COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF BIG RIVERS ELECTRIC CORPORATION FOR ENFORCEMENT OF RATE AND SERVICE STANDARDS.	))))	Case No. 2019-00269

BRIEF OF
BIG RIVERS ELECTRIC CORPORATION

Tyson Kamuf, Esq.
Senthia Santana, Esq.
Gregory E. Mayes, Jr., Esq.
BIG RIVERS ELECTRIC CORPORATION
201 Third Street, P.O. Box 727
Henderson, Kentucky 42419-0024
Ph: (270) 827-2561 Fax: (270) 844-6417
tyson.kamuf@bigrivers.com
senthia.santana@bigrivers.com
gregory.mayes@bigrivers.com

Michael L. Kurtz, Esq.
Kurt J. Boehm, Esq.
Jody Kyler Cohn, Esq.
BOEHM, KURTZ & LOWRY
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202
Ph: 513.421.2255 fax: 513.421.2764
mkurtz@BKLlawfirm.com
kboehm@BKLlawfirm.com
jkylercohn@BKLlawfirm.com

COUNSEL FOR BIG RIVERS ELECTRIC CORPORATION

November 17, 2020

TABLE OF CONTENTS

I. DESCRIPTION OF THE PARTIES 2

II. INTRODUCTION 4

1. Big Rivers, The City of Henderson, Station Two, and Economic Development In Western Kentucky 4

III. THE STATION TWO CONTRACTS 9

1. 1970 Power Sales Contract 9

2. 1970 Power Plant Construction and Operation Agreement 10

3. 1970 Joint Facilities Agreement 12

4. 1974 System Reserves Agreement 13

5. 1993 Amendments 13

6. 1998 Amendments 16

7. 2009 Memorandum of Understanding 17

IV. LEGAL STATUS OF HENDERSON UTILITY COMMISSION IN RELATION TO CITY 18

1. For Contractual Purposes, The City And The Utility Commission Are One And The Same; Legally The City Ultimately Controls The Utility Commission 18

V. COMMISSION JURISDICTION UNDER KRS 278.200 19

VI. DECOMMISSIONING AND RETIREMENT-IN-PLACE COSTS 22

1. Henderson Is Contractually Obligated To Pay 22.76% Of The Costs To Decommission The Power Plant It Has Owned And Benefited From 22

2. Ownership Of The Station Two Facilities Is Irrelevant To The Determination Of Each Parties' Share Of Decommissioning Cost Responsibility. 30

3. **The Station Two Ash Pond Must Be Decommissioned By April 2024 Under The CCR Rule And It Is Subject To The 22.76%/77.24% Decommissioning Cost Sharing Formula 32**

4. **Big Rivers Has No Contractual Obligation For Any Station Two Retirement In Place Costs That The City Imprudently Elects to Incur 35**

VII. HENDERSON'S CONTRACTUAL OBLIGATIONS REGARDING THE GREEN LANDFILL 38

1. **The Green Landfill Rates In 2015-2019 Were The Same For Both Parties and Were Reasonable 39**

2. **The City Is Required To Pay The Ongoing Costs Of Storing And Maintaining Its Scrubber Sludge And Ash Pond Dredgings In The Green Landfill 41**

3. **The Station Two Scrubber Sludge And Ash Pond Dredgings Stored And Maintained In The Green Landfill Will Be Subject to the 22.76%/77.24% Decommissioning Cost Sharing Formula When The Green Landfill Is Retired In The Future 44**

VIII. JOINT USE FACILITIES 46

1. **Joint Use Facilities Owned By The City Are Subject To The Decommissioning Cost Sharing Formula; Or If Retired In Place Are Solely The City's Responsibility 46**

IX. 2018/2019 CAPACITY RESERVATION 48

1. **For Fiscal Year 2018/2019, Henderson Attempted To Reserve 10 MW Less Capacity Than Was Required To Satisfy The City's MISO Requirements. 48**

X. MISO FEES AND COSTS 53

1. **MISO Fees Related To NERC Compliance 53**

2. **Henderson Must Pay The MISO Fees That Big Rivers Incurred Because Of The City's Load And The City's Generation From December 2010 Through February 2019 ..... 56**

3. **MISO SCHEDULE 17 Fees 58**

4. MISO Operating Reserve Fees 58

5. MISO Schedule 23 Fees 59

XI. EXCESS HENDERSON ENERGY AND HENDERSON NATIVE LOAD..... 62

1. Big Rivers Correctly Applied The Commission's Approved Methodology From Case No. 2016-00278 In Its Calculation Of Excess Henderson Energy From January 5, 2018 Until Station Two Was Retired On February 1, 2019 62

2. Relitigation Of Excess Henderson Energy Costs Prior To January 5, 2018 Is Barred By The Unambiguous Settlement Agreement 63

3. Big Rivers Correctly Calculated Its Fuel And Reagent Costs To Serve Henderson's Native Load 67

XII. SEVERANCE COSTS 68

1. Severance Costs To Keep Station Two Operational While Henderson Secured An Alternative Supplier Were Reasonable 68

XIII. IT WOULD BE A VIOLATION OF KRS 278.030 FOR THE CITY TO SIMPLY ABANDON ITS POWER PLANT AND SHIFT THOSE COSTS TO BIG RIVERS 71

1. Henderson Has Greatly Benefitted From Its Ownership And Control Of Station Two 71

2. Henderson Municipal Power And Light Is Financially Very Strong And Can Afford To Pay 73

3. The Outcome Of This Case Will Directly Impact Big Rivers' Rates... 76

XIV. UPDATED SUMMARY OF AMOUNT DUE (TO)/FROM HENDERSON 76

XV. ONGOING ENFORCEMENT UNDER KRS 278.390 78

XVI. CONCLUSION 82

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF BIG RIVERS ELECTRIC CORPORATION FOR ENFORCEMENT OF RATE AND SERVICE STANDARDS.	))))	Case No. 2019-00269

BRIEF OF BIG RIVERS ELECTRIC CORPORATION

Big Rivers Electric Corporation ("Big Rivers") submits this Brief to the Kentucky Public Service Commission ("Commission"). This case boils down to a limited number of discrete issues: 1) defining decommissioning and enforcing Big Rivers' and the City of Henderson, Kentucky and the Henderson Utility Commission d/b/a Henderson Municipal Power & Light (collectively, "Henderson" or "City") contractual obligation to pay decommissioning or retirement in place costs associated with Station Two,[1] including the Station Two ash pond; 2) confirming that the City is responsible for its share of Station Two ash pond dredgings and scrubber sludge "stackout," "disposal," and "storage" costs at the Green Landfill, as well as the costs of decommissioning its portion of the Green Landfill

[1] Station Two is defined in the 2005 Amendment to the Station Two Contracts as the "City's 350-megawatt generating station (rated on the date of the 2006 Amendments to Contracts at 312 MW net send out capability), located at a site on the Green River in Henderson County, Kentucky, and, to the extent furnished and owned by City, all auxiliary facilities, joint use facilities and related facilities, renewals, replacements, additions, expansions and improvements thereto, including the Station Two FGD System added thereto and the Station Two SCR System but excluding the City's Transmission and Transformation Facilities…and excluding facilities furnished and owned by Big Rivers;" *See also* Direct Testimony of Michael T. Pullen, Exhibit 13.

when the Landfill is no longer needed (Big Rivers intends to suspend operation of the Green units or convert it to natural gas by June of 2022);[2] 3) enforcing the Commission's January 5, 2018 Order in Case No. 2016-000278 regarding Excess Henderson Energy ("EHE") and prohibiting the relitigation of that issue; 4) verifying the accuracy of Big Rivers' calculations of MISO fees incurred because of the City's generation and load; 5) determining the City's 2018/2019 capacity reservation pursuant to the MISO rules; 6) clarifying that Big Rivers is allowed to continue utilizing City-owned Joint Use Facilities that support the operation of its Green Station and that the City is required to pay its contractual share of decommissioning or retirement in place costs when those City-owned Facilities are no longer needed; and 7) determining whether the payment of severance was reasonable.

I. DESCRIPTION OF THE PARTIES

Big Rivers is a rural electric cooperative corporation organized pursuant to KRS Chapter 279. Big Rivers owns generating assets and purchases, transmits and sells electricity at wholesale. Its principal purpose is to provide the wholesale electricity requirements of its three distribution cooperative members: Jackson Purchase Energy Corporation, Kenergy Corp., and Meade County Rural Electric Cooperative Corporation (collectively, the "Members"). The Members in turn provide retail electric service to approximately 118,000 consumers/retail members located in 22 Western Kentucky counties: Ballard, Breckenridge, Caldwell, Carlisle, Crittenden, Daviess, Graves, Grayson, Hancock,

[2] Big Rivers 2020 Integrated Resource Plan ("IRP"), Case No. 2020-00299 (September 21, 2020) at 176-77; Tr. (October 22, 2020) at 09:22:20.

Hardin, Henderson, Hopkins, Livingston, Lyon, Marshall, McCracken, McLean, Meade, Muhlenberg, Ohio, Union, and Webster.

The City of Henderson is a municipality and political subdivision in Western Kentucky with the power to furnish utility services to its residents in accordance with the requirements of KRS Chapter 96. Henderson owns two coal-fired electric generating units near Sebree, Kentucky, known as "Station Two" that have a total net capacity of 312 MW.

The City of Henderson Utility Commission, d/b/a Henderson Municipal Power and Light is owned by the City.[3] The City operates its municipal retail electric system through the Henderson Utility Commission, "which the City created on June 1, 1949 pursuant to Section 96.530 of the Kentucky Revised Statutes to operate, manage, equip and maintain the [s]ystem."[4] The Henderson Utility Commission "was also vested with the same authority with respect to Station Two when it was constructed and placed into service during the early 1970s."[5] The five Commissioners serving on the Henderson Utility Commission are appointed by the City Mayor with the approval of the City's Board of Commissioners.[6] Within the Station Two Contracts, the term "City" includes the Henderson Utility Commission.[7]

[3] https://www.hmpl.com/.
[4] City of Henderson, Kentucky Electric System Revenue Bonds, Series 2011A, Henderson Response to BREC DR Item 40, Attachment 1 at 1.
[5] City of Henderson, Kentucky Electric System Revenue Bonds, Series 2011A, Henderson Response to BREC DR Item 40, Attachment 1 at 12.
[6] City of Henderson, Kentucky Electric System Revenue Bonds, Series 2011A, Henderson Response to BREC DR Item 40, Attachment 1 at 10.
[7] 1970 Power Plant Construction and Operation Agreement, Section 32.2; 1970 Joint Facilities Agreement, Section 12.

II. INTRODUCTION

1. Big Rivers, The City of Henderson, Station Two, and Economic Development In Western Kentucky

Station Two was part of a comprehensive economic development plan for Western Kentucky devised by Big Rivers and its distribution cooperative member-owners that began in the 1960s. The plan was to use electricity as a natural resource to attract industry to Western Kentucky, primarily in the energy-intensive aluminum and paper industries. "During the 1960s, Green River Electric [now "Kenergy"] President and General Manager J.R. Miller was a leading force in the more than $200 million industrial development of Hancock County. This development included the location of seven major plants within the county."[8] "Most generating and transmission co-ops were formed to provide power supply, basic needs. Big Rivers was more specialized, put together to provide economic development, unique in that it was formed to attract industry."[9]

First was Big Rivers' 65 MW Reid Plant, built to serve the Harvey Aluminum Company (now Aleris Rolled Products) in Lewisport. Then came the massive 443 MW three-unit Coleman plant, which went commercial in 1969-1971, built in Hawesville primarily to serve the National Southwire Aluminum ("NSA") aluminum smelter (now Century Aluminum), the Southwire aluminum rod and cable mill, and the Willamette paper plant

[8] *Let There be Light, The Story of Rural Electrification in Kentucky*, David Dick author, Plum Lick Publishing, 2008 at 102. *See also*, Interview with J.R. Miller, October 30, 1997, Louie B. Nunn Center for Oral History, University of Kentucky.
[9] *Let There Be Light, The Story of Rural Electrification in Kentucky* at 12-13.

(now Domtar).[10] NSA's 1968 Industrial Revenue Bond issue of $142 million to build its Western Kentucky aluminum smelter was at the time the largest in Wall Street history.[11]

Next came Station Two. Having exhausted its Rural Electrification Administration ("REA") borrowing capabilities with Coleman, Big Rivers needed a new financing plan. As set forth in the 1970 Station Two Contracts, Henderson would finance the 350 MW Station Two power plant 100% with low-cost, tax-free municipal debt. Tax-free municipal debt is a form of subsidy from the federal government, and the bonds can only be used for specified purposes. At a capital cost of about $76 million, this form of financing made the capital-intensive Station Two Plant very competitive. But because the City would initially need only a fraction of this very large and efficient plant, Big Rivers would take and pay for all capacity not needed by the City. Big Rivers' take or pay capacity obligation for the Station Two fixed costs made the transaction financially viable. Because energy costs are variable, Big Rivers had the option (but not the obligation) to use and pay for Station Two energy not needed by the City. Station Two went commercial in 1973 and the City's load was projected to grow through a comprehensive annexation plan to eventually utilize the capacity of all or most of the plant. The Commission-approved 1970 Station Two Contracts were originally set to terminate in 2003.

Station Two was built just twenty miles from the City of Henderson at Big Rivers' existing Reid power plant site in Sebree, Kentucky. This allowed for joint use economies by

[10] Id. ("The location of Harvey Aluminum in Lewisport was a lost cause until J.R. Miller said he could and would supply the electricity needed for the operation of the plant…From this point, everything was positive. It was the turning point for the industrialization of Hancock County and J.R. Miller was primarily responsible.").
[11] https://www.southwire.com/history.

utilizing existing power plant infrastructure such as barge unloading, coal conveyors, and the like. Big Rivers provided transmission from Station Two to the City's existing municipal electric system at no cost. Subject to the City's ownership and control, Big Rivers would use its utility expertise to manage and operate Station Two as an independent contractor. Later, Big Rivers would manage for the City its North American Electric Reliability Corporation ("NERC")/Southeastern Reliability Corporation ("SERC") compliance obligations, largely through membership in the Midcontinent Independent System Operation ("MISO").

The Sebree plant site (including Reid and Station Two) is only a few miles away from the Sebree aluminum smelter (now also owned by Century Aluminum), which went into commercial operation in 1973, the same year as Station Two. This was not a coincidence; it was the plan. The surplus capacity from the efficient, low-cost Station Two served the energy intensive (98% load factor) Sebree aluminum smelter. Coal for Station Two was barged or trucked in from nearby mines in Western Kentucky. Low transportation costs assured low energy prices for both the City's customers and Big Rivers' customers, including the Sebree aluminum smelter. The Sebree aluminum smelter and its hundreds of high paying jobs chose to locate in Western Kentucky precisely because of this low-cost energy and capacity. Vast amounts of coal were mined in Western Kentucky to serve the energy-intensive Sebree aluminum smelter, creating thousands of mining, transportation, and related jobs, as well as important coal severance tax revenue for the counties hosting the mines and their school districts.

In 1979-81, Big Rivers added the 454 MW Green plant at the Sebree site to serve its growing industrial load in Western Kentucky. The Reid/Green/Station Two complex had a total capacity of approximately 896 MW. Both generating units at the Green plant were equipped with a flue gas desulfurization ("FGD" or "scrubber") system. In 1993, when the decision was made to install a scrubber on Station Two to comply with the Acid Rain provisions of the Clean Air Act, the cost of that scrubber was greatly reduced by using $42.3 million of existing equipment at the Green scrubber and storing Station Two scrubber sludge and ash pond dredgings in the Green Landfill.

Big Rivers continues to be a driver of economic development in Western Kentucky. On August 17, 2020, the Commission approved a 20-year electric power contract to supply Nucor Corporation's ("Nucor") $1.35 billion facility now under construction in Brandenburg, Kentucky.[12] Big Rivers' innovative and aggressive power supply agreement was an essential component of Nucor's decision to build its energy-intensive new facility in Kentucky. Importantly, all of Big Rivers' financial modeling inputs to price the Nucor contract assumed that Henderson would live up to its Station Two Contractual obligations.

This comprehensive economic development plan greatly benefits all of Western Kentucky, including the City of Henderson. Since Station Two went commercial in 1973, Henderson has consumed 19,500,000 MWh of its energy — enough to supply the City's current native load for approximately 31 years. The City of Henderson has historically had among the lowest electric rates in Kentucky, meaning it has historically had some of the lowest electric rates in the country. Henderson's credit rating from Moody's is three notches

[12] Case No. 2019-00365.

above investment grade. Many of the direct and indirect jobs created by Big Rivers' economic development efforts benefited the City, its local businesses, and its citizens. These benefits supplemented the economic development benefits that Henderson derived from the placement of Big Rivers corporate headquarters within the City.

But over fifty years things changed. The aluminum smelters no longer buy generation from Big Rivers. Instead, Kenergy serves its two aluminum smelter customers through Commission-approved market-based rates.[13] Big Rivers plans to suspend operations at Green or convert it to natural gas by June 2022. On August 29, 2018, the Commission issued an Order finding that Station Two was no longer economically viable.[14] In that Order, the Commission also granted Big Rivers authority to continue to operate Station Two in order to afford Henderson an opportunity to find an alternate power supply. Station Two was retired on February 1, 2019. The City is currently its own market participant in MISO, purchases local balancing authority services from a third party, and serves its load through market-based purchases.

Now comes the final chapter - the contractual obligation of the City to pay its final cost reconciliation for services already provided by Big Rivers, and to pay its ongoing and future cost responsibility for environmental remediation and decommissioning of the power plant it has owned and benefited from for 47 years. Even though it has significantly lower rates and a much stronger financial position and credit rating than Big Rivers, the City refuses to take responsibility for its share of these costs. Instead, the City attempts to evade

[13] Case No. 2013-00221 and Case No. 2013-00413.
[14] Case No. 2018-00146.

its contractual obligations through a series of collateral attacks on the Commission's exclusive jurisdiction.

Unlike the City, Big Rivers accepts its contractual obligation to pay the majority of the environmental remediation and decommissioning costs. However, Big Rivers fundamentally opposes also paying the City's contractual share of the same environmental remediation and decommissioning costs for a power plant the City has owned and benefitted from for almost fifty years.

The Legislature has given the Commission exclusive jurisdiction under KRS 278.200 to "enforce any rate or service standard" in any contract between a utility and a city, as well as enforcement of "obligations arising out of such contract." Big Rivers will comply with whatever Order the Commission issues. But the City has demonstrated a distinct unwillingness to do the same. If the Commission approves Big Rivers' Application in full or in part, it is probable that the Commission will need to "compel obedience" to its lawful order in the Franklin Circuit Court under KRS 278.390. That may be the only way to resolve the issues raised in this case in an orderly manner.

III. THE STATION TWO CONTRACTS

1. 1970 Power Sales Contract

The 1970 Power Sales Contract governs the allocation of capacity and energy, billing and payment, and certain operating standards associated with Station Two.[15] The Contract

[15] 1970 Power Sales Contract Sections 1.1 and 2.2.

provides, *inter alia,* "[u]pon the completion of Station Two City will have electric power and energy surplus to the immediate needs of City…"[16] Under the Contract, Big Rivers has an "obligation to take and pay for the *capacity* of City's Station Two" not reserved by the City.[17] With respect to *energy*, Big Rivers has the right (but not the obligation) to receive "Station Two energy associated with its allotted net capacity."[18] The Contract itself refers to benefits the City received from constructing Station Two, stating that "[b]y its addition of Station Two, City will be able to provide more economical and reliable electric service to itself and its inhabitants, and through its sale of surplus electric power and energy to Big Rivers, as provided by this Agreement, City can assure the economic feasibility of such addition."[19] In its first year of operation in 1973, the capacity reserved by the City was only 7.43% of the total capacity of Station Two.[20]

2. 1970 Power Plant Construction and Operation Agreement

The 1970 Power Plant Construction and Operation Agreement, among other things, sets forth standards for Station Two site acquisition, construction, fuel supply, general plant equipment, capital funds, bond sales, operation, maintenance, control, cost allocation, budgeting, accounting, and billing. As with the Power Sales Contract, the Power Plant Construction and Operation Agreement describes benefits derived by the City due to Station Two's construction, providing that the City's consulting engineers have "determined and recommend that the most feasible and economical plan for providing the City's present and

[16] Id.
[17] Id. at Sections 3.3 and 3.5 (emphasis added).
[18] Id. at Section 4.1 (emphasis added).
[19] 1970 Power Sales Contract at Section 1.4.
[20] Exhibit Pullen-1 at 1 of 3.

anticipated electric generation needs is the construction by City of a relatively large and more efficient generating station, whereby City can provide adequate, low-cost power and energy for the present and future needs of its Municipal Electric Light & Power System" with "interim sales of surplus power and energy" to Big Rivers.[21]

The construction of a plant much too large for the City's then-current needs created opportunities for municipal expansion by allowing for a comprehensive annexation program whereby Henderson's corporate limits could be increased by approximately three-fold.[22] Additionally, Big Rivers provided transmission from Station Two to the City's municipal system at no cost.[23] From 1973 to 2019, Henderson consumed 19,500,000 MWh of Station Two energy, enough energy to supply the City's current native load for approximately 31 years.[24]

The Power Plant and Operation Agreement also details the City's role as owner of Station Two and Big Rivers' role as operator of Station Two. The Agreement provides "[e]xcept as otherwise provided herein, City shall have full ownership, management and control of its Station Two…Big Rivers will provide, as an independent contractor, all operating personnel, materials, supplies and technical services required for the continuous operation of City's Station Two…"[25] Big Rivers agreed to "at all times operate City's Station Two on a best efforts basis, in an efficient and economical manner…and the City agreed to

[21] 1970 Power Plant Construction and Operation Agreement Section 1.6.
[22] Id. at Section 1.5 "City is presently planning a comprehensive annexation program whereby the area of its corporate limits will be increased by approximately three-fold."
[23] Id. at Section 13.8 (d) "Big Rivers will make no charge to City for the use of Big Rivers' transmission facilities from point of City's Station Two switchyard to the several substations of City's Existing System."
[24] Berry Rebuttal Testimony at 16.
[25] Power Plant Construction and Operation Agreement at Section 13.1 and Section 13.2.

"pay Big Rivers, on a monthly basis, its reasonable expenditures incurred in the operation and maintenance of City's Station Two…."[26] If at any time Big Rivers did not operate Station Two in a continuous and economic manner, the City had the right under the Operation Agreement "to immediately take over the complete operation and maintenance of Station Two."[27]

3. 1970 Joint Facilities Agreement

Station Two was constructed at the site of Big Rivers' Reid plant to take advantage of existing infrastructure, such as barge unloaders and coal conveyors. The Joint Facilities Agreement ("JFA") governs the allocation, title, costs, O&M, operating standards, and obligations associated with the Joint Use Facilities that will be used by both Station Two and Big Rivers' Reid plant. Under the JFA, both Henderson and Big Rivers recognized that "material economies in construction and operation can be achieved through the joint use by both parties of certain operating facilities which serve as auxiliaries of their respective generating stations."[28] Each party is responsible for the continued operating, maintenance, repair and replacement costs of its joint use facilities.[29] Joint use facilities will continue to be provided so long as either party operates or maintains a generating station that uses such facilities.[30] Each party "permanently" retains title to their respective Joint Use Facilities.[31] A color-coded map showing generating assets owned by Big Rivers, generating

[26] Id. at Section 13.4 and Section 13.6.
[27] City of Henderson, Kentucky Electric System Revenue Bonds, Series 2011A, Henderson Response to BREC DR Item 40, Attachment 1 at 26; Tr. (October 22, 2020) at 1:19:34.
[28] 1970 Joint Facilities Agreement at Section 1.3.
[29] Id. at Section 6.1.
[30] Id. at Section 1.5, Section 4.1 and Section 8.1.
[31] Id. at Section 4.1.

assets owned by the City, Joint Use Facilities owned by Big Rivers, and Joint Use Facilities owned by the City is attached to the Rebuttal Testimonies of Mr. Berry and Mr. Pullen.

All three of the 1970 Station Two Contracts were approved by the Commission on October 22, 1970 in Case No. 5406.

4. 1974 System Reserves Agreement

Under the 1974 System Reserves Agreement, both Big Rivers and Henderson were required "to maintain adequate reserve generating capacity on its system so as not to impose disproportionate demands upon the other for assistance in meeting the normal contingencies of operating its power system…"[32] At the time, fulfilling this requirement meant maintaining a planning reserve margin of 15%.[33] The City's contingency reserve requirement, which required spinning, unloaded generation, was equal to the amount of capacity the City reserved from Station Two each year. Generating capacity necessary to meet the planning and contingency reserve requirement could be provided by the City from its Station One, its Station Two, or from firm capacity purchases.[34] However, as discussed below, this requirement was later modified in the 1998 Amendments.

5. 1993 Amendments

The 1993 Amendments authorized the construction of a scrubber on Station Two to comply with the Acid Rain Provisions of the Clean Air Act.[35] The 1993 Amendments

[32] 1974 System Reserves Agreement at 1.
[33] Id. at Section 2.1 and Section 3.1.
[34] Id. at Section 2.1.
[35] The 1993 Amendments were approved by the Commission on March 31, 1995, Case No. 94-032.

amended the Power Sales Contract, the Power Plant Construction and Operation Agreement, the Joint Facilities Agreement and added a new Section 8 titled Station Two Decommissioning Costs. The 1993 Amendments are central to resolving the issues in this case.

Section 8 provides that if "Big Rivers exercises its option to extend the life of the Contracts for the operating life of Station Two, as heretofore defined, the parties shall bear decommissioning costs of Station Two in the proportions in which they shared capacity costs during the life of Station Two."[36] This contractual cost-sharing obligation applies to both parties regardless of which party owns the land or facilities associated with Station Two. Under the clear wording of the Contract, the parties' respective capacity utilization from 1973-2019 is the sole determinant of decommissioning cost sharing.

In 1998, Big Rivers exercised its contractual option to extend the contract termination date from 2003 to the economically competitive life of Station Two.[37] Station Two was retired on February 1, 2019. The decommissioning cost sharing ratio is therefore Big Rivers 77.24%/Henderson 22.76%.[38] But for the 1993 Amendments, Big Rivers would have had no contractual obligation to pay for any decommissioning costs for the City's power plant.

In 1993, the Power Sales Contract was amended to change the definition of Station Two. The definition of Station Two was expanded to include the Station Two ash pond, as

[36] 1993 Amendments Section 8.
[37] 1998 Amendments at Section 2.1 ("The terms of all the Contracts except the Joint Facilities Agreement shall be extended for the operating life of Station Two, the operating life of which shall be considered to continue for so long as Unit 1 and 2, or either of them, is operated or is capable of normal, continuous, reliable operation for the economically competitive production of electricity, temporary outages excepted.").
[38] Exhibit Pullen-1 at 3 of 3l; 1970 Power Sales Contract at Sections 2.9 and 26.1.

well as Station Two ash pond dredgings stored in the Green Landfill, both of which are expressly listed as City-owned Joint Use Facilities.[39] Therefore, the Station Two ash pond is subject to the 77.24%/22.76% decommissioning cost-sharing. Station Two waste stored in the Green Landfill (which is only a subset of the entire Landfill) will also be subject to the 77.24%/22.76% cost sharing once the Green Landfill is itself decommissioned sometime in the future.

The 1993 Amendments also addressed operating and maintenance ("O&M") costs of the new scrubber, including scrubber sludge "stackout," "disposal," and "storage" in "appropriate landfills." Such costs are to be allocated to the parties based on their respective usage of the scrubber. "The costs of operating and maintaining the FGD Joint Facilities … and the cost of sludge stackout and disposal (including haulage and deposit in appropriate landfills) therefrom, shall be allocated to the Green Station and Station Two…in the proportions in which the stations put sulfur through the Green and Station Two FGD systems…."[40] The allocation of scrubber sludge "storage" costs is to be similarly based on usage of the scrubber. "The 'waste treatment' area power, maintenance and labor costs and the scrubber sludge disposal and storage costs would be split similarly…"[41] Big Rivers continues to incur stackout, disposal, and storage costs for the City's scrubber waste stored in the Green Landfill. While the Green Landfill is in operation, each party is required to

[39] Station Two means joint use facilities "to the extent furnished and owned by City…" 1993 Amendments at Section 5.1. The 1993 Amendments Exhibit 1, Page 1 of 3 Part B lists "Joint Use Facilities Provided By and Owned By the City But Located on Big Rivers' Property." Item 13 of Part B is the Station Two ash pond and item 15 is the Station Two ash pond dredgings stored at the Green Landfill.
[40] 1993 Amendments at 11-12, new Section 3.4.
[41] 1993 Amendments at 13, new Section 3.4.

pay the cost of storing and maintaining its scrubber sludge and ash pond dredgings contained in the Landfill.

Finally, the 1993 Amendments authorized Station Two to utilize 32 separate components of Big Rivers' existing Green scrubber (lime silo, lime conveyor, barge unloader, pneumatic ash transfer system, etc.). Green and Station Two are both located at the Sebree complex. The installed value of these 32 components of the Green scrubber was $42.3 million (depreciated value of $21.6 million).[42] Also, use of Big Rivers' existing landfill at Green avoided the need for the City to construct a separate landfill for Station Two. The parties recognized that all of this had the effect of "greatly reducing the cost of the Station Two FGD System."[43]

The 1993 Amendments were approved by the Commission on March 31, 1995 in Case No. 94-032.

6. 1998 Amendments

The 1998 Amendments did two primary things.[44] First, as previously discussed, Big Rivers exercised its option to extend its participation in the Station Two Contacts from 2003 to the economically competitive life of the units, thus triggering Big Rivers' obligation to share in the costs of decommissioning Station Two.[45] Second, it amended the System Reserves Agreement to eliminate the 15% reserve margin requirement that could be met by owned or purchased capacity. The new requirement was for both "City and Big Rivers" to

[42] Big Rivers Response to Staff Item 2-2.
[43] 1993 Amendments at 2.
[44] The 1998 Amendments were approved by the Commission on July 14, 1998, Case No. 1998-00267.
[45] 1998 Amendments Section 1.

"comply with any system capacity requirements now required or imposed at a future date" by "any regional transmission authority" (e.g. MISO).[46] Further, the "City agrees to comply with any requirements validly imposed by…[MISO]…upon Big Rivers based on Big Rivers' role as control area operator, but only if and to the extent that such requirements imposed on Big Rivers are on account of or due to the generation or load of the City."[47]

The 1998 Amendments were approved by the Commission on July 14, 1998 in Case No. 1998-00267. All of the Station Two Contracts, except for the Joint Facilities Agreement (as amended) expired when the Station Two units were no longer economically viable.[48] But KRS 278.200 provides that the Commission may continue to enforce "all rights, privileges and obligations arising out of" those Contracts.

7. 2009 Memorandum of Understanding

After Big Rivers regained control of its generation in 2009 pursuant to the "Unwind" of the long-term lease with the unregulated LG&E entities, Big Rivers agreed to continue providing Transmission Operations, Generation Operations and Balancing Authority functions for the City.[49] Big Rivers performed these functions for the City through MISO until Station Two was retired and Henderson itself joined MISO in 2019.

---

[46] 1998 Amendments at Section 5.

[47] Id.

[48] *In the Matter of: Application of Big Rivers Electric Corporation for Termination of Contracts and a Declaratory Order and for Authority to Establish a Regulatory Asset,* Case No. 2018-00146.

[49] "Subsequent to the Unwind Transaction, Big Rivers Electric Corporation will continue to provide and be responsible for compliance with all TOP, GOP, and BA Reliability Standard functions related to Henderson Municipal Power and Light as those functions were provided by Big Rivers Electric Corporation, Western Kentucky Energy Corporation, and LG&E Energy Marketing, Inc. prior to the Unwind transaction." Exhibit 15 to Application in this case.

IV. LEGAL STATUS OF HENDERSON UTILITY COMMISSION IN RELATION TO CITY

1. For Contractual Purposes, The City And The Utility Commission Are One And The Same; Legally The City Ultimately Controls The Utility Commission

Several questions regarding the legal relationship between the City and the Henderson Utility Commission were raised at the hearing.[50] That legal relationship is expressly addressed in the Station Two Contracts, which were each signed by both the City and the Henderson Utility Commission. Specifically, both Section 32 of the 1970 Power Plant Construction and Operation Agreement and Section 12 of the 1970 Joint Facilities Agreement provide that for purposes of the Station Two Contracts, the City and the Henderson Utility Commission are treated as one and the same, stating:

> …It is recognized by the parties that the City operates, manages and controls its electric utility system through its City of Henderson Utility Commission, appointed pursuant to KRS 96.530. All references to City under the terms and provisions of this Agreement shall include its City of Henderson Utility Commission to the extent applicable……The parties agree that all rights and obligations of City under the terms and provisions of this Agreement shall also constitute rights and obligations of the City of Henderson Utility Commission. By its execution of this Agreement the City of Henderson Utility Commission covenants and agrees that all references to City under the terms and provisions of this Agreement shall include the City of Henderson Utility Commission, and that it shall be obligated under this Agreement accordingly.

While the Henderson Utility Commission is a public body politic and corporate and may contract and be contracted with, sue and be sued, in and by its corporate name and have and use a corporate seal in accordance with KRS 96.530, it expressly agreed to be treated identically to the City under the Station Two Contracts.

[50] Tr. (October 22, 2020) at 15:08.

Moreover, the Henderson Utility Commission as well as the Station Two assets are both ultimately owned by the City.[51] The five Commissioners serving on the Henderson Utility Commission are appointed by the City Mayor with the approval of the City's Board of Commissioners.[52] The City created the Henderson Utility Commission pursuant to KRS 96.530 "to operate, manage, equip and maintain" the City's retail electric system and vested the Henderson Utility Commission with "the same authority with respect to Station Two when it was constructed and placed into service during the early 1970s."[53] However, while the Henderson Utility Commission operates, manages, equips, and maintains the City's utility assets,[54] the rates fixed by the Utility Commission must ultimately be approved by the City.[55] As the City's 2011 Bond Prospectus states, "…the Utility Commission determines the user charges and rates and financing needs of the System, subject to the approval and adoption of the City's Board of Commissioners."[56] The City therefore ultimately controls the Henderson Utility Commission.

V. COMMISSION JURISDICTION UNDER KRS 278.200

Henderson has repeatedly sought to collaterally attack the Commission's exclusive jurisdiction over the Station Two Contracts. Since the filing of Big Rivers' Application in

[51] KRS 96.520.
[52] City of Henderson, Kentucky Electric System Revenue Bonds, Series 2011A, Henderson Response to BREC DR Item 40, Attachment 1 at 10.
[53] City of Henderson, Kentucky Electric System Revenue Bonds, Series 2011A, Henderson Response to BREC DR Item 40, Attachment 1 at 1 and 12.
[54] KRS 96.530; City of Henderson, Kentucky Electric System Revenue Bonds, Series 2011A, Henderson Response to BREC DR Item 40, Attachment 1 at 12.
[55] KRS 96.535.
[56] City of Henderson, Kentucky Electric System Revenue Bonds, Series 2011A, Henderson Response to BREC DR Item 40, Attachment 1 at 12.

July 2019, Henderson has commenced at least three actions in Kentucky state courts contesting rates and service standards set forth in the Contracts, including the provisions governing the sharing of Station Two ash pond decommissioning costs,[57] the parties' cost responsibility for Excess Henderson Energy generated by Station Two,[58] and the calculation of annual operating and maintenance budgets associated with Station Two.[59] These state court actions have no effect on the Commission's exclusive jurisdiction and each has been held in abeyance pending the resolution of this proceeding.

The Commission's jurisdiction over the rates and service standards set forth in the Station Two Contracts, as well as all rights, privileges and obligations arising out of those Contracts, is a matter already thoroughly addressed and settled in this proceeding. On February 4, 2020, the Commission issued an Order denying the City's Motion to Dismiss for lack of jurisdiction, finding that it could properly decide the issues raised in this matter. In that Order, the Commission recognized its authority under KRS 278.200, which grants the Commission jurisdiction to *"originate, establish, change, promulgate and* ***enforce any rate or service standard of any utility*** *that has been or may be fixed by any contract, franchise or agreement between the utility and any city,* ***and all rights, privileges and obligations arising out of any such contract****, franchise or agreement, regulating any such rate or service standard."*[60] And the Commission held that the issues raised by Big Rivers

[57] Webster Circuit Court Case No. 20-CI-00073,
[58] Henderson Circuit Court Case No. 20-CI-000413.
[59] Henderson Circuit Court Case No. 19-CI-00504.
[60] Emphasis added. KRS 278.010(12) broadly defines a "*rate*" as "[A]ny individual or joint fare, toll, charge, rental, or other compensation for service rendered or to be rendered by any utility, and any rule, regulation, practice, act, requirement, or privilege in any way relating to such fare, toll, charge, rental, or other compensation, and any schedule or tariff or part of a schedule or tariff thereof." KRS 278.010(13) defines

"implicate the service and rates under the various Station Two Contracts, and such issues are clearly within the scope of the Commission's jurisdiction under KRS 278.200."[61] Further, the Commission noted that it has repeatedly exercised jurisdiction over the Station Two Contracts, approving the original versions on October 22, 1970 in Case No. 5406 and ruling on several contract amendments and various other issues arising over the Contracts' nearly fifty-year life. Case 5406, Order (October 22, 1970) (approving Power Sales Contract, Power Plant Construction and Operation Agreement and Joint Facilities Agreement); Case No. 94-032, Order (March 31, 1995) (approving 1993 Amendments); Case No. 1998-00267, Order (July 14, 1998) (approving 1998 Amendments); Case No. 2005-00532, Order (February 24, 2006) (approving 2005 Amendments); Case No. 2016-00278, Order (January 5, 2018) (granting Big Rivers' request for Declaratory Order); Case No. 2018-00146, Order (August 29, 2018) (finding that the Station Two units were no longer economically viable).[62]

The Commission's February 4, 2020 decision in this case was consistent with Kentucky Supreme Court precedent, which holds that KRS 278.200 applies to both the service provided by (and the rates charged by) a utility to its customers, and to the service provided by (and the rates charged by) a utility to a city. *Simpson County 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 exercises exclusive*

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

[61] Order (February 4, 2020) at 7.

[62] Order at 6.

jurisdiction over utility rates and service"). Likewise, the Commission's February 4, 2020 decision was supported by Kentucky Court of Appeals precedent, which affirms the principle that with respect to a contract between a utility and a city, the city is subject to the jurisdiction of the Commission. *City of Greenup v. Pub. Serv. Comm'n,* 182 S.W.3d 535, 538 (Ky. 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*").

This Commission is the only proper forum for litigating the issues raised in this Application. Only after the Commission has ruled should these issues be subject to review by a civil court - the Franklin Circuit Court - in accordance with KRS 278.410. Accordingly, Big Rivers will not address the merits of each of Henderson's improper collateral attacks, instead focusing on enforcing the rate and service standards within the Station Two Contracts as well as all rights, privileges, and obligations arising out of those Contracts in accordance with KRS 278.200.

VI. DECOMMISSIONING AND RETIREMENT-IN-PLACE COSTS

1. Henderson Is Contractually Obligated To Pay 22.76% Of The Costs To Decommission The Power Plant It Has Owned And Benefited From For 47 Years

Decommissioning Station Two proper (two steam generators, two turbine generators, two electrostatic precipitators, one bypass stack, two cooling towers, one turbine building, one cooling tower, one barge unloader, eight coal conveyors, etc.) is a critical issue here. The total cost of decommissioning Station Two proper (excluding the City-owned ash pond, City-

owned waste in the Landfill, and City-owned Joint Use Facilities that Big Rivers will continue to utilize) is currently expected to be $3 million to $6 million.[63] The Station Two Contracts are not ambiguous with respect to paying for this $3-$6 million cost, providing that "the parties shall bear decommissioning costs of Station Two in the proportions in which they shared capacity costs during the life of Station Two."[64] This contractual obligation remains for both parties regardless of which party owns the land or facilities associated with Station Two. In accordance with the plain language of the Contracts, that cost sharing ratio is 77.24% Big Rivers/22.76% Henderson.[65]

The City's defense is exceedingly weak. In a single Q&A, Henderson asserts that decommissioning of Station Two was completed as of April 2019 and the City has no further contractual obligations with respect to the decommissioning of Station Two.[66] Station Two was not decommissioned in April of last year – the structure still stands, and the City refuses even to undertake asbestos removal. There are $3-6 million of decommissioning costs that still have to be paid for. As detailed in the Direct and Rebuttal Testimonies of Mr. Berry, Mr. Pullen, and Mr. Kopp, there is absolutely no engineering or economic credibility to the assertion Station Two has already been decommissioned. Because of its completely unsupported litigation position, we can only surmise that the City does not take the Commission's jurisdiction seriously. Indeed, City witness Heimgartner testified that "[t]he issues remaining in dispute between Henderson and Big Rivers are so complex in

[63] Tr. (October 22, 2020) at 9:24:17 (modifying Direct Testimony of Michael T. Pullen at 12).
[64] 1993 Amendments, Section 8.
[65] Exhibit Pullen-1.
[66] Direct Testimony of Christopher Heimgartner at 20-21.

nature and so far removed from issues of utility rates or service, it is difficult at first blush to understand why Big Rivers thinks the Commission can or should get involved."[67] Given Henderson's reluctance to accept the Commission's jurisdiction over these issues, it may be that the City's litigation strategy is to effectively ignore any Commission Order on alleged jurisdictional grounds, try to tie this issue up in the courts for years, and simply hope that Big Rivers and its 118,000 customers will pay all costs, including the City's contractually-obligated share, to decommission the City's power plant. Big Rivers cannot do that.

Station Two is currently being maintained in retirement in place status. Retirement in place occurs when a unit is removed from service and activities are performed to maintain the unit in a "safe, dark, and dry" condition. Retirement in place is essentially treading water. It is attempting to continuously maintain safety at the plant while the plant itself slowly rusts and deteriorates.

In contrast, decommissioning requires finality. In order to "decommission" Station Two, the facilities would have to be demolished, remediated, and restored to a state suitable for future industrial use.[68] The decommissioning process would also include all ongoing

[67] Direct Testimony of Christopher Heimgartner at 13.

[68] Rebuttal Testimony of Robert W. Berry at 8. Direct Testimony of Robert W. Berry at 36; Big Rivers Response to Staff First Request for Information, Item No. 10; Big Rivers Response to Staff First Request for Information, Item No. 1(b). ("The scope of the decommissioning includes asbestos removal; dismantling the boilers, steam turbine, precipitators, scrubbers, selective catalytic reactors, stacks, and transformers; on-site concrete crushing and disposal; debris removal; less salvage value for the scrap metal… The scope also includes decommissioning of the cooling water intake, grounds, fuel oil storage, balance of plant buildings, coal handling facilities and coal yard, and final grading and seeding of the site." Big Rivers Response to Henderson First Request for Information, Item No. 38 (""In all decommissioning studies that Burns & McDonnell has prepared to support depreciation calculations, we have based the costs on returning the sites to conditions suitable for industrial use. These decommissioning costs, including this assumption, have be[en] approved as the basis of setting end-of-life costs in depreciation calculations by the Public Service Commission of Kentucky, as well as commissions in Florida, Indiana, New Mexico, Arizona, North Carolina, and South Carolina.").

maintenance, environmental monitoring, and environmental remediation that may be required in the future.[69]

Commission precedent aligns with Big Rivers' definition of decommissioning. Kentucky Power currently has a Big Sandy Decommissioning Rider ("BSDR") approved by the Commission in Case No. 2017-00179. In its annual BSDR filings, Kentucky Power lists multiple decommissioning costs which it is currently recovering from its ratepayers, including:

- Fly ash pond closure;
- Bottom ash pond closure;
- Asbestos removal;
- Demolition of boiler and turbine infrastructure continued, with environmental remediation being performed;
- Removal of remaining coal related equipment;
- Removal of remaining BS2 structure entirely;
- Removal of fill slab portion of the foundation;
- Removal of underground piping and roadways;
- Site grading;
- Closure of stack penetration;
- Relocation of plant potable water line;
- Safe maintenance of plant environment and environmental compliance.[70]

These costs are similar to the $3 million to $6 million of decommissioning costs that can be expected with respect to Station Two.

Louisville Gas and Electric has recently completed the decommissioning of its Paddy's Run and Cane Run coal-fired generating stations. Both coal-fired stations were dismantled,

[69] Big Rivers Response to Henderson First Request for Information, Item No. 38.
[70] 2019 and 2020 Annual Filings of Kentucky Power Big Sandy Decommissioning Rider, Case No. 2017-00179, Post-Case Files (August 15, 2019 and August 11, 2020); Rebuttal Testimony of Robert W. Berry at 9-10.

environmentally remediated, and then demolished. The Paddy's Run and Cane Run sites were both returned to green space.[71]

East Kentucky Power Cooperative likewise recently completed the decommissioning process for its Dale station. This process included demolition, removal of environmentally-regulated materials such as asbestos, and conversion of the plant to a brownfield site.[72] And Henderson itself not long ago completed the demolition of its Station One generating facility. This included removal of asbestos, demolition of the power plant and smokestack, and conversion of the site to a green space.[73]

This Commission recently approved a depreciation study for Duke Kentucky which incorporates decommissioning costs calculated based on assumptions that full demolition would take place and the impacted sites would be restored to a condition suitable for industrial use.[74] Similar depreciation studies have been approved throughout the country.[75] Additionally, the Edison Electric Institute defines the term decommissioning simply as "removal of a utility plant from service and dismantling of same."[76]

Station Two cannot realistically be considered to have been "decommissioned" in April 2019 as Henderson asserts. Even the City's independent auditors don't believe that assertion, and require disclosure of the contractual decommissioning obligation.

---

[71] Big Rivers Response to Staff First Request for Information, Item No. 10; Rebuttal Testimony of Robert W. Berry at 8.
[72] Id.
[73] Rebuttal Testimony of Robert W. Berry at 10.
[74] Id. at 9, *In the Matter of: Electronic Application of Duke Energy Kentucky, Inc. for: 1) an Adjustment of the Electric Rates; 2) Approval of an Environmental Compliance Plan and Surcharge Mechanism; 3) Approval of New Tariffs; 4) Approval of Accounting Practices to Establish Regulatory Assets and Liabilities; and 5) All other Required Approvals and Relief*, Case No. 2017-00321, Orders (April 13, 2018 and October 2, 2018).
[75] Big Rivers Response to Henderson First Request for Information, Item No. 38.
[76] *Glossary of Electric Utility Terms*, Edison Electric Institute (1995) at 18.

Henderson's audited financial statements reflect a future asset retirement obligation related to Station Two, including the power plant, the ash pond, and other Joint Use Facilities, explaining that "[t]he Commission is legally obligated to remove asbestos, lead paint, and other contaminants located at the Station Two facility. Accordingly, a liability has been established in accordance with SFAS No. 143 Accounting for Asset Retirement Obligations. During the fiscal year ended May 31, 2018, management became aware of an asset retirement obligation related to an ash pond located at the Station Two facility."[77] Henderson's financial statements recognize a Station Two asset retirement obligation of $1,369,055 as of May 31, 2019,[78] which was increased to $2,888,704 as of May 31, 2020.

Decommissioning is the prudent course of action with respect to Station Two – it is the legal, logical, and right thing to do. As Big Rivers' witness Kopp explains, the costs to maintain a generating facility in a retired in place state will typically exceed the costs to fully decommission the facility in approximately 5 to 7 years, absent a valid reason for delay.[79] Big Rivers witness Pullen testified that "common sense tells us you can't leave those…structures standing forever. They're going to deteriorate…Based on our experience at Coleman, we know that as time goes on, structures deteriorate, and it just doesn't make sense to leave a unit indefinitely like that. Eventually, it's going to have to come down."[80] Therefore, maintaining Station Two in a retired in place state indefinitely only increases

[77] Rebuttal Testimony of Paul G. Smith at 25; Henderson Response to Big Rivers First Request for Information, Item Nos. 1-31, Attachment 1 at 37.
[78] Id.; Rebuttal Testimony of Robert W. Berry at 17-18.
[79] Direct Testimony Jeffrey T. Kopp at 9; Tr. (October 22, 2020) at 11:26:49.
[80] Tr. (October 22, 2020) at 11:27:11.

Henderson's total cost exposure compared to proceeding with decommissioning the unit now.

Decommissioning is also in the public interest. Public safety concerns surrounding Station Two will continue to exist if Station Two is not decommissioned, including potential asbestos exposure to the more than 100 employees working at the Green plant, many of whom are Henderson residents, as well as to on-site contractors and the public in general. For example, Henderson Station One caught fire while awaiting demolition, which could be a catastrophic event if a similar occurrence happens at Station Two.[81] In addition, leaving rusting facilities in prime areas of the Commonwealth (i.e. near rivers and electrical switch yards) rather than restoring those areas to a condition suitable for future industrial use is not conducive to economic development in Kentucky.[82]

While there is no legal requirement that all of Station Two be decommissioned at this time, the timely decommissioning of certain portions of Station Two is mandatory.[83] Mandatory decommissioning consists of those activities required by federal regulations and laws, including:

- *40 CFR 257 and 261, Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals ("CCR")*
    - Required Compliance Activities at Station Two: Closure of the Station Two ash pond no later than April 2024 and ongoing groundwater monitoring for thirty years following closure.[84]
    - Estimated Compliance Cost: $13.3 million closure cost plus $25,000 ongoing annual maintenance and monitoring costs.

[81] Rebuttal Testimony of Robert W. Berry at 15.
[82] Id.
[83] Id. at 16.
[84] Tr. (October 22, 2020) at 9:49:55.

40 CFR 112.5, Spill Prevention Control and Countermeasure Plan

- Required Compliance Activities at Station Two: Removal and/or maintenance of hazardous waste (solvents, paints, etc.) onsite.[85]
- Estimated Compliance Cost: Ongoing environmental monitoring and site security is estimated to be at least $300,000 per year.

- *40 CFR 122, National Pollutant Discharge Elimination System*
  - Required Compliance Activities at Station Two: Limiting runoff and discharge from Station Two ash pond and coal pile.[86]
  - Estimated Compliance Cost: Ongoing environmental monitoring and site security is estimated to be at least $300,000 per year.
- *40 CFR Part 61 Subpart M, Notification required per National Emission Standard for Asbestos*
  - Required Compliance Activities at Station Two: Ongoing containment of any asbestos exposure.[87]
  - Estimated Compliance Cost: $1.6 million to $2.8 million for removal, $50,000 to $100,000 per year for ongoing containment until removal is completed.
- *Surface Mining Control Reclamation Act*
  - Required Compliance Activities at Station Two: Cleanup of Station Two coal pile and removal of any residual.[88]
  - Estimated Compliance Cost: Ongoing environmental monitoring and site security is estimated to be at least $300,000 per year.
- *Resource Conservation and Recovery Act*
  - Required Compliance Activities at Station Two: Waste management of hazardous wastes such as water treatment wastes, waste oils, used SCR catalysts, solvents, building sump wastes, and general refuse materials.
  - Estimated Compliance Cost: Ongoing environmental monitoring and site security is estimated to be at least $300,000 per year.

Mandatory decommissioning must be completed. The failure to do so can result in civil and criminal penalties. The City has no choice.

Big Rivers is responsible for 77.24% of decommissioning costs, or approximately 3.5 times the amount Henderson is obligated to pay. Big Rivers has every desire and incentive

[85] Tr. (October 22, 2020) at 9:50:27.
[86] Tr. (October 22, 2020) at 9:50:56.
[87] Tr. (October 22, 2020) at 9:52:24.
[88] Tr. (October 22, 2020) at 9:54:57.

to minimize Station Two decommissioning costs because it will bear the majority of these costs. Big Rivers and its Members absolutely oppose incurring excessive decommissioning expenses. The same process and standards that are used for all large-scale projects at a generating facility can be used for this decommissioning project. An experienced engineering firm can be hired to draft a specific scope of work for the decommissioning project. A request for proposal ("RFP") is then issued following all state law required municipal bidding requirements. The responses to the RFP will provide a reasonable degree of certainty as to the expected cost to fully decommission Station Two.

To address the City's concern about uncapped cost responsibility, Big Rivers is willing to allow Henderson to manage the decommissioning process including compliance with all current and future environmental regulations. If Henderson oversees the decommissioning, Big Rivers continues to support a Commission review and reimbursement process. But no matter who oversees the process, decommissioning can and should occur as soon as possible.

2. Ownership Of The Station Two Facilities Is Irrelevant To The Determination Of Each Parties' Share Of Decommissioning Cost Responsibility.

The City's collateral attack on the Commission's exclusive jurisdiction in the Webster Circuit Court – where City is seeking a declaratory order that the deed to certain Station Two property has reverted back to Big Rivers – is irrelevant to the determination of the parties' decommissioning cost responsibility.[89] As discussed above, Section 8 of the 1993 Amendments provides that both Big Rivers and the City are obligated to share in the costs

[89] Webster Circuit Case No. 18-CI-00020; Direct Testimony of Christopher Heimgartner at 15.

of decommissioning Station Two "in the proportions in which they shared capacity costs during the life of Station Two."[90] This obligation applies to both parties regardless of which party owns the land or facilities associated with Station Two.

Moreover, if the cost responsibility associated with decommissioning the Station Two facilities fell entirely upon the owner of each Station Two facility, then Henderson's share of decommissioning costs would increase from the 77.24%/22.76% provided for under the Contracts. The pending deed reversion case impacts only a fraction of Station Two facilities (boilers, turbines, generators, and cooling towers). Thus, even if the City is successful at the Webster Circuit Court, major Station Two facilities (including the Station Two ash pond, Station Two waste in the Green landfill, scrubbers, stack, crusher house, barge unloader, coal conveyors, fuel oil tank, fly ash silo, warehouse, water plant, thickener return tanks and pumps, additive hold tank, slaker building, river mooring cells, switchyard breakers and transformers) are left within the City's ownership.[91] Accordingly, if decommissioning cost responsibility actually depended upon ownership (which it does not), then Henderson would be responsible for 100% of the decommissioning costs of the Station Two facilities that are not subject to a deed reversion. There is no question that the City would be worse off under this hypothetical scenario.

[90] 1993 Amendments Section 8.

[91] *See* Attachment 1 to this Brief, which clarifies which Station Two facilities are subject to the potential deed reversion.

3. The Station Two Ash Pond Must Be Decommissioned By April 2024 Under The CCR Rule And It Is Subject To The 22.76%/77.24% Decommissioning Cost Sharing Formula

The largest cost issue in this case is decommissioning the Station Two ash pond. The capital cost of ash pond closure is expected to be approximately $13.3 million.[92] In addition, there will be 30 years of groundwater monitoring at a cost of approximately $25,000 per year.[93]

The City-owned ash pond is part of the City-owned and -controlled Station Two.[94] In 1993, the Power Sales Contract was amended to change the definition of Station Two. The definition of Station Two now includes the Station Two ash pond.[95] Therefore, the Station Two ash pond is subject to the 77.24%/22.76% decommissioning cost sharing. Absent that amendment, Big Rivers would have no financial responsibility for the closure and post-closure costs associated with the City-owned ash pond.

Ceasing operations at Station Two on February 1, 2019 triggered environmental compliance requirements set forth in the CCR Rule, 40 CFR 257 *et seq.*[96] That Rule establishes technical requirements for coal combustion residual landfills/surface impoundments in order to address risks from coal ash disposal, such as leaking of contaminants into ground water, blowing of contaminants into the air as dust, and the

[92] Rebuttal Testimony of Michael T. Pullen at 12; Tr. (October 22, 2020) at 11:31:17.
[93] Id.
[94] Id. at 6.
[95] Station Two means joint use facilities "to the extent furnished and owned by City…" 1993 Amendments at Section 5.1. The 1993 Amendments Exhibit 1, Page 1 of 3 Part B lists "Joint Use Facilities Provided by and Owned by the City but Located on Big Rivers' Property." Item 13 of Part B is the Station Two ash pond and item 15 is the Station Two ash pond dredgings stored at the Green Landfill.
[96] Rebuttal Testimony of Michael T. Pullen at 5.

catastrophic failure of coal ash surface impoundments. Once Station Two ceased operations, the CCR Rule required decommissioning of the Station Two ash pond by no later than April 17, 2024.[97] Ongoing groundwater monitoring is also required to take place at the ash pond for thirty years after it is decommissioned. And if new environmental regulations arise, there may be additional ash pond decommissioning activities required. Time is of the essence in completing the CCR decommissioning process at the Station Two ash pond.

Unlike other portions of Station Two where completion of the decommissioning process is currently discretionary and where retirement in place is an option, the ash pond is subject to federal law mandating that it be decommissioned no later than April 2024.[98] In light of this federal decommissioning mandate, the Station Two Contracts require that the City proceed with decommissioning of the Station Two ash pond.

The City is contractually obligated to decommission the Station Two ash pond. Section 30.1 of the Power Plant Construction and Operation Agreement provides that the "City and Big Rivers will, at all times, faithfully obey and comply with existing and future laws, rules and regulations of federal, state or local governmental bodies lawfully affecting the operations and activities of and in connection with City's Station Two."[99] In addition, the City is contractually obligated to faithfully obey and comply with existing and future federal, state or local environmental laws, rules and regulations affecting Station Two.[100]

---

[97] Id. at 5-6.
[98] Rebuttal Testimony of Mr. Michael T. Pullen at 5.
[99] Application, Exhibit 9.
[100] 1970 Power Plant Construction and Operation Agreement Section 30.1 "City and Big Rivers will, at all times, faithfully obey and comply with existing and future laws, rules and regulations of federal, state and local governmental bodies lawfully affecting the operations and activities of and in connection with City's Station Two."

Therefore, compliance with the CCR Rule requirements is a service standard and obligation arising out of the Station Two Contracts with which Henderson must comply.

In its August 6, 2020 environmental surcharge Order, the Commission confirmed that the Station Two ash pond is owned by the City, stating "[w]ith respect to Project 13-3, involving the Station Two ash pond closure, the Commission finds that this project does not require a CPCN because Station Two is wholly owned by the city of Henderson and is, therefore, exempt from the requirements of KRS 278.020(1). This finding is consistent with our determination in Case No. 2012-00063 involving the installation of emission control monitors at Station Two as not requiring a CPCN due to the city of Henderson's ownership of Station Two."[101]

While Henderson may need to bid out the decommissioning contracts consistent with state law municipal bidding requirements, the City cannot avoid federal environmental mandates due to those bidding requirements. As stated, failure to comply with the CCR Rule would result in civil and criminal penalties.

Because the ash pond is undisputedly owned by the City, Big Rivers cannot perform the decommissioning work without City approval. Therefore, with the City's consent, Big Rivers acting as an independent contractor can and will proceed with the actual work of capping the ash pond and monitoring the groundwater as required by the CCR Rule, but only if Henderson pays its 22.76% share of the associated costs as required by Section 8 of the 1993 Amendments.[102] In the alternative, Henderson can take on this responsibility and

[101] Order, Case No. 2019-00435 (August 6, 2020) Order at 20.
[102] Rebuttal Testimony of Robert W. Berry at 20.

Big Rivers will pay the City our 77.24% share.[103] Big Rivers is indifferent, but refusal to comply with the CCR Rule is not an option.

4. Big Rivers Has No Contractual Obligation For Any Station Two Retirement In Place Costs That The City Imprudently Elects to Incur

Station Two is currently being maintained in a retirement in place state, which differs from decommissioning. Retirement in place is temporary, not final. It occurs when a unit is removed from service and activities are performed to maintain the unit in a "safe, dark, and dry" condition.[104] Such retirement in place maintenance activities include removing any chemicals and consumables, draining oils, encapsulating or remediating friable asbestos, deenergizing all equipment, securing areas that no longer need to be accessed, and other activities deemed necessary for the unit to remain in this condition for an extended period of time.[105] Thus far, as an independent contractor, Big Rivers has

---

[103] Id.

[104] Such activities include removing any chemicals and consumables, draining oils, encapsulating or remediating friable asbestos, deenergizing all equipment, securing areas that no longer need to be accessed, and other activities deemed necessary for the unit to remain in this condition for an extended period of time. Retirement in place also involves ongoing maintenance activities, such as environmental remediation, asbestos abatement, draining (lubricating oils, fuel oil, transformer oil), rerouting of utilities, inventory of other regulated materials (PCB, fuels, hydraulic fluids, halon or other fire protection chemicals, residual coal and ash, industrial gases), inspections (structural integrity, insulation and lagging conditions, asbestos panel condition at the cooling towers, proper operation of the basement sump pumps and the silo sump pumps and proper operation of the lighting in the main corridors), Kentucky Pollutant Discharge Elimination System required sampling on outfall 04 (Station Two ash pond), groundwater monitoring wells for the Station Two ash pond, preventative maintenance (flue gas chimney, stack lighting, elevator and fire water system), safety procedures, security and all other measures necessary to bring and maintain Station Two to a "safe, dark, and dry" condition prior to demolition. Rebuttal Testimony of Robert W. Berry at 7:9-8:9.

[105] Big Rivers Response to Henderson First Request for Information, Item Nos. 31 and 32. Rebuttal Testimony of Robert W. Berry at 11-12. Retirement in place also involves ongoing maintenance activities, such as environmental remediation, asbestos abatement, draining (lubricating oils, fuel oil, transformer oil), rerouting of utilities, inventory of other regulated materials (PCB, fuels, hydraulic fluids, halon or other fire protection chemicals, residual coal and ash, industrial gases), inspections (structural integrity, insulation and lagging conditions, asbestos panel condition at the cooling towers, proper operation of the basement sump pumps and the silo sump pumps and proper operation of the lighting in the main corridors), Kentucky Pollutant Discharge Elimination System required sampling on outfall 004 (Station Two ash pond), groundwater monitoring wells

supplied the operating personnel, materials, supplies, and technical services required to maintain Station Two in that retirement in place condition. Yet the City has not reimbursed Big Rivers for any of these retirement in place costs,[106] which as of June 30, 2020, total $3,036,646 (with interest).[107]

Although the immediate decommissioning of certain portions of Station Two is mandatory, some portions of Station Two may be left in their current retirement in place state for a discretionary amount of time. For example, there is no current legal requirement to take down the 350-foot tall Station Two chimney.[108] But keeping those discretionary portions of Station Two in a retirement in place state indefinitely is imprudent. Retirement in place requires ongoing maintenance expenses associated with keeping Station Two safe and secure until such time as it is fully decommissioned, such as security costs, building maintenance costs, permitting expenses, asbestos encapsulation/periodic asbestos abatement, FAA lighting compliance costs, etc.[109] These costs add up quickly. Indeed, security costs alone are anticipated to be $775,000 per year.[110] This explains why typically, in five to seven years, more money is spent on maintenance costs during the time a unit is in a retirement in place condition than would be have been spent to fully demolish equipment and structures and perform site remediation activities.[111] Moreover, the

for the Station Two ash pond, preventative maintenance (flue gas chimney, stack lighting, elevator and fire water system), safety procedures, security and all other measures necessary to bring and maintain Station Two to a "safe, dark, and dry" condition prior to demolition."

[106] Rebuttal Testimony of Robert W. Berry at 8:9-13.
[107] Smith Rebuttal at 18:2-7; Exhibit Smith-5b.
[108] Rebuttal Testimony of Robert W. Berry at 14:5-7.
[109] Direct Testimony of Robert W. Berry at 44:4-8 and 36:22-37:4.
[110] Direct Testimony of Robert W. Berry at 44:8-10.
[111] Direct Testimony of Jeffrey T. Kopp at 9:4-8.

equipment and structures located at Station Two cannot remain in perpetuity and will be required to be torn down at a future date as they reach end of life.[112] Delaying decommissioning of all of Station Two therefore only serves to increase the overall cost of decommissioning.[113]

Further, during the time Station Two is in a retirement in place state, liabilities will need to be managed, including but not limited to, integrity of structures, personnel safety, site access, and scrap theft. It is not realistic to manage these liabilities in perpetuity.[114] Accordingly, maintaining Station Two in a retirement in place state will be more costly and riskier in the long run than simply decommissioning the entire plant now.[115]

As the owner of Station Two, the decision whether to retire the discretionary portions of Station Two in place is the City's. Big Rivers cannot demolish the City's property without its permission.[116] However, should the City choose not to proceed with decommissioning Station Two, then Big Rivers has no contractual obligation to pay the costs associated with maintaining Station Two in a retirement in place state.[117] Unlike the contractual cost sharing required for decommissioning costs, the City has 100% cost responsibility for all retirement in place costs of its power plant.[118] Those costs are Henderson's obligations -

[112] Direct Testimony of Jeffrey T. Kopp at 9:8-10.
[113] Direct Testimony of Robert W. Berry at 44:16-18.
[114] Direct Testimony of Jeffrey T. Kopp at 8:17-20.
[115] Rebuttal Testimony of Robert W. Berry at 13:1-2.
[116] Rebuttal Testimony of Robert W. Berry at 13:2-5.
[117] Tr. (October 22, 2020) at 10:03:50.
[118] Rebuttal Testimony of Robert W. Berry at 13:14-17.

including public safety and environmental obligations - arising out of the Station Two Contracts and are the City's responsibility.[119]

Consequently, the Commission should find that in the event Henderson elects not to cooperate in fully decommissioning Station Two or not to city bid and award contracts necessary for the completion of full decommissioning of Station Two, then any ongoing maintenance costs or other costs or liabilities that may result from those decisions are solely the responsibility of Henderson, and Big Rivers has no contractual obligation to share in those costs or associated liability.

VII. HENDERSON'S CONTRACTUAL OBLIGATIONS REGARDING THE GREEN LANDFILL

Scrubber sludge from the Station Two FGD is directly disposed of in the Green Landfill. As the Station Two ash pond is periodically dredged to make room for additional fly ash and bottom ash, those dredgings are also stored and maintained in the Green Landfill. There are three discrete issues regarding the Green Landfill. First, were Big Rivers' cost-based "stackout," "disposal," and "storage" rates for maintaining the City's scrubber sludge and ash pond dredgings in 2015-2019 reasonable? Second, is the City required to pay the ongoing cost of storing and maintaining its scrubber sludge and ash pond dredgings in the Green Landfill? Finally, will the City be required to pay its share of decommissioning the Green Landfill once the Landfill is itself decommissioned in the future?

[119] Rebuttal Testimony of Robert W. Berry at 13:18-21.

1. The Green Landfill Rates In 2015-2019 Were The Same For Both Parties and Were Reasonable

The City seeks to avoid paying for $1.75 million of actually incurred Station Two scrubber sludge and ash pond dredgings disposal, storage, and maintenance costs at the Green Landfill for the period 2015-2019. As set forth in Exhibit Moll-3 and Exhibit Moll-7, the City contends that Big Rivers' cost-based landfill disposal fee from 2014/2015 of $1.78/ton should remain fixed through 2019. The City's makes this claim despite significant cost increases at the Landfill, particularly the vertical expansion wall. For example, Big Rivers' actual landfill disposal costs in 2016/2017 were $6.85/ton. A cost-based rate for landfill disposal increases or decreases over time depending on actual circumstances, as do all cost-based rates. The City's position of simply "locking in" the low point on the cost curve is arbitrary. It would be equally arbitrary for Big Rivers to assert that the high point on the cost curve should be "locked in."[120]

Recovery of Big Rivers' actual landfill costs is fully authorized by the Power Plant Construction and Operation Agreement. That Agreement holds Big Rivers to a "best efforts" standard in its efficient and economical operation of the plant and applies a reasonableness standard to costs payable by the City.[121] Section 13.4 of that Agreement provides that:

> Big Rivers covenants and agrees that during the term of this Agreement it will at all times operate City's Station Two on a best efforts basis, in an efficient and economical manner…

[120] Rebuttal Testimony of Robert W. Berry at 24; Rebuttal Testimony of Paul G. Smith at 12-13.
[121] Power Plant Construction and Operation Agreement at Sections 13.4 and 13.6.

Section 13.6 of that Agreement provides that the "City will pay Big Rivers, on a monthly basis, its reasonable expenditures incurred in the operation and maintenance of City's Station Two…." Big Rivers' actual costs were reasonable, and the City has not demonstrated otherwise. But arbitrarily "locking in" the low point on the cost curve would not be reasonable.

Big Rivers charges the City the same landfill disposal costs that it charges itself. Each party is treated equally. There is no discrimination or subsidization.

Henderson also claims that it should not pay for the costs of a vertical expansion of the Green Landfill since it was unaware of and ultimately objected to that expansion.[122] But the expansion which the City contests was reasonable and necessary at the time in order to accommodate Henderson's Station Two scrubber sludge and ash pond dredgings. But for the accumulation of the City's waste, the vertical expansion would not have been necessary.[123]

Big Rivers does not earn a profit on its landfill disposal charges to the City. Big Rivers only passes-through its actual costs and both parties pay exactly the same rate. This has been a good deal for the City. Since 2015, Henderson has saved $3.1 million by using the Green Landfill at cost compared to trucking its scrubber sludge and ash pond dredgings offsite and storing it in a commercial landfill.[124] Accordingly, consistent with its obligations arising out of the Station Two Contracts, Henderson should pay the actual landfill costs associated with its share of the Station Two scrubber sludge and ash pond dredgings. The

[122] Direct Testimony of Barbara Moll at 10.
[123] Rebuttal Testimony of Robert W. Berry at 24; Tr. (October 22, 2020) at 10:07:39.
[124] Direct Testimony of Robert W. Berry at 49.

City's request to avoid $1.75 million of landfill costs for the period 2015-2019, including costs it reviewed, approved, and paid but now disputes and wants to be refunded, should be rejected.

2. The City Is Required To Pay The Ongoing Costs Of Storing And Maintaining Its Scrubber Sludge And Ash Pond Dredgings In The Green Landfill

Henderson alleges that it was only responsible for haulage costs associated with its share of Station Two scrubber sludge and ash pond dredgings, which it has already paid.[125] Relying upon Sections 6.1 and 8.1 of the 1970 version of the Joint Facilities Agreement,[126] Henderson argues that neither party is currently operating or maintaining a generation station which is "served by" the Station Two ash pond dredgings. This is incorrect. Big Rivers continues to operate and maintain the Green station which *is* served by the continued use of the entire Green Landfill. And Station Two ash pond dredgings stored in the Green Landfill are a Joint Use Facility which the City is required to maintain and which the Joint Facilities Agreement expressly states that the City will permanently retain title of.

Henderson's claim that it no longer has an obligation to pay for ongoing costs for its share of the Station Two waste stored in the Green Landfill violates the Station Two Contracts as amended in 1993. The 1993 Amendments addressed operating and maintenance costs of the new scrubber, including scrubber sludge "stackout," "disposal,"

---

[125] Direct Testimony of Christopher Heimgartner at 22-23; Direct Testimony of Barbara Moll at 9.

[126] Section 6.1 of the Joint Facilities Agreement obligates Henderson to share in the costs of operating and maintaining joint-use facilities, including the Station Two ash pond dredgings, "so as to assure the continuous operation of the parties' respective generating station or stations served thereby." Section 8.1 of the Agreement states that this obligation remains in effect "so long as either party continues to operate or maintain a generating station which is served by any such joint-use facility."

and "storage" costs at "appropriate landfills." Such costs are to be allocated to the parties based on their respective usage of the scrubber. Landfill costs for scrubber sludge "storage" is specifically identified as a cost the City must pay. "The costs of operating and maintaining the FGD Joint Facilities … and the cost of sludge *stackout* and *disposal* (including haulage and deposit in *appropriate landfills*) therefrom, shall be allocated to the Green Station and Station Two… in the proportions in which the stations put sulfur through the Green and Station Two FGD systems…"[127] The allocation of scrubber sludge "storage" costs is to be similarly based on usage of the scrubber. "'The 'waste treatment' area power, maintenance and labor costs and the scrubber sludge *disposal and storage* costs would be split similarly…."[128]

The 1993 Amendments at Exhibit 1, Page 1 of 3, Item 15 lists Station Two ash pond dredgings stored in the Green Landfill as a city-owned Joint Use Facility on Big Rivers' property. Title to that Joint Use Facility remains with Henderson.[129] Big Rivers has never taken ownership of any City property, including its ash pond dredgings stored in our landfill. The City is responsible for the cost of maintaining its Joint Use Facilities, including its ash pond dredgings stored in the Landfill.[130]

Big Rivers continues to incur storage costs for the City's scrubber waste maintained in the Green Landfill. These storage costs will be ongoing until the Green Landfill is decommissioned, which may happen in the near future.

---

[127] 1993 Amendments at 11-12, new Section 3.4.
[128] 1993 Amendments at 13, new Section 3.4.
[129] Section 4.1 of the Joint Facilities Agreement; Berry Direct Testimony at 47.
[130] Section 6.1 of the Joint Facilities Agreement; Berry Direct Testimony at 48.

Big Rivers has incurred and continues to incur real costs to remain in compliance with numerous environmental regulations in order to store the City's Station Two scrubber sludge and ash pond dredgings in our Green Landfill. And Big Rivers will continue to incur ongoing capital and maintenance costs to ensure that this waste is properly stored within the Landfill. At no point did Big Rivers take title to Henderson's scrubber sludge or ash pond dredgings stored in the Green Landfill, as the City seems to allege. In fact, Big Rivers would be legally prohibited from doing so because of the nature of our Landfill permit. Consequently, Henderson is responsible for its proportional share of the ongoing costs associated with storing its waste in Big Rivers' Landfill.

The City's share of ongoing landfill costs is approximately 9.88%.[131] Because Station Two is no longer adding new waste to the landfill, but the Green Station is, that 9.88% number will be reduced over time.

Big Rivers' proposal to bill the City monthly for the ongoing costs of storing its waste in the Green landfill is reasonable and consistent with the Station Two Contracts. Owning and benefiting from the cheap energy produced by a coal-fired power plant for 47 years comes with certain residual costs, and maintaining an environmentally-compliant landfill is one of them.

[131] Tr. (October 22, 2020) at 11:01:37; Attachment to Big Rivers' Response to HMPL Post-Hearing Item 2.

3. The Station Two Scrubber Sludge And Ash Pond Dredgings Stored And Maintained In The Green Landfill Will Be Subject to the 22.76%/77.24% Decommissioning Cost Sharing Formula When The Green Landfill Is Retired In The Future

In 1993, the City agreed that it would be contractually responsible for its share of the cost of decommissioning Station Two scrubber sludge and ash pond dredgings stored in the "Green Station Sludge Disposal Landfill" when the Green Landfill is itself decommissioned. This was part of a comprehensive series of amendments authorizing the construction of a scrubber on Station Two, which cost was greatly reduced through the utilization of existing Green Station scrubber equipment and the existing Green Landfill.

The 1993 Amendments include the Station Two ash pond dredgings stored at the Green Station Sludge Disposal Landfill in the definition of Station Two.[132] Those ash pond dredgings are just as much a part of Station Two as are the turbine generators or cooling towers.

The 1993 Amendments also made the City responsible for Station Two "scrubber sludge disposal and storage costs."[133] The City's scrubber sludge will be stored permanently once the Green Landfill is capped as part of the decommissioning process.

Therefore, once the Green Landfill is decommissioned, the Station Two scrubber sludge and ash pond dredgings stored there will be subject to the Station Two decommissioning cost sharing formula. This was part of the *quid pro quo* of allowing the

---

[132] The 1993 Amendments includes in the definition of Station Two joint use facilities "to the extent furnished and owned by City." The 1993 Amendments Exhibit 1 at 1 of 3, PART B lists the "*Joint Use Facilities Provided By and Owned By the City But Located on Big Rivers' Property." Item 15 of Part B is "Station Two Ash Pond Dredgings in Green Station Sludge Disposal Landfill adjacent to Green River south of Green Station."*

[133] 1993 Amendments at 12-13.

Station Two scrubber to use significant portions of the Green scrubber as well as the Green Landfill, both at Big Rivers' cost and with no profit.

For example, if the Station Two scrubber sludge and ash pond dredgings comprise 40% of the total Green Landfill when the Landfill is decommissioned sometime in the future, this is how the City's share would be calculated. City's share: 22.76% x 40% = 9.1%. The City would be responsible for 9.1% of Green Landfill decommissioning costs.

Mr. Berry was very clear on this in his Direct Testimony. "Big Rivers is requesting an Order finding that Henderson is responsible for its allocated share of the costs associated with decommissioning the Station Two waste in the landfill and that Henderson is obligated to share in those allocated costs based upon the decommissioning cost sharing provisions in the Station Two Contracts."[134]

Big Rivers currently estimates decommissioning costs at the Green Landfill will be $20.7 million.[135] Big Rivers will make every effort to control that cost since it will be responsible for the lion's share. Big Rivers has every incentive to be as efficient as possible.

The need for this Commission to confirm and enforce Henderson's contractual obligation to share in Green Landfill decommissioning costs has become even more critical recently in light of Big Rivers' 2020 IRP Filing, under which Big Rivers describes its plan to suspend operations at the Green Units by June of 2022.[136] Should that plan come to fruition,

[134] Direct Testimony of Robert W. Berry at 49.
[135] Tr. (October 22, 2020) at 11:02:48.
[136] Big Rivers 2020 IRP, Case No. 2020-00299 (September 21, 2020) at 176-77; Tr. (October 22, 2020) at 09:22:20.

then Big Rivers will likely immediately begin the decommissioning process at the Green Landfill in order to establish a clean brownfield site upon which to construct a future Natural Gas Combined Cycle unit.[137]

Owning a coal-fired power plant is expensive. The environmental obligations are significant. Neither party can change that. But the City's attempt to simply abandon its power plant and unilaterally absolve itself of cost responsibility is unjust, unreasonable, and in violation of the Station Two Contracts.

VIII. JOINT USE FACILITIES

1. Joint Use Facilities Owned By The City Are Subject To The Decommissioning Cost Sharing Formula; Or If Retired In Place Are Solely The City's Responsibility

Joint Use Facilities are power production assets that are used by one or more of the power plants located at the Reid/Green/Station Two complex.[138] For example, a barge unloader or coal conveyor may serve multiple plants. This form of cost sharing benefited both parties. Section 1.5 of the Joint Facilities Agreement allows Big Rivers to continue to utilize City-owned Joint Use Facilities for so long as Big Rivers operates a generating facility in connection therewith.[139]

---

[137] Id. at 176.

[138] Direct Testimony of Michael T. Pullen at 19:19-20.

[139] Section 1.5 of the Joint Facilities Agreement provides "It is the intention of the parties, by this Agreement, each to devote to the joint use of both parties, as long as they or either of them, or their respective successors or assigns, shall continue to operate a generating station or stations in connection therewith, those joint use facilities to be provided by each, and to provide for the continuous operation and maintenance thereof for the parties' joint and separate benefits."

Big Rivers needs to utilize certain City-owned Station Two Joint Use Facilities in order to continue operating the Green Station. The specific City-owned Joint Use Facilities still needed by Big Rivers are listed in Exhibit Pullen-12. While the Green Station is running, Big Rivers will pay 100% of the O&M costs associated with using the City's Joint Use Facilities.

Exhibit Pullen-13 lists the City-owned Joint Use Facilities that neither party needs following the retirement of Station Two, including the Station Two ash pond and 19 other facilities. Those facilities are ready to be decommissioned now. In the future, once Green is retired, all of the City-owned Joint Use Facilities will need to be decommissioned.

All costs to decommission the City's Joint Use Facilities no longer used (Exhibit Pullen-13) or that continue in-service until Green retires in the future (Exhibit Pullen-12) will be subject to the 22.76%/77.24% cost sharing required by Section 8 of the 1993 Amendments.[140]

Henderson states that it does not object to Big Rivers' use of City-owned Joint Use Facilities necessary for continued operation of the Green Station. But the City does object to paying any of the decommissioning costs associated with the Joint Use Facility owned by it now or in the future.[141] This position is directly contrary to the Station Two Contracts, in which the City accepted responsibility for paying 22.76% of the cost to decommission these components of its power plant.

[140] Rebuttal Testimony of Michael T. Pullen at 12:16-13:2.
[141] Direct Testimony of Christopher Heimgartner at 23.

The Commission should rule that Big Rivers is contractually permitted to use, and contractually required to pay for operating and maintaining, the City-owned Joint Use Facilities listed in Exhibit Pullen-12 until Green retires. Additionally, the Commission should rule that Henderson must pay 22.76% of all current and future costs to decommission the Joint Use Facilities that it owns.

As discussed previously, decommissioning requires demolition. Big Rivers cannot lawfully demolish City property without its permission. Therefore, Station Two Joint Use Facilities may need to be retired in place. If that is the case, then Big Rivers has no contractual obligation for the retirement in place costs. Such costs would solely be the responsibility of Henderson.

IX. 2018/2019 CAPACITY RESERVATION

1. For Fiscal Year 2018/2019, Henderson Attempted To Reserve 10 MW Less Capacity Than Was Required To Satisfy The City's MISO Requirements.

Since 2010, Big Rivers' and Henderson's capacity reserve requirements have been based upon the MISO Planning Reserve Margin Requirement ("PRMR"), including the capacity reserve requirements applicable to Fiscal Year 2018/19. Henderson argues that it was not subject to those MISO reserve requirements and was only subject to NERC rules during Fiscal Year 2018/2019.[142] City witness Bickett testifies that "[p]er the Station Two Contracts, and under the NERC Reliability Standards, neither MISO, nor Big Rivers, had

[142] Direct Testimony of Brad Bickett at 8-10; NERC Website, "All Reliability Standards," *available at https://www.nerc.com/pa/Stand/Pages/AllReliabilityStandards.aspx?jurisdiction=United%20States.*

authority over Henderson's capacity reservation from Station Two."[143] Henderson's position is incorrect. Both Big Rivers and the City must comply with the reserve margin requirements of MISO.[144]

Under the 1998 Amendments to the Station Two Contracts, Henderson was required to reserve sufficient capacity from Station Two to satisfy its MISO PRMR. Those Amendments expressly provide that both the City and Big Rivers must "comply with any system capacity requirements now required or imposed at a future date" by "any regional transmission authority" (e.g. MISO).[145] Further, the City agreed "to comply with any requirements validly imposed by…[MISO]…upon Big Rivers based on Big Rivers' role as control area operator, but only if and to the extent that such requirements imposed on Big Rivers are on account of or due to the generation or load of the City."[146] Henderson failed to satisfy these contractual requirements in Fiscal Year 2018/2019.[147]

The capacity reservation process required by MISO is very detailed, as explained in the MISO Tariff.[148] In accordance with the MISO tariff requirements, and as shown in

---

[143] Direct Testimony of Brad Bickett at 9.

[144] NERC merely provides a default reserve margin of 15% in areas that are not subject to a regional authority like MISO. NERC explains that its "Reference Reserve Margin is equivalent to the Target Reserve Margin Level **provided by the Regional/subregional's own specific margin based on load, generation, and transmission characteristics as well as regulatory requirements.** If not provided, NERC assigned 15 percent Reserve Margin for predominately thermal systems and 10 percent for predominately hydro systems." MISO Tariff, Section 68A.7 (Establishing Planning Reserve Margin Requirements), *available at* https://cdn.misoenergy.org/Tariff%20-%20As%20Filed%20Version72596.pdf (emphasis added). In other words, NERC would default to 15% only in the event that MISO had not set a specific reserve requirement. But MISO has acted.

[145] 1998 Amendments at Section 5; Tr. (October 22, 2020) at 11:40:32.

[146] Id.

[147] Direct Testimony of Mark Eacret at 4:5-13.

[148] a. The Transmission Provider will establish Planning Reserve Margin Requirements (PRMR) for an LSE's Load within any given LRZ equal to the LSE's forecasted Coincident Peak Demand, including transmission losses, times (1 + Transmission Provider Region PRM). b. The Transmission Provider will use the

Exhibit Eacret-2, Big Rivers adjusted the City's projected non-coincident peak demand by a MISO Coincidence Factor, then losses and planning reserves are added and SEPA is deducted to arrive at a final PRMR capacity requirement of 124.7 MW. However, while MISO requirements dictated that Henderson's PRMR was 124.7 MW for Fiscal Year 2018/2019,[149] Henderson incorrectly attempted to reserve only 115 MW of capacity for that year. The effect was to artificially increase Big Rivers' share of the Station Two fixed costs.[150] In other words, an unjustified attempted cost-shift.

Henderson's 115 MW capacity reservation calculation contains multiple errors - the biggest of which relates to its forced outage assumptions.[151] Forced outage rate assumptions are important here because a reliable power plant has its capacity reduced or discounted by a smaller amount when calculating its capacity value (UCAP) than an unreliable power plant. For example, a fossil fuel plant has its capacity value reduced or discounted less than an intermittent resource like wind.[152] Because Station Two is less reliable than the industry average, Station Two has a higher-than-average forced outage rate. Based upon Station Two's performance for the prior three years, the net capability of Henderson Unit 1 was reduced by 11% and the net capability of Henderson Unit 2 was reduced by 21.2%. Yet in calculating its 115 MW figure, Henderson mistakenly used an "industry average" forced

---

Transmission Provider Region PRM for the PRMR calculation unless an alternate PRM is established by a state. In such event, the Transmission Provider will use the alternate PRM that a state regulatory agency has created for the geographic area in which the state has jurisdiction. The Transmission Provider will convert any state provided PRM to a comparable Unforced Capacity basis. MISO Tariff, Section 68A.7 (Establishing Planning Reserve Margin Requirements), *available at* https://cdn.misoenergy.org/Tariff%20-%20As%20Filed%20Version72596.pdf.

[149] Direct Testimony of Mark Eacret, Exhibit Eacret-2.

[150] Direct Testimony of Mark Eacret at 5:1-5.

[151] Big Rivers Response to Staff Initial Request for Information, Item No. 24.

[152] Tr. (October 22, 2020) at 1:40:02.

outage rate for Station Two (6.85%) instead of Station Two's actual, significantly higher forced outage rate.[153] The use of such an unrealistically low forced outage rate was improper.[154]

The City made a similar error with respect to its SEPA allocation of 12 MW. Because of issues surrounding the dams on the Cumberland River, MISO discounts all SEPA capacity by about 20%. The City failed to do this and attempted to count all 12 MW. The effect of that is that Henderson allocated almost all of the performance-related reduction in MW value to Big Rivers.[155]

The MISO reduction in capacity value based upon past performance of the Station Two units was 50.2 MW and the MISO adjustment to Henderson's SEPA allocation was 2 MW. Henderson's approach allocated 51.7 MW of the 52.2 MW total to Big Rivers (99%). Under the Big Rivers calculation, Big Rivers absorbed 30 MW of the Station Two reduction and Henderson 20.2 MW. Big Rivers applied the entire 2 MW reduction of Henderson's SEPA allocation to Henderson.[156]

Now, Big Rivers is simply asking the Commission to enforce the City's Station Two capacity obligation consistent with the MISO rules. If not, then Big Rivers will be forced to make up the difference.

---

[153] Tr. (October 22, 2020) at 1:40:35.
[154] Big Rivers Response to Staff Initial Request for Information, Item No. 24.
[155] Big Rivers Response to Staff Initial Request for Information, Item No. 24.
[156] Big Rivers Response to Staff Initial Request for Information, Item No. 24, Attachment 2.

Upon notice from Big Rivers of its capacity reservation deficiency, Henderson tried to purchase 8 Zonal Resource Credits ("ZRC"s) within MISO to satisfy its capacity requirements.[157] But Big Rivers rightfully rejected the City's ZRC approach since it was not permitted under the System Reserves Agreement as amended in 1998. Under Section 2.1 of the 1974 version of the System Reserves Agreement, Henderson was authorized to meet its "minimum generating capacity equal to its system peak load during such contract year plus fifteen per cent (15%)" through generation from "CITY's Station One," "reserved generation from CITY's Station Two," and/or "firm capacity purchased or otherwise available from others."[158] In 1998, however, that provision of the System Reserves Agreement was completely rewritten to no longer allow the City to meet its capacity obligations through purchases. Consequently, Henderson's attempted use of ZRC market purchases to satisfy its capacity reserve requirements is not allowed.[159]

The City cannot artificially reduce its capacity obligation through market purchases of ZRCs for the sole purpose of shifting capacity costs to Big Rivers. If it could, then the City could purchase its entire 125 MW capacity obligation from the market (priced at about $10/MW-day based upon the 2020 PRA) and leave Big Rivers with 100% of the Station Two fixed capacity costs (priced at about $136.99/MW-day).[160] There is no provision of the Station Two Contracts which remotely allows the City to pay the lower of cost or market for capacity.

[157] Direct Testimony of Mark Eacret at 5:9-16.
[158] Application, Exhibit 11 at 2-3.
[159] Rebuttal Testimony of Mark Eacret at 11:5-6.
[160] Rebuttal Testimony of Mark Eacret at 11:20-12:5; Rebuttal Testimony of Paul G. Smith at 16:14-20.

X. MISO FEES AND COSTS

1. MISO Fees Related To NERC Compliance

The City contends that it is not responsible for paying certain MISO fees incurred by Big Rivers on Henderson's behalf since December 2010 based upon its claim that those fees were incurred unnecessarily by Big Rivers.[161]

The City's claims are incorrect. As an initial matter, in 1998, both the City and Big Rivers specifically amended the System Reserves Agreement to address and recognize the potential need to join a regional transmission authority, such as MISO. The 1998 Amendments eliminated the requirement that both Big Rivers and the City maintain a 15% planning reserve margin requirement that could be met by owned or purchased capacity, replacing that language with a new requirement for both "City and Big Rivers" to "comply with any system capacity requirements, now required or imposed at a future date" by "any regional transmission authority" (e.g. MISO).[162] This language change expanded the scope of the original language to cover both planning reserve requirements as well as contingency reserve requirements, and made clear that Henderson must meet the MISO planning reserve margin. Further, the City agreed "to comply with any requirements validly imposed by…[MISO]…upon Big Rivers based on Big Rivers' role as control area operator, but only if and to the extent that such requirements imposed on Big Rivers are on account of or due to the generation or load of the City."[163]

---

[161] Direct Testimony of Brad Bickett at 16-19; Rebuttal Testimony of Michael W. Chambliss at 4.
[162] 1998 Amendments at Section 5.
[163] Id.; Direct Testimony of Michael W. Chambliss at 11-12.

By 2010, registration of Henderson's load and generation in MISO was required to ensure Henderson's compliance with NERC requirements and directly benefitted the City.[164] NERC adopted new electric system reliability standards in 2007 for all electric utilities in the United States. As power plant owners, Henderson and Big Rivers were each required to comply with reliability standards set by NERC, including NERC Standard BAL-002 and NERC Standard BAL-005-0. BAL-005-0 required that all load and generation be within the metered bounds of a Balancing Authority. Henderson was fully aware that Big Rivers intended to join MISO at the end of 2010, but took no action to move to another Balancing Authority. As such, Big Rivers had no choice but to register Henderson's load and generation with MISO such that Henderson's load and Henderson's share of Station Two were within the metered bounds of MISO's Balancing Authority. For Big Rivers not to register Henderson's load and generation with MISO would have been a violation of federal requirements.

Henderson's most recent Financial Statement acknowledges the applicability of NERC requirements to the City, stating that "HMP&L is required to comply with the new reliability standards and incurs administrative expenses related to NERC compliance." [165] Because the only feasible way for Henderson to satisfy the NERC reliability standards in 2010 was to join MISO,[166] the failure to do so would have resulted in the City violating federal reliability standards. Therefore, Henderson should not be permitted to evade MISO fees that it would have incurred either directly from MISO, or indirectly through Big Rivers.

[164] 1998 Amendments at Section 5; Rebuttal Testimony of Michael W. Chambliss at 8.
[165] Henderson Response to Big Rivers First Request for Information, Item No. 31, Attachment 1 at 11.
[166] Rebuttal Testimony of Michael W. Chambliss at 9.

Henderson expressly agreed that it would satisfy its NERC requirements through Big Rivers. In July 2009, the City signed a Memorandum of Understanding ("MOU") with Big Rivers providing that Big Rivers would continue the Transmission Operations, Generation Operations, and Balancing Authority functions for Henderson after the Unwind Transaction with LG&E was complete.[167] The responsibility granted by the City to Big Rivers in the MOU was never revoked.

As compliance reports prepared by the SERC Reliability Corporation confirm, Henderson consented to Big Rivers providing Balancing Authority, Transmission Operator, Generator Owner, and LSE functions for Henderson in MISO beginning July 17, 2009 in furtherance of Henderson's NERC compliance requirements. The SERC Compliance Audit of Big Rivers provides:

> BREC also has two Coordinated Functional Registrations for the TO function (CFR00091) and for the LSE function (CFR00092) with Henderson Municipal Power & Light (HMP&L), and is registered as a Joint Registration Organization (JRO00087) for the GO function with HMP&L.[168]

The SERC Compliance Audit of Henderson provides:

> HMPL was also registered for a Coordinated Function Registration (CFR) with Big Rivers Electric Corporation for the following compliance responsibilities: TO functions (IRO-004 R4) and LSE functions (TOP-002 R3 & IRO-004 R4 (CFR-00092), effective July 17, 2009. The Reliability Coordinator (RC, Balancing Authority (BA),

[167] Application, Exhibit 15, the 2009 MOU provides "*Subsequent to the Unwind Transaction, Big Rivers Electric Corporation will continue to provide and be responsible for compliance with all TOP, GOP, and BA Reliability Standard functions related to Henderson Municipal Power and Light as those functions were provided by Big Rivers Electric Corporation, Western Kentucky Energy Corporation, and LG&E Energy Marketing, Inc. prior to the Unwind Transaction*."

[168] Rebuttal Testimony of Michael W. Chambliss at 4.

and Transmission Operator (TOP) for HMPL are as follows, respectively MISO is the RC for HMPL and Big Rivers Electric Corporation is the BA and TOP for HMPL.[169]

Without Big Rivers' meeting Henderson's System Reserves obligation through MISO membership, Henderson would have had to incur substantial additional costs on its own.[170] Through MISO membership, both Henderson and Big Rivers were permitted to carry less capacity reserves as part of the MISO Balancing Authority, rather than each party's standby capacity obligations being individually determined based on the NERC BAL-002 requirements.[171] In sum, Big Rivers' membership in MISO greatly benefited both Big Rivers and the City. For the same reasons that MISO was a good deal for Big Rivers, it was a good deal for Henderson. Consequently, the City should be required to reimburse Big Rivers for the MISO fees incurred on its behalf.

2. Henderson Must Pay The MISO Fees That Big Rivers Incurred Because Of The City's Load And The City's Generation From December 2010 Through February 2019

As the operator of Station Two, Big Rivers acted as the "Market Participant" for Station Two generation and Henderson native load transactions within the MISO market from December 2010 until February 2019.[172] In its role as Market Participant, Big Rivers received invoices from MISO that included fees incurred as a direct result of Henderson's load and generation participating in MISO. These invoices were then reviewed by ACES for accuracy. Then, after conducting its own internal review, Big Rivers allocated to

[169] Id. at 5.
[170] Id. at 6.
[171] Id. at 8.
[172] Direct Testimony of Mark Eacret at 6:16-19.

Henderson its share of the MISO fees under the service schedules presented in Exhibit Eacret-3 based upon the ratio of Henderson load and generation to the total of Henderson and Big Rivers load and generation and submitted an invoice to Henderson for payment.[173] From December 2010 through February 2019, those fees totaled $1,901,590 (before interest).[174]

All of the MISO fees that Big Rivers invoiced to Henderson represented a direct pass through of the fees incurred by Big Rivers on Henderson's behalf and were directly attributable to Henderson's service to its native load customers as well as the generation owned by Henderson.[175] While City witness Bickett would not acknowledge that any MISO fees were load-related,[176] City witness Brown subsequently conceded that fact.[177] The disputed MISO fees did not include any sort of profit to Big Rivers. Rather, Big Rivers only sought to recover costs associated with Henderson's service to its native load customers that were borne by the Member Owners of Big Rivers.[178]

Henderson claims that it is only required to pay $38,512.03 of the $1,901,590 (before interest) in MISO fees incurred from 2010 to 2019. The $38,512.03 in MISO fees that Henderson agrees to pay are the 2010-2016 fees associated with MISO Schedule 24 (Local Balancing Authority Cost Recovery). Henderson does not agree to pay any of the non-Schedule 24 MISO fees, which generally fall into three buckets: 1) Schedule 17 fees

[173] Direct Testimony of Mark Eacret at 6:20-7:4.
[174] Direct Testimony of Mark Eacret at 6:4-5.
[175] Direct Testimony of Mark Eacret, Exhibit Eacret-3.
[176] Tr. (October 22, 2020) at 1:55:58.
[177] Tr. (October 22, 2020) at 2:01:34.
[178] Direct Testimony of Mark Eacret at 9:20-10:3.

associated with energy and operating reserve markets support administrative service (e.g. market modeling, market bidding support, market settlements and billing, market monitor functions, etc.);[179] 2) Operating reserve fees (e.g. spinning reserves, regulation, supplemental reserve costs); and 3) Schedule 23 fees (recovery of Schedule 10 and Schedule 17 costs from certain carved-out Grandfathered Agreements).[180] As discussed below, the Commission should require Henderson to reimburse Big Rivers for each of these categories of fees.

3. MISO SCHEDULE 17 Fees

Henderson disputes the MISO Schedule 17 fees on the basis that it was not a MISO Market Participant from December 2010 through February 2019. However, as discussed above, had Big Rivers not served as Henderson's Market Participant in MISO during that period, Henderson would have had to do so itself or find some other viable means to satisfy its NERC reliability requirements. Because MISO membership was the only viable alternative to satisfy those requirements in 2010, Henderson would have been subject to Schedule 17 fees regardless. Accordingly, Henderson should not be permitted to avoid costs that it directly caused simply because Big Rivers was the entity that registered Henderson's load and generation in MISO.[181]

4. MISO Operating Reserve Fees

[179] While Henderson witness Brown indicates that the City may also be responsible for some MISO Schedule 17 (Energy and Operating Reserve Markets Support Administrative Service Cost Recovery Adder) fees incurred from 2010 through 2016, Henderson witness Bickett claims that the City has no responsibility to pay the remaining non-Schedule 24 MISO fees.
[180] Rebuttal Testimony of Mark Eacret at 2:4-22.
[181] Rebuttal Testimony of Mark Eacret at 7:8-15.

Henderson disputes the MISO and operating reserve fees on the basis that it did not require the reserves during the period from December 2010 through February 2019. But the operating reserve fees in dispute are again, directly related to Henderson's MISO load. Because Henderson caused those fees to be incurred, the City should have to pay those fees.[182] It would be unreasonable and inconsistent with principles of cost causation to force Big Rivers' customers to subsidize the City's MISO costs.

5. MISO Schedule 23 Fees

The City disputes the MISO Schedule 23 charges based upon its allegations that Henderson did not require transmission service and that the charges were a violation of the MISO tariff and/or result in double recovery.[183] Contrary to Henderson's claims, the Schedule 23 fees: 1) are applicable to a valid grandfathered transmission agreement; 2) are permitted by the MISO tariff; and 3) do not constitute double recovery.[184]

First, while Henderson witness Brown claims that the Grandfathered Agreement ("GFA") to which Henderson was subject was likely a violation of the MISO tariff and exempt from fees under MISO Schedule 23, his claim relies upon a misreading of that tariff. GFAs No. 510 and 511 were filed by MISO in April 2010 as a carved-out GFA for the purposes of accommodating BREC's integration into MISO, and were approved by FERC via a letter Order.[185] While GFA 510 was deactivated by MISO pursuant to BREC's request in 2019, GFAs 510 and 511 were valid GFAs under the MISO tariff for the purposes of

[182] Rebuttal Testimony of Mark Eacret at 8:1-3.
[183] Direct Testimony of Brad Bickett at 18; Direct Testimony of Seth Brown at 7-8.
[184] Rebuttal Testimony of Mark Eacret at 8:6-8.
[185] FERC Docket No. ER10-1024; Rebuttal Testimony of Mark Eacret at 8:9-15.

allowing charges to Henderson during the relevant period. Henderson presumably continues to use GFA 511 today for delivery of its SEPA allocation.[186]

Second, fees assessed under Schedule 23 represent administrative costs applicable to customers under carved-out Grandfathered Agreements, not transmission costs. The MISO tariff provides "the purpose of this Schedule 23 is to provide a mechanism for the direct cost recovery of Transmission Provider charges applicable to services provided to customers under Carved-Out GFAs."[187] Therefore, Big Rivers incurred and paid Schedule 23 charges from MISO applicable to Henderson's valid GFA 510. Under GFA 510, Henderson did not pay a transmission charge. Big Rivers is entitled to reimbursement for those payments.[188]

Third, recovery of the MISO Schedule 23 fees would not result in a double recovery. The actual calculation of GFA-related Schedule 23 charges by MISO is done so as to preclude double recovery of those costs.[189]

If Henderson did not want Big Rivers to serve as its MISO Market Participant from 2010 through 2019, the City had alternative options for participation. As early as September 2010, Henderson was reminded by MISO of its ongoing option to serve as its own Market Participant or to hire a third-party to serve as Market Participant on its behalf.[190] Yet the City chose not to invoke that option, instead relying upon Big Rivers to act on its behalf in MISO until February 2019.

---

[186] Rebuttal Testimony of Mark Eacret at 8:16-20.
[187] MISO Tariff at 2210, Section 23.
[188] Rebuttal Testimony of Mark Eacret at 8:21-7.
[189] Rebuttal Testimony of Mark Eacret at 9:8-14.
[190] Rebuttal Testimony of Mark Eacret at 5.

Further, despite its insistence that MISO membership was unnecessary, the City began using such alternative options to participate in MISO in 2019 after Big Rivers no longer provided such services. Around March of 2019, Henderson began paying Gridforce Energy Management, LLC ("Gridforce") to perform Local Balancing Authority services for the City in MISO at a cost of $600,000 per year. Henderson pays this annual cost *in addition to* the other applicable MISO fees to which the City is now directly subject. Hence, under its current arrangement, Henderson is incurring more than two times the annual MISO-related costs than the approximately $259,000 average annual cost that Big Rivers incurred on the City's behalf and seeks to collect in this case.[191] It is still unclear whether the City is paying the same MISO fee schedules that it now refuses to reimburse Big Rivers for because Henderson refused to provide any of its 2019-2020 MISO invoices in this proceeding.[192] This is telling since the City's best evidence that Big Rivers' MISO pass-through costs were excessive would be to compare those costs with those directly billed from MISO.

All of the MISO fees at issue are contractually Henderson's responsibility and should be reimbursed to Big Rivers with interest. Henderson and its native load customers received a significant benefit from Big Rivers joining MISO at a substantial savings to Henderson's other options for complying with its standby capacity obligations.[193] Henderson should not be permitted to shift its cost responsibility to Big Rivers and its Member Owners, who have already paid their share of the Station Two-related MISO fees.

[191] Rebuttal Testimony of Mark Eacret at 6.
[192] Rebuttal Testimony of Mark J. Eacret at 6-7.
[193] Direct Testimony of Mark Eacret at 10:4-7.

XI. EXCESS HENDERSON ENERGY AND HENDERSON NATIVE LOAD

1. Big Rivers Correctly Applied The Commission's Approved Methodology From Case No. 2016-00278 In Its Calculation Of Excess Henderson Energy From January 5, 2018 Until Station Two Was Retired On February 1, 2019

Excess Henderson Energy ("EHE") represents the hourly difference between the amount of capacity that Henderson's reserved through the Power Sales Contract and the amount of capacity needed by Henderson to serve its native load and for sale to third parties. When the capacity needed to serve Henderson's native load is less than the amount Henderson reserved in the Power Sales Contract, this results in EHE. In its January 5, 2018 Order in Case No. 2016-00278 the Commission interpreted the 1998 Amendments to the Power Sales Contract as clearly and unambiguously defining EHE as:

> [E]nergy that is not taken or scheduled by Henderson within its reserved capacity. In other words, Excess Henderson Energy is the difference between Henderson's reserved capacity under the Power Sales Contract, or 115 MW as of 2016, and the amount of capacity needed by Henderson to serve its native load and for sale by Henderson to third-parties.[194]

In that case, the Commission found that Big Rivers is not responsible for variable costs incurred to produce EHE that Big Rivers declines, stating that "Big Rivers is not required to pay for any variable costs associated with Excess Henderson Energy that Big Rivers elects not to take."[195]

Big Rivers' recommendation regarding EHE in this case is simply that the Commission enforce its 2018 Order and continue to apply the same methodology for EHE that was approved in Case No. 2016-00278. This is necessary because Henderson refuses

[194] Order, Case No. 2016-00278 (January 5, 2018) at 12-13.
[195] Order, Case No. 2016-00278 (January 5, 2018) at 12-13.

to accept or abide by that Order, even though the Order remains valid during the pendency of the appeal.[196] Mr. Smith's Direct Testimony at Exhibit Smith-2 supported a calculation of the total amount due to or from Henderson related to EHE based on this Commission-approved methodology. Mr. Smith subsequently updated his calculation to reflect modified Green Landfill cost sharing calculations.[197]

2. Relitigation Of Excess Henderson Energy Costs Prior To January 5, 2018 Is Barred By The Unambiguous Settlement Agreement

Big River's calculation of the EHE amount contained in revised Exhibit Smith-2 also complies with the terms of the December 15, 2017 Settlement Agreement and Release ("2017 Settlement") agreed to by Henderson and Big Rivers and approved in Henderson Circuit Court Civil Action No. 09-CI-693. The 2017 Settlement defined "Disputed Excess Energy" in the same way that EHE was defined by the Commission.[198] As explained in Mr. Smith's Rebuttal Testimony,[199] the 2017 Settlement resolved all of Henderson's claims relating to EHE prior to January 5, 2018 in exchange for various consideration including a black box payment of $6.25 million from Big Rivers to Henderson. Most notably, the 2017 Settlement "*releases, acquits, and forever discharges…BREC…of and from any and all manner of actions, causes of action, suits…liabilities, claims and demands of any nature or kind whatsoever, whether or not in contract, in equity, in tort or otherwise, which Henderson ever*

---

[196] *See* Direct Testimony of Christopher Heimgartner at 17:19-20 ("Henderson's appeal of the Commission Order remains pending and Henderson has not accepted responsibility for the variable costs at issue in Case No. 2016-00278").
[197] Big Rivers Response to Staff Post-Hearing Supplemental Item 1.
[198] As set forth in the 2017 Settlement, "Disputed Excess Energy" means "energy associated with Henderson's reserved generating capacity under the Power Sales Contract in excess of what is consumed by Henderson and its inhabitants on an hourly basis…"
[199] Smith Rebuttal at 5-7.

had, now has, may now have or may hereafter have against [Big Rivers] *… resulting from, arising out of or in any manner relating to : (1) the generation, production, use, sale or resale of "Disputed Excess Energy…"*[200] The language is unambiguous that Henderson is forever barred from pursuing additional consideration from Big Rivers for EHE for the period of time prior to January 5, 2018.

Despite this undeniably clear and unambiguous language, Henderson takes the position in this case that the 2017 Settlement should be voided and the EHE issue should be relitigated for the period before January 5, 2018 by creating a false distinction between "wanted" and "unwanted" EHE. Henderson argues that Exhibit Smith-2 pertains to the generation of uneconomic energy which was "unwanted" by either Henderson or Big Rivers, but which had to be generated to keep the Station Two units in continuous operation.

---

[200] Section V., Paragraph 4 of the Settlement Agreement and Release provides:

> In consideration of the mutual promises, covenants and agreements contained in this Agreement, the resolution and settlement of disputed claims and controversies, and other good and valuable consideration, the receipt and sufficiency of which are conclusively acknowledged, Henderson hereby releases, acquits, and forever discharges, individually and collectively, BREC and WKEC, along with their affiliates, parents, members, officers, directors, employees, agents, representatives, advisors, successors, predecessors, boards and assigns (collectively, the "Released Parties") of and from any and all manner of actions, causes of action, suits, sums of money, accountings, reckonings, covenants, controversies, agreements, promises, remedies, amounts paid in settlement, compromises, losses, rights of contribution, damages, judgements, executions, debts, obligations, liabilities, claims and demands of any nature or kind whatsoever, whether or not in contract, in equity, in tort or otherwise, which Henderson ever had, now has, may now have or may hereafter have against the Released Parties (or any of them) resulting from, arising out of or in any manner relating to: (1); the generation, production, use, sale or resale of "Disputed Excess Energy" as defined herein, or the capacity, fixed, or variable costs associated with such energy, including but not limited to those asserted or that could have been asserted in, or that were or could have been in any way connected with, the "Damages Suit" or the "Arbitration Proceeding;" and (2) any obligations, past or future, of BREC to Henderson under the Power Sales Contract or the Arbitration Proceeding related to, arising out of , or concerning "Disputed Excess Energy" as defined herein, whether known or unknown, accrued or unaccrued, asserted or unasserted, direct or indirect, fixed, contingent or otherwise…

A copy of the 2017 Settlement Agreement is included with Mr. Berry's Direct Testimony as Exhibit Berry-2.

Henderson argues that this energy was separate and distinct from the economic energy which both parties "wanted."[201]

But the Commission, in Case No. 2016-00278, did not make a distinction between, nor did it even reference, "wanted" or "unwanted" energy in its Order in Case No. 2016-00278. Similarly, the 2017 Settlement Agreement also does not reference "wanted" or "unwanted" energy. As Mr. Berry testified at the hearing, "all energy, in 2016 as well as today, is Excess Henderson Energy. Some of it's profitable, some of it's not, some of it's wanted, some of it's not. But the only energy that should be in dispute between either party is Excess Henderson Energy, which was defined as the difference between their load - Henderson's load - and their actual reservation on an hourly basis."[202] Additionally, Big Rivers witness Smith explained at the hearing that it was Henderson that wanted the EHE to be generated and required Big Rivers to generate that EHE, even when it was uneconomic to do so.[203]

Both the Order and the 2017 Settlement address the totality of EHE. The 2017 Settlement Agreement resolved all of Henderson's claims relating to EHE, up to January 5, 2018. That is why Big Rivers paid the City $6.25 million.[204]

The proper way to operate a power plant in MISO is to dispatch the plant when its projected cost is less than market, and to remove the unit from service and buy from the

[201] Direct Testimony of Barbara Moll at 5; Direct Testimony of Christopher Heimgartner at 17-19.
[202] Tr. (October 22, 2020) at 9:28:42.
[203] Tr. (October 22, 2020) at 11:55:00; Tr. of Henderson General Manager Gary Quick, Case No. 2016-00278 at 2:45:08-2:48:00 and 2:50:55-2:52:30.
[204] Tr. (October 22, 2020) at 9:29:58.

market when the market is projected to be more economic. For years, Big Rivers tried to convince the City to allow Station Two to be operated according to these principles of economic commit and dispatch. But the City refused. The City claimed that operating its Station Two was needed for rate consistency and reliability,[205] even when the plant was producing excess energy that had to be sold in the MISO market for a loss, and even though economic purchases in the MISO market are much more reliable than an aging Station Two.[206] The City received the rate consistency and fictitious reliability that it wanted. But those came at a cost that the City now wants to pass on to Big Rivers and its Members. Big Rivers is simply asking the Commission to properly assign costs to the cost-causer, and to the ultimate receiver of the EHE, which aligns with both the Commission's January 5, 2018 Order and the 2017 Settlement Agreement.

The City's calculation of EHE is shown in Exhibit Moll-2 and reaches all the way back to June 1, 2016 in violation of the 2017 Settlement. On this basis alone, Henderson's argument with respect to EHE and Exhibit Moll-2 should be rejected. Henderson's attempt to use the artificial "wanted/unwanted" distinction as a rationale to improperly relitigate the period before January 5, 2018 should likewise be rejected. The Commission should instead approve Big Rivers' calculation of the total amount due to or from Henderson related

[205] Post-Hearing Brief of Henderson, Case No. 2016-00278 (March 14, 2017) at 12 ("The ownership and operation of Station Two enables Henderson to offer power to the city and its inhabitants at consistent rates that are not subject to market fluctuations. Henderson remains willing to explore all options for stemming losses associated with the production of uneconomic energy at Station Two, provided Henderson receives assurances that it will be able to maintain that consistency."); Hearing Transcript of Henderson General Manager Gary Quick, Case No. 2016-00278, at 2:45:08-2:48:00 and 2:50:55-2:52:30 (idling one or both units at Station Two and purchasing from the MISO market could adversely affect reliability to the detriment of the citizens of Henderson).

[206] Tr. (October 22, 2020) at 11:55:50.

to EHE shown in revised Exhibit Smith-2, which simply applies the methodology approved by the Commission in Case No. 2016-00278.

3. Big Rivers Correctly Calculated Its Fuel And Reagent Costs To Serve Henderson's Native Load

The Henderson Native Load issue is the inverse of the EHE issue. For long periods of time, the City did not maintain enough coal to serve its native load. During these periods, Big Rivers provided the coal needed to operate Station Two in order to keep the lights on in Henderson.[207] The City sold this energy to its native load customers, collected the cost to generate this energy from its customers; but now refuses to reimburse Big Rivers for that coal.

Exhibit Moll-2 is Henderson's attempt to make Big Rivers pay the City's costs related to supplying Henderson's native load. As explained in the Rebuttal Testimony of Mr. Smith,[208] Exhibit Moll-2 improperly includes the coal, lime and fuel oil shortfall that Henderson did not have in inventory and that was supplied by Big Rivers to serve Henderson's native load.

Revised Exhibit Smith-3 accurately reflects the current amount due from Henderson to Big Rivers related to fuel and reagent shortfall to serve Henderson Native Load. This Exhibit includes the variable costs related to Henderson's coal, lime and fuel oil shortfall until Station Two was retired on January 31, 2019.[209] The calculation of the Henderson

[207] Tr. (October 22, 2020) at 11:54:26.
[208] Rebuttal Testimony of Paul G. Smith at 9-10.
[209] *See* Direct Testimony of Paul G. Smith at 10-11; Big Rivers Response to Staff Post-Hearing Supplemental Item 1.

native load costs shown in Exhibit Smith-3 naturally result from precisely following the EHE methodology approved by the Commission in its Order in Case No. 2016-00278.

In sum, Big Rivers calculated the quantity of EHE and associated variable costs between January 5, 2018 and January 31, 2019 (revised Exhibit Smith-2) and the related amount of fuel and reagents provided by Big Rivers to generate electricity to serve Henderson's native load (revised Exhibit Smith-3) by precisely applying the methodology adopted by the Commission in Case No. 2016-00278. Therefore, the native load costs contained in revised Exhibit Smith-3 should be approved.

XII. SEVERANCE COSTS

1. Severance Costs To Keep Station Two Operational While Henderson Secured An Alternative Supplier Were Reasonable

Henderson argues that it should not have to pay its share of Station Two severance costs because Big Rivers assigned a portion of these "*costs to Henderson without contractual authority and with full knowledge Henderson has no obligation to pay and has verbally contested responsibility for the costs*."[210] Henderson's position on severance costs is particularly unreasonable because those costs (amounting to approximately $50,000 per employee for 6 months of compensation) were incurred solely in order to retain skilled employees that may otherwise have left during the additional nine-month period from May 1, 2018 through January 31, 2019 in which Henderson requested, and Big Rivers agreed, to

[210] Direct Testimony of Barbara Moll at 8.

continue operating Station Two so that Henderson could secure an alternative supplier.[211] Unlike the City, Big Rivers would have been better off financially if the skilled employees were not retained and the uneconomic Station Two was retired earlier.[212] In this way, severance costs were incurred for the benefit of the City, not for Big Rivers. Yet the City's position is that Big Rivers should pay 100% of severance costs and Henderson should pay 0%.

Not only is severance a common practice within the utility industry, Big Rivers' position on severance/retention costs is fully authorized by the Power Plant Construction and Operation Agreement. That Agreement holds Big Rivers to a "best efforts" standard in its efficient and economical operation of the plant and applies a reasonableness standard to costs payable by the City. Section 13.4 of that Agreement provides that "Big Rivers covenants and agrees that during the term of this Agreement it will at all times operate City's Station Two on a "best efforts" basis, in an efficient and economical manner…." Section 13.6 of that Agreement provides that the "City will pay Big Rivers, on a monthly basis, its reasonable expenditures incurred in the operation and maintenance of City's Station Two…."

While the City generally objects to Big Rivers' decision to make severance/retention payments to employees, it has not demonstrated that severance/retention payments were inefficient, uneconomic or unreasonable. Such a showing would be required in order for

[211] As documented in Case No. 2018-00146, Henderson requested that Station Two continue to generate electricity past the point at which the Station was no longer economical to operate. *See* Berry Rebuttal at 22; Tr. (October 22, 2020) at 1:11:43.
[212] Berry Rebuttal at 22-23.

Henderson to avoid paying its share of severance costs under the Power Plant Construction And Operation Agreement. Therefore, those payments are recoverable under the Contracts and the Commission should require Henderson to pay for its share of the severance/retention costs.

Severance payments were not a gift to employees. In the business judgment of Big Rivers, severance payments were required in order to retain essential employees through the life of Station Two. Given Station Two's pending closure, Station Two employees had good reason to seek employment elsewhere during that period, a situation similar to what Henderson experienced when announcing the closure of its Station One generating facility.[213] In order for an employee to receive a severance payment, that employee was required to continue to work at Station Two until his or her position was no longer needed as Station Two ceased operations. The availability of severance provided an incentive for Station Two employees to remain working at the facilities so that Henderson would continue to have a power supply.

As explained by Mr. Berry,[214] as operator of Station Two for 47 years, Big Rivers was required to use its best business judgment to efficiently and economically manage its labor force, and it did so, to both Big Rivers' and Henderson's benefit. If at any time, Henderson thought that Big Rivers was not operating Station Two in an continuous and economical manner, the City had the "the right under the Operation Agreement to immediately take

[213] Berry Rebuttal, at. 23.
[214] Berry Rebuttal at 22.

over the complete operation and maintenance of Station Two."[215] For decades, Henderson did not exercise its contractual right to take over the operation of its power plant. Indeed, throughout the operation of Station Two, Henderson shared in Station-Two-related labor costs, including retirement benefits, even for Big Rivers' employees. Offering severance to the Station Two labor force was consistent with customary practice within the utility industry, particularly for skilled power plant workers. Henderson should therefore be held responsible for its share of the severance/retention costs.

Finally, as recognized at the hearing, the Commission authorizes Kentucky Power to recover severance costs as a reasonable expense through its Big Sandy Decommissioning Rider.

XIII. IT WOULD BE A VIOLATION OF KRS 278.030 FOR THE CITY TO SIMPLY ABANDON ITS POWER PLANT AND SHIFT THOSE COSTS TO BIG RIVERS

Under KRS 278.030, the rates charged by Big Rivers must be "fair, just and reasonable." That standard would be violated if the City were allowed to simply abandon the power plant it has owned and benefited from for 47 years in an attempt to shift retirement and prior operating costs to Big Rivers.

1. Henderson Has Greatly Benefitted From Its Ownership And Control Of Station Two

[215] City of Henderson, Kentucky Electric System Revenue Bonds, Series 2011A, Henderson Response to BREC DR Item 40, Attachment 1 at 26; Tr. (October 22, 2020) at 1:19:34 and 2:53:10.

Henderson enjoyed the joint use benefits and economies of scale of Station Two for 47 years. In its first full year of operation, Henderson used only 17 MW out of Station Two's net rated total capacity of 300 MW, or only 5.67%.[216] Station Two satisfied the City's need for capacity and the sale of surplus energy and capacity to Big Rivers made the plant economically feasible,[217] created opportunities for municipal expansion by allowing for a comprehensive annexation program whereby Henderson's corporate limits could be increased by approximately three-fold,[218] resulted in economies of scale,[219] and produced substantial cost savings for Henderson (e.g. reduced labor costs, transmission costs, landfill costs), and $42.3 million in capital cost savings related to the use of the FGD equipment installed at the Green Station to be used as joint-use equipment for the Station Two FGD in compliance with Clean Air Act Amendments.[220] Since Station Two went commercial, Henderson has consumed 19,500,000 MWh of its energy - enough energy to supply the City's

[216] Exhibit Pullen-1 at 1 of 3.

[217] 1970 Power Sales Contract Section 1.4 ("By its addition of Station Two, City will be able to provide more economical and reliable electric service to itself and its inhabitants, and through its sales of surplus electric power and energy to Big Rivers, as provided by this Agreement, City can assure the economic feasibility of such addition.").

[218] 1970 Power Plant Construction and Operation Agreement Section 1.5 "City is presently planning a comprehensive annexation program whereby the area of its corporate limits will be increased by approximately three-fold." Section 1.6: "City's consulting engineers have determined that City will require additional generating capabilities by the year 1973 in order to provide for the needs of its electric consumers. Said engineers have further determined and recommended to City that the most feasible and economical plan for providing the City's present and anticipated electric generation needs is the construction by City of a relatively large and more efficient generating station, whereby City can provide adequate, low-cost power and energy for the present and future needs of its Municipal Electric Light & Power System…"

[219] 1970 Joint Facilities Agreement 1.3: "It is recognized by the parties that material economies in construction and operation can be achieved through the joint use by both parties of certain operating facilities which serve as auxiliaries of their respective generating stations."

[220] Big Rivers Response to Staff First Request for Information, Item No. 4; 1993 Amendments at p. 2 "WHEREAS, certain facilities now owned by Big Rivers subject to certain mortgage liens, and used in operating the FDG System of Big Rivers' Green Generating Station, can be used jointly by the Green Station and Station Two, thus greatly reducing the cost of the Station Two FDG System," Big Rivers Response to Staff Second Request for Information, Item No. 2.

current native load for approximately 31 years. And the residential customers of Kenergy, Jackson Purchase and Meade County pay electric rates that are 35%-41% higher than those paid by the residents of Henderson.[221]

Now that Henderson's Station Two benefits have ceased, the City seeks to avoid the remaining costs associated with Station Two, essentially opting to completely abandon the units and shirk all of its obligations related to shutting down and cleaning up the facilities. The cleanup of Station Two after its operating life was expressly contemplated in the 1993 Amendments and Henderson should be held to its contractual commitments to share in the decommissioning costs, or absorb all of the retirement in place costs of the power plant it owns.[222]

2. Henderson Municipal Power And Light Is Financially Very Strong And Can Afford To Pay

Henderson is in a very strong financial position and enforcing the rates and service standards in the Station Two Contracts will not change that position. According to Moody's December 10, 2019 credit opinion, Henderson's credit rating is Baa1 stable, or three notches above investment grade. The City's unrestricted cash and discretionary funds as of May 31, 2019 was approximately $26.1 million, which is more than twice its outstanding debt balance of $10.76 million as of the same date. According to Moody's, Henderson has a "power cost adjustment mechanism that allows for automatic monthly pass-through adjustments based on any unexpected increase or decrease in power costs, thus avoiding calls on liquidity

[221] Berry Direct at 17.
[222] Tr. (October 22, 2020) at 10:40.

to address variable costs not already incorporated in the existing rate level." Based on Henderson's native load of approximately 600,000 MWh per year, a $1/MWh rate increase would generate about $600,000 per year. HMP&L's rates are significantly below the rates charged by Big Rivers' Member-owners, and Moody's notes that HMP&L's rates are about 15% below the state average. Based upon data from the Energy Information Administration ("EIA"), in 2018 Henderson had the lowest electric rates in Kentucky.[223] Therefore, requiring Henderson to live up to its Station Two contractual obligations can be readily absorbed without threatening Henderson's financial stability.

Henderson's financial statements have already recognized the financial impact of its decommissioning obligation. The asset retirement obligation reflected in Henderson's audited financial statements quantify and reference Henderson's obligation to remove asbestos, lead paint, and other contaminants, their obligation related to the ash pond, and an obligation to dismantle and remove assets located at the Station Two facility. It is disingenuous for Henderson to dispute their decommissioning obligation in this proceeding while at the same time issue audited financial statements that acknowledge such an obligation exists to their banks, lenders, financial market investors, and City residents.

Due to Henderson's very strong financial position, combined with the multi-million-dollar asset retirement obligation already reflected in Henderson's financial results, Big Rivers strongly disagrees with any assertion that Big Rivers' proposals in this proceeding threaten Henderson's financial stability.

---

[223] EIA Electric Sales, Revenue, and Average Prices, *available at: https://www.eia.gov/electricity/sales_revenue_price/*.

3. The Outcome Of This Case Will Directly Impact Big Rivers' Rates

The outcome of this case will have an immediate, automatic, and significant effect on Big Rivers' rates. The recovery of the Station Two ash pond and landfill costs will impact the amount Big Rivers recovers in its monthly environmental surcharge mechanism. Additionally, any extra dollar that Big Rivers is required to pay for costs that are the responsibility of Henderson will reduce the amount of Member rate credits payable through the Member Rate Stability Mechanism, or MRSM, and reduce the amount available to amortize the smelter regulatory assets. Also, an adverse decision in this case could limit the ability of Big Rivers to attain and maintain investment grade credit ratings thus increasing borrowing costs and making transactions in the wholesale market less profitable through increased credit requirements.

XIV. UPDATED SUMMARY OF AMOUNT DUE (TO)/FROM HENDERSON

Following is a summary of the total amounts due (to)/from Henderson as of June 30, 2020 assuming the City is allocated 22.76% of decommissioning costs, as shown in Revised Updated Exhibit Smith-1:

Exhibit	Description	Amount Due (To)/From Henderson	Interest
Smith-2	Excess Henderson Energy	(3,310,482)	(439,052)
Smith-3	Henderson Native Load	4,693,587	838,054
Smith-4	Other Operating Costs	(941,581)	450,843
Smith-5	Decommissioning Costs	933,995	41,532
	Subtotal	1,375,519	$891,377
	Interest	891,377	
	Total	2,266,896	

Assuming the Commission issues an order requiring Henderson to pay 100% of the retirement in place costs at Station Two, the total amount due (to)/from Henderson as of June 30, 2020 increases as follows, as shown in Revised Exhibit Smith-1b:

Exhibit	Description	Amount Due (To)/From Henderson	Interest
Smith-2	Excess Henderson Energy	(3,310,482)	(439,052)
Smith-3	Henderson Native Load	4,693,587	838,054
Smith-4	Other Operating Costs	(941,581)	450,843
Smith-5b	Retirement In Place Costs	2,812,353	137,558
	Subtotal	3,253,877	$987,403
	Interest	987,403	
	Total	4,241,280	

The interest component in the above Tables, which is calculated on the monthly past due amount at a 6% interest rate, reflects the additional charge to keep Big Rivers financially whole. For the period 2010-2019, Big Rivers' average cost of debt was 5.16%, and its weighted average cost of capital was 7.39%. Therefore, a 6% interest rate is reasonable to compensate Big Rivers for the loss of the use of its money for more than a decade.[224] Recovery of interest is also appropriate given the extended delay, and burdensome effort required to enforce collection of the amounts due from Henderson. Without interest, the City would be rewarded for its vexatious litigation strategy.

[224] Rebuttal Testimony of Paul G. Smith at 18.

XV. ONGOING ENFORCEMENT UNDER KRS 278.390

Under KRS 278.200, the Commission has supervisory authority over the rate and service standards in the Station Two Contracts, as well as jurisdiction over obligations arising out of the Contracts.[225] Because of the history of the parties being unable to resolve their differences, and the need to bring those differences to the Commission for a resolution, Big Rivers believes it is necessary for the Commission to establish a reasonable process for the efficient processing of payments to Big Rivers relating to the Station Two Contracts. Big Rivers proposes a monthly filing of charges like the monthly filings it makes with respect to its fuel adjustment clause, environmental surcharge, member rate stability mechanism, and non-FAC Purchased Power Adjustment; along with periodic reviews of those charges.

Big Rivers proposes that it: 1) file monthly with the Commission a charge representing Henderson's share of all Station Two Contract costs incurred by Big Rivers; 2) after filing with the Commission, the monthly charge would be submitted to Henderson for payment within thirty days; and 3) the charges would be subject to comprehensive Commission review, audit, true-up and refund under whatever schedule the Commission deems appropriate.[226]

[225] KRS 278.200 provides "[t]he commission may, under the provisions of this chapter, originate, establish, change, promulgate and enforce any rate or service standard of any utility that has been or may be fixed by any contract, franchise or agreement between the utility and any city, and all rights, privileges and obligations arising out of any such contract, franchise or agreement, regulating any such rate or service standard, shall be subject to the jurisdiction and supervision of the commission, but no such rate or service standard shall be changed, nor any contract, franchise or agreement affecting it abrogated or changed, until a hearing has been had before the commission in the manner prescribed in this chapter."

[226] Direst Testimony of Paul G. Smith at 17.

The review process would allow Henderson to participate and contest any cost that it does not believe was reasonably incurred or was unreasonably charged. An example-schedule of charges showing the type of invoice that would be submitted to the Commission for ultimate payment by Henderson is attached as Rebuttal Exhibit Smith-2 and Rebuttal Exhibit Smith-2b.

If the Commission approves this Application, then the first monthly filing would include the net amount owed to Big Rivers for Excess Henderson Energy (Smith-2), Henderson Native Load (Smith-3) and Other Operating Costs (Smith-4). As of June 30, 2020, this would be a payment from Henderson to Big Rivers of $1,291,369 (including interest). Except for ongoing Green Landfill costs and interest, this amount is fixed and will not change. In addition, the City will be billed for either: a) 22.76% of decommissioning costs (plus interest); or b) 100% of retirement in place costs (plus interest). As of June 30, 2020, these amounts are shown on Revised Exhibit Smith-1 and Exhibit Smith-1b.

As summarized in the Direct Testimony of Mr. Berry,[227] Henderson has refused to comply with the Commission's Order in Case No. 2016-00278 concerning EHE costs by not paying for the variable costs associated with EHE as ordered by the Commission. By refusing to comply with the ongoing directives of the Commission's Order, Henderson has treated its appeal of Case No. 2016-00278 to the Franklin Circuit Court as if it effectively stays the Order of the Commission.[228] However, under KRS 278.390, Commission Orders continue in force until they are revoked by the Commission or vacated by a court of

[227] Direct Testimony of Robert W. Berry at 6.
[228] Franklin Circuit Court, Case No. 18-CI-00078.

competent jurisdiction and parties must comply with Commission Orders while an appeal is pending. As the Kentucky Court of Appeals has held, "the mere filing of an appeal does not stay the legal effectiveness of an order of the commission. Unless and until the order….is vacated, the order remains in effect."[229] If Henderson successfully challenged a Commission Order in the Franklin Circuit Court and a refund of costs paid by the City was required on remand, then Big Rivers would comply with that decision. Because of this refund safeguard, the City will be fully protected from complying with the Commission's decision while an appeal is pending. But in the absence of any Court ruling vacating the Commission's Order, that Order would still be effective, and the City must pay what is owed to Big Rivers during the pendency of any appeal.

Henderson has also attempted to subvert the Commission's exclusive jurisdiction by filing numerous claims related to the Station Two Contracts at the Webster Circuit Court[230] and the Henderson Circuit Court.[231] These collateral attacks on the Commission's exclusive jurisdiction and Henderson's steadfast refusal to comply with the Commission's Order concerning EHE raise serious concerns that Henderson may not comply with a Commission Order in this proceeding.[232]

If Henderson refuses to follow the Commission's Order in this case, then **t**he Legislature has given the Commission a very strong tool. If Henderson refuses to comply with the Commission's lawful Order by not paying for its share of Station Two costs, then

[229] *Jent v. Ky. Utils. Co,* 332 S.W.3d 102, 105 (Ky App. 2010).
[230] *See* Webster Circuit Case Nos. 18-CI-00020 and 20-CI-00073.
[231] *See* Henderson Circuit Case Nos. 19-CI-00504 and 20-CI-00413.
[232] Direct Testimony of Christopher Heimgartner at 13.

the Commission should seek to "compel obedience" to its rate order at the Franklin Circuit Court pursuant to KRS 278.390. KRS 278.390 (Enforcement of orders) states:

> The commission may compel obedience to its lawful orders by mandamus, injunction or other proper proceedings in the Franklin Circuit Court or any other court of competent jurisdiction, and such proceedings shall have priority over all pending cases. Every order entered by the commission shall continue in force until the expiration of the time, if any, named by the commission in the order, or until revoked or modified by the commission, unless the order is suspended, or vacated in whole or in part, by order or decree of a court of competent jurisdiction.

KRS 278.390 was enacted so that the Commission can swiftly enforce its lawful orders by filing a mandamus, injunction or other pleading at the Franklin Circuit Court. And the Franklin Circuit Court can hold disobeying parties in contempt, as the Kentucky Supreme Court has recognized, explaining that "KRS 278.390 gives the Commission specific authority to compel obedience to its orders by '…(in) mandamus, injunctions or other proper proceeding in the Franklin Circuit Court.' Thus, the court could use its normal contempt power to enforce resulting judgments and orders."[233] Kentucky precedent provides that "[a] trial court has inherent power to punish individuals for contempt…and nearly unfettered discretion in issuing contempt citations."[234]

Filings made pursuant to KRS 278.390 are given priority over all other pending cases on the Franklin Circuit Court docket. The Commission has rarely needed to use KRS 278.390 because parties, in almost all cases, comply with Commission Orders. In the

[233] *South Cent. Bell Tel. Co v. Utility Regulatory Com.*, 637 S.W.2d 649, 652 (1982).
[234] *Ky. Ret. Sys. v. Foster*, 338 S.W.3d 788, 800 (Ky. App. 2010); *Crowder v. Rearden*, 296 S.W.3d 445, 450 (Ky. App. 2009)(citing *Newsome v. Commonwealth*, 35 S.W.3d 836, 839 (Ky. App. 2001); *Smith v. City of Loyall*, 702 S.W.2d 838, 839 (Ky. App. 1986)).

unusual circumstance in which a party fails to comply with a Commission Order the Commission should not hesitate to "compel obedience" through KRS 278.390.

XVI. CONCLUSION

WHEREFORE, for the reasons set forth herein, Big Rivers respectfully requests that this Honorable Commission grant the requests in this Application and any other relief that the Commission deems appropriate.

Respectfully submitted,

Tyson Kamuf, Esq.
Senthia Santana, Esq.
Gregory E. Mayes, Jr., Esq.
BIG RIVERS ELECTRIC CORPORATION
201 Third Street, P.O. Box 727
Henderson, Kentucky 42419-0024
Ph: (270) 827-2561 Fax: (270) 844-6417
tyson.kamuf@bigrivers.com
senthia.santana@bigrivers.com
gregory.mayes@bigrivers.com

/s/ Michael L. Kurtz
Michael L. Kurtz, Esq.
Kurt J. Boehm, Esq.
Jody Kyler Cohn, Esq.
BOEHM, KURTZ & LOWRY
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202
Ph: 513.421.2255 fax: 513.421.2764
mkurtz@BKLlawfirm.com
kboehm@BKLlawfirm.com
jkylercohn@BKLlawfirm.com

COUNSEL FOR BIG RIVERS ELECTRIC CORPORATION

November 17, 2020

Big Rivers Electric Corporation
Case No. 2019-00269
Station Two Equipment Table

Item	Station Two Facilities Subject to the Potential Deed Reversion	Station Two Facilities NOT Subject to the Potential Deed Reversion	Existing HMPL Station Two Joint Use Facilities to Remain in Service (NOT Subject to the Potential Deed Reversion)
1	**Unit 1 consisting of:**	Unit 1 booster fan	Barge Mooring Cells No. 1N, 2N, 3N, 4N, 1S, 2S, 3S, & 4S as shown on Burns & Roe Drawing No. 04-3280-S3200.
2	Riley boiler, Deaerator heater and storage tank, boiler feed pumps, condensate pumps, condensate storage tanks, and feed water heaters. The coal bunkers, coal feeders, coal mills and the Primary Air (PA) fans.	FGD System Chimney, 350' Tall	One Coal Barge Unloader, McDowell Wellman, 1000 net ton/hr. capacity.
3	General Electric Turbine, Generator, Exciter.	Two Wheelabrator Absorber Modules, Building & Associated Equipment	One Coal Conveyor, 1
4	Condenser	Station Two Slaker Building, slaking tanks, and equipment	One Crusher House fed by Conveyor No. 1.
5	The ash removal system includes the precipitators and ash hoppers and the wet bottom ash hopper.	Station Two Additive Hold tank	Four 161KV Oil Circuit Breakers, General Electric, S/N 0139A7206208, 0139A7206209, 0139A7206212, 0139A7206213, located in Plant Switchyard.
6	The fans and duct work including the Forced Draft (FD) Fans.	Two lime feed conveyors 2C1 and 2C2	One Lot of Line Terminal Structures, Bus, Relay Panels, etc., located in Plant Switchyard
7	The electrical distribution system including the transformers and Motor Control Centers (MCC).	Two additive feed systems; Station Two Scrubber system includes pipe and pipe rack	
8	Selective Catalytic Reduction including the ammonia grid and catalyst	Two bleed slurry systems to Big Rivers' Green Station Primary Dewatering System	

Big Rivers Electric Corporation
Case No. 2019-00269
Station Two Equipment Table

Item	Station Two Facilities Subject to the Potential Deed Reversion	Station Two Facilities <u>NOT</u> Subject to the Potential Deed Reversion	Existing HMPL Station Two Joint Use Facilities to Remain in Service (<u>NOT</u> Subject to the Potential Deed Reversion)
9	**Unit 2 consisting of:**	One electrical power supply for FGD, with redundant feeds including power transformer, bus work, relay panels and metering equipment	
10	Riley boiler, Deaerator heater and storage tank, boiler feed pumps, condensate pumps, condensate storage tanks, and feed water heaters. The coal bunkers, coal feeders, coal mills and the Primary Air (PA) fans.	**City owned joint use facilities to be decommissioned consisting of:**	
11	Westinghouse Turbine, Generator, Exciter.	Seven Coal Conveyors, 2, 3A, 3B, 4A, 4B, 5B & 6B	
12	Condenser	One Reclaim Hopper which feeds coal conveyors 4A & 4B.	
13	The ash removal system includes the precipitators and ash hoppers and the wet bottom ash hopper.	One Water Treatment Plant with Demineralizer Building and associated equipment.	
14	The fans and duct work including the Forced Draft (FD) Fans and a booster fan.	One 50,000-gallon capacity Fuel Oil Storage Tank & distribution system.	
15	The electrical distribution system including the transformers and Motor Control Centers (MCC).	One Flyash Silo, Sump & System Components.	
16	Selective Catalytic Reduction including the ammonia grid and catalyst	One prefab metal Warehouse adjacent to Fly Ash Silo.	

Big Rivers Electric Corporation
Case No. 2019-00269
Station Two Equipment Table

Item	Station Two Facilities Subject to the Potential Deed Reversion	Station Two Facilities NOT Subject to the Potential Deed Reversion	Existing HMPL Station Two Joint Use Facilities to Remain in Service (NOT Subject to the Potential Deed Reversion)
17	North and South Cooling Towers	Coal Handing Equipment as listed in Continuous Property Records.	
18	Two bulk ammonia storage tanks and associated fill equipment	One lot of Materials & Spare Parts in Big Rivers Warehouse No. 15 as defined by inventory control records.	
19	Bypass stack	One Ash Pond and Effluent Lines.	
20		Circulating Water Lines.	
21		Two Step-Up Transformers, McGraw Edison, S/N C-04280-5-1, C-04280-5-2, located in Plant Switchyard. (Already decommissioned)	
22		Two Auxiliary Transformers, Westinghouse, S/N RCP 37261, RCP 37262, located in Plant Switchyard. (Already decommissioned)	
23		One Excitation Transformer, General Electric, S/N D-597562, located in Plant Switchyard. (Already decommissioned)	
24		One Tugboat - The "William Newman" 37 feet long, 21.27 gross tons, 14.0 net tons, coastguard capacity 350 HP. (Already decommissioned)	
25		Station Two Ash Pond Dredgings in Green Station Sludge Disposal Landfill adjacent to Green River South of Green Station.	

Big Rivers Electric Corporation
Case No. 2019-00269
Station Two Equipment Table

Item	Station Two Facilities Subject to the Potential Deed Reversion	Station Two Facilities NOT Subject to the Potential Deed Reversion	Existing HMPL Station Two Joint Use Facilities to Remain in Service (NOT Subject to the Potential Deed Reversion)
26		Two Lime Slaking Water Pumps and Lines to Slaking Building.	
27		Two Pug Mill Mixers. (Proposed but never installed)	
28		One Vacuum Filter and Associated Equipment Including Building Expansion (Proposed but never installed)	
29		Two New Thickener Underflow Lines and Two Flow Monitors.	
30		Two Control Systems on Big Rivers' Green Station Thickener Return Water Tanks.	
31		One New Filtrate Surge Tank and Controls	