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February 27, 2017

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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FEB 28 2017

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 copies of Big Rivers Electric Corporation's Post-Hearing Brief.

I certify that on this date, a copy of this letter and a copy of the Brief were served on all persons listed on the attached service list by first-class mail.

Sincerely,

Tyson Kamuf
Counsel for Big Rivers Electric Corporation

TAK/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

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FEB 28 2017

PUBLIC SERVICE
COMMISSION

In the Matter of:

APPLICATION OF BIG RIVERS ELECTRIC)
CORPORATION FOR A DECLARATORY)
ORDER)

Case No. 2016-00278

POST-HEARING BRIEF OF
BIG RIVERS ELECTRIC CORPORATION

February 28, 2017

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

5 In the Matter of:
6

7 APPLICATION OF BIG RIVERS ELECTRIC CORPORATION)
8 FOR A DECLARATORY ORDER) Case No. 2016-00278
9)
10

11
12 **POST-HEARING BRIEF OF BIG RIVERS ELECTRIC CORPORATION**

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

15 The City of Henderson, Kentucky, and the City of Henderson Utility Commission d/b/a
16 Henderson Municipal Power & Light (collectively, “Henderson”) require Big Rivers to generate
17 certain energy from Henderson’s Station Two generating plant that neither Henderson nor Big
18 Rivers want, and expect Big Rivers to pay the variable costs of generating that unwanted energy.
19 The cost to Big Rivers of those unreasonable directives from Henderson is material. Big Rivers’
20 attempts to resolve this dispute with Henderson by agreement have been rebuffed by Henderson.
21 That is why this matter is before the Commission for resolution pursuant to the Commission’s
22 authority over a contract between a city and one of the Commission’s jurisdictional utilities.

23 **I. Introduction.**

24 Big Rivers operates and maintains the two Station Two generating units under a series of
25 contracts that were originally executed on August 1, 1970, and that have since been amended
26 (the “Station Two Contracts”).¹ A number of disputes have arisen between the parties relating to
27 the Station Two Contracts.² Henderson’s unreasonable positions and reluctance even to meet
28 with Big Rivers to discuss mutually-beneficial solutions make finding amicable resolutions to

¹ Application ¶ 5.

² Direct Testimony of Robert W. Berry, Application Exhibit 10, p. 5.

1 those disputes challenging.³ The issue now before the Commission relates to Henderson's
2 insistence not only that Big Rivers generate uneconomic energy that Big Rivers does not want to
3 generate, but also that Big Rivers pay for that unwanted energy, including the portion of that
4 unwanted energy that belongs to Henderson and is within Henderson's capacity reservation.⁴

5 Henderson's unreasonable demands, coupled with a weak wholesale market, forced Big
6 Rivers to act "to stop the bleeding"⁵ by filing this case asking the Commission to enforce the
7 Station Two Contracts that require Henderson to be responsible for the costs of the energy that
8 belongs to Henderson, that Henderson does not utilize for the benefit of itself and its inhabitants,
9 and that Big Rivers elects not to take (the "Excess Henderson Energy" or "EHE").

10 Henderson rests primarily on its position that the Commission does not have jurisdiction
11 over this proceeding.⁶ However, as discussed below, the Commission's jurisdiction over this
12 dispute is clear.⁷ And, although the Station Two Contracts are equally clear that Henderson is
13 responsible for the costs of the EHE it insists that Big Rivers generate but that Big Rivers elects
14 not to take,⁸ this matter cannot be resolved without the Commission's assistance.⁹ Nevertheless,
15 if the Commission disagrees that the Station Two Contracts require Henderson to be responsible
16 for the costs of the EHE, the Commission should order that Big Rivers not be held responsible
17 for the costs of, or be required to pay for, EHE that Big Rivers does not want.¹⁰

³ See *infra* Section III.

⁴ See Application ¶¶ 8-13.

⁵ Hearing Testimony of Robert W. Berry, Tr. 10:30'39".

⁶ See Direct Testimony of Gary Quick, p. 4:1-5.

⁷ See *infra* Section II.

⁸ See *infra* Section III.

⁹ See *infra* Section IV.

¹⁰ See *infra* Section V.

1 **II. The Commission has jurisdiction over this matter.**

2 The dispute between Big Rivers and Henderson over whether Big Rivers is required
3 under the Station Two Contracts to take, pay Henderson for, and be responsible for the variable
4 production costs of the EHE that Big Rivers does not want, and Big Rivers' related requests for
5 relief, are clearly within the Commission's jurisdiction. In fact, the Commission has asserted
6 jurisdiction over the Station Two Contracts on numerous occasions.¹¹ It is undisputed that the
7 Station Two Contracts, including the Power Sales Contract, are contracts between Big Rivers (a
8 utility) and Henderson (a city).¹² KRS 278.200 governs the rate and service terms of such
9 contracts and provides:

10 The commission may, under the provisions of this chapter, originate, establish,
11 change, promulgate and enforce any rate or service standard of any utility that has
12 been or may be fixed by any contract, franchise or agreement between the utility
13 and any city, and all rights, privileges and obligations arising out of any such
14 contract, franchise or agreement, regulating any such rate or service standard,
15 shall be subject to the jurisdiction and supervision of the commission, but no such
16 rate or service standard shall be changed, nor any contract, franchise or agreement
17 affecting it abrogated or changed, until a hearing has been had before the
18 commission in the manner prescribed in this chapter.

19 Thus, the Commission is expressly granted jurisdiction by the General Assembly over the rate
20 and service provisions of the Station Two Contracts, including the Power Sales Contract.

21 The current dispute over which party is responsible for the variable costs incurred to
22 produce the unwanted EHE involves both rates and service standards. KRS 278.010(13) defines
23 service as:

24 [A]ny practice or requirement in any way relating to the service of any utility,
25 including the voltage of electricity, the heat units and pressure of gas, the purity,
26 pressure, and quantity of water, and in general the quality, quantity, and pressure
27 of any commodity or product used or to be used for or in connection with the
28 business of any utility, but does not include Voice over Internet Protocol (VoIP)
29 service.

¹¹ Application ¶ 15; *id.* p. 6, n. 7.

¹² *See id.* ¶ 15.

1 KRS 278.010(12) defines a rate as:

2 [A]ny individual or joint fare, toll, charge, rental, or other compensation for
3 service rendered or to be rendered by any utility, and any rule, regulation,
4 practice, act, requirement, or privilege in any way relating to such fare, toll,
5 charge, rental, or other compensation, and any schedule or tariff or part of a
6 schedule or tariff thereof.

7 Although service and rate are defined in KRS Chapter 278 in terms of service of a utility, KRS
8 278.200 applies both to the service provided by (and the rates charged by) a utility to its
9 customers, and to the service provided by (and the rates charged by) a city to a utility.¹³

10 The quantity of capacity and energy Big Rivers receives from Station Two and the price
11 Big Rivers 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.¹⁴ In fact, this
13 proceeding directly involves the amount of EHE Big Rivers must take, pay the variable costs of,
14 and pay Henderson for under the Power Sales Contract.

15 The quantity of energy provided by a city to a utility falls squarely within the
16 Commission’s jurisdiction over service:

17 The service regulation of which the Commission was given jurisdiction, clearly
18 refers to the quantity and quality of the commodity furnished as contracted for
19 with the facilities provided, and, perhaps, if such facilities are inadequate for that
20 purpose it might be held that the Commission would have the right to require the
21 requisite alterations so as to produce efficient service.¹⁵

¹³ See *Simpson Cty. Water Dist. v. City of Franklin*, 872 S.W.2d 460, 462–63 (Ky. 1994) (“Thus, when a city is involved, the sentence reflects unequivocally the legislature’s intent that the PSC exercise exclusive jurisdiction over utility rates and service”); *City of Greenup v. Pub. Serv. Comm’n*, 182 S.W.3d 535, 538 (Ky. Ct. App. 2005) (“In summary, the PSC does not have jurisdiction over utility services furnished by a municipality except to the extent that those services are rendered pursuant to a contract with a utility which is regulated by the PSC. In such cases the municipality, in the matters covered under the contract, is subject to the jurisdiction of the PSC”).

¹⁴ Application ¶ 7.

¹⁵ *Peoples Gas Co. of Kentucky v. City of Barbourville*, 291 Ky. 805, 165 S.W.2d 567, 571 (1942); see also *Benzinger v. Union Light, Heat & Power Co.*, 293 Ky. 747, 170 S.W.2d 38, 41 (1943) (“Therefore, when any controversy relating to quantity and quality—preferred either by the municipality against the utility, or by a customer of the latter—the commission was given exclusive jurisdiction of that question,

1 Thus, the Commission’s jurisdiction over service extends to the quantity of EHE Big Rivers is
2 required to take under the Station Two Contracts and whether Big Rivers must take, pay the
3 variable costs of, and pay Henderson for the uneconomic EHE Big Rivers does not want.

4 The present dispute also invokes the Commission’s jurisdiction over the rates of city-
5 utility contracts under KRS 278.200. If Big Rivers elects to take EHE, then the Station Two
6 Contracts require Big Rivers to not only be responsible for the variable costs incurred to produce
7 that energy, but the contracts also require Big Rivers to pay Henderson for the energy so taken.¹⁶
8 As modified by the arbitration award in the arbitration Big Rivers filed to resolve an issue over
9 which party had the first right to EHE (the “Arbitration Award”),¹⁷ which Big Rivers and
10 Henderson could not resolve as part of the Big Rivers unwind transaction,¹⁸ Big Rivers pays
11 Henderson a premium for any EHE that Big Rivers elects to take from Station Two. That
12 premium is either \$1.50/MWh, if Henderson has not presented a firm bona fide third party offer,
13 or if Henderson has presented a firm bona fide third party offer, Big Rivers must match the price
14 of the offer if it wishes to purchase that energy from Henderson.¹⁹

15 The price Big Rivers is charged for any energy it takes under the Station Two Contracts
16 is a rate. Because of the contract premium Big Rivers pays Henderson for EHE, if Big Rivers is
17 required to take and pay Henderson for EHE that Big Rivers does not want, the average cost of
18 energy to Big Rivers under the Station Two Contracts will be higher than if Big Rivers is not

including the further jurisdiction over facilities insofar as any part thereof might obstruct or curtail quality or quantity of the furnished product”).

¹⁶ Application ¶ 12.

¹⁷ *Id.* ¶ 8. A copy of the Arbitration Award is attached to the Application as Exhibit 9.

¹⁸ *See In the Matter of: The Applications of Big Rivers Electric Corporation for: (1) Approval of Wholesale Tariff Additions for Big Rivers Electric Corporation, (2) Approval of Transactions, (3) Approval to Issue Evidences of Indebtedness, and (4) Approval of Amendments to Contracts; and of E. On U.S., LLC, Western Kentucky Energy Corp. and LG&E Energy Marketing, Inc. for Approval of Transactions*, Order, P.S.C. Case No. 2007-00455 (March 6, 2009), pp. 34-37.

¹⁹ Big Rivers’ responses to Item 1.b. of the Commission Staff’s First Request for Information and Item 2 of the Commission Staff’s Second Request for Information.

1 required to take and pay Henderson for that energy. Therefore, the dispute over which party is
2 responsible for the variable production costs for the unwanted EHE unavoidably affects the rates
3 Big Rivers pays Henderson for energy under the Station Two Contracts and falls under the
4 Commission's jurisdiction over rates pursuant to KRS 278.200.

5 Also, to the extent that the Commission disagrees that the Station Two Contracts require
6 Henderson to be responsible for the variable production costs of the unwanted EHE, but grants
7 Big Rivers' alternative request for relief by ordering that Big Rivers is not required to pay
8 Henderson for the unwanted EHE, the Commission would be exercising its jurisdiction over the
9 rates in the Station Two Contracts. In fact, no entity other than the Commission has the authority
10 to order a change in the rates under the Station Two Contracts under these circumstances.²⁰
11 Moreover, even were Big Rivers not charged a premium for the EHE it elects to take, if the

²⁰ See KRS 278.200; *Smith v. S. Bell Tel. & Tel. Co.*, 268 Ky. 421, 104 S.W.2d 961, 963 (1937) (“The court is of the opinion that the primary jurisdiction and authority to fix rates, establish reasonable regulation of service, and to alter and make changes to said regulations and to make investigation as to any change in service as is sought by appellant in the case at bar, is **exclusively and primarily in the commission**, but is subject, however, to review, or a rehearing as provided by sections 3952–36 and 3952–44 of the Statutes”) (emphasis added); *Fern Lake Co. v. Pub. Serv. Comm'n*, 357 S.W.2d 701, 704 (Ky. 1962) (“Appellees have strenuously defended the Commission's order on the ground that it constitutes a proper regulation of the rates and services of a utility. See KRS 278.040. They insist it is a well established rule that the Commission has the authority to change rates upon a proper showing and that its power may not be limited by contract because the law in force when and where a contract is made becomes a part of it. Appellees further maintain that the Commission's prior approval of the contract does not estop it from subsequently changing rates therein when necessary in the public interest. We cannot challenge the soundness of these contentions.”); *Bulldog's Enterprises, Inc. v. Duke Energy*, 412 S.W.3d 210, 211–12 (Ky. Ct. App. 2013) (“While the PSC instructed that it was without jurisdiction to award the relief sought by Bulldog's, including certification for a class action, it acted with primary and exclusive jurisdiction over the underlying billing issue. The underlying billing issue is central to the claims asserted by Bulldog's in circuit court. Allowing the circuit court to resolve these issues would go against the very intent of the legislature in granting jurisdiction to the PSC. See *Smith*, 104 S.W.2d at 962. Moreover, such a result would provide a means for circumventing a determination by the PSC on issues exclusively within its jurisdiction”); *In the Matter of: Proposed Revision of Rules Regarding the Provision of Wholesale Water Serv. by the City of Versailles to Ne. Woodford Water Dist.*, Order, P.S.C. Case No. 2011-00419 (Aug. 12, 2014) (“Kentucky courts have previously held that KRS 278.200 authorizes the Commission to modify contracts involving utility rates and services as a valid use of the state's police power to regulate utility rates and service. The Commission may revise any rate or service standard in a contract between a municipal utility and public utility despite objections by either party if the Commission finds that the proposed revision is reasonable under the circumstances”) (footnotes omitted).

1 Commission simply changes the allocation of the variable costs incurred to produce the
2 unwanted EHE, the Commission is still acting within its jurisdiction.²¹

3 Additionally, the Commission’s jurisdiction over rates extends to the rates Big Rivers
4 charges its distribution cooperative members and to the rates Big Rivers’ members charge their
5 retail members/customers.²² The relief Big Rivers is requesting in this proceeding will have an
6 impact on its rates to its members and on their rates to their retail customers. Big Rivers sells all
7 of the energy it receives from Station Two into the Midcontinent Independent System Operator,
8 Inc. (“MISO”) market.²³ As even Mr. Quick acknowledges, unwanted energy generated from
9 Station Two must go somewhere.²⁴ Because Henderson requires Big Rivers to operate the
10 Station Two units even when their production costs exceed market prices, Big Rivers is selling
11 energy from Station Two even when it costs more to produce that energy than the revenues it
12 brings.²⁵ Big Rivers’ margins from sales into the MISO market reduce the rates Big Rivers’
13 members would otherwise pay.²⁶ If Big Rivers is required to take and pay for unprofitable EHE,

²¹ See *In the Matter of: Forest Creek, LLC v. Jessamine-South Elkhorn Water District*, Order, P.S.C. Case No. 2011-00297, p. 8 (Mar. 16, 2012) (“On its face, Forest Creek's complaint involves matters within the Commission's jurisdiction. It involves procedures for the design and construction of water main extensions **and for the allocation and payment of the cost of such extensions**. The ultimate relief sought is an extension of water service to an area within Jessamine District's territory where service facilities are allegedly inadequate. **Moreover, the Interim Water Service Agreement clearly relates to the provision of utility service. It sets out fees that Forest Creek must pay as a condition for obtaining the extension of service.** It provides the procedures for which the plans for the proposed water main extension will be reviewed, defines Forest Creek's responsibilities and obligations during all phases of the extension and upon completion of the main extension, and establishes general design specifications for the water main extension. It further addresses Forest Creek's right to any refunds from the cost of the water main extension. **The Commission does not accept Jessamine District's premise that the Complaint merely involves an issue of contract interpretation**”) (emphasis added).

²² See KRS 278.040(2) (“The jurisdiction of the commission shall extend to all utilities in this state. The commission shall have exclusive jurisdiction over the regulation of rates and service of utilities . . .”).

²³ Big Rivers’ response to Item 5 of the Commission Staff’s First Request for Information.

²⁴ “[T]hey’re not going to just be shooting into the ground, I don’t think. It’s going somewhere. Somebody is going to take it.” Big Rivers’ Hearing Exhibit 8 (Deposition of Gary Quick taken in the arbitration), p. 185:18-20.

²⁵ Hearing Testimony of Robert W. Berry, Tr. 10:09’29” - 10:10:12’15”.

²⁶ *Id.*

1 the losses Big Rivers would incur by selling that energy into the MISO market must be recovered
2 from Big Rivers' members through higher rates.²⁷ The impact to Big Rivers in 2016 if Big
3 Rivers had been required to take all of the uneconomic EHE would have been approximately
4 \$3.4 million.²⁸ Big Rivers' fuel adjustment charges ("FAC") to its members and their FAC
5 charges to their retail customers would also be higher if Big Rivers were responsible for the
6 variable costs incurred to produce the uneconomic EHE.²⁹

7 Henderson argues, without supporting authority, that this matter is not properly before the
8 Commission because it requires the Commission to interpret contracts.³⁰ However, KRS
9 278.200 grants the Commission the authority to "change" and "enforce" the Station Two
10 Contracts. The Commission also has the "the powers reasonably necessary and fairly
11 appropriate to make effective the express powers granted to or duties imposed on [it]."³¹
12 Henderson's argument that the Commission does not have the power to interpret what
13 contractual provisions mean would make it impossible for the Commission to exercise its
14 statutory authority to change and enforce contracts. Henderson's argument has been soundly

²⁷ *Id.*

²⁸ *Id.*

²⁹ See Big Rivers' response to Item 1 of Henderson's First Request for Information ("Because the Station Two units are generally higher cost units, the greater Big Rivers' take from Station Two, the greater the impact of Station Two's costs on Big Rivers system average fuel costs. Those system average fuel costs are used to determine Big Rivers' FAC charges to its members. Thus, if Big Rivers is required to take the uneconomic Excess Henderson Energy, its FAC charges to its members will generally be greater than they would have been had Big Rivers been able to exercise its contractual right not to take such energy"); Hearing Testimony of Robert W. Berry, Tr. 10:15'05" - 10:15'40".

³⁰ See Direct Testimony of Gary Quick, p. 4.

³¹ *Humana of Kentucky, Inc. v. NKC Hosps., Inc.*, 751 S.W.2d 369, 372-73 (Ky. 1988) ("As a general principle administrative agencies are held to 'possess the powers reasonably necessary and fairly appropriate to make effective the express powers granted to or duties imposed on them.'"), quoting 73 C.J.S. Public Administrative Law and Procedure § 51 (1983).

1 rejected by the Kentucky Supreme Court.³² The Commission likewise has rejected the argument
2 that it lacks the authority to interpret contracts:

3 Assuming *arguendo* that the sole question that the Complaint presents is one of
4 contract interpretation, we find no merit in Jessamine District's contention that the
5 Commission lacks the authority to make such interpretation. Kentucky courts
6 have held that the Commission's authority to consider a complaint regarding
7 utility rates and service “includes the authority to adjudicate private contractual
8 rights involving utility rates and service” and that “[t]he only limitation on this
9 authority is that it cannot litigate claims for unliquidated damages.”³³

10 Because this case involves the review, enforcement, and possibly the change of contractual
11 provisions between a utility and a city concerning services and rates, it is unquestionably
12 properly before the Commission.

13 **III. The Commission should enforce the Station Two Contracts by declaring that**
14 **Henderson is responsible for the variable costs of any Excess Henderson**
15 **Energy, as described and calculated by Big Rivers, that Big Rivers declines to**
16 **take and utilize**

17 The Station Two Contracts, including the Power Sales Contract, require Henderson to be
18 responsible for the variable costs incurred to produce any EHE that Big Rivers declines to take.³⁴
19 Under Section 3.3 of the Power Sales Contract, Henderson each year elects a portion of the 312
20 MW Total Capacity of Station Two to be reserved to it for serving itself and its inhabitants.³⁵
21 The balance of the Station Two capacity is allocated to Big Rivers.³⁶ Henderson’s capacity
22 reservation for the 2016-2017 contract year is 115 MW, and Big Rivers’ resulting allotted
23 capacity share is 197 MW.³⁷ Big Rivers and Henderson are separately responsible for the costs

³² See *Simpson Cty. Water Dist. v. City of Franklin*, 872 S.W.2d 460, 464-65 (Ky. 1994) (citations omitted).

³³ *In the Matter of: Forest Creek, LLC v. Jessamine-South Elkhorn Water District*, Order, P.S.C. Case No. 2011-00297 (Mar. 16, 2012) (footnote omitted).

³⁴ Application ¶ 7; see also Power Sales Contract Sections 3.8, as amended (Application Exhibit 7, p. 6) and 6.7 (Application Exhibit 8, pp. 72-73).

³⁵ Application ¶ 7; see also Power Sales Contract Section 3.3, as amended (Application Exhibit 6).

³⁶ Power Sales Contract Section 3.3, as amended (Application Exhibit 6).

³⁷ Application ¶ 7.

1 associated with their capacity share and for the variable costs associated with the energy each of
2 them uses in a given hour, which includes the obligation that each party must replace at its cost
3 all fuels and reagents consumed for the energy used by that party.³⁸

4 When Henderson takes less energy in an hour than is available to it under its capacity
5 reservation, energy associated with Henderson's remaining reservation is EHE.³⁹ As modified
6 by the Arbitration Award, the 1998 amendments to the Power Sales Contract grant Henderson
7 the first right to sell the EHE to third parties pursuant to a firm, bona fide offer to purchase,
8 subject to Big Rivers' right of first refusal.⁴⁰ The Power Sales Contract grants Big Rivers the
9 option to take any EHE that Henderson does not sell to third parties, and requires that Big Rivers
10 pay Henderson a premium for any EHE Big Rivers takes.⁴¹ Each party is responsible under the
11 Station Two Contracts for the variable costs associated with the energy taken by that party, and
12 thus, Big Rivers is responsible for the variable production costs of, and is required to pay
13 Henderson for, any EHE Big Rivers elects to take.⁴²

14 However, as even Henderson admits,⁴³ Big Rivers has no obligation to take any EHE
15 under the Power Sales Contract, which provides:

16 In the event that at any time and from time to time [Henderson] does not take the
17 full amount of energy associated with its reserved capacity from Station Two
18 (determined in accordance with this Agreement), Big Rivers may, at its discretion,

³⁸ *Id.*; see also Power Sales Contract Sections 3.8, as amended (Application Exhibit 7, p. 6) and 6.7 (Application Exhibit 8, pp. 72-73).

³⁹ Application ¶ 8.

⁴⁰ Big Rivers' response to Item 1.b. of the Commission Staff's First Request for Information.

⁴¹ Application ¶ 10.

⁴² Big Rivers' response to Item 2 of the Commission Staff's Second Request for Information.

⁴³ See Direct Testimony of Gary Quick, p. 7:3-6 ("The Power Sales Contract, as amended, in Section 3.8 makes clear that, where there is 'Excess Henderson Energy,' Big Rivers is entitled to exercise its option to take or not take that energy and, if taken, to pay Henderson at a rate equal to \$1.50 per MWh taken").

1 take and utilize all such energy (or any portion thereof designated by Big Rivers)
2 not scheduled or taken by [Henderson]⁴⁴

3 The Arbitration Award made clear that the EHE “shall be considered to belong to
4 [Henderson],”⁴⁵ and Henderson has acknowledged that the EHE belongs to it.⁴⁶ Since EHE
5 belongs to Henderson, and since Big Rivers is not required to take any EHE, the EHE not taken
6 by Big Rivers necessarily must be taken and paid for by Henderson. However, Henderson has
7 refused to fulfill its obligations for replacing the fuel and reagent utilized to produce the EHE
8 that Big Rivers elects not to take, and Big Rivers has had to procure with its own cash the fuel
9 and reagent needed to make up for Henderson’s failure to provide these inventories as required
10 by the Station Two Contracts.⁴⁷ From June 1, 2016, through December 31, 2016, Big Rivers has
11 expended approximately \$3 million for the fuel and reagent associated with Henderson’s EHE
12 that Big Rivers did not take or utilize.⁴⁸ Big Rivers therefore asks the Commission to enforce the
13 Station Two Contracts by declaring that Henderson is responsible for the variable production
14 costs of any EHE that Big Rivers elects not to take, and that Big Rivers is not required to pay
15 Henderson for any EHE not taken by Big Rivers.

16 Henderson attempts to avoid responsibility for the costs of the EHE, which Henderson
17 requires Big Rivers to produce, by complaining that there are “a number of legal issues”
18 involved, such as whether the definition of EHE includes Henderson’s sales to third parties and
19 whether the methodology in an Indemnification Agreement between Big Rivers and Western

⁴⁴ Power Sales Contract Section 3.8(a), as amended (Application Exhibit 7, p. 6); *see also* Application ¶ 10.

⁴⁵ Arbitration Award, p. 3.

⁴⁶ Big Rivers’ Hearing Exhibit 8 (Deposition of Gary Quick taken in the arbitration), p. 184:21.

⁴⁷ *See* Direct Testimony of Robert W. Berry, Application Exhibit 10, p. 14:5-12; Big Rivers’ response to Item 4 of the Commission Staff’s Second Request for Information.

⁴⁸ Big Rivers’ Hearing Exhibit 4, pp. 3 and 6.

1 Kentucky Energy Corp. (“WKEC”) for calculating the amount of EHE is applicable.⁴⁹
2 Henderson also argues in Mr. Quick’s direct testimony and responses to information requests
3 that Big Rivers is not required to generate EHE and that, “[i]n the event that Big Rivers elects for
4 whatever reasons to generate ‘Excess Henderson Energy,’ . . . then Henderson contends that Big
5 Rivers is responsible for the variable costs of producing any such energy.”⁵⁰ Mr. Quick’s
6 position in this proceeding is a departure from his testimony in his deposition from the
7 arbitration, where in response to a question about who pays the variable costs of unwanted EHE
8 that is generated, he stated, “I don’t know.”⁵¹ Additionally, as explained below, Henderson’s
9 proffered definition of EHE is irrelevant and incorrect, even Henderson does not support the
10 methodology for calculating EHE from the Indemnification Agreement, and Henderson’s claims
11 that it is not requiring Big Rivers to generate the unwanted EHE are completely at odds with the
12 record in this matter. The Commission should reject Henderson’s attempts to distract from the
13 issue at hand to avoid being held responsible for the variable costs incurred to produce EHE that
14 Henderson requires Big Rivers to produce, that Big Rivers does not want, and that belongs to
15 Henderson.

16 **A. Henderson’s definition of Excess Henderson Energy is not only**
17 **irrelevant to the issue at hand, it is also incorrect.**

18 “Excess Henderson Energy” is the energy in any hour associated with the difference
19 between Henderson’s annual capacity reservation and the energy required in that hour to meet
20 the needs of Henderson and its inhabitants.⁵² Although Henderson previously used this

⁴⁹ Direct Testimony of Gary Quick, pp. 9:11 – 10:1; Henderson’s response to Item 6 of Big Rivers’ First Request for Information, p. 13:11-15.

⁵⁰ Direct Testimony of Gary Quick, p. 7:15-19.

⁵¹ Big Rivers’ Hearing Exhibit 8, pp. 185:4 – 186:4.

⁵² Rebuttal Testimony of Robert W. Berry p. 6:17-20.

1 definition of EHE,⁵³ Henderson spends much of the direct testimony of its witness, Gary Quick,
2 attempting to modify the definition of EHE in an effort to exclude energy Henderson sells to
3 third parties from the definition.⁵⁴

4 This attempted modification is irrelevant and should not distract from the issue of
5 whether Henderson can force Big Rivers to take and pay for unprofitable EHE contrary to the
6 provisions of the Power Sales Contract. Big Rivers agrees that, under the Arbitration Award,
7 Henderson has the first right to offer energy within Henderson’s capacity reservation to third
8 parties, subject to Big Rivers’ right of first refusal.⁵⁵ And Henderson does not dispute its
9 responsibility for the variable production costs of any energy sold by it to third parties. Thus, the
10 only variable costs at issue are those associated with EHE that is not sold by Henderson and that
11 Big Rivers elects not to take. In other words, whether energy that Henderson sells to third
12 parties is considered EHE is not relevant to the issue before the Commission, which is whether
13 the Station Two Contracts require Big Rivers to pay the variable costs of, and to pay Henderson
14 for, the *unwanted* EHE (*i.e.*, the energy within Henderson’s capacity reservation that is not used
15 to meet the needs of Henderson and its inhabitants, not sold by Henderson to third parties, and
16 not taken by Big Rivers pursuant to its contractual option to purchase EHE).

17 Additionally, the definition of EHE urged by Henderson is not supported by Section 3.8
18 of the Power Sales Contract, which contemplates in express language that EHE can be the
19 subject of a sale by Henderson to a third party. As noted by Mr. Berry in his rebuttal testimony,
20 Section 3.8(d) of the Power Sales Contract describes “Excess Henderson Energy” as energy that

⁵³ See Big Rivers’ response to Item 1 of Henderson’s Second Request for Information (“Mr. Gary Quick, writing for Henderson, states in the letter to Mr. Bob Berry dated October 27, 2015: ‘The amount of HMPL’s available hourly Excess Energy will be an amount up to its Annual Reserved Capacity minus its hourly native forecasted loads’”).

⁵⁴ Rebuttal Testimony of Robert W. Berry pp. 6-9.

⁵⁵ Big Rivers’ response to Item 1.b. of the Commission Staff’s First Request for Information.

1 Henderson may sell to a third party; it states that Henderson cannot sell or commit “Excess
2 Henderson Energy” to a person other than Big Rivers without giving Big Rivers an opportunity
3 to purchase it; it provides that Big Rivers can purchase the “Excess Henderson Energy” or
4 Henderson may resell it to “third-parties;” and it requires Henderson to pay for use of Big
5 Rivers’ transmission system in accordance with Big Rivers’ Open Access Transmission Tariff
6 (which Henderson would only pay for if it sold energy to third parties) in marketing “Excess
7 Henderson Energy.”⁵⁶ None of this language in Section 3.8(d) has any meaning unless “Excess
8 Henderson Energy” is all energy associated with Henderson’s capacity reservation above the
9 amount required to meet the needs of Henderson and its inhabitants, including any energy sold to
10 third parties.

11 The Arbitration Award likewise uses the term Excess Henderson Energy to include
12 energy Henderson sells to third parties. For example, page 4 of the Arbitration Award describes
13 “Excess Henderson Energy” as energy “within Henderson’s reserved capacity which Henderson
14 does not need to serve its native load” that “Henderson may sell to [a] third party”⁵⁷ Thus,
15 Henderson’s attempts to change the definition of EHE should be rejected as irrelevant and
16 incorrect.

17 **B. The Commission should adopt Big Rivers’ methodology for**
18 **calculating the amount of Excess Henderson Energy.**

19 Henderson complains that, since June 1, 2016, Big Rivers has not used the methodology
20 for calculating the amount of EHE set forth in an Indemnification Agreement between Big
21 Rivers and WKEC entered into in 2009.⁵⁸ Under the Indemnification Agreement, the amount of
22 EHE was determined differently depending on whether one or both of the Station Two units

⁵⁶ Rebuttal Testimony of Robert W. Berry, pp. 7:21 – 9:7.

⁵⁷ Arbitration Award, p. 4.

⁵⁸ See, e.g., Direct Testimony of Gary Quick, p. 9 for Henderson’s position; see Big Rivers’ response to Item 25 of Henderson’s Second Request for Information for a copy of the Indemnification Agreement.

1 were operating.⁵⁹ When both units were operating, EHE came after both Henderson's native
2 load and Big Rivers' capacity allocation.⁶⁰ When only one unit was operating, EHE came before
3 any energy associated with Big Rivers' capacity allocation.⁶¹ Prior to June 1, 2016, Big Rivers
4 utilized the calculation methodology from the Indemnification Agreement so as not to jeopardize
5 WKEC's obligations under the Indemnification Agreement to indemnify Big Rivers for issues
6 relating to the EHE,⁶² or to complicate the arbitration or related appeal or attempts to resolve the
7 litigation.⁶³

8 After the Arbitration Award was issued and the related appeals concluded in August
9 2015, Big Rivers took steps and had numerous discussions to ensure that changing to a simpler
10 calculation methodology consistent with the Arbitration Award would not jeopardize WKEC's
11 obligations under the Indemnification Agreement.⁶⁴ After Big Rivers confirmed that it would
12 not jeopardize the Indemnification Agreement, Big Rivers began to utilize a simpler calculation
13 methodology. Under that simpler methodology, EHE comes before any energy associated with
14 Big Rivers' capacity allocation regardless of whether one or both units are operating.⁶⁵ This
15 simpler methodology is consistent with the Arbitration Award and the Station Two Contracts⁶⁶
16 and with Henderson's requirements that (i) the energy associated with its capacity reservation be
17 available continuously for the needs of itself and its inhabitants and for any third-party sales it
18 makes, and (ii) its energy is the first to come from Station Two generation.⁶⁷

⁵⁹ Big Rivers' response to Item 8 of the Commission's Staff's First Request for Information.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Hearing Testimony of Robert W. Berry, Tr. 10:25'56" – 10:27'47" and 10:29'00" – 10:31'00".

⁶³ See Big Rivers' response to Item 4.b. of the Commission Staff's First Request for Information.

⁶⁴ Hearing Testimony of Robert W. Berry, Tr. 11:02'14" - 11:03'48".

⁶⁵ Rebuttal Testimony of Robert W. Berry, p. 12:21-23.

⁶⁶ Big Rivers' response to Item 7 of the Commission Staff's First Request for Information; Hearing Testimony of Robert W. Berry, Tr. 10:25'56".

⁶⁷ Rebuttal Testimony of Robert W. Berry, p. 11:5-9.

1 Henderson is not a party to the Indemnification Agreement, and none of the Station Two
2 Contracts require Big Rivers to utilize the calculation methodology set forth in the
3 Indemnification Agreement.⁶⁸ It is strange for Henderson to complain that Big Rivers no longer
4 follows the calculation methodology from the Indemnification Agreement when Henderson
5 denies that it is appropriate for Big Rivers to calculate EHE in accordance with that
6 methodology.⁶⁹ In fact, Henderson creates a new calculation methodology in its response to Item
7 4.b. of Big Rivers' First Request for Information. Since neither party believes the methodology
8 from the Indemnification Agreement should continue to be used, the Commission should reject
9 Henderson's argument and adopt Big Rivers' fairer and more reasonable methodology.

10 Under Henderson's newly minted "stacking" methodology, energy for Henderson's
11 native load is the first energy taken from Station Two, followed by EHE that Henderson sells to
12 third parties, followed by energy associated with Big Rivers' capacity allocation, followed by
13 EHE that Henderson does not sell to third parties.⁷⁰ However, there is no contractual basis for
14 separating EHE into two parts, with the EHE Henderson wants to take coming before any energy
15 flows to Big Rivers, and with the EHE that belongs to Henderson but that Henderson does not
16 want to take coming after Big Rivers has taken all the energy associated with its capacity
17 allocation.

18 Henderson's methodology ensures that the EHE it wants will always be available for
19 Henderson, and that when the cost of producing energy from Station Two is less than the market
20 price of energy, Henderson will get its full 115 MW allocation, including EHE that Henderson
21 sells to third parties, before Big Rivers gets any energy from Station Two. But when the cost of
22 producing energy from Station Two exceeds the market price of energy and Big Rivers operates

⁶⁸ *Id.*, p. 12:21-23.

⁶⁹ Henderson's response to Item 4.b. of Big Rivers' First Request for Information.

⁷⁰ *See id.*

1 the Station Two units at or near their minimums, Henderson’s methodology “stacks” the
2 uneconomic EHE after Henderson’s native load and Big Rivers’ capacity allocation. Because
3 the sum of Henderson’s native load and Big Rivers’ capacity allocation exceeds the minimum
4 generation levels of the units, under Henderson’s methodology, there will never be any
5 uneconomic EHE, and Big Rivers will receive more uneconomic energy associated with its
6 capacity allocation than it would if all EHE was assigned the same priority. So, when the energy
7 is economic, Henderson reaps the full economic benefit, but when the energy is uneconomic,
8 Henderson avoids the expense of generating that energy and places it on Big Rivers.⁷¹

9 It is not reasonable to divide EHE into two parts. All EHE should be given the same
10 priority. Henderson has acknowledged that it cannot make Big Rivers take EHE, even when that
11 EHE is generated.⁷² Yet Henderson’s methodology would do just that – it would force Big
12 Rivers to generate and take and pay for energy that is uneconomic and that Big Rivers does not
13 want.

14 Since Henderson demands that the EHE it may sell to third parties be available before
15 any energy is available for Big Rivers’ capacity allocation, all EHE should come before Big
16 Rivers’ capacity allocation. This is the methodology Big Rivers has been using since June 1,
17 2016. Big Rivers’ calculation methodology is reasonable, and should be adopted by the
18 Commission.

19 **C. Henderson’s claim that it does not require Big Rivers to generate the**
20 **unwanted EHE is contrary to the record.**

21 Henderson claims in the Direct Testimony of Gary Quick that “Big Rivers is required to
22 generate only that energy which Henderson schedules or takes, up to Henderson’s reserved

⁷¹ See Rebuttal Testimony of Robert W. Berry, pp. 10:6 – 11:2.

⁷² Big Rivers’ Hearing Exhibit 8 (Deposition of Gary Quick taken in the arbitration), pp. 180:7-8 and 185:17-23.

1 capacity.”⁷³ The record in this case, however, is replete with examples of how Henderson exerts
2 significant control over the operation of Station Two, demanding that Big Rivers operate both
3 Station Two units continuously even when the cost of operating the units exceeds the price of
4 energy in the market, and threatening to sue Big Rivers for merely suggesting that there is a more
5 prudent way to operate the units.⁷⁴

6 Big Rivers does not want to generate any energy, including EHE not wanted by
7 Henderson, when it is uneconomic to do so. If Henderson allowed Big Rivers to operate the
8 Station Two units on an economic commitment basis, there would be little to no uneconomic
9 energy generated from Station Two, and the dispute presented to the Commission would likely
10 be manageable. Big Rivers has tried to discuss the economic operation of the units with
11 Henderson numerous times over the past several years, but Henderson has rejected all of Big
12 Rivers’ recommendations and has required Big Rivers to operate both units of Station Two on a
13 continuous basis.⁷⁵ In fact, Henderson has threatened legal action if Big Rivers idles a unit for
14 economic reasons.⁷⁶

15 Henderson goes so far as to insist upon controlling the length of maintenance outages.
16 Henderson has required Big Rivers to work overtime, weekends and holidays to return units to
17 service quicker than if Big Rivers worked straight time, even when the cost of producing energy
18 from the restarted unit was uneconomic.⁷⁷ Henderson has even refused to allow Big Rivers to
19 work straight time on an outage when Big Rivers offered to protect Henderson from any market

⁷³ Direct Testimony of Gary Quick, p. 7:18-19.

⁷⁴ See, e.g., Rebuttal Testimony of Robert W. Berry, p. 16; Big Rivers’ response to Item 8 of Henderson’s First Request for Information; Big Rivers’ responses to Items 5, 6, 8, 9, 10, and 14 of Henderson’s Second Request for Information.

⁷⁵ See Direct Testimony of Robert W. Berry, Application Exhibit 10, p. 12:5-19; Rebuttal Testimony of Robert W. Berry, pp. 16-17; see also Exhibit Berry Rebuttal_3 to the Rebuttal Testimony of Robert W. Berry; Big Rivers’ response to Item 8 of Henderson’s First Request for Information.

⁷⁶ Big Rivers’ response to Item 8 of Henderson’s First Request for Information.

⁷⁷ Rebuttal Testimony of Robert W. Berry, p. 16:19-22.

1 risk in exchange for allowing Big Rivers to keep the resulting savings.⁷⁸ Thus, any suggestion
2 on the part of Henderson that Big Rivers is voluntarily generating uneconomic EHE is
3 disingenuous.⁷⁹

4 Additionally, Henderson requires both Station Two units to operate continuously even
5 though either unit at its minimum would satisfy Henderson’s capacity reservation. Henderson’s
6 current capacity reservation is 115 MW, while the Station Two units’ minimum operating levels
7 are 115 MW and 120 MW.⁸⁰ Thus, even if Henderson is utilizing its full capacity reservation
8 and both units are operating at their minimums, there is still 120 MW of additional generation in
9 any hour. That energy belongs to Big Rivers as part of its capacity allocation, and Big Rivers is
10 required to pay the variable costs of that energy, even if Big Rivers can purchase that energy on
11 the wholesale market at a lower cost.⁸¹ Henderson does not dispute that Big Rivers is suffering
12 the losses that result from Henderson’s decision for the energy associated with Big Rivers’
13 capacity allocation. Henderson should not also be allowed to force Big Rivers to bear the costs
14 for the uneconomic EHE that is part of Henderson’s capacity reservation.

15 Henderson asserts that it “is unaware of any contractual provision that would permit Big
16 Rivers to cycle or idle one or both units for economic reasons.”⁸² But as Mr. Berry points out in

⁷⁸ See Exhibit Berry Rebuttal_3 to the Rebuttal Testimony of Robert W. Berry.

⁷⁹ See, e.g., Henderson’s response to Item 8.b. of Big Rivers’ First Request for Information (“Henderson states that Big Rivers operates and maintains Station Two subject to Henderson’s ownership and control . . .”); Application Exhibit 11, p. 4 (letter from Quick to Berry dated May 31, 2016) (Mr. Quick states, “Henderson disagrees with your account of the facts and your interpretation of the Power Sales Contract as amended, and Henderson does not consent to any of the changes of practice outlined in your letter. If Big Rivers implements these changes of practice it will be in further breach of the contracts between Henderson and Big Rivers; therefore, Henderson reserves all of its rights to enforce the Station Two Contracts and recover any resulting damages”); Henderson’s response to Item 1.b. of Big Rivers’ First Request for Information (Henderson states, “Therefore, Big Rivers does not have the right to decide to operate only one of the units”).

⁸⁰ See Rebuttal Testimony of Robert W. Berry, p. 16:1-10.

⁸¹ See *id.*, pp. 14:16 – 15:3.

⁸² Henderson’s response to Item 8 of Big Rivers’ First Request for Information; see also Henderson’s response to Item 1 of Big Rivers’ First Request for Information (“Big Rivers is contractually obligated to

1 his rebuttal testimony, there are no contractual provisions that prevent economic dispatch of
2 Station Two.⁸³ As he goes on to note: “A utility does not idle, cycle or economically commit a
3 generating unit for any reason except economics.”⁸⁴ He further observes that the Station Two
4 Power Plant Construction and Operation Agreement provides in Section 13.4 that Big Rivers
5 “will at all times operate the City’s Station Two on a best efforts basis, in an efficient and
6 economical manner”⁸⁵ Mr. Berry reasonably believes that the words “efficient and
7 economical” mean Big Rivers should not generate energy from Station Two when the energy is
8 available at a lower price in the market.⁸⁶

9 Henderson also says that it wants to avoid the risk of fluctuation of prices in the
10 wholesale markets.⁸⁷ As noted in Mr. Berry’s rebuttal testimony, “Idling, cycling or
11 economically committing a generating unit is a routine practice for a generating utility that is
12 using its best efforts to operate a generating plant in an efficient and economical manner.”⁸⁸ Big
13 Rivers and other utilities have operated their own units on an economic basis for years, and in
14 MISO, the market price risk of economically committing generating units is minimal.⁸⁹ Utilities
15 all over the United States, including municipal utilities, rely on the wholesale market for their
16 energy and capacity needs.⁹⁰ In fact, within the past two years, Big Rivers has entered into
17 contracts with eight municipal entities in three states that are doing exactly that.⁹¹

maintain Station Two in continuous operation...None of the Station Two Contracts provide Big Rivers the unilateral right to idle one or both units in response to market conditions”).

⁸³ Rebuttal Testimony of Robert W. Berry, p. 19:5-8.

⁸⁴ *Id.*, p. 19:8-11.

⁸⁵ *Id.*, p. 16:4-7.

⁸⁶ *Id.*, pp. 14-20.

⁸⁷ *Id.*, p. 22:10-11.

⁸⁸ *Id.*, p. 19:8-10.

⁸⁹ *Id.*, p. 22:17-23; *see also* Big Rivers’ response to Item 33 of Henderson’s Second Request for Information.

⁹⁰ Rebuttal Testimony of Robert W. Berry, p. 23:1-3.

⁹¹ *Id.*, p. 23:3-4.

1 Finally, Henderson says that it will not let Big Rivers cycle the units based on economics
2 because Henderson does not want to take its load into the market because of some undefined
3 “reliability” concerns.⁹² However, Big Rivers already sells all of Station Two’s generation into
4 the MISO market and purchases all of the energy from Henderson’s native load from the MISO
5 market.⁹³ Cycling the units for economic purposes would not change how Henderson’s native
6 load is served. Moreover, Henderson already relies ultimately on the market for reliability. If
7 energy and capacity to meet the needs of Henderson and its inhabitants are not available from
8 Station Two, pursuant to the System Reserves Agreement,⁹⁴ Henderson’s needs will be met first
9 from Big Rivers’ system, and next from the wholesale market.⁹⁵

10 Offering the Station Two units into MISO on an economic commitment basis is an
11 efficient and economically prudent course of action. In Big Rivers’ response to Item 2 of the
12 Commission Staff’s Post-Hearing Request for Information, Big Rivers estimated the cost to Big
13 Rivers and Henderson for 2016 of Henderson’s requirement that the Station Two units be in
14 continuous operation. Henderson’s decision cost Henderson approximately \$4.4 million more
15 than if Henderson had allowed Big Rivers to operate the units on an economic commitment basis
16 (not including any EHE).⁹⁶ For the energy associated with Big Rivers’ capacity allocation,

⁹² Hearing Testimony of Gary Quick, Tr. 12:28’20”.

⁹³ Big Rivers’ response to Item 18 of Henderson’s Second Request for Information (“All Station Two energy is sold into the MISO market, so there is no difference between Excess Henderson Energy sold into the MISO market and the energy associated with Big Rivers’ capacity allocation from that perspective”); Big Rivers’ response to Item 5 of the Commission Staff’s First Request for Information.

⁹⁴ The System Reserves Agreement is Exhibit 1 to Henderson’s responses to Big Rivers’ First Request for Information. The System Reserves Agreement was amended in 1998. *See* Exhibit 7 to the Application of Big Rivers, p. 10, Section 5.

⁹⁵ Systems Reserve Agreement (Exhibit 1 to Henderson’s responses to Big Rivers’ First Request for Information) Sections 2.2(a) and 4.3.

⁹⁶ Attachment to Big Rivers’ response to Item 2 of the Commission Staff’s Post-Hearing Request for Information.

1 Henderson's requirement cost Big Rivers approximately \$4.5 million.⁹⁷ If Big Rivers were
2 required to bear the costs of all of the EHE for the year, Big Rivers would have additionally lost
3 approximately \$3.4 million,⁹⁸ bringing the total loss to Big Rivers resulting from Henderson's
4 requirement that Big Rivers continuously operate the units, compared to operating the units
5 economically, to almost \$8 million. This is a material amount, particularly when compared to
6 Big Rivers' 2015 margins of approximately \$11.2 million.⁹⁹ Altogether, Henderson's
7 requirement to continuously run the units cost Big Rivers and Henderson approximately \$12.3
8 million, an amount that Henderson has not disputed.¹⁰⁰

9 Henderson's rates to its customers are not within the Commission's jurisdiction, so if
10 Henderson wants to generate energy for itself even when that energy could be purchased at a
11 lower cost in the market, it is free to do so.¹⁰¹ However, Henderson should not be permitted to
12 demand that Big Rivers generate uneconomic energy and to force Big Rivers to bear the losses
13 associated with that energy, especially with respect to the uneconomic EHE that is within
14 Henderson's capacity reservation.

15 **IV. The issue presented cannot be resolved by agreement between the parties.**

16 Big Rivers asks the Commission to resolve the question of who is responsible for the
17 variable production costs of EHE that is not wanted by either Henderson or Big Rivers.
18 Henderson unreasonably refuses to discuss this issue with Big Rivers, even though this issue and
19 the cost of the larger amount of uneconomical energy that is unnecessarily produced by Station

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Big Rivers' 2015 Annual Financial Statement filed with the Commission, p. 23.

¹⁰⁰ Attachment to Big Rivers' response to Item 2 of the Commission Staff's Post-Hearing Request for Information.

¹⁰¹ Rebuttal Testimony of Robert W. Berry, p. 23:11-16.

1 Two because of the operational dictates of Henderson cry out for a rational resolution.¹⁰² Big
2 Rivers has no choice but to turn to the Commission because this dispute will not be resolved by
3 agreement of the parties.

4 Henderson flatly refused Big Rivers' request to discuss Henderson's rejection of Big
5 Rivers' notice that it was no longer going to take the uneconomic EHE. When Big Rivers sent to
6 Henderson its May 25, 2016, notice¹⁰³ that Big Rivers was going to cease taking EHE when the
7 variable production costs of energy from Station Two exceeds the market price of energy, Mr.
8 Quick responded on May 31, 2016, with a one-paragraph letter generally contesting everything
9 said in Mr. Berry's letter, and threatening breach of contract litigation.¹⁰⁴ Mr. Berry replied on
10 June 3, 2016, asking for an explanation of Henderson's objections, and seeking a meeting to
11 discuss Henderson's issues.¹⁰⁵ In his June 17, 2016 response, Mr. Quick said that he had nothing
12 to add to his prior letter, accused Mr. Berry of misstating facts, and advised Mr. Berry "to
13 consult with your attorneys."¹⁰⁶ Big Rivers believed it had no choice at that point but to seek
14 resolution by the Commission of an issue that clearly was not otherwise going to be resolved.

15 Henderson's intransigence described in the previous paragraph is part of a pattern
16 reinforcing Big Rivers' conclusion that the issue in this case will not be resolved consensually.
17 For example, Henderson's refusal to accommodate reasonable generation plant operating
18 procedures that would result in significant economies of operation is well-documented in the
19 record, and is discussed in detail earlier in this brief. But even getting Henderson to listen to Big
20 Rivers' proposals for economic operation has become difficult.

¹⁰² See, e.g., questions of Vice Chair Cicero, Tr. 12:59'15" - 13:04'48".

¹⁰³ Letter from Berry to Quick dated May 28, 2016, Application Exhibit 11, p. 1.

¹⁰⁴ See Letter from Quick to Berry dated May 31, 2016, Application Exhibit 11, p. 4.

¹⁰⁵ Letter from Berry to Quick dated June 3, 2016, Application Exhibit 11, p. 5.

¹⁰⁶ Letter from Quick to Berry dated June 17, 2016, Application Exhibit 11, p. 6.

1 Big Rivers sought a meeting with Henderson in early September of 2016 to propose
2 concepts for more economic operation of Station Two. At the last minute, Henderson imposed a
3 confidentiality requirement as a condition to the meeting,¹⁰⁷ which prompted Big Rivers to
4 submit its proposal in writing in a letter dated September 8, 2016.¹⁰⁸ Mr. Quick erroneously
5 refers to this letter as being the initial request for a meeting.¹⁰⁹ Big Rivers and Henderson did
6 finally have a meeting on October 26, 2016, subject to a confidentiality agreement, which Mr.
7 Quick accurately reported resulted in no agreement,¹¹⁰ a status that has remained unchanged.¹¹¹

8 Henderson has been even more reluctant to meet with Big Rivers to establish scheduling
9 protocols that would provide the necessary commercial foundation for Henderson to exercise the
10 conditional rights the arbitration panel awarded Henderson to sell EHE into the wholesale
11 market. Following the Kentucky Supreme Court denial of discretionary review in the arbitration
12 case in August of 2015, on October 27, 2015, Mr. Quick wrote Mr. Berry proposing terms for a
13 scheduling protocol to allow Henderson to sell its EHE into the wholesale market.¹¹² Mr. Berry
14 responded on November 5, 2015, identifying additional issues that Big Rivers believed needed to
15 be discussed, and asking for dates for a meeting at which the parties could resolve issues and
16 begin drafting an agreement.¹¹³ As Mr. Berry noted in his response, Mr. Quick's October 27,
17 2015, letter was almost identical in content to Mr. Quick's letter to Big Rivers dated July 13,
18 2012.

¹⁰⁷ Direct Testimony of Gary Quick, pp. 8:26 - 9:3.

¹⁰⁸ Big Rivers' responses to Items 5 and 9 of Henderson's Second Information Request.

¹⁰⁹ Direct Testimony of Gary Quick, p. 8:20-23.

¹¹⁰ Henderson's response to Item 5 of the Commission Staff's First Request for Information.

¹¹¹ Hearing Testimony of Gary Quick, Tr. 11:53'08".

¹¹² Exhibit 1 to Henderson's response to Item 2 of the Commission Staff's First Request for Information, p. 53. Henderson's exhibit is attached hereto as "Brief Appendix 1." For convenience, Big Rivers has numbered the pages of the exhibit.

¹¹³ Brief Appendix 1, p. 51; *see also* Big Rivers' response to Item 2 of the Commission Staff's First Request for Information, pp. 4:10 - 5:4.

1 Mr. Quick replied to Mr. Berry on November 13, 2015, asserting that no “further
2 protocols or agreements” were required, that the Power Sales Contract and MISO rules answered
3 all necessary questions, refusing a meeting, and threatening litigation if Big Rivers did not accept
4 the scheduling protocols as proposed by him in his letters.¹¹⁴ On December 11, 2015, Mr. Berry
5 responded, explaining why discussions were required, and urging a meeting to resolve
6 outstanding issues rather than further litigation.¹¹⁵ Mr. Quick eventually agreed to a meeting,
7 requiring that only two representatives of each party could be present, and that the parties sign a
8 strict confidentiality agreement to protect the discussions from disclosure or use in other
9 proceedings.¹¹⁶ Henderson’s two representatives were from The Energy Authority (“TEA”),
10 Henderson’s market consultant.¹¹⁷ No employee of Henderson attended the meeting.

11 In response to questions from Big Rivers following the meeting, TEA sent Big Rivers an
12 e-mail message on February 2, 2016, listing a number of additional terms for a scheduling
13 protocol.¹¹⁸ Big Rivers wrote Henderson and TEA on March 28, 2016, asking for a sample,
14 complete scheduling protocol, and repeating questions it had previously asked of Henderson that
15 remained unanswered.¹¹⁹ Big Rivers repeated its request for a complete, proposed scheduling
16 protocol in letters to Henderson on May 25, 2016,¹²⁰ and June 3, 2016.¹²¹ On July 8, 2016,
17 having still received no response from Henderson to its request for a draft scheduling protocol,
18 Mr. Berry wrote Henderson enclosing a complete draft scheduling protocol with all necessary

¹¹⁴ Brief Appendix 1, p. 50.

¹¹⁵ *Id.*, p. 48.

¹¹⁶ *Id.*, pp. 41-42. Note that despite Henderson’s insistence upon a confidentiality agreement covering the meeting, Henderson has publicly disclosed numerous documents covered by that agreement in its information request responses.

¹¹⁷ *Id.*, pp. 22-23.

¹¹⁸ *Id.*, p. 16.

¹¹⁹ *Id.*, p. 26.

¹²⁰ *Id.*, p. 19.

¹²¹ *Id.*, p. 18.

1 commercial terms included and incorporating most of the suggestions made by TEA.¹²²
2 Henderson's response to that letter came from its counsel in a letter to Big Rivers' counsel, in
3 which Henderson's counsel said that the scheduling protocols in Mr. Quick's letters from July
4 2012 and October 2015 should be accepted or rejected,¹²³ thereby dismissing and repudiating all
5 the work accomplished by Big Rivers and TEA on the scheduling protocol with a take-it-or-
6 leave-it offer. Henderson has still not agreed for its management to meet with Big Rivers
7 regarding the scheduling protocol.

8 Henderson contends that it very much wants to get a scheduling protocol in place so it
9 can move forward with its EHE marketing plans and, as shown above, incorrectly accuses Big
10 Rivers of blocking the establishment of that scheduling protocol.¹²⁴ If Henderson will not meet
11 and talk with Big Rivers about a scheduling protocol that Henderson purports to want so badly,
12 there is no prospect that the unwanted EHE variable costs issue can be resolved consensually.

13 V. **If the Commission disagrees that the Station Two Contracts require**
14 **Henderson to be responsible for the variable costs of Excess Henderson**
15 **Energy that Big Rivers declines to take, the Commission should alternatively**
16 **order (i) that Henderson be responsible for the variable costs of the Excess**
17 **Henderson Energy that Big Rivers declines to take, and (ii) that Big Rivers is**
18 **not required to pay Henderson for any Excess Henderson Energy that Big**
19 **Rivers declines to take.**

20 The Commission has an obligation to ensure that rates are fair, just, and reasonable, and
21 that service is reasonable.¹²⁵ That obligation extends to the rates and service standards of the
22 Station Two Contracts:

23 *Simpson County Water District [v. City of Franklin, 872 S.W.2d 460 (Ky. 1994)]*
24 effectively subjects all contracts between municipal utilities and public utilities to

¹²² *Id.*, p. 2. This document has an incomplete copy of the proposed protocol that was attached to the original letter. For a complete copy of the proposed protocol, please see a second copy of the July 8, 2016, letter attached to an e-mail message found at Brief Appendix 1, p. 10.

¹²³ Brief Appendix 1, p. 1.

¹²⁴ Rebuttal Testimony of Robert W. Berry, pp. 25:1 - 27:2.

¹²⁵ KRS 278.030(1)-(2).

1 the Commission's jurisdiction, requires all municipal utility transactions with a
2 public utility to comply with the provisions of KRS Chapter 278, and makes
3 Commission approval a prerequisite to any change in a rate that a municipal
4 utility assesses a public utility for wholesale utility service.

5 The *Commission* reviews rates to ensure that they are fair, just, and reasonable
6 [citing KRS 278.030].¹²⁶

7 It is unfair and unreasonable for Henderson to demand that the Station Two units be
8 operated uneconomically and to require Big Rivers to bear the costs of that decision.¹²⁷ In other
9 words, it is unfair, unjust, and unreasonable for Big Rivers to have to take and pay for the
10 uneconomic EHE and for Big Rivers' members and their retail customers to have higher rates as
11 a result.¹²⁸ Therefore, if the Commission determines that the Station Two Contracts do not
12 already require Henderson to be responsible for the variable costs of any EHE that Big Rivers
13 declines to take, the Commission should order (i) that Henderson be responsible for the variable
14 costs of the EHE that Big Rivers declines to take, and (ii) that Big Rivers is not required to pay
15 Henderson for any EHE that Big Rivers declines to take.

16 VI. Conclusion.

17 Big Rivers respectfully requests that the Commission: (i) find that the Commission has
18 jurisdiction over this matter; and (ii) enforce the Station Two Contracts by declaring that Big
19 Rivers is not responsible under the Station Two Contracts for the variable costs of, or to pay
20 Henderson for, any Excess Henderson Energy, as described and calculated by Big Rivers, that
21 Big Rivers declines to take and utilize. If the Commission disagrees that the Station Two

¹²⁶ *In the Matter of: Proposed Adjustment of the Wholesale Water Serv. Rates of the City of Burkesville*, Order, Case No. 2009-00041 (Oct. 12, 2009), at p. 4; *see also In the Matter of: Proposed Revision of Rules Regarding the Provision of Wholesale Water Serv. by the City of Versailles to Ne. Woodford Water Dist.*, Order, Case No. 2011-00419 (Aug. 12, 2014), at p. 12, n. 43 (“KRS 278.200 expressly provides that the Commission may originate, establish or change any rate or service standard established by a contract between a public utility and a city. KRS 278.030 and KRS 278.040 impose a duty upon the Commission to ensure that such rates and service are fair, just, and reasonable”) (citation omitted); KRS 278.200; Big Rivers’ response to Item 5 of Henderson’s First Request for Information.

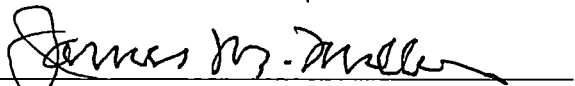
¹²⁷ *See supra* Section III.

¹²⁸ *See supra* Section II.

1 Contracts require Henderson to be responsible for the variable costs of EHE that Big Rivers
2 declines to take, then Big Rivers alternatively requests that the Commission order (i) that
3 Henderson be responsible for the variable costs of EHE that Big Rivers declines to take, and (ii)
4 that Big Rivers is not required to pay Henderson for any EHE that Big Rivers declines to take.

5 On this the 27th day of February, 2017.

6 Respectfully submitted,
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9

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