 required to prosecute a rate case.⁸⁰⁹ Even large investor-owned utilities typically hire outside
16 counsel and consultants to prosecute their rate cases,⁸¹⁰ and so, Big Rivers’ decision to do the
17 same here is certainly consistent with typical industry practice. Moreover, Mr. Ostrander’s
18 strategy would be functionally and economically no different from Big Rivers’ current staffing

⁷⁹⁹ *Id.* at p. 40:7-10.

⁸⁰⁰ *Id.* at pp. 40:14-41:10.

⁸⁰¹ *Id.* at p. 41:20-23.

⁸⁰² *Id.* at p. 42:10-12.

⁸⁰³ *Id.* at p. 42:12-14.

⁸⁰⁴ *Id.* at p. 41:25-33.

⁸⁰⁵ *Id.* at pp. 41:35-42:2.

⁸⁰⁶ 535 Rate Case Order at *27-30.

⁸⁰⁷ Ostrander Direct Testimony at pp. 40:14-41:5.

⁸⁰⁸ 535 Rate Case Order at *29-30.

⁸⁰⁹ Ostrander Direct Testimony at p. 41:6-10

⁸¹⁰ Speed Rebuttal Testimony at p. 7:1-10.

1 plan, resulting in no savings.⁸¹¹ Not only would Mr. Ostrander’s proposal fail to reduce costs, it
2 would be implemented at the expense of the institutional experience and memory accrued by the
3 current legal and consulting team, resulting in decreased efficiency.⁸¹²

4 Second, Mr. Ostrander argues that the proposed adjustment should be granted because
5 some of the expenses are unspent, and because the unspent portion is not known and measurable
6 and lacks sufficient documentation. The Commission previously rejected that same argument,
7 finding that “[i]t should come as no surprise that a significant portion of the rate case expenses a
8 utility has estimated at the time it files its application will not have been spent by the time
9 intervenor testimony is filed.”⁸¹³ The Commission’s “typical ratemaking practice” is to
10 “recognize and allow the rate case expenses incurred by Big Rivers up through and including the
11 month of the hearing”⁸¹⁴ Big Rivers also reiterates that it “will only seek to recover actual
12 costs that are reasonable, prudently incurred, and appropriately documented for the Commission
13 and the public. Big Rivers will not seek recovery of budgeted but unspent amounts.”⁸¹⁵

14 Third, Mr. Ostrander alleges that some rate case expenses must be duplicative work
15 “because many of the issues, testimony, and data requests are the same in both cases.”⁸¹⁶ Mr.
16 Ostrander provides no specific factual support for his allegations.⁸¹⁷ Instead, he grossly
17 mischaracterizes a Big Rivers’ data request response to claim that Big Rivers “does not even
18 budget for . . . efficiencies in this case.”⁸¹⁸ The inaccuracy of this allegation is easily revealed, as
19 Big Rivers’ testimony and data request responses indicate that Big Rivers budgeted for 13%

⁸¹¹ *Id.* at p. 7:4-7.

⁸¹² *Id.* at p. 7:11-13.

⁸¹³ 535 Rate Case Order at *29.

⁸¹⁴ *Id.* at *30.

⁸¹⁵ Direct Testimony of DeAnna M. Speed, Application Tab 62, p. 18:19-22 (June 28, 2013) (“Speed Direct Testimony”).

⁸¹⁶ Ostrander Direct Testimony at p. 41:29-31.

⁸¹⁷ Speed Rebuttal Testimony at p. 9:4-5.

⁸¹⁸ *Id.* at pp. 8:23-9:3 (citing Ostrander Direct Testimony at p. 41:32-33). *See* Big Rivers’ Response to Item No. 258 of the Attorney General’s First Data Requests.

1 lower rate case expenses in this proceeding than in the 535 Rate Case.⁸¹⁹ In addition, his bald
2 allegations of duplicative work are easily refuted in the fact that Big Rivers responded to more
3 than 1,900 data requests in this proceeding, many of which either required significant updates or
4 did not overlap with prior requests.⁸²⁰

5 Fourth, Mr. Ostrander alleges that Big Rivers manages the accuracy of rate case expenses
6 but not their reasonableness.⁸²¹ This is false.⁸²² Big Rivers is using the same staffing strategy
7 and review process in this case as in the prior rate case, and Big Rivers' expenses and its
8 methods of verifying their reasonableness were approved by the Commission in the 535 Rate
9 Case Order.⁸²³ Mr. Ostrander's allegations are not remotely based in fact, and he does not
10 articulate why expenses incurred with the same reasonableness in the 535 Rate Case are now
11 unreasonable.

12 Big Rivers has met its burden to demonstrate the reasonableness of its rate case expenses.
13 Consistent with Commission practice, Big Rivers should be allowed to recover these expenses
14 and to amortize them over a three-year period for the purposes of ratemaking. Accordingly, the
15 Commission should reject proposed adjustment OAG-6-BCO.

16 **7. The Commission should reject proposed adjustment OAG-7-BCO,**
17 **reducing ACES fees included in Big Rivers' revenue requirement to**
18 **account for Century Kentucky's reimbursement of these expenses,**
19 **because Big Rivers has already performed this adjustment.**

20 The Attorney General proposes an adjustment under the assumption that Big Rivers has
21 not reflected the effect Century Kentucky's reimbursement of certain ACES fees as a result of

⁸¹⁹ Speed Rebuttal Testimony at p. 10:6-8; Big Rivers' Response to Item No. 258 of the Attorney General's First Data Requests.

⁸²⁰ Speed Rebuttal Testimony at p. 9-12-19.

⁸²¹ Ostrander Direct Testimony, pp. 41:35-42:8.

⁸²² Speed Direct Testimony at p. 10:15-17 ("All rate case costs that Big Rivers seeks to recover will be reviewed for reasonableness and prudence, and the proper documentation will be provided to the Commission.").

⁸²³ *Id.* at p. 11:8-11.

1 the transaction that was approved by the Commission in Case No. 2013-00221.⁸²⁴ However, Big
2 Rivers has already performed this adjustment, and the Attorney General's proposed adjustment is
3 moot.

4 Big Rivers filed its application in this case prior to the Commission's final order in Case
5 No. 2013-00221 approving the Century Hawesville Smelter Transaction. During the
6 Commission Staff's third round of discovery in this case (PSC 3-10), Big Rivers provided a
7 calculation of the effect that Commission approval of the transaction would have on its revenue
8 requirement.⁸²⁵

9 The approval of the Century Hawesville Smelter Transaction qualifies as a "regulatory
10 enactment" under the Commission's rules,⁸²⁶ allowing Big Rivers to incorporate the effects of
11 that transaction as calculated in PSC 3-10 into the revenue requirement.⁸²⁷ Big Rivers has done
12 so.⁸²⁸ The Commission should adopt the calculations provided by Big Rivers in response to PSC
13 3-10, which are incorporated into the proposed revenue requirement set forth in the Rebuttal
14 Testimony of John Wolfram. The Commission should reject proposed adjustment OAG-7-BCO
15 as moot.

16 **E. The Commission Should Reject KIUC's Proposals.**

17 The Commission should reject KIUC's (i) rate plan, a version of which was already
18 rejected in the 535 Rate Case; (ii) proposal to exclude the depreciation expense of the Wilson
19 Station; (iii) protests regarding the possibility of an economic development rate for future load
20 development; (iv) proposal to redirect funds from the Rural Economic Reserve to the Large

⁸²⁴ See Ostrander Direct Testimony at p. 50:6-13.

⁸²⁵ Big Rivers' Response to Item No. 10 of Commission Staff's Third Data Requests. See also Wolfram Rebuttal Testimony at p. 32:11-37:7 (sponsoring updated exhibits to revise the revenue requirement to reflect changes that include the approval of the Century Hawesville Smelter Transaction).

⁸²⁶ See 807 KAR 5:001(16)(11)(d).

⁸²⁷ Wolfram Rebuttal Testimony at p. 33:16-17.

⁸²⁸ *Id.* See also Berry Rebuttal Testimony at p. 24:7-22; *id.*, Exhibit Berry Rebuttal-6.

1 Industrial class; (v) proposal to allow the Large Industrial rate class market-based pricing; (vi)
2 proposal to defer smelter surcredit revenues; (vii) analysis of the potential future effects of CO₂
3 costs; (viii) proposal to remove certain ACES fees from the revenue requirement; and (ix)
4 proposal to remove non-recurring lay-up expenses related to the Coleman Station from the
5 revenue requirement.

6 As in the 535 Rate Case, KIUC resorts to mischaracterizing the impact of Big Rivers’
7 rate adjustments in an attempt to make its flawed proposal seem more reasonable. KIUC
8 “combines the all-in effects” of the rate adjustment proposed in this case, the rate adjustment in
9 the 535 Rate Case, the increases of the FAC and ES mechanisms that “are projected to increase
10 in the fully forecasted test period with or without the proposed rate adjustment,” and the rate
11 impact that will occur when the reserve funds are exhausted. Of course, this will happen with or
12 without the rate relief Big Rivers is seeking in this case, all over a period of time from May 2012
13 to April 2015 (i.e. the beginning of the base period in the previous rate case until after the RER
14 fund is exhausted). KIUC then amplifies this mischaracterization by disregarding the
15 ameliorating effects of the Big Rivers’ proposal to mitigate any rate impact through accelerated
16 use of the Reserve Funds.⁸²⁹ The result of this approach is that KIUC consistently “overstates
17 the impact of the proposed base rate increases for the fully forecasted test period” in this
18 proceeding.⁸³⁰

19 KIUC then proposes a “rate plan” designed to undermine Big Rivers’ financial stability
20 as early as December 2014⁸³¹ in the unfounded hope that creditors will be cowed into forgiving

⁸²⁹ Wolfram Rebuttal Testimony at p. 21:1-5.

⁸³⁰ *Id.* at p. 21:15-16.

⁸³¹ Kollen Direct Testimony at pp. 10:22-11:2; KIUC’s Response to Item No. 25 of Big Rivers’ First Data Requests; Richert Rebuttal Testimony at p. 29:9-15.

1 massive amounts of debt principal.⁸³² As discussed above, this plan—including its proposal to
2 exclude the depreciation expense of the Wilson Station—would be financially catastrophic.⁸³³ As
3 a part of its ill-conceived proposal, KIUC believes Big Rivers should abandon its valuable
4 generation assets rather than temporarily idle them, even though its primary witness “admits he
5 has not analyzed the impact of the reduced Members’ equity, margins, TIER, and available
6 collateral that would result from Big Rivers retiring its Wilson and Coleman generating stations
7 on Big Rivers’ ability to borrow and on the interest rate Big Rivers would pay if it were able to
8 borrow.”⁸³⁴ Moreover, KIUC admits this is the same “KIUC Rate Plan proposed in the [535
9 Rate Case] . . . modified only to include certain ‘reasonable increase[s].’”⁸³⁵ In short—and to
10 use the terminology of which KIUC is so fond—the “KIUC Rate Plan” is a misinformed, poorly
11 researched, unrealistic, unworkable, and, most importantly, dangerous “time-bomb.” The
12 Commission rejected KIUC’s rate plan in the 535 Rate Case, and it should reject it again.

13 KIUC attempts to justify its position by repeatedly and incorrectly asserting that the
14 Commission is discriminating against Large Industrials.⁸³⁶ For example, KIUC complains that
15 some of Big Rivers’ mitigation efforts discriminate against the Large Industrials in favor of
16 potential new customers. However, this simply demonstrates KIUC’s profound
17 misunderstanding of the purpose of an economic development rate, which is designed to “attract
18 new load” for the benefit of existing retail customers, and it ignores the Commission’s ongoing

⁸³² Mabey Rebuttal Testimony at p. 8:1-2; Mabey Hearing Testimony, Jan. 8, 2014, Tr. 15:12’20”.

⁸³³ See Section VII.

⁸³⁴ Richert Rebuttal Testimony at p. 25:2-7. See Kollen Direct Testimony at p. 9-13-15; KIUC’s Response to Item No. 28 of Big Rivers’ First Data Requests.

⁸³⁵ Kollen Direct Testimony at p. 10:4-7.

⁸³⁶ Baron Direct Testimony at p. 10:22-25 (“excluding Large Industrial customers from receiving any benefit from the Rural Economic Reserve funds [as the RER currently does by order of the Commission] would be unreasonably discriminatory and would provide an unreasonable preference to Rural customers over Large Industrial customers”).

1 authority to oversee such economic development efforts to protect existing ratepayers.⁸³⁷
2 Similarly, KIUC insists that the Rural Economic Reserve discriminates against the Large
3 Industrials in favor of the Rural rate class, even though the Commission itself established that
4 fund years ago in the Unwind Transaction and upheld its appropriate distinction between
5 customer classes in the 535 Rate Case, noting that “KIUC chose to not seek a rehearing or file an
6 appeal” of the Unwind Order.⁸³⁸

7 This allegation of discrimination in favor of the Rural rate class also provides the
8 foundation for KIUC’s alternative proposal that the Commission allow the Large Industrials
9 “market-based pricing for 15%-25% of their load.”⁸³⁹ There are numerous flaws with this
10 proposal, beginning with the fact that the actual remedy KIUC seeks—an order from the
11 Commission ordering Big Rivers to purchase power from the market for select Large
12 Industrials—is outside the scope of the relief available in a ratemaking proceeding, and the
13 Commission should decline to consider it in this context. To the substance of the proposal,
14 however, even if that sort of relief were available in this proceeding, it is fundamentally unfair.
15 As Mr. Berry and Ms. Richert explain, allowing Large Industrials access to the market or
16 market-priced power would either “require a greater increase for other Members and would
17 require those other Members (the Rurals) to subsidize the Large Industrials”⁸⁴⁰ or it would
18 “result in revenue shortfalls, insufficient MFIR, and Big Rivers defaulting on its loan obligations
19”⁸⁴¹ KIUC quietly sidesteps this issue, although it does acknowledge that it “provides no

⁸³⁷ See Wolfram Rebuttal Testimony at p. 30:9-20. See also Bailey Hearing Testimony, Jan. 7, 2014, Tr. 11:16’51” (“Rates that make a contribution to fixed costs, if they’re high enough to make a contribution to fixed costs, should benefit the remaining Members.”).

⁸³⁸ 535 Rate Case Order at *50.

⁸³⁹ Baron Direct Testimony at p. 4:2-5.

⁸⁴⁰ Berry Rebuttal Testimony at p. 28:13-16; Bailey Hearing Testimony, Jan. 7, 2014, Tr. 11:05’39”.

⁸⁴¹ Richert Rebuttal Testimony at pp. 23:23-24:3.

1 analysis on the impact [its analysis] would have on the remaining customer base.”⁸⁴² Moreover,
2 if KIUC’s proposal were applied to all retail customers, “there would be no end to customers
3 seeking market-based pricing for all of their load, leaving no customers to pay for a utility’s
4 fixed costs when market prices are low but then forcing the utility to have the capacity available
5 to serve all the customers in its territory when market prices are high.”⁸⁴³ The result would be an
6 increased burden on residential customers,⁸⁴⁴ and it is an untenable situation that must be
7 avoided.

8 Despite KIUC’s protests to the contrary, the reality is that the Large Industrials are not
9 being unreasonably discriminated against. In fact, “the total rates granted in Case No. 2012-
10 00535 and requested in this rate case are not larger for Large Industrial customers than Rural
11 customers”⁸⁴⁵ Consequently, the entire premise of KIUC’s arguments is false, and the
12 related proposals—stifling economic development, diverting money from Rural Class to Large
13 Industrials, and granting Large Industrials access to the market or market prices—should be
14 denied.

15 Many of KIUC’s other more tangential proposals are equally misguided, although
16 generally due to factual errors or misunderstandings rather than legal misallegations of
17 “discrimination.” These will be addressed individually below.

18 First, KIUC’s proposal to defer smelter surcredit revenues is premised on its mistaken
19 belief that Big Rivers has addressed the smelter surcredits differently than other similar revenues.
20 As Mr. Wolfram explained, the smelter surcredits were appropriately accounted for because they

⁸⁴² *Id.* at p. 23:22-23.

⁸⁴³ Berry Rebuttal Testimony at p. 28:16-21. *See also* Bailey Hearing Testimony, Jan. 7, 2014, Tr. 11:06’42” (“[D]oing that would just lead to an unending situation where everyone is asking for that, and eventually that would just collapse under its own weight.”).

⁸⁴⁴ *Id.* at Tr. 11:05’39”.

⁸⁴⁵ Richert Rebuttal Testimony at pp. 21:19-22:2 (emphasis original).

1 “are not a nonrecurring, one-time event,” unlike the other items the KIUC relied on for
2 comparison. For the reasons set forth in Section XVII.E, the Commission should approve Big
3 Rivers’ adjustment to account for the revenue credits that correspond to the smelter surcharge
4 payments and deny KIUC’s proposal to amortize those revenues.

5 Second, KIUC’s witness Mr. Hayet presented a flawed analysis of the potential impact of
6 CO₂ costs on Big Rivers’ operations beginning in 2020.⁸⁴⁶ However, “the CO₂ impacts are
7 excluded from the test period, both in Big Rivers’ forecast and in the Hayet Analysis.”⁸⁴⁷ In
8 addition, Mr. Hayet’s analysis is flawed because it did not include production cost runs, which
9 are the “appropriate way to assess the impacts of CO₂ on Big Rivers’ operations”⁸⁴⁸ More
10 importantly, this is a question of long-term resource planning that will be addressed in Big
11 Rivers’ IRP, ECP, and CPCN proceedings, at which time the Commission can evaluate it in the
12 appropriate manner.⁸⁴⁹

13 Third, KIUC proposes to reduce Big Rivers’ revenue requirement by almost \$13 million,
14 representing its guess as to the potential amount of transmission revenues Big Rivers might
15 receive. As explained in Section XII.F, such guesswork is dangerous and has the potential to
16 lead to Big Rivers’ defaulting on its debt obligations. Big Rivers’ proposal to direct any
17 transmission revenues from the smelter transactions into the Economic Reserve is a much safer
18 and more appropriate method for protecting Big Rivers, its Members, and their retail customers
19 (including the Large Industrial class).

20 Fourth, KIUC proposes to reduce Big Rivers’ revenue requirement by \$1.333 million to
21 account for ACES fees it believes will be paid by Century. Big Rivers has already adjusted the

⁸⁴⁶ Hayet Direct Testimony at p. 30:17-20.

⁸⁴⁷ Wolfram Rebuttal Testimony at p. 19:14-19.

⁸⁴⁸ *Id.* at p. 19:21-24.

⁸⁴⁹ *Id.* at p. 20:1-4.

1 \$783,724 of ACES fees to be paid by Century relating to the Hawesville Smelter's share of the
2 ACES fees, and Big Rivers proposes the Commission make an additional adjustment to remove
3 the Sebree Smelter's share of the ACES fees, as explained in Section XVII.B.⁸⁵⁰ As such,
4 KIUC's recommendation is moot and should be denied.

5 Fifth, KIUC proposes reducing Big Rivers' revenue requirement by \$1.6 million to adjust
6 for non-recurring lay-up costs related to the Coleman Station.⁸⁵¹ However, as shown in Exhibit
7 Wolfram-2, Reference Schedule 1.13, "[a]ny non-recurring lay-up costs for Coleman have
8 already been properly removed from the revenue deficiency in this instant case via a pro-forma
9 entry."⁸⁵²

10 KIUC's recommendations are based on mischaracterizations of Big Rivers' proposed
11 rates, false claims of discrimination, and multiple errors and misunderstandings of the items
12 included in Big Rivers' revenue requirement. As a result, KIUC's proposals would not result in
13 fair, just, and reasonable rates, and the Commission should reject them.

14 **F. The Commission Should Reject Sierra Club's Proposals.**

15 The Commission should reject Sierra Club's (i) proposal to grant Big Rivers minimal rate
16 relief designed to keep Big Rivers temporarily "afloat";⁸⁵³ (ii) proposal to force Big Rivers to
17 "sell[] at greatly reduced prices or clos[e] the Coleman and Wilson plants;"⁸⁵⁴ and (iii) criticisms
18 of Big Rivers' Mitigation Plan, price elasticity forecast, and load forecast.⁸⁵⁵

19 Sierra Club's primary proposal is to set Big Rivers' rates at the "minimum necessary to
20 pay its outstanding debts,"⁸⁵⁶ hoping that this will keep Big Rivers barely "afloat"⁸⁵⁷ for long

⁸⁵⁰ *Id.* at p. 33:16-17.

⁸⁵¹ *See* Richert Rebuttal Testimony at p. 31:7-8.

⁸⁵² *Id.* at p. 31:7-11. *See also* Section XVII.J.

⁸⁵³ Ackerman Direct Testimony at p. 28:26-29; *Id.* at p. 5:17-23.

⁸⁵⁴ *Id.* at pp. 5:6.

⁸⁵⁵ *Id.* at pp. 6-21.

⁸⁵⁶ *Id.* at p. 6:6-8.

1 enough to sell the Wilson and Coleman Stations at a loss or, failing that, retire them.⁸⁵⁸ Sierra
2 Club argues that its approach “loses nothing except the opportunity to gamble on” Big Rivers’
3 Mitigation Plan,⁸⁵⁹ but the reality is that this approach risks losing everything. Sierra Club’s
4 proposal is unrealistic, is not supported by reasonable evidence, and would likely lead to
5 disastrous financial consequences for Big Rivers, its Members, and their retail customers.

6 Sierra Club’s proposal is an overly-simplistic “Right-Sized Scenario” idea⁸⁶⁰ that focuses
7 less on the interests of Big Rivers’ Members and their retail customers than on Sierra Club’s
8 institutional goals to “transition or close these dirty coal burning plants”⁸⁶¹ In pursuit of its
9 own institutional interests, Sierra Club effectively ignores the practical reality that Big Rivers
10 “has serious service and financial obligations and credit issues to manage in a time-sensitive
11 manner”⁸⁶²

12 As discussed in Section IX.B, Sierra Club’s entire approach is informed by the misguided
13 notion that simply calculating a “magic number” to just barely keep Big Rivers solvent is the
14 panacea to the challenges facing Big Rivers. This approach completely fails to account for the
15 reactions of the third parties that control Big Rivers’ financial future. Slashing rates to force

⁸⁵⁷ *Id.* at p. 28:26-29; *id.* at p. 5:17-23.

⁸⁵⁸ *Id.* at pp. 5:28-6:6, 23:18-25:2. *See also* Ackerman Hearing Testimony, Jan. 9, 2014, Tr. 17:15’45” (“I have always assumed that that was taken for granted, in any of the proposals, including mine that [Big Rivers’] expenses would be covered.”).

⁸⁵⁹ Ackerman Direct Testimony at p. 28:21-23.

⁸⁶⁰ *Id.* at p. 28:20-23.

⁸⁶¹ *See* Richert Rebuttal Testimony at p. 36 n. 2 (“Sierra Club makes no secret that it is primarily motivated by its desire to force Big Rivers to reduce its use of coal generation. For example, Sierra Club has been soliciting Kentucky residents to oppose Big Rivers’ rate adjustment on the grounds that ‘Big Rivers should look for opportunities to transition or close these dirty coal burning plants’” (See Sierra Club’s Solicitation for Public Comment, attached as Exhibit Richert Rebuttal-2 (retrieved December 11, 2013).) *See also* Big Rivers Hearing Exhibit I (demonstrating that the Sierra Club Environmental Law Program involves targeting coal-fired generation); Ackerman Hearing Testimony, Jan. 9, 2014, Tr. 17:10’02” (confirming that Exhibit 2 reads “159 [dirty coal plants] down, 364 to go).

⁸⁶² Richert Rebuttal Testimony at p. 34:13-17.

1 operational changes and creditor concessions⁸⁶³ would “extend the regulatory uncertainty
2 surrounding Big Rivers’ financial future,” scaring away potential load replacement customers
3 and lenders necessary in the future to continue operations. The endgame of Sierra Club’s
4 proposal is bankruptcy.⁸⁶⁴ And, Sierra Club freely admits that it has not studied the effects of a
5 potential bankruptcy.⁸⁶⁵

6 Sierra Club’s ultimate goal of disposing of coal generation plants would be equally
7 harmful to Big Rivers’ Members. As an initial matter, its witness “offers no expertise, studies, or
8 analyses to support his assertions about selling or retiring plants, nor does he explain—aside
9 from his affiliation with the Sierra Club—why he believes it is in ratepayers’ rational interests to
10 force sales or retirements at rock bottom prices.”⁸⁶⁶ More importantly, however and as discussed
11 in Section XVIII.C, the Wilson and Coleman Stations are vital assets to Big Rivers’ Members,
12 and they are critical to Big Rivers’ ability to obtain the credit necessary to fund ongoing
13 operations. Forcing sales or retirements “would be the equivalent of throwing in the towel on
14 Big Rivers; it offers little likelihood for Big Rivers of anything except bankruptcy and potentially
15 liquidation.”⁸⁶⁷

16 Sierra Club responds to these concerns by speculating that closing the Wilson and
17 Coleman Stations could spare Big Rivers the potential costs of complying with future
18 environmental regulations.⁸⁶⁸ However, many of the regulations cited by the Sierra Club may
19 not even come to pass, and the Wilson Station “is fully compliant with all current and proposed

⁸⁶³ Ackerman Direct Testimony at p. 25:3-15 (asserting that under its approach, “it will be possible to renegotiate the debt covenants.”).

⁸⁶⁴ See Richert Rebuttal Testimony at pp. 34:11-35:12.

⁸⁶⁵ See Sierra Club’s Response to Item No. 6 of Big Rivers’ First Data Requests (failing to identify and provide any studies analyzing how bankruptcy would affect Big Rivers’ retail rates); Sierra Club’s Response to Item No. 8 of Big Rivers’ First Data Requests (failing to identify any experience Dr. Ackerman has that is directly related to electric utility restructuring, Chapter 11 bankruptcies, Chapter 7 bankruptcies, or electric cooperative management).

⁸⁶⁶ Richert Rebuttal Testimony at p. 36:9-12.

⁸⁶⁷ Berry Rebuttal Testimony at p. 6:15-17.

⁸⁶⁸ Ackerman Direct Testimony at p. 26:7-27:13.

1 environmental regulations except some potential CO₂ regulations.”⁸⁶⁹ Furthermore, as discussed
2 in Section X.A, Big Rivers’ continued ownership of the Wilson and Coleman Stations could
3 assist the Commonwealth in meeting potential future environmental regulations. For these
4 reasons, the Commission should reject Sierra Club’s proposal to force Big Rivers to “sell[] at
5 greatly reduced prices or clos[e] the Coleman and Wilson plants.”⁸⁷⁰

6 Finally, Sierra Club levels a variety of criticisms at Big Rivers’ forecasts, including its
7 price elasticity forecast,⁸⁷¹ load forecast,⁸⁷² and its expectations of success for its Mitigation
8 Plan.⁸⁷³ However, as discussed in earlier sections, Sierra Club’s criticisms are unsupported,
9 unfounded, incorrect, and relate entirely to Big Rivers’ long-term planning horizon issues.
10 Those issues do not affect the rates Big Rivers needs to remain financially viable.⁸⁷⁴

11 In the end, Sierra Club’s recommendations are based on unsubstantiated speculation and
12 criticisms, and its proposal would not result in fair, just, and reasonable rates. Accordingly, the
13 Commission should reject Sierra Club’s recommendations.

14 **G. The Commission Should Reject Proposals for Additional Studies.**

15 The Commission should reject the Opposing Intervenors’ proposals that Big Rivers
16 perform additional studies and analyses.⁸⁷⁵ The proposed analyses include measures as drastic as
17 a management audit and otherwise focus on issues such as future resource planning that will be
18 thoroughly considered in future proceedings. In the meantime, Big Rivers’ financial viability
19 depends on “the rates Big Rivers needs based on its revenues and expenses forecasted for the test

⁸⁶⁹ Berry Testimony at p. 19:19-20.

⁸⁷⁰ Ackerman Direct Testimony at pp. 5:6.

⁸⁷¹ See Section XII.D.

⁸⁷² See Section XII.D.

⁸⁷³ See Section VIII.B.

⁸⁷⁴ See Section XVIII.G.

⁸⁷⁵ See, e.g., Kollen Direct Testimony at p. 11:2-5 (“the Commission direct the Company to retain professional advisers and counsel to identify and pursue options that will benefit customers, including, but not limited to, asset sales, corporate restructuring, corporate liquidation, and creditor concessions”); Hayet Direct Testimony at p. 44:19-20 (“Commission should direct the Company to re-evaluate other business options to right-size the Company”).

1 period.”⁸⁷⁶ As described throughout this proceeding, Big Rivers’ “forecast is reasonable and is
2 adequately supported by studies.”⁸⁷⁷ Because the Opposing Intervenors’ proposed analyses are
3 unduly burdensome and “would not impact the rates Big Rivers needs,”⁸⁷⁸ the Commission
4 should reject them. In addition to being unnecessary, such recommendations would only serve to
5 drain time, focus, and resources away from implementing the Mitigation Plan.

6 Mr. Kollen for KIUC proposes that the Commission order an audit of Big Rivers’
7 management,⁸⁷⁹ arguing that Big Rivers has “chosen not to retain professional advisors”
8 regarding restructuring and has demonstrated “unwillingness” to consider alternatives such as
9 selling plants below book value.⁸⁸⁰ Mr. Kollen bases his recommendation on the Commission’s
10 actions in a case involving East Kentucky Power Cooperative (“EKPC”), in which the
11 Commission ordered an audit to address concerns that a conflict of interest among the directors
12 led to their not being “fully committed to reversing [EKPC’s] weakening financial condition.”⁸⁸¹
13 The factors that led to the Commission’s concern in that case are not present here—the most
14 striking examples being the fact that Big Rivers is actively pursuing the rate adjustments
15 necessary to stabilize its finances, with the full support of its Board of Directors, and that it is

⁸⁷⁶ Bailey Rebuttal Testimony at p. 13:1-3. *See also* Wolfram Rebuttal Testimony at pp. 6:19-7:2 (“This case is a rate application. The Commission should consider whether the forecasted test period provides a sound basis for rates that are fair, just and reasonable, and it should set rates accordingly. To do so, the Commission should assess whether the forecasted test period reasonably represents the conditions that will exist at the time the rates are placed into effect. Again, this does not require that the Commission try to fully evaluate in this case the conditions that will exist several years from now on a least cost planning basis.”). *See also id.* at p. 9:19-10:10 (Big Rivers will “continue to be subject to the plant fixed costs that cannot be avoided by idling the plants. Those fixed costs will not change based on additional analyses, and additional analyses will not impact Big Rivers’ revenues and expenses in the forecasted test period used in this filing.”).

⁸⁷⁷ Bailey Rebuttal Testimony at p. 13:3. *See also id.* at p. 13:14-16 (“Big Rivers performed studies and analyses to inform and support its decision making. Big Rivers has filed numerous production cost model runs in this proceeding, alone.”).

⁸⁷⁸ *Id.* at p. 14:11-14.

⁸⁷⁹ *See* Kollen Hearing Testimony, Jan. 9, 2014, 19:36’30” (discussing mechanics of a proposed management audit).

⁸⁸⁰ *Id.* at 19:32’50”.

⁸⁸¹ *See In the Matter of the Application of East Kentucky Power Coop., Inc. for an Order Approving Accounting Practices to Establish a Regulatory Asset Related to Certain Replacement Power Costs Resulting from Generation Forced Outages*, Case No. 2008-00436, Order of Dec. 23, 2008 at *7-9.

1 diligently working to implement its plan to mitigate those rate adjustments. The two
2 circumstances are not even superficially similar, and the Commission should decline to follow
3 Mr. Kollen's proposal.

4 A management audit premised on second-guessing the Unwind Transaction, the
5 Mitigation Plan, or any other planning or decision-making that was thoroughly examined
6 through the public hearing process, would be extremely counter-productive. As noted
7 throughout, the Commission should not ignore the broader capital market and vendor perception
8 that the order in this case will engender. Unlike the situation with EKPC, where the management
9 audit was about ensuring EKPC's financial viability, KIUC's request for a Big Rivers
10 management audit revolves around the consideration of restructuring and would undermine Big
11 Rivers' financial viability. There are significant risks regarding how creditors and rating
12 agencies would view such a Commission-ordered management audit. A management audit
13 would announce to Big Rivers' existing and potential creditors, existing and potential vendors,
14 and potential new loads that Big Rivers' future is still in doubt, which would almost certainly
15 "light the bankruptcy fuse," not to mention further impair and distract from Big Rivers'
16 mitigation efforts.⁸⁸²

17 KIUC's proposed management audit is unnecessary, and it would provide no benefit to
18 Big Rivers' Members. Mr. Kollen has ignored key facts. Big Rivers has already negotiated
19 beneficial refinancings with its creditors.⁸⁸³ In connection with this case, Big Rivers also
20 retained Mr. Mabey (a renowned bankruptcy expert, practicing bankruptcy attorney, and former
21 federal bankruptcy judge),⁸⁸⁴ Haynes & Boone (which has highly specialized expertise in

⁸⁸² See Section VI (explaining the central importance of ongoing regulatory support).

⁸⁸³ See Section IV.C.1.

⁸⁸⁴ Mabey Rebuttal Testimony at pp. 3:17-4:11.

1 bankruptcy matters),⁸⁸⁵ and Mr. Walker (an expert in cooperative finance),⁸⁸⁶ all of whom
2 support the wisdom and practicality of Big Rivers' strategies to suppress the risk of bankruptcy.

3 Furthermore, Big Rivers' management has not acted unilaterally. It has worked closely
4 with the Commission for approximately three decades to responsibly and timely manage the
5 risks associated with the Smelter load. As discussed in Section IV.A, the current stakeholders,
6 including Big Rivers, its Members, KIUC, and the Commission, were all involved in the
7 proceedings in which the Unwind Transaction and the rate adjustment in the 535 Rate Case were
8 approved:

9 "At no time during the 14 plus months that Case No. 2007-00455 was before the
10 Commission did KIUC claim that the Unwind Transaction would result in rate
11 increases that would be too high for Aleris, Domtar, and Kimberly Clark. To the
12 contrary, Alcan and Century filed testimony supporting the Unwind Transaction
13 as beneficial for both Industrial customers and Rural customers .. ."⁸⁸⁷

14 Quite simply, Big Rivers is doing everything in its power to quickly and
15 effectively mitigate the effects of the Smelter contract terminations, and a management
16 audit would sound the death knell for any realistic chance of avoiding bankruptcy or a
17 potential liquidation, neither of which will benefit the Members or their retail customers.

18 Some of the Opposing Intervenors' other proposed analyses stem from their
19 allegations that Big Rivers' Mitigation Plan is not sufficiently supported.⁸⁸⁸ However,
20 those allegations are false.⁸⁸⁹ The Commission already found it "reasonable to afford Big

⁸⁸⁵ Speed Rebuttal Testimony at p. 15:9-17.

⁸⁸⁶ Walker Direct Testimony at pp. 3:10-4:8.

⁸⁸⁷ 535 Rate Case Order at *49-50.

⁸⁸⁸ See, e.g., Hayet Direct Testimony at p. 4:9-10 (Mitigation Plan is based on "unrealistic or clearly erroneous assumptions").

⁸⁸⁹ See Section VIII.B.

1 Rivers the time to pursue its mitigation strategies”⁸⁹⁰ None of the Opposing
2 Intervenors’ allegations or proposed studies affects that finding.⁸⁹¹

3 Many of the analyses and studies proposed by the Opposing Intervenors relate
4 entirely to Big Rivers’ long-term planning horizon, not the forecasted test period, and therefore
5 they would not affect the rates Big Rivers needs to remain financially viable. For example,
6 Sierra Club criticizes Wood Mackenzie’s “blending” of ACES broker prices and its forecast;
7 however, those criticisms affect only the “long term planning horizon” because the broker prices
8 included in the forecasted test period “are actual market prices and not forecasted prices.”⁸⁹²
9 Similarly, the Opposing Intervenors criticize Big Rivers’ load replacement forecasts, but the
10 replacement load is not projected to commence until 2016, long after the forecasted test period
11 used to establish the proposed rates has ended.⁸⁹³ The Opposing Intervenors also criticize Big
12 Rivers for not taking into account certain possible carbon emissions regulations,⁸⁹⁴ but all parties
13 agree that no such new regulations are “expected to be in place during the forecasted test
14 period.”⁸⁹⁵ As a threshold matter, it is inaccurate to suggest that Big Rivers did not consider the
15 “long term planning horizon.” It did; the Opposing Intervenors simply draw different
16 conclusions from those reached by the respected and reputable consultants upon which Big
17 Rivers relied for those considerations. Nevertheless, the resolution of those issues does not
18 change the calculation of the revenue requirement necessary at this time to avoid undermining
19 Big Rivers’ financial viability.

⁸⁹⁰ 535 Rate Case Order at *19. See also Wolfram Rebuttal Testimony at p. 12:7-13.

⁸⁹¹ *Id.* at p. 6:6-13.

⁸⁹² *Id.* at p. 10:11-23.

⁸⁹³ *Id.* at p. 12:7-17.

⁸⁹⁴ See, e.g., Hayet Direct Testimony at pp. 2-3, 28:19-29:1.

⁸⁹⁵ Wolfram Rebuttal Testimony at p. 13:4-14.

1 Furthermore, the Commission's denial of the Opposing Intervenors' proposals will not
2 hinder its authority or ability to monitor and evaluate Big Rivers' continued analyses of its
3 resources on an ongoing basis, or to monitor and evaluate the Mitigation Plan on an ongoing
4 basis.⁸⁹⁶ Indeed, Big Rivers already plans to conduct additional analyses to determine when to
5 return the Wilson and Coleman Stations to service.⁸⁹⁷ In addition, the Commission will "have
6 continuing jurisdiction over Big Rivers under KRS 278" and will have numerous opportunities in
7 the near future to continue to evaluate Big Rivers' progress.⁸⁹⁸ Big Rivers is scheduled to file
8 IRPs in 2014, 2017, and 2020, each of which will "provide[] a forum in which Big Rivers
9 conducts a thorough assessment of its future load forecasts, demand side alternatives, and supply
10 side alternatives over a fifteen-year planning horizon" and "ensure[] that Big Rivers will review
11 and update its load forecast and resource plans as it is implementing its Mitigation Plan"⁸⁹⁹
12 Big Rivers also expects to file ECP and CPCN applications prior to restarting the Coleman
13 Station units, and, if it successfully sells or leases the Wilson or Coleman Station, it would file an
14 application with the Commission "seeking authority to transfer control of those assets" and
15 "would include the studies that demonstrate that such a transaction is for a proper purpose and is
16 consistent with the public interest."⁹⁰⁰ These future proceedings enable the Commission to grant
17 Big Rivers' proposed rates "without transforming this rate proceeding into a least-cost resource

⁸⁹⁶ *Id.* at p. 8:1-9. *See also* Bailey Hearing Testimony, Jan. 7, 2014, Tr. 14:39'30" ("The Commission has at their disposal many opportunities for those kind of reviews. Obviously every few months we have an environmental surcharge proceeding, we have fuel cost proceedings, we have purchased power cost proceedings, there are integrated resource plan proceedings. Obviously if we bring in any significant load those contracts will be brought to the Commission, at which time the revenues can be considered. There are endless opportunities. And the Commission always has the show cause opportunity.")

⁸⁹⁷ Wolfram Rebuttal Testimony at p. 9:9-12. *See also* Berry Rebuttal Testimony at p. 6:1-4 ("Additional analyses will be performed in the future when circumstances appear to justify bringing the plants back online; that decision will be based on an analysis of the circumstances at the time.")

⁸⁹⁸ Wolfram Rebuttal Testimony at p. 8:1-9.

⁸⁹⁹ *Id.* at p. 8:10-21.

⁹⁰⁰ *Id.* at p. 9:1-8.

1 analysis over the long term planning horizon.”⁹⁰¹ In other words, these future planned analyses
2 and proceedings “give the Commission the necessary assurances that Big Rivers will continue to
3 perform the appropriate resource studies on a routine basis,” and will “provide Big Rivers, the
4 intervenors, and the Commission with additional and on-going insight into the reasonableness of
5 Big Rivers’ resource plans—and thus its rates—over the next three to five years and beyond.”⁹⁰²

6 For these reasons, the Opposing Intervenor’s proposals for additional studies and
7 analyses are unnecessary and unduly burdensome in the context of this rate proceeding, and the
8 Commission should reject them.

9 **H. Big Rivers’ 1986 Rate Case Involved a Very Different Set of Facts Than**
10 **Those at Issue in This Proceeding.**

11 The Opposing Intervenor’s have invoked the Commission’s March 17, 1987, order in
12 Case No. 9613 in their testimony,⁹⁰³ no doubt because the Commission denied Big Rivers’ rate
13 request in that case.⁹⁰⁴ However, because of the dramatic differences in factual circumstances,
14 the rejection of proposed rates in the 9613 Order sheds no light on this proceeding or on whether
15 Big Rivers’ proposed rates are fair, just, and reasonable.

16 The Commission had before it in Case No. 9613 a workout plan that was agreed upon by
17 Big Rivers and its creditors.⁹⁰⁵ Big Rivers’ assets were being foreclosed upon by REA (now
18 RUS),⁹⁰⁶ and REA had refused to advance committed loan funds to Big Rivers so Big Rivers
19 could complete construction of the yet unfinished Wilson Station.⁹⁰⁷ In the 9613 Order, the
20 Commission stated that “[t]he overriding issue in this case is the workout plan [with the

⁹⁰¹ *Id.* at p. 13:19-20.

⁹⁰² *Id.* at p. 14:7-9.

⁹⁰³ *See, e.g.,* Kollen Direct Testimony at pp. 38-39; Brevitz Direct Testimony at pp. 54-55.

⁹⁰⁴ *See generally* 9613 Order.

⁹⁰⁵ *See id.* at *16 (“[t]he overriding issue in this case is the workout plan”).

⁹⁰⁶ *Id.* at *9.

⁹⁰⁷ *Id.*

1 smelters], not a proposed rate increase.”⁹⁰⁸ The Commission denied Big Rivers’ proposed rates
2 in that case because it found that the proposed “workout plan will not provide for a workable,
3 long-term solution to Big Rivers’ financial problems”⁹⁰⁹ It then required the parties to
4 continue negotiating a new workout plan that established an aluminum-market-based pricing
5 approach for the smelters.⁹¹⁰

6 None of these facts are at issue in this case. The Smelters have terminated the Smelter
7 Agreements; consequently, the concerns about fluctuations of the global aluminum market are
8 simply not present here as they were in the 9613 case.⁹¹¹ Similarly, a “workout plan with the
9 smelters” is not at issue in this case, as the arrangements with the Smelters will have no adverse
10 impact beyond what would be experienced if they simply ceased smelting operations.⁹¹²
11 Furthermore, the 9613 Order addressed the ratemaking treatment of the Wilson Station when it
12 was newly-constructed,⁹¹³ whereas in the current proceeding the Wilson Station has been
13 operational and provided tremendous value to Big Rivers’ Members for decades. Also, as
14 discussed above, Big Rivers has already begun implementation of a workable, long-term plan to
15 address the revenue loss created by the Smelters’ contract terminations: the Mitigation Plan. In
16 short, the central factual issues that drove the Commission’s decision in the 9613 Order are not
17 issues in this case.

18 Moreover, the various stakeholders and the Commission had the luxury of time in the
19 9613 case, a fact central to the Commission’s ultimate decision to order further negotiations and

⁹⁰⁸ *Id.* at *16.

⁹⁰⁹ *Id.* at *46. *See also id.* at *17 (“Since our approval of this rate increase would trigger the operation of the workout plan, we reject the rate increase as unreasonable.”).

⁹¹⁰ *Id.* at *44 (ordering Big Rivers and the smelters to “negotiate a flexible rate plan that recognizes the cyclical nature of the [aluminum] industry”).

⁹¹¹ *Id.* at *44-46.

⁹¹² *See* Section XI.

⁹¹³ *See* 9613 Order at *9.

1 initiate a new proceeding to monitor those negotiations.⁹¹⁴ Here, as explained in Section IX, Big
2 Rivers does not have that luxury. The Sebree Smelter’s unilateral contract termination, pursuant
3 to the Smelter Agreements approved by the Commission, put Big Rivers on a 12-month timer.
4 At the end of those 12 months (January 31, 2014), Big Rivers’ revenue deficiency must be
5 resolved, or Big Rivers will almost certainly face bankruptcy. There is simply no time for
6 deferring a decision in this matter, and there is no time for unrealistic “workout” negotiations.

7 Despite these significant differences, the 9613 Order does shed light on at least two
8 issues that remain relevant.

9 First, after the Commission denied Big Rivers’ rate request in that case, the REA issued a
10 letter to the Commission to explain that “[f]rankly, we are all surprised and disappointed at this
11 action of the Commission”⁹¹⁵ The letter also informed the Commission that, as a direct
12 result of the denial of Big Rivers’ proposed rates, the “REA and the RTB will suspend all loan
13 and loan guarantee approvals and advances on loans and loan guarantees already approved to all
14 electric and telephone borrowers in Kentucky.”⁹¹⁶ The REA’s reaction in 1987 suggests the kind
15 of reaction RUS, and perhaps creditors of other Kentucky jurisdictional utilities, could have if
16 the Commission chooses to deny Big Rivers’ proposed rate relief and undermines Big Rivers’
17 financial viability rather than allow competent utility management time to manage the issues
18 faced by Big Rivers.

19 Second, in that case, as in this case, certain witnesses put forth proposals that would have
20 led to Big Rivers’ bankruptcy. The Commission rejected that approach, as it should now,
21 stating:

⁹¹⁴ *Id.* at *42-43, *46-47.

⁹¹⁵ See Embargo Letter (suspending all loan guarantee approvals and advances to Kentucky utilities).

⁹¹⁶ See Embargo Letter (emphasis added).

1 The Commission does not see bankruptcy as a preferable option
2 for Big Rivers. Bankruptcy would prolong the corrosive
3 uncertainty in the Big Rivers service territory. It could prove
4 unfortunate for both customers and creditors.⁹¹⁷

5 This concern remains as relevant today as it was then.

6
7 **XIX. The Following Outstanding Motions and Petitions Should Be Granted.**

8 The Commission should grant the following outstanding motions and petitions for the
9 reasons stated in the respective motion or petition:

- 10 • Big Rivers' 7/12/13 petition for confidential protection and motion for deviation
11 (related to Big Rivers' responses to PSC 1);
- 12 • Big Rivers' 9/3/13 motion for deviation (related to Big Rivers' responses to PSC
13 2, AG 1, KIUC 1, and SC 1);
- 14 • Big Rivers' 9/30/13 petition for confidential protection and motion for deviation
15 (related to Big Rivers' responses to PSC 3, AG 2, KIUC 2, and SC 2);
- 16 • Big Rivers' 10/22/13 petition for confidential protection (related to Big Rivers'
17 revised data request responses);
- 18 • Big Rivers' 11/12/13 petition for confidential protection (related to Big Rivers'
19 revised data request responses);
- 20 • Big Rivers' 12/17/13 petition for confidential protection (related to Big Rivers'
21 rebuttal testimony);
- 22 • Big Rivers' 1/24/14 petition for confidential protection and motion for deviation
23 (related to Big Rivers' responses to post-hearing data requests).

⁹¹⁷ 9613 Order at *41.

1 Big Rivers sufficient rates, Big Rivers will be able to focus its efforts on the Mitigation Plan, but
2 if the order is unresponsive, it would “light the bankruptcy fuse.”

3 Amazingly, the Opposing Intervenors freely admit that they did not evaluate how a Big
4 Rivers’ bankruptcy would affect Big Rivers, its Members, and their retail customers.

5 Consequently, the uncontroverted evidence is that:

6 What is certain is that this [bankruptcy] process, regardless of how
7 it turns out, will cost millions of dollars and put the future of the
8 company in jeopardy. The retail customers may ultimately end up
9 bearing the brunt of these increased costs in one form or another.
10 It is my opinion that the requested rate adjustment is a far superior
11 mechanism for serving the interests of Big Rivers’ Members and
12 for continuing the viability of Big Rivers as it will allow the
13 company to implement its Mitigation Plan for the benefit of the
14 company, its creditors, the Members, and the Members’ retail
15 customers.⁹¹⁹

16
17 Big Rivers acknowledges that the rate adjustment it seeks in this proceeding is
18 significant, but that does not change the Commission’s Constitutional mandate to grant sufficient
19 rates. Big Rivers has a reasonable plan to transition to a Smelter-less system, but it will not be
20 able to realize the benefits of that plan under the financial stress of a continued “chipping away”
21 at depreciation or other aspects of its revenue requirement. Any action that the Commission
22 takes must also survive the independent scrutiny of Big Rivers’ third-party lenders, rating
23 agencies, large vendors, and potential load replacement customers who have adopted a “wait and
24 see” approach to this case.

25 Big Rivers seeks only the bare minimum rate adjustment necessary to be a viable utility,
26 maintain its generating fleet, meet its debt service, and fund an appropriately reduced scale of
27 operations. It is pursuing every reasonable opportunity to mitigate the impact of its request, from
28 using reserve funds to postpone the effective date of this adjustment, to supplementing reserve


⁹¹⁹ Mabey Rebuttal Testimony at p. 36:5-12.

1 funds with transmission revenues from the Smelters, to every other aspect of its multifaceted
2 Mitigation Plan. Big Rivers just needs time to implement it. Granting the rate relief sought in
3 this case will provide the financial stability necessary to buy that time. Under any other
4 scenario, Big Rivers faces bankruptcy and the great disruption, expense, and uncertainty that it
5 would visit upon Big Rivers, its Members, their retail customers, and western Kentucky.

6 Consequently, and for the reasons detailed in this brief, Big Rivers respectfully requests
7 that the Commission find that Big Rivers' proposed rates are fair, just, and reasonable.

8 On this the 13th day of February, 2014.

9 Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing was or will be served on the following by Federal Express or by regular mail upon the persons listed below, on the date this brief is filed with the Kentucky Public Service Commission or the following day.

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