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December 5, 2016

VIA FEDERAL EXPRESS

Dr. Talina R. Mathews
Executive Director
Public Service Commission
211 Sower Boulevard, P.O. Box 615
Frankfort, Kentucky 40602-0615

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DEC 5 2016

PUBLIC SERVICE
COMMISSION

Re: *In the Matter of: Application of Big Rivers
Electric Corporation for a Declaratory Order*
Case No. 2016-00278

Dear Dr. Mathews:

Enclosed for filing on behalf of Big Rivers Electric Corporation are an original and ten (10) copies of the Rebuttal Testimony of Robert W. Berry in the above-referenced matter. I certify that on this date, a copy of this letter and a copy of the rebuttal testimony were served on each of the persons listed on the attached service list by first class mail.

Sincerely yours,

James M. Miller
Counsel for Big Rivers Electric Corporation

JMM/abg

Enclosures

cc: Service List

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PSC Case No. 2016-00278

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY

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DEC 5 2016

**PUBLIC SERVICE
COMMISSION**

In the Matter of:

**APPLICATION OF BIG RIVERS ELECTRIC
CORPORATION FOR DECLARATORY ORDER**

) **Case No.**
) **2016-00278**
)

REBUTTAL TESTIMONY

OF

ROBERT W. BERRY
PRESIDENT AND CHIEF EXECUTIVE OFFICER

ON BEHALF OF

BIG RIVERS ELECTRIC CORPORATION

FILED: December 5, 2016

**REBUTTAL TESTIMONY
OF
ROBERT W. BERRY**

I. INTRODUCTION

Q. Please state your name.

A. My name is Robert W. Berry.

Q. Are you the same Robert W. Berry who filed direct testimony as Exhibit 10 to the application Big Rivers Electric Corporation (“Big Rivers”) filed with the Kentucky Public Service Commission (“Commission”) in this matter?

A. Yes.

II. SUMMARY OF REBUTTAL TESTIMONY

Q. What is the purpose of your rebuttal testimony?

A. The purpose of my rebuttal testimony is to respond to the direct testimony of Gary Quick, General Manager of Henderson Municipal Power & Light, including correcting his mischaracterizations of the facts and Big Rivers' positions, and responding to the positions in opposition to Big Rivers taken by the City of Henderson, Kentucky and City of Henderson Utility Commission (collectively, "Henderson") in their responses to information requests from the Commission Staff and Big Rivers.

1 **Q. Will you please summarize the substance of your rebuttal testimony?**

2 A. Yes. As I understand Mr. Quick's testimony and Henderson's responses to
3 information requests from Commission Staff and Big Rivers, Henderson's positions on
4 Big Rivers' application ("Application") are:

- 5 • Big Rivers does not have a contractual right to generate and dispose of energy
6 within Henderson's reserved capacity in a way that does not meet with
7 Henderson's approval, or to take Henderson's supply of coal and lime inventories
8 to generate that energy. This position of Henderson would require Big Rivers to
9 be responsible for the variable costs of uneconomic energy Henderson requires
10 Big Rivers to produce from Station Two that Big Rivers does not want. My
11 rebuttal testimony demonstrates that there are no contractual requirements or
12 prudent utility practices that require Big Rivers to pay for producing energy that it
13 does not want and that is uneconomic, including any energy within Henderson's
14 capacity reservation.
- 15 • Big Rivers is not required to produce any energy from Station Two beyond the
16 energy required by Henderson from time to time for itself, its inhabitants, or for
17 sales to third parties pursuant to a firm, bona fide offer for energy with respect to
18 which Big Rivers has a right of first refusal. My testimony describes Henderson's
19 repeated assertion of control over operational decisions that not only requires
20 generation of uneconomic energy, but that prevents Big Rivers from operating
21 Station Two at all times on a best efforts basis, in an efficient and economical
22 manner consistent with its obligations in the Station Two Contracts.

1 • Mr. Quick seems to suggest that a root of the problem presented is the “unilateral
2 change in practice” by Big Rivers in calculating the amount of Excess Henderson
3 Energy in an hour. My rebuttal testimony shows that the method Big Rivers
4 adopted on June 1, 2016, to measure the amount of Excess Henderson Energy in
5 any hour is consistent with the terms of the Station Two Contracts and the
6 arbitration award attached as Exhibit 9 to Big Rivers’ Application. I also show
7 that even without the change in practice on June 1, 2016, there is still a problem
8 with responsibility for the variable cost of unwanted Excess Henderson Energy.

9 • Henderson also asserts that the Commission has no jurisdiction to hear this issue.
10 My rebuttal testimony points out the facts already in the record that inescapably
11 require Commission jurisdiction under these circumstances. I also describe why
12 Henderson’s refusal to even discuss the issues in this matter with Big Rivers
13 leaves Big Rivers no choice but to submit those issues to the Commission for
14 resolution.

15 **Q. Which energy production costs does Big Rivers contend, in this proceeding, that it is**
16 **not or should not be required to pay?**

17 A. Big Rivers seeks a declaratory order in this proceeding that it is not responsible
18 for the variable production costs for Excess Henderson Energy, as described and
19 calculated by Big Rivers in this proceeding, generated by Station Two that neither Big
20 Rivers nor Henderson wants.

21 **Q. What is the magnitude of this issue for Big Rivers?**

22 A. I discuss on pages 14 and 15 of my direct testimony, attached as Exhibit 10 to the
23 Application, the dollar impact of this issue on Big Rivers and its Members. Since June 1,

1 2016, through October 31, 2016, the variable costs for production of unwanted Excess
2 Henderson Energy total \$3,888,843. During that period, sales of that unwanted energy
3 into the Midcontinent Independent System Operator, Inc. ("MISO") produced revenue of
4 \$2,818,628, which has been sent to Henderson by checks that Henderson subsequently
5 returned to Big Rivers.

6
7 **III. BIG RIVERS' DEFINITION OF EXCESS HENDERSON ENERGY IS**
8 **SUPPORTED BY THE STATION TWO CONTRACTS AND IS REASONABLE**
9

10 **Q. There seems to be disagreement about exactly what energy generated by Station**
11 **Two is "Excess Henderson Energy." What is Big Rivers' position on the proper**
12 **definition of "Excess Henderson Energy"?**

13 A. Mr. Quick testifies at some length about the definition of Excess Henderson
14 Energy, and Henderson's response to item 4 of Big Rivers' requests for information
15 introduces a new formula for calculating the amount of Excess Henderson Energy in an
16 hour that is inconsistent with the arbitration award, the Station Two Contracts and any
17 past practices of the parties. Big Rivers defines Excess Henderson Energy as the energy
18 in any hour associated with the difference between Henderson's annual capacity
19 reservation and the energy required in that hour to meet the needs of Henderson and its
20 inhabitants. Mr. Quick's definition of Excess Henderson Energy enlarges the phrase
21 "energy required in that hour to meet the needs of Henderson and its inhabitants" by
22 adding energy that is "scheduled or taken by Henderson for sale to third parties." He
23 insists on page 7 of his testimony that energy within Henderson's reserved capacity is not

1 Excess Henderson Energy “until and unless Henderson elects to either not schedule or
2 not take the energy for its own use, or offer the energy for sale to third parties.”

3 Mr. Quick refers on page 9 of his testimony to “the appropriate characterization of
4 Excess Henderson Energy” as an issue that has already been litigated in the arbitration
5 proceeding that is referred to in his testimony. This is true, and the arbitration award’s
6 definition of Excess Henderson Energy is the same as Big Rivers’ definition, not the
7 definition proposed by Mr. Quick. Page 4 of the written arbitration award, attached as
8 Exhibit 9 to the Application, directly refers to “Excess Henderson Energy” as energy
9 “within Henderson’s reserved capacity which Henderson does not need to serve its native
10 load” that “Henderson may sell to [a] third party”

11 The difference in the definitions, which centers on whether energy within
12 Henderson’s reserved capacity that is subject to a third party sale is characterized as
13 Excess Henderson Energy, is immaterial to the question of who is responsible for the
14 variable costs of producing energy within Henderson’s capacity reservation that neither
15 Henderson nor Big Rivers wants. Henderson acknowledges that it is responsible for the
16 variable costs of energy it sells to a third party. It is the responsibility for the variable
17 costs of producing the remaining Excess Henderson Energy, which I refer to as the
18 “unwanted Excess Henderson Energy,” that is the subject of this proceeding.

19 **Q. Does Section 3.8 of the Power Sales Contract support Mr. Quick’s definition of**
20 **Excess Henderson Energy?**

21 A. No, it does not. As I just noted, the arbitration award, which interprets Section
22 3.8, includes third-party sales of Excess Henderson Energy. Despite that finding, Mr.
23 Quick contends that the words “not scheduled or taken by the City” in the definition of

1 Excess Henderson Energy in Section 3.8(a) exclude third-party sales from Excess
2 Henderson Energy. In doing so, he takes those words out of context, as they only apply
3 to energy that Henderson uses to meet the needs of itself and its inhabitants. Page 3 of
4 the arbitration award only uses the words “schedule and take” in reference to
5 Henderson’s native load and not to energy Henderson may want to sell to a third party.
6 Mr. Quick’s definition of Excess Henderson Energy also ignores the balance of Section
7 3.8. For convenience, I attach a copy of Section 3.8 of the Power Sales Contract to my
8 rebuttal testimony as Exhibit Berry Rebuttal_1.

9 Section 3.8(d) describes Excess Henderson Energy as energy that Henderson may
10 sell to a third party. It states that Henderson, referred to as the “City” in the Power Sales
11 Contract, cannot sell or commit “Excess Henderson Energy” to a person other than Big
12 Rivers without giving Big Rivers an opportunity to purchase it. It also provides that Big
13 Rivers can purchase the “Excess Henderson Energy” or the City may resell it to “third-
14 parties.” And Section 3.8(d) requires Henderson to pay for use of Big Rivers’
15 transmission system in accordance with Big Rivers’ Open Access Transmission Tariff in
16 marketing “Excess Henderson Energy.” Henderson would only pay Big Rivers under
17 Big Rivers’ Open Access Transmission Tariff for sales to third parties. All this language
18 in Section 3.8(d) has no meaning unless “Excess Henderson Energy” is all energy
19 associated with Henderson’s capacity reservation above the amount required to meet the
20 needs of Henderson and its inhabitants, including any energy sold to third parties.

21 In a March 14, 2008 letter from Mr. Quick to Western Kentucky Energy Corp.
22 (WKEC) and LG&E Energy Marketing, Inc. (“LEM”), who were then operating Station
23 Two, Mr. Quick admits that Excess Henderson Energy includes energy within

1 Henderson's reserved capacity that Henderson may sell to a third party. His statement in
2 the letter clearly conflicts with his position in this proceeding that Excess Henderson
3 Energy does not include energy that is included in third party sales. While the agreement
4 under which those parties were operating, the "Station Two Agreement," is different than
5 the Power Sales Contract, the definition of Excess Henderson Energy is the same. Mr.
6 Quick's letter and the relevant excerpt from the Station Two Agreement are attached to
7 my testimony as Exhibit Berry Rebuttal_2.

8
9 **IV. BIG RIVERS' CALCULATION OF EXCESS HENDERSON ENERGY IS**
10 **APPROPRIATE UNDER THE STATION TWO CONTRACTS AND IS**
11 **REASONABLE**

12
13 **Q. Please explain the new formula for calculating the amount of Excess Henderson**
14 **Energy in an hour that you say Henderson has introduced for the first time in its**
15 **response to item 4 of Big Rivers' requests for information, and that is inconsistent**
16 **with the arbitration award, the Station Two Contracts and any past practices of the**
17 **parties.**

18 **A.** To make his formula work, Mr. Quick asserts his incorrect definition of Excess
19 Henderson Energy, which divides Excess Henderson Energy into two separate parts—the
20 part used for third party sales and the part not used for third party sales. The formula for
21 calculating Excess Henderson Energy in an hour first introduced by Henderson in its
22 response to item 4b of Big Rivers' requests for information seeks to eliminate the issue
23 raised by Big Rivers in this proceeding by providing that Excess Henderson Energy

1 available for Big Rivers to take and use is the last generation in the “stack” of generation
2 he describes. This formula is different from the formula Big Rivers is currently using,
3 and the formula Big Rivers and Western Kentucky Energy Corp. used between
4 themselves for purposes of their indemnification agreement. To my knowledge there are
5 no terms in the Station Two Contracts or the arbitration award that require this formula.

6 Based upon Mr. Quick’s formula, there will never be any uneconomic Excess
7 Henderson Energy unless Big Rivers first takes all 197 MW of uneconomic energy
8 associated with its Station Two capacity allotment. In most cases, when the variable
9 costs associated with generating energy at Station Two exceed the wholesale market price
10 for energy, Station Two will generate energy at or very near the minimum level necessary
11 for safe operation of the units, 115 MW for unit 1 and 120 MW for unit 2, for a total of
12 235 MW. Because Henderson will presumably always take more than 38 MW for itself
13 and its native load and Big Rivers’ allocated capacity is 197 MW, under Mr. Quick’s
14 prioritization of energy there will never be any unwanted Excess Henderson Energy for
15 which Henderson must pay the variable production costs. Of course, when the variable
16 cost to produce energy from Station Two is below the wholesale market price, Henderson
17 will attempt to sell all of its reserved capacity above its native load, so that Henderson
18 will take its full reservation of 115 MW before Big Rivers takes any of its 197 MW
19 allocation. So, when the energy is economic, Henderson reaps the full benefit, but when
20 the energy is uneconomic, Henderson seeks to avoid the expense and place it on Big
21 Rivers. However, Henderson cannot reasonably divide Excess Henderson Energy into
22 two parts, the part it wants to sell to third parties and the uneconomic energy that it
23 cannot sell, and place the uneconomic energy behind Big Rivers’ allocated capacity so as

1 to avoid Henderson's responsibility for variable costs of the uneconomic energy it
2 requires Big Rivers to generate from Station Two.

3 **Q. Please explain in detail how Big Rivers calculates the amount of Excess Henderson**
4 **Energy in any hour.**

5 A. As explained in other parts of my rebuttal testimony, Henderson requires that its
6 capacity reservation from Station Two and the associated energy be available
7 continuously for the needs of itself, its inhabitants, and its third-party sales. As described
8 in Henderson's response to item 4b of Big Rivers' information requests, that capacity and
9 energy is the first to come from the Station Two generation. Using this as the beginning
10 premise, based upon Henderson's current capacity reservation, the first 115 MW in an
11 hour from Station Two belongs to Henderson. The difference between 115 MW and the
12 requirements of Henderson and its inhabitants is Excess Henderson Energy, as defined by
13 Section 3.8 of the Power Sales Contract and the arbitration award. If Big Rivers declines
14 to take any Excess Henderson Energy not otherwise scheduled and taken by Henderson
15 for a third-party sale, then Henderson is responsible for the variable costs of producing
16 that energy. If Big Rivers decides to take and use any Excess Henderson Energy from
17 Henderson's reservation that is not otherwise scheduled and taken by Henderson for a
18 third-party sale, Big Rivers will purchase that energy at the variable production costs plus
19 \$1.50 per MWh.

20 To give an example, assume that Henderson's capacity reservation is 115 MW,
21 the needs of itself and its inhabitants is 90 MW in an hour, and Henderson is making a
22 third-party sale of 10 MW in that hour. Excess Henderson Energy in that hour is 25 MW.
23 In accordance with the arbitration award, Big Rivers has the first right to purchase the

1 first 10MW of the Excess Henderson Energy on the same terms at which Henderson has
2 a firm offer from a third party. The Excess Henderson Energy associated with the
3 remaining 15 MW of Excess Henderson Energy is available for purchase by Big Rivers,
4 at its discretion, at the variable cost of production plus \$1.50 per MWh. For any energy
5 Big Rivers may take from its allocation of Station Two capacity in that hour, Big Rivers
6 pays the variable production costs.

7 For example, if Big Rivers decides that it is not economically prudent to take and
8 use the Excess Henderson Energy in that hour and exercises its contractual right to
9 decline to take Excess Henderson Energy, Henderson is responsible for the variable
10 production costs of that 15 MW of Excess Henderson Energy that Henderson requires
11 Big Rivers to generate even though Big Rivers does not want to take it. For the balance
12 of the energy generated by Station Two in that hour - energy associated with Big Rivers'
13 allocation of Station Two capacity that Big Rivers does not want to generate but is
14 required to generate by Henderson's policies - Big Rivers pays the variable production
15 costs.

16 **Q. Mr. Quick implies that the "change in practice" by Big Rivers in how it calculates**
17 **the amount of Excess Henderson Energy in an hour is not proper because it varies**
18 **from the calculation previously made by Big Rivers pursuant to Exhibit A to the**
19 **indemnification agreement between Big Rivers and Western Kentucky Energy**
20 **Corporation. Do you agree?**

21 **A.** No. Exhibit A is not part of any contractual obligation between Big Rivers and
22 Henderson. It is an exhibit to an agreement between Big Rivers and Western Kentucky
23 Energy Corp. ("WKEC") that was entered into in 2009. Even Mr. Quick states in his

1 response to item 4 of Big Rivers' information requests that the amount of Excess
2 Henderson Energy in an hour should not be calculated in accordance with Exhibit A.
3 Even if Big Rivers were still calculating Excess Henderson Energy in an hour pursuant to
4 Exhibit A, that would not resolve the issue. There would still be Excess Henderson
5 Energy that Big Rivers would not want to generate or take that Henderson would insist
6 that Big Rivers must generate and pay the variable costs of producing.

7 **Q. Mr. Quick accuses Big Rivers of failing to explain why it changed the way it was**
8 **measuring Excess Henderson Energy in an hour and the associated assignment of**
9 **the variable costs of producing that energy. That testimony is found in his**
10 **testimony on page 5, line 19, and page 8, line 10. Is this a fair criticism?**

11 A. No, and I do not understand that criticism. My three page letter to Mr. Quick of
12 May 25, 2016, a copy of which is included in Exhibit 11 of the Application, explains that
13 Big Rivers' practice of routinely purchasing all Excess Henderson Energy, even when the
14 variable costs of producing the energy exceeded the market price was resulting in
15 unacceptable financial losses to Big Rivers. I further state that Big Rivers was exercising
16 its contractual right not to take Excess Henderson Energy, and would consequently not be
17 paying the variable costs of producing that energy. Mr. Quick asked no questions about
18 my explanation in his letters back to me dated May 31, 2016, and June 17, 2016, said that
19 there was no need to meet to discuss positions, and referred Big Rivers to its attorneys. I
20 also explain this matter in my response to item 4 of the Commission Staff's first request
21 for information.
22
23

1 **V. HENDERSON REQUIRES BIG RIVERS TO OPERATE STATION TWO**
2 **UNECONOMICALLY**

3
4 **Q. Henderson says that Big Rivers is only required to generate the energy within**
5 **Henderson’s capacity reservation “which Henderson schedules or takes”? Is that**
6 **consistent with your experience?**

7 A. No, and Henderson’s statement is misleading. First, because Henderson delivers
8 no schedules to Big Rivers for the load of itself and its inhabitants, Big Rivers must be
9 prepared to deliver the full 115 MW of energy to Henderson at any time. Next, the
10 Station Two Contracts have always provided that the capacity and output of Station Two
11 “shall be reserved to and available for use” by Henderson “for the purpose of supplying
12 the needs of the City and its inhabitants for electric power and energy”¹ Henderson
13 and the arbitration award now require that energy associated with Henderson’s reserved
14 capacity also be available for use by Henderson for the purpose of making third-party
15 sales in compliance with the arbitration award.

16 Henderson further requires both Station Two units to be operated continuously,
17 and the minimum generation levels of the units exceed Henderson’s capacity reservation.
18 Finally, even if only one unit of Station Two is running, Henderson’s operating
19 requirements and the current operating requirements of the unit make it impossible to
20 follow Henderson’s load within its reserved capacity when Henderson’s load is less than
21 115 MW. And of course Henderson’s requirement for Big Rivers to continuously operate
22 both of the Station Two units forces Big Rivers to generate uneconomical energy from its

¹ 2005 Amendments to the Station Two Contracts, Section 301, Application Exhibit 8, page 66.

1 capacity allocation that negatively impacts Big Rivers' Members and their retail
2 ratepayers. So, Henderson requires Big Rivers to generate energy in excess of what
3 Henderson "schedules and takes."

4 **Q. Does Big Rivers agree with Henderson that the Station Two Contracts require both**
5 **units to operate continuously?**

6 A. No. Big Rivers reads the language quoted by Henderson from Section 13.2 of the
7 Power Plant Construction and Operation Agreement (Application Exhibit 2) as requiring
8 Big Rivers to *provide* all operating personnel, materials, supplies and technical services
9 required for the continuous operation of Station Two so that Station Two can be operated
10 when needed to fulfill the needs of Henderson and Big Rivers. There should be no
11 reason why the parties should want a contractual requirement that the Station Two units
12 be generating energy when the energy is not required for the needs of the parties, and the
13 variable cost of producing the energy is greater than the cost of energy available in the
14 market.

15 Mr. Quick's explanation in his response to item 3 of Big Rivers' information
16 requests for why both Station Two units must be in "continuous operation" does not
17 identify any contractual basis for that requirement. The energy requirements of
18 Henderson to fulfill its obligations to its native load and any third parties can be met
19 under the Station Two Contracts with one unit running.

20 **Q. Mr. Quick seems to suggest that Big Rivers has the operating flexibility to**
21 **substantially mitigate this issue by not generating energy from Station Two above**
22 **the amount required for Henderson and its native load. What support do you have**
23 **for your contention that Big Rivers does not have that flexibility?**

1 A. As I have previously testified, the minimum generation level for Unit 1 is 115
2 MW and for Unit 2 is 120 MW in order to maintain the minimum operating temperature
3 for safe and continuous operation of the Station Two SCR system in compliance with
4 applicable environmental laws and regulations. In addition, the Power Plant Construction
5 and Operation Agreement provides in Section 13.4 that Big Rivers “will at all times
6 operate the City’s Station Two on a best efforts basis, in an efficient and economical
7 manner” The operating requirements imposed on Big Rivers by Henderson prevent
8 Big Rivers from operating Station Two in an efficient and economical manner, and taking
9 steps that could substantially reduce the magnitude of the issues that Big Rivers has asked
10 the Commission to resolve.

11 As I describe in more detail in my direct testimony, Application Exhibit 10, page
12 12, and in Big Rivers’ responses to Henderson’s information requests, including but not
13 limited to HMPL 1-8, and HMPL 2-5, 2-6, 2-8, 2-9, 2-10, and 2-14, Henderson
14 consistently requires Big Rivers to operate both Station Two units when the electricity
15 needs of Big Rivers and Henderson could be satisfied more economically through market
16 purchases. As stated in Big Rivers’ response to HMPL 1-8, Henderson threatened to sue
17 Big Rivers when Big Rivers said it wanted to put a Station Two unit in standby service
18 when it was uneconomical to operate.

19 Also, Henderson always asserts control over the length of outages. Henderson
20 has required Big Rivers to work overtime, weekends and holidays at higher costs to
21 return units to service quicker even when the energy generated by the units is
22 uneconomical. A good example of what I mean is shown in the electronic mail exchange
23 between Wayne Thompson of Henderson and me in 2012, which I have attached to this

1 testimony as Exhibit Berry Rebuttal_3. And keep in mind that the energy to be generated
2 by returning the unit to service in that example was energy associated with Big Rivers'
3 capacity allocation that Big Rivers did not want to generate. Big Rivers certainly has no
4 "take and pay" obligation with respect to energy under the Station Two Contracts, but
5 Henderson's exercise of control over the decision about when to run the Station Two
6 units has effectively imposed that kind of obligation on Big Rivers. In this case, though,
7 Big Rivers is only asking the Commission to address the unreasonableness of
8 Henderson's position that Big Rivers should be responsible for the variable costs of
9 unwanted Excess Henderson Energy. If Henderson acts unreasonably and contrary to its
10 economic best interests, its ratepayers, not Big Rivers' ratepayers, should bear the costs
11 of Henderson's choices.

12 **Q. In his response to item 6 of Big Rivers' information requests, Mr. Quick refers to a**
13 **recent example where Big Rivers was able to reduce the output of the Station Two**
14 **units to 79 MW and 74 MW, respectively. Does this not conflict with the generation**
15 **minimums you have given?**

16 A. No. The minimum generation levels I have stated are the minimum generation
17 levels that Big Rivers believes are currently appropriate based on previous testing of the
18 units. But because of the significant negative financial impact on Big Rivers and its
19 Members of Henderson's requirement that Big Rivers continuously operate both Station
20 Two units, Big Rivers is constantly searching for ways to reduce those minimum
21 operating levels. We continue to perform additional minimum load testing with the
22 Station Two units to determine if we can safely operate the units at lower levels while
23 complying with applicable environmental laws and regulations. The event to which Mr.

1 Quick refers is one of the times we were testing the minimum operating level of the plant.
2 We are presently evaluating the data from that and other tests to determine if the
3 minimum generation level can be reduced to approximately 75 MW for each of the
4 Station Two units while meeting all applicable environmental laws and regulations and
5 maintaining the units in safe and reliable operation. At this time no conclusion has been
6 reached as to whether we can reduce the minimum operating levels below the levels
7 previously identified in my testimony, but we will continue to test and evaluate this issue.

8 **Q. If Big Rivers can reduce the minimum output of the Station Two units to 79 MW**
9 **and 74 MW, respectively, is Mr. Quick correct that there will be little, if any, energy**
10 **generated that will exceed Henderson's native load in a given time period?**

11 A. No. Even if Big Rivers reduces the minimum generation levels to those
12 levels, there would still be 153 MW of generation, which is materially above
13 Henderson's capacity reservation of 115 MW, and even further above
14 Henderson's average hourly native load requirement during the past five years of
15 71.4 MW². However, if Henderson dropped its objections to Big Rivers idling a
16 unit during uneconomic times and Big Rivers is successful in reducing the
17 minimum generation level of the Station Two units to 75 MW, I agree that Big
18 Rivers could significantly reduce the amount of unwanted Excess Henderson
19 Energy in certain hours.
20
21

² Prior sixty months beginning with October of 2016; does not include any energy taken by Henderson from SEPA.

1 **Q. How do you respond to the two conditions Mr. Quick establishes, in his answer to**
2 **item 7 of the Commission Staff information requests, to consider allowing Big**
3 **Rivers to idle or place one or both Station Two units in standby service when it is**
4 **uneconomical to operate them?**

5 **A.**First, in response to Mr. Quick's opening sentence that he is aware of no
6 contractual provision that would permit Big Rivers to idle one or both of the Station Two
7 units for economic or market reasons, I would say that there are no contractual provisions
8 that prevent it, and there are contractual provisions that permit it. Idling, cycling or
9 economically committing a generating unit is a routine practice for a generating utility
10 that is using its best efforts to operate a generating plant in an efficient and economical
11 manner. A utility does not idle, cycle or economically commit a generating unit for any
12 reason except economics. Big Rivers has operated its generating system in this manner
13 and has had no mechanical issues with its generating units as a result.

14 Big Rivers first learned of Mr. Quick's offer to support Big Rivers paying the cost
15 of a third party consultant to study the issue when we read Henderson's responses to Big
16 Rivers' information requests. My initial reaction is that Mr. Quick overlooks the fact that
17 Big Rivers is a generating utility with employees who are experts on the subject, who
18 have actually operated the Station Two units for many years, and who have received
19 industry awards for operation of Station Two. In fact, Big Rivers has a much bigger
20 financial stake in the operating integrity of Station Two than Henderson because Big
21 Rivers' Net Book Value on Station Two is nearly five times that of Henderson. Big
22 Rivers' Net Book Value on Station Two was \$88,705,565.51 as of 5/31/2016 versus
23 Henderson's Net Book Value of \$17,957,726.25 (See Henderson response to item 11 of

1 Big Rivers' information requests). Big Rivers is also currently responsible for more than
2 63% of the Station Two maintenance and repair costs.

3 Henderson has not agreed to sit down with Big Rivers to negotiate terms
4 on which it would permit Big Rivers to idle, cycle or economically commit the
5 Station Two units. So there is no ongoing negotiation about Henderson's demand
6 for "assurance" that energy associated with its reserved capacity would continue
7 to be available at no increased cost to Henderson. I would note that Henderson
8 previously rejected a similar proposal as shown in Exhibit Berry Rebuttal_3.

9
10 **VI. BIG RIVERS IS NOT RESPONSIBLE FOR THE VARIABLE COSTS OF**
11 **GENERATING UNWANTED EXCESS HENDERSON ENERGY**

12
13 **Q. Why does Big Rivers contend it is not responsible for the variable production**
14 **costs of the unwanted Excess Henderson Energy?**

15 **A.** Under Section 6.7 of the Power Sales Contract, a party takes responsibility
16 for the variable production costs of energy within its capacity reservation by
17 paying or providing the fuel, all reagents, and sludge disposal costs associated
18 with the production of the energy. The language in Section 3.8(a) of the Power
19 Sales Contract is clear that "Big Rivers may, at its discretion, take and utilize" all
20 or part of the Excess Henderson Energy. Section 3.8 only requires Big Rivers to
21 be responsible for the variable costs of Excess Henderson that it, in its discretion,
22 "takes." Since June 1, 2016, Big Rivers has not wanted, and has not taken and
23 utilized Excess Henderson Energy that is uneconomical for Big Rivers to sell into

1 MISO. Because Henderson has required that Big Rivers generate that energy, as
2 explained in more detail previously in my testimony, the energy has been
3 generated and sold into MISO for Henderson's benefit.

4 **Q. Henderson has disputed Big Rivers' authority to use the fuel and reagents that**
5 **Henderson has purchased and provided to Station Two for production of the**
6 **unwanted Excess Henderson Energy since June 1, 2016. What authority does Big**
7 **Rivers have to allocate those costs to Henderson?**

8 A. Once Henderson elects its annual capacity reservation, the Station Two Contracts
9 make Henderson liable for the fixed capacity costs associated with the capacity it has
10 reserved and the variable production costs for generating energy within that capacity,
11 except for any Excess Henderson Energy that Big Rivers exercises its contractual options
12 to take and pay for. Likewise, Big Rivers is responsible for these same costs associated
13 with the capacity allocated to it.

14 If the Power Sales Contract were to be interpreted to impose on Big Rivers
15 the variable production costs of energy within Henderson's capacity allocation
16 that neither Henderson nor Big Rivers wants, that interpretation would be contrary
17 to, and would nullify, the express provisions in the contract giving Big Rivers the
18 option but not the obligation to take and pay for that energy. Thus, the Power
19 Sales Contract cannot impose responsibility for those costs on Big Rivers, and the
20 only other party on which those costs can be imposed is Henderson. Those costs
21 are "paid" by Henderson when Big Rivers uses Henderson's coal and reagents to
22 produce that energy. That result is not only appropriate under the Station Two
23 Contracts but it is entirely reasonable because the Excess Henderson Energy

1 “belongs” to Henderson, which is the express conclusion written on page 3 of the
2 arbitration award. Mr. Quick’s testimony makes it clear that Henderson exercises
3 complete control over all the energy associated with its capacity reservation, and
4 that Big Rivers’ obligation is to generate the energy up to Henderson’s capacity
5 reservation. This statement is found on page 7 of Mr. Quick’s testimony, lines 18
6 and 19.

7 **Q. Why does Henderson insist upon paying for generation from the Station Two units**
8 **when the energy produced is more expensive than energy available in the wholesale**
9 **market?**

10 A. Henderson tells us that it wants to avoid the risk of fluctuation of prices in the
11 wholesale markets. But its policy about how to avoid that risk is simply to always run the
12 Station Two units, and force its customers and Big Rivers to pay the variable costs of
13 energy generated from those units even if that higher cost could be avoided or mitigated.
14 It is unreasonable for Henderson to impose that costly policy on Big Rivers, especially
15 with respect to energy that belongs to Henderson and that is being produced only because
16 of Henderson’s demands about how Big Rivers must operate the units.

17 Any prudent utility operating in the market takes steps to mitigate its exposure to
18 market risk, and there are many ways to do so. If the Station Two units were offered into
19 MISO on an economic commitment basis, by definition they would operate only when
20 the cost of the energy produced by the units was economic in the market. The exposure
21 to Henderson to market price fluctuation under those circumstances before one or both
22 Henderson units can be returned to service is measurable in hours, and there are certainly
23 ways to hedge even that limited risk.

1 Utilities all over the United States, including municipal utilities, purchase energy,
2 capacity or both in the wholesale market and are comfortable with that risk as managed
3 by them. Within the past two years, Big Rivers has entered into contracts with eight
4 municipal entities in three states that are doing exactly that.

5 **Q. The Excess Henderson Energy in dispute in this proceeding is energy within**
6 **Henderson's capacity reservation that Henderson does not want for itself, its**
7 **inhabitants or third party sales. Why is it fair, just and reasonable that Henderson**
8 **should be responsible for the variable cost of producing energy that it does not**
9 **want?**

10 A. Henderson does not want that energy, but Henderson requires, for its own reasons
11 and purposes, that the energy be generated. As mentioned earlier, Henderson is free to
12 adopt and follow a policy of paying more for energy to serve the needs of the City of
13 Henderson and its native load than it would pay if it allowed Big Rivers to economically
14 dispatch Station Two, or otherwise manage the generation of Station Two. Henderson's
15 rates to its retail customers are not subject to Commission jurisdiction and its retail rate
16 policies are not subject to Commission scrutiny for prudence. But Henderson cannot
17 reasonably require Big Rivers to pay the cost of pursuing a policy that Big Rivers
18 considers imprudent. The position taken by Henderson insulates it from the price signals
19 that are usually considered when making a decision about when to generate and when not
20 to generate energy from an electric generating unit, and unreasonably shifts the cost of
21 ignoring those price signals to Big Rivers.

22 And I must emphasize again that Henderson's Station Two operating parameters
23 mean that Big Rivers is paying the variable costs of generating energy within Big Rivers'

1 Station Two capacity allocation when Big Rivers would otherwise not generate that
2 energy. For example, even if the generation from each of the Station Two units is at the
3 minimums described in my direct testimony at page 9, and Henderson is taking all the
4 energy associated with its capacity reservation, Big Rivers is still required to generate and
5 pay the variable costs for generating 120 MW of energy. As a practical matter, if the
6 wholesale market price of energy is lower than the variable cost of producing energy
7 from Station Two, Henderson will rarely be taking all the energy associated with its
8 capacity reservation, so Henderson will have Big Rivers paying for the variable costs of
9 120 MW of energy plus all energy within Henderson's capacity reservation above the
10 needs of Henderson and its inhabitants. And in that example, under the new definition of
11 Excess Henderson Energy used by Henderson, even if only one unit of Station Two were
12 running and that unit were running at its minimum of 115 MW, Henderson would still
13 have Big Rivers pay the variable generating costs of all energy within Henderson's
14 capacity reservation above the needs of Henderson for itself, its inhabitants and its third-
15 party sales.

16 Henderson wants Big Rivers to take-and-pay the variable production costs of
17 energy from Station Two that Big Rivers does not want to take, and that is uneconomical
18 to produce, including the portion of Excess Henderson Energy that is in dispute in this
19 case. The Station Two Contracts do not require Big Rivers to take-and-pay for this
20 energy.
21

1 **Q. Mr. Quick complains that Big Rivers has not “allowed” Henderson to take energy**
2 **associated with its capacity reservation that Henderson wants to sell to third parties.**
3 **Is his complaint justified?**

4 **A.** No. Big Rivers and Henderson did have a dispute over their respective rights
5 regarding energy associated with Henderson’s capacity allocation that Henderson did not
6 require for itself or its native load. That dispute was resolved by arbitration and the
7 arbitration award was confirmed by the courts. Pursuant to the arbitration award,
8 attached as Exhibit 9 to Big Rivers’ Application, Henderson has a right to sell energy
9 within its capacity reservation to a third party based upon a firm, bona fide offer if that
10 offer is presented to Big Rivers, and Big Rivers does not elect to purchase the energy on
11 the same terms. As Henderson admits, it has never presented Big Rivers with a firm,
12 bona fide third party offer to purchase energy within Henderson’s capacity reservation.

13 Henderson has also never agreed with Big Rivers on the commercial terms that
14 would define Big Rivers’ rights and obligations under any such transaction between
15 Henderson and a third party, and that would protect Big Rivers and its Members from the
16 risks and expenses inherent in such transactions. Henderson unreasonably insists that the
17 transaction procedures it describes in its letters to Big Rivers of July 13, 2012 and
18 October 27, 2015, attached to Big Rivers’ response to item 1 of Henderson’s
19 supplemental requests for information, can be implemented under the existing Station
20 Two Contracts. Big Rivers’ repeated explanations of why Henderson’s procedures are
21 commercially insufficient have been rejected by Henderson without explanation other
22 than that the terms of the Station Two Contracts and the MISO tariff provide sufficient
23 procedures. Even the chairman of the arbitration panel considering the dispute regarding

1 Section 3.8 of the Power Sales Contract recognized in his concurrence in the award the
2 need to establish more details about how Henderson's market transaction will take place.
3 The transaction-specific details included by Big Rivers in the commercial procedures
4 protocol it proposed to Henderson on July 8, 2016 (Attachment 1, page 1, to Big Rivers'
5 response to item 1 of Commission Staff's first information request), in an effort to
6 resolve and get beyond that issue, show the types of commercial points that are routinely
7 resolved every day by parties in similar transactions.

8 The proposals made by Henderson in Mr. Quick's letter referenced above contain
9 details for the procedures protocols that are not found in the Station Two Contracts or the
10 MISO tariff. And the additional procedures protocol details outlined by Henderson's
11 representative in an unnumbered document produced by Henderson in response to item 2
12 of Commission Staff's information requests, attached as Exhibit Berry Rebuttal__4, only
13 reinforce the need to have a reasonable commercial agreement about the procedures
14 protocols that the parties must use in these transactions.

15 But consistent with its position on some other issues, no employee of Henderson
16 has ever agreed to meet with Big Rivers to discuss and negotiate the appropriate
17 commercial procedures necessary for Henderson to conduct its transactions without
18 imposing commercial risks, costs and uncertainties on Big Rivers. Henderson's response
19 has been that the procedures in its two letters are a take-it-or-leave-it proposal, even
20 though its own representative proposes additional terms as shown in Exhibit Berry
21 Rebuttal__4. To my knowledge, Henderson has not yet registered as an asset owner in
22 MISO, which is required if it wants to conduct business as it proposes, and that is
23 probably a 90 to 180 day process. It is extremely unreasonable for Henderson to refuse

1 to even discuss these proposed commercial procedures protocols with Big Rivers, and
2 then accuse Big Rivers of being an obstacle to its market access.

3 **Q. Mr. Quick has also questioned whether the Commission has jurisdiction over Big**
4 **Rivers' Application by questioning whether the issues presented involve rates and**
5 **service. Does Big Rivers believe that rates and service are involved in the issues**
6 **presented in its Application in this matter?**

7 A. The analysis of jurisdiction is a legal matter, and I am not a lawyer. From a
8 factual standpoint, Big Rivers and Henderson are parties to the Power Sales Contract
9 under which, among other things, Big Rivers has a right to certain capacity and energy
10 from Station Two. The quantity of that capacity and energy and the price Big Rivers
11 pays for that capacity and energy are determined by the terms of the Station Two
12 Contracts, including but not necessarily limited to the Power Sales Contract. This dispute
13 involves the amount of energy Big Rivers is required to take and pay for under the Power
14 Sales Contract, and the price Big Rivers is required to pay for that energy. The resolution
15 of this dispute will necessarily determine how much energy Big Rivers is required to
16 purchase under the Power Sales Contract, and the average cost to Big Rivers and its
17 Members of each unit of electricity Big Rivers takes under the Power Sales Contract.

18 **Q. Mr. Quick also implies in his testimony, page 9, lines 14 through 17, that**
19 **Henderson's allegations that Big Rivers had no authority "to act as [Henderson's]**
20 **MISO Market Participant [or] to register Henderson's Station Two generation**
21 **Units" create an issue that is significant in this case. Do you agree?**

22 A. No. For the reasons stated in Big Rivers' responses to Henderson's motion to
23 compel, those allegations, which Big Rivers denies, have no relevance to this case. The

1 issue presented by Big Rivers in this proceeding has to do with the responsibility for the
2 variable production costs of certain energy. Where that energy goes in the market has no
3 significance for this case.

4 **Q. Mr. Quick asks on behalf of Henderson that Big Rivers' Application be dismissed**
5 **because "Big Rivers is disputing provisions of contracts that were freely negotiated**
6 **between sophisticated parties more than four decades ago." Do you agree with his**
7 **characterization of Big Rivers' Application?**

8 A. Absolutely not. He does not identify the "provisions of contracts" negotiated four
9 decades ago that he asserts Big Rivers is disputing. He could not be referring to Section
10 3.8 of the Power Sales Contract since it was only added by amendment in 1998. In fact,
11 Big Rivers contends that its actions and the primary relief requested in its Application are
12 consistent with the terms of the Station Two Contracts. The fact that issues that can have
13 a material effect on ratepayers under the Commission's jurisdiction arise in the
14 performance of 40+ year-old contracts demonstrates why the Kentucky General
15 Assembly saw fit to give the Commission continuing supervision over the contracts
16 involved in this proceeding.

17
18 **VIII. REVIEW OF RELIEF SOUGHT BY BIG RIVERS**
19

20 **Q. What relief is Big Rivers asking that the Commission grant to Big Rivers?**

21 A. Big Rivers first requests the Commission to find that it has the jurisdiction and
22 authority to grant the relief sought by Big Rivers in this Application. Big Rivers further
23 requests that the Commission enforce the Power Sales Contract by issuing an order

1 finding that Big Rivers is not responsible for the variable costs of any Excess Henderson
2 Energy, as described and calculated by Big Rivers in this proceeding, that Big Rivers
3 declines to take in accordance with its rights under the Power Sales Contract, and that
4 Henderson is responsible for those variable costs.

5 If, however, the Commission were to interpret the Power Sales Contract to find
6 that Big Rivers is not excluded from responsibility for the variable costs of all of
7 Henderson's Excess Henderson Energy, as described and calculated by Big Rivers in this
8 proceeding, not taken and utilized by Big Rivers, then Big Rivers alternatively requests
9 that the Commission find that this requirement is not fair, just, and reasonable, and
10 exercise its authority to hold that Big Rivers is not responsible under the Station Two
11 Contracts for the variable costs of any Excess Henderson Energy, as described and
12 calculated by Big Rivers in this proceeding, not taken and utilized by Big Rivers, and that
13 Henderson is responsible for those costs.

14 15 **IX. CONCLUSION**

16 17 **Q. Do you have any concluding remarks?**

18 A. Yes. Big Rivers regrets having to bring this matter before the Commission, but
19 had no choice. Henderson is attempting to force Big Rivers to operate Station Two in a
20 manner that Big Rivers believes is contrary to the economic operation principles of the
21 Station Two Contracts and prudent principles for economic operation of a power
22 generating station. Henderson broadens its "first call" rights to the energy associated
23 with its capacity reservation to include third party sales that it is permitted to make in

1 accordance with the terms of the arbitration award. So Big Rivers is not just following
2 the load requirements of Henderson and its inhabitants, but is also required to have
3 energy available for a last-minute decision by Henderson to make a third-party sale of the
4 balance of the energy within its capacity reservation. Henderson's requirements of Big
5 Rivers in the operation of Station Two isolate Henderson from the price signals of the
6 market, and force Big Rivers to pay the variable costs of producing uneconomic Excess
7 Henderson Energy that Big Rivers does not want to generate or take, along with a
8 substantial amount of energy within Big Rivers' capacity allotment that Big Rivers also
9 does not want to generate and take. Henderson's position would require the Commission
10 to determine that the Station Two Contracts require the parties to perform the contracts in
11 a manner that is contrary to prudent principles for economic operation of a generating
12 plant, and for Big Rivers and eventually its Members to pay the economic costs of doing
13 so with respect to Excess Henderson Energy. And for whatever reasons, Henderson
14 refuses to have any meaningful, business-like discussions with Big Rivers to resolve
15 these issues. My goals are to get this issue resolved as proposed by Big Rivers, seek to
16 resolve other outstanding issues with Henderson, and eventually achieve a more normal
17 business relationship with Henderson.

18 **Q. Does this conclude your rebuttal testimony?**

19 **A. Yes.**

1 Verification

2 I, Robert W. Berry, President and CEO of Big Rivers Electric Corporation, hereby state
3 and affirm that the foregoing testimony and attached exhibits were prepared by me or under my
4 supervision, and all statements contained therein are true and correct to the best of my
5 knowledge and belief, on this the 2 day of December, 2016.

6 

7 Robert W. Berry

8
9 COMMONWEALTH OF KENTUCKY)

10 COUNTY OF HENDERSON)

11 The foregoing verification statement was SUBSCRIBED AND SWORN to before me by
12 Robert W. Berry, President and CEO of Big Rivers Electric Corporation, on this the 2 day of
13 December, 2016.

14 

15 Notary Public, Ky., State at Large

16 My commission expires: 10/31/2020



Power Sales Contract, Section 3.8

Big Rivers and City hereby agree that the following provisions shall apply to energy from capacity not utilized by City or from capacity in excess of the capacity calculated in accordance with Section 3.6 of this Agreement.

(a) In the event that at any time and from time to time City does not take the full amount of energy associated with its reserved capacity from Station Two (determined in accordance with this Agreement), Big Rivers may, at its discretion, take and utilize all such energy (or any portion thereof designated by Big Rivers) not scheduled or taken by City (the "Excess Henderson Energy"), in accordance with Section 3.8(c).

(b) If at any time Station Two capacity is generated in excess of the Total Capacity of Station Two determined in accordance with Section 3.6 of this Agreement ("Excess Henderson Capacity"), Big Rivers shall take and utilize all energy associated with such Excess Henderson Capacity, unless otherwise agreed to by Big Rivers and City, in accordance with Section 3.8(c).

(c) Following the end of each calendar month, Big Rivers shall notify City of the amount of Excess Henderson Energy and energy associated with Excess Henderson Capacity, if any, taken by Big Rivers during the previous month, and Big Rivers shall pay City prior to the 25th day of the then current month for the amount of Excess Henderson Energy and energy associated with the Excess Henderson Capacity so taken by it at a rate equal to \$1.50 per mWh. In addition, Big Rivers shall provide, at its own cost, the full replacement of all fuels and reagents consumed from the Station Two fuel and reagent reserves for the production of the Excess Henderson Energy and energy associated with the Excess Henderson Capacity so taken by it. Further, Big Rivers shall pay the portion of sludge disposal costs attributable to the Excess Henderson Energy and energy associated with Excess Henderson Capacity, as calculated in accordance with Section 3.4 of the Joint Facilities Agreement.

(d) City agrees that Big Rivers, as operator, shall be allowed, but shall not be required, to operate Station Two to obtain capacity above the Total Capacity of Station Two determined in accordance with Section 3.6 of this Agreement. City further agrees that it shall not at any time be permitted to sell or commit to any person other than Big Rivers any Excess Henderson Energy without having first offered Big Rivers the opportunity to purchase such Excess Henderson Energy. Big Rivers shall have a reasonable period of time after submission of the City's scheduled energy requirements to decide whether to purchase any Excess Henderson Energy not scheduled by City. Big Rivers agrees to notify City thereafter if it does not intend to purchase such energy, and agrees to give City a response within a reasonable time so that City may take efforts to resell this power to third-parties. City agrees to compensate Big Rivers according to Big Rivers' Open Access Transmission Tariff to the extent City utilizes any transmission on Big Rivers' transmission system in marketing Excess Henderson Energy.



RECEIVED MAR 17 2008

C: D. Spainhoward

HENDERSON MUNICIPAL POWER & LIGHT

March 14, 2008

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

Western Kentucky Energy Corp. and
LG&E Energy Marketing, Inc.
220 West Main Street
Louisville, KY 40202

Attn: David Sinclair

RE: *STATION TWO AGREEMENT
PAYMENT FOR HENDERSON EXCESS ENERGY*

Gentlemen:

This letter will serve as the City of Henderson Utility Commission's Notice of Default to Western Kentucky Energy Corp. and LG&E Energy Marketing, Inc. under the provisions of Sections 11.5(a) and (c) of the Station Two Agreement and New Section 3.8 of the July 15, 1998 Amendment to the Power Sales Contract. This Default Notice is given pursuant to Section 13.4(a) of the Station Two Agreement. You are requested to cure this default within three (3) days after your receipt of this Notice, as provided by Section 13.5(b) of the Station Two Agreement.

The nature of your Default is as follows:

a. Section 11.5 of the Station Two Agreement became effective on July 15, 1998. Pursuant to Section 11.5(a) Station Two Subsidiary has the right, but not the obligation, to take all or any portion of Excess Henderson Energy not taken or scheduled by Henderson, subject to the provisions of Section 11.5(c).

b. Section 11.5(c) provides: "Promptly following the end of each calendar month . . . Station Two Subsidiary shall *notify* Henderson and Big Rivers of the amount of Excess Henderson Energy . . . taken by . . . Station Two Subsidiary during the previous month. That section of the agreement further provides that Station Two Subsidiary will make payment to Henderson in the amount of \$1.50 per mwh for the Excess Henderson Energy used during the preceding month. The payment is due by the 25th of the month.

Exhibit Berry Rebuttal_2
Page 1 of 7



c. Western Kentucky Energy Corp. and LG&E Energy Marketing, Inc. have produced records that establish the amount of Excess Henderson Energy taken by Station Two Subsidiary and its successor Western Kentucky Energy Corp. from 1998 through October of 2007. Those records show that Station Two Subsidiary (Western Kentucky Energy Corp.) is now indebted to Henderson Municipal Power & Light in the amount of \$584,427.00, not including interest for late payments. Your records should also reveal that additional sums are due since October 2007.

d. Your stated reason for not making these payments has been the assertion that Henderson has an obligation to notify Station Two Subsidiary of the availability of Excess Henderson Energy. However, the provisions of Section 11.5(a) and (c) have no requirement for Henderson to give notice to Station Two Subsidiary. Just the reverse is true. Subparagraph (c) requires Station Two Subsidiary to promptly give Henderson notice of the amount of Excess Henderson Energy it has taken during the previous month. While there are notice provisions in Subparagraph (d) of Section 11.5, those notice provisions come into play when Henderson contracts to provide Excess Henderson Energy to some third party, thereby becoming obligated to give notice to Station Two Subsidiary of first right of refusal for such Excess Henderson Energy.


e. Under the provisions of Section 9.2 of the Power Sales Contract, Henderson is entitled to receive interest on past due payments at the rate of 1% per month, until paid. Using your records of these required payments we have determined the amount of interest currently due on each payment and have enclosed an invoice setting forth the total amount due through October, 2007. With interest the amount due is \$893,330.00.

The City of Henderson Utility Commission hereby makes demand upon Western Kentucky Energy Corp. and/or LG&E Energy Marketing, Inc. for payment of past due amounts pursuant to this Notice of Default, within three (3) days after your receipt of this Notice.

Pursuant to the Station Two Agreement, Henderson has provided Big Rivers Electric Corporation a copy of this Notice of Default.

Very truly yours,

CITY OF HENDERSON UTILITY COMMISSION

By: 
Gary Quick, General Manager

cc: Big Rivers Electric Corporation

Enclosure: Invoice

REFUND OF OVERCHARGE OF STANDBY ENERGY

<u>Two Units Available</u>			<u>One Unit Available</u>			
<u>Year</u>	<u>MWh</u>	<u>Payment</u>	<u>MWh</u>	<u>Payment</u>	<u>Total Payment</u>	<u>Total Payment With Interest</u>
1998 (7/15/1998)	159	\$ 238	4,172	\$ 6,258	\$ 6,496	\$ 13,609
1999	3,516	5,274	15,987	23,981	29,255	59,095
2000	12,820	19,231	25,906	38,858	58,089	110,369
2001	13,337	20,006	33,965	50,947	70,953	126,296
2002	16,044	24,066	30,481	45,722	69,788	115,848
2003	8,776	13,164	54,894	82,342	95,506	147,079
2004	5,809	8,714	53,094	79,640	88,354	125,463
2005	9,441	14,162	48,661	72,991	33,838 *	43,989
2006	36,806	55,208	24,921	37,382	92,590	109,256
2007 (thru Oct)	9,330	13,994	17,042	25,563	39,557	42,326
Total		\$174,057		\$463,684	\$637,742	\$893,330
					*(53,315) Credit	
					\$584,427	

LEM to Big Rivers of the Pre-Closing Development Agreement(s) and Economic Development Agreement(s) as contemplated herein, LEM shall be deemed to be released and discharged from any further obligation or liability to Henderson or Big Rivers thereunder or under this Section 11 3(c), or with respect thereto or hereto, except for any breaches or defaults by LEM under that agreement or under this Section 11 3(c) occurring prior to that assignment or transfer

11 4 Section 3 4 of Power Sales Contract By way of clarification only and not in limitation of the Parties' respective rights and obligations thereunder, the Parties acknowledge and agree that the annual adjustment to Henderson's five year capacity reservation forecasts in amounts not exceeding five (5) megawatts per Contract Year provided for in Section 3 3 of the Station Two Power Sales Agreement, as applied as contemplated in the concluding sentence of Section 3 4 of the Station Two Power Sales Agreement (as amended by the 1998 Amendments), is limited to five (5) megawatts per Contract Year for all commercial or industrial customers of Henderson collectively, not five (5) megawatts per Contract Year for each such customer

11 5 Use of Excess Energy and Capacity The Parties hereby agree that, during the Phase I Subcontract Term and the Phase II Assignment Term, the provisions of this Section 11 5 shall apply and govern their respective rights and obligations with respect to Excess Henderson Energy and Energy associated with Excess Henderson Capacity (each as defined below), in lieu of the provisions of Section 3 8 of the Station Two Power Sales Agreement (as amended by the 1998 Amendments) Consistent with the foregoing, the Parties agree that the provisions of Section 3 8 of the Station Two Power Sales Agreement shall be suspended throughout the Phase I Subcontract Term and the Phase II Assignment Term Notwithstanding the foregoing, the provisions of Sections 8 12 and 9 7 of the Agreement, as they relate to Excess Henderson Energy and Energy associated with Excess Henderson Capacity, shall also govern the Parties' respective rights and obligations to the extent contemplated therein

(a) In the event that at any time and from time to time Henderson does not schedule or take the full amount of Energy associated with its reserved Capacity from Station Two (determined in accordance with Station Two Power Sales Agreement), (1) Big Rivers shall,

during the Phase I Subcontract Term, upon the prior request of LEM, and (2) Station Two Subsidiary may, during the Phase II Assignment Term, in its discretion, take and utilize all such Energy (or any portion thereof designated by Station Two Subsidiary) not so scheduled or taken by Henderson (the "Excess Henderson Energy"), as provided herein. Henderson agrees to permit Big Rivers or Station Two Subsidiary (as applicable) to take and utilize all or any portion of such Excess Henderson Energy as contemplated above.

(b) If at any time Station Two Capacity is generated in excess of the Total Capacity of Station Two determined in accordance with Section 3.6 of the Station Two Power Sales Agreement ("Excess Henderson Capacity"), (1) Big Rivers shall during the Phase I Subcontract Term, and (2) Station Two Subsidiary shall, during the Phase II Assignment Term, take and utilize all Energy associated with such Excess Henderson Capacity as provided herein (unless otherwise agreed to by Station Two Subsidiary and Henderson). Henderson agrees to permit Big Rivers or Station Two Subsidiary (as applicable) to take and utilize all such Energy as contemplated above.

(c) Promptly following the end of each calendar month during the Phase I Subcontract Term and the Phase II Assignment Term, Station Two Subsidiary shall notify Henderson and Big Rivers of the amount of Excess Henderson Energy and Energy associated with the Excess Henderson Capacity, if any, taken by Big Rivers or Station Two Subsidiary, as the case may be, during the previous month. Big Rivers or Station Two Subsidiary (whichever Party so took the Excess Henderson Energy and/or Energy associated with Excess Henderson Capacity) shall pay to Henderson, prior to the 25th day of the then current month, for the amount of Excess Henderson Energy and Energy associated with the Excess Henderson Capacity so taken by it during that prior month, a purchase price per megawatt hour equal to \$1.50. In addition, Big Rivers or Station Two Subsidiary, as the case may be, shall (i) provide, at its own cost, the full replacement of all fuels and reagents consumed from the Station Two fuel and reagent reserves for the production of the Excess Henderson Energy and Energy associated with the Excess Henderson Capacity so taken by it, and (ii) pay the portion of the sludge disposal costs attributable to that Excess Henderson Energy and Energy associated with Excess Henderson

Capacity, as calculated in accordance with Section 3 4 of the Joint Facilities Agreement. Notwithstanding the foregoing, Station Two Subsidiary agrees to promptly reimburse Big Rivers for its out-of-pocket costs and expenses incurred in connection with such fuels, reagents and sludge disposal to the extent not paid by LEM as an Operating Pass Through Cost pursuant to Section 8 12 of this Agreement, and Station Two Subsidiary shall administer all such fuel and reagent procurement on behalf of Big Rivers pursuant to Section 8 14 (c) of this Agreement.

(d) Henderson and Big Rivers agree that Station Two Subsidiary shall be allowed, but shall not be required, to operate Station Two to obtain Capacity above the Total Capacity of Station Two determined in accordance with Section 3 6 of the Station Two Power Sales Agreement, provided, however, that Station Two Subsidiary's operation of Station Two shall at all times be subject to its operating covenants to Big Rivers and Henderson, respectively, set forth elsewhere in this Agreement or the Assigned Station Two Contracts, as applicable. Henderson further agrees that it shall not at any time be permitted to sell or commit to any Person (other than to Big Rivers or Station Two Subsidiary as contemplated in this Section 11 5) any Excess Henderson Energy without having first offered Big Rivers or Station Two Subsidiary the opportunity to purchase such Excess Henderson Energy as contemplated herein. Big Rivers or Station Two Subsidiary (as applicable) shall have a reasonable period of time after submission of Henderson's scheduled Energy requirements to decide whether to purchase any Excess Henderson Energy not scheduled by Henderson. Big Rivers or Station Two Subsidiary (as applicable) agrees to notify Henderson thereafter if it does not intend to purchase such Energy, and agrees to give Henderson a response within a reasonable time so that Henderson may take efforts to resell that Energy to third-parties. Henderson agrees to compensate Big Rivers according to Big Rivers' Open Access Transmission Tariff to the extent Henderson utilizes any transmission on Big Rivers' transmission system in marketing Excess Henderson Energy. In the event Big Rivers or Station Two Subsidiary (as applicable) decline to purchase any Excess Henderson Energy as contemplated above, then LEM agrees, upon the written request of Henderson delivered within a reasonable period of time prior to the production of such Excess Henderson Energy (but in no event prior to the redemption or retirement in full of the Station

Two Bonds), to reasonably assist Henderson in its efforts to market that Excess Henderson Energy to third-parties for Henderson's own account

12 CONDEMNATION, DAMAGE OR DESTRUCTION OF STATION TWO ASSETS

12.1 Condemnation If all or substantially all of the Station Two Assets are condemned or become the subject of any taking through powers of eminent domain, this Agreement shall terminate when possession of the Station Two Assets is taken by the condemning or taking authority. Upon such termination, the Parties hereto shall have no further liability or obligation under this Agreement (other than liabilities accrued under this Agreement before the date of such condemnation or taking). If less than substantially all of the Station Two Assets are condemned or taken, then this Agreement shall not terminate.

12.2 Damage or Destruction If at any time during the Phase I Subcontract Term or the Phase II Assignment Term the Station Two Assets are damaged or destroyed and such damage or destruction was caused by a casualty covered by an insurance policy required by Section 18 of the Station Two Operating Agreement or Section 10.8 of this Agreement, the proceeds of such insurance shall, to the extent made available to the Parties (including the Trustee under the Station Two Bonds) and to the extent consistent with Prudent Utility Practice, be used to restore the Station Two Assets as soon as reasonably possible to substantially the same general condition, character or use as existed before the damage, and this Agreement shall remain in effect. To the extent not covered by the proceeds of insurance, the capital costs of such restoration of the Station Two Assets shall be allocated to and paid by the Parties as required by Section 6.3(d) of the Station Two Power Sales Agreement and Section 13(a) of the Station Two Operating Agreement and, as between Big Rivers and Station Two Subsidiary to the extent consistent with either Section 8.17(b) or 9.10(a) of this Agreement, shall be deemed payments for Station Two Improvements pursuant to an approved modification of the Operating Budget and shall be paid and reimbursed, as the case may be, in accordance with the provisions of Sections 8.17(d) and 8.17(e) or Section 9.10(c) of this Agreement, as then applicable, provided, that the Station Two Improvement Sharing Ratios applied to such restoration shall be those

From: Wayne Thompson [mailto:WThompson@hmpl.net]
Sent: Thursday, March 22, 2012 11:42 AM
To: Bob Berry <Bob.Berry@bigrivers.com>
Subject: RE: H-1 Outage

Bob

We have reviewed your latest proposal for H-1 outage and stand by our prior decision that H-1 scheduled outage should proceed as initially scheduled.

Thanks

Wayne

From: Bob Berry [mailto:Bob.Berry@bigrivers.com]
Sent: Wednesday, March 21, 2012 7:17 PM
To: Wayne Thompson
Subject: RE: H-1 Outage

Wayne, If you are only concerned of your risk exposure to the market during that 14 day time period, I would like to propose the following. If H-2 trips off line during the last 14 days of the H-1 extended outage, Big Rivers would supply HMP&L the replacement energy at the lower of a) HMP&L's total variable production cost (includes fuel, reagent, disposal and emissions allowances), or the replacement cost of the power market. In return for eliminating HMP&L's risk, Big Rivers would keep all of the proposed savings associated with extending the outage (estimated to be approximately \$370,000). This solution balances the risk and reward and allows both parties to obtain their specific needs.

Thanks

Bob

From: Wayne Thompson [mailto:WThompson@hmpl.net]
Sent: Friday, March 16, 2012 3:22 PM
To: Bob Berry
Subject: FW: H-1 Outage

Bob

We have taken your request under consideration to extend the scheduled H-1 outage an additional 14 days to possibly reduce some of the anticipated O&M cost of the outage. After extensive internal discussions we believe that it would not be in the best interest of our customers to be exposed to the uncertainty of the power market for an additional 14 days in the event that H-2 was unable to supply our energy requirements. We request that the H-1 scheduled outage proceed as initially scheduled.

Thanks

Wayne

From: Bob Berry [mailto:Bob.Berry@bigrivers.com]
Sent: Tuesday, March 06, 2012 4:15 PM
To: Wayne Thompson
Subject: H-1 Outage

Wayne,

Big Rivers is contemplating extending the duration of the H-1 scheduled outage to reduce cost by eliminating overtime. By extending the outage by 14 days we anticipate we can reduce the O&M cost by approximately \$370,000 (gross). Is extending this outage 14 days to reduce O&M cost acceptable to HMP&L? Please contact me if you have any questions. I look forward to your response.

Bob

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It was great meeting you and Bob. This email is a follow up to our January 27 meeting and is subject to the same agreed terms and conditions set out in the January 15, 2016, Letter Agreement signed by Gary Quick and Robert Berry. We're glad you asked for clarification because neither of the "Approaches" outlined in your January 28 email accurately reflects the process that Matt and I described during our January 27 Meeting. Here is a summary of our proposed process including additional scheduling details for your consideration. As stated, we will do our best to accommodate any timeline changes to meet BREC's scheduling needs. In addition, it probably goes without saying, but please note that although TEA's name is used throughout the below, our relationship with Henderson is strictly contractual, and subject to change without any adverse impact to the below. Please let us know if you have any questions.

- TEA would register HPL as an Asset Owner with MISO under the TEA Market Participant
- When authorized by HPL, TEA would communicate a bona fide firm offer to BREC via email by 0800 EST/EDT for the next day, weekends, and/or holidays
- The firm offer would be predicated on hourly volumes within HPL's Annual Reserved Capacity
- The firm offer may not be explicit to every hour (i.e. Bid may only be for hours ending 5 through hours ending 23 EST/EDT)
- BREC will assess the offer with ACES and notify TEA by 0900 EST/EDT via recorded phone call as to whether or not it intends to exercise its first right of refusal and TEA will confirm the phone call
- If BREC has not notified TEA of a decision concerning the exercise of its first right of refusal by 0900 EST/EDT then TEA and Henderson will proceed as if BREC had affirmatively declined to exercise its first right of refusal
- BREC's decision to exercise or to not exercise its first right of refusal will be for the entire schedule (i.e. No "cherry picking" hours)
- If BREC chooses to exercise its first right of refusal, the existing billing process with HPL will be maintained and BREC will pay the offer price
- If BREC decides not to exercise its first right of refusal, (or if it fails to exercise the right before 0900 EST/EDT) TEA will populate a Day Ahead (DA) MISO Finsched in the MISO portal with the schedule volumes by 1200 EST/EDT of transaction date
- The MISO Finsched will be predicated on a long-term MISO Finsched Contract with the defined "Source", "Sink", & "Delivery Point" designated as the resource bus
- BREC would agree to confirm the Finsched volumes by 1600 EST/EDT on the transaction date
- Both parties agree that all times will be flexible to accommodate all parties and potential FERC 809 implications