1
2 **COMMONWEALTH OF KENTUCKY**
3 **BEFORE THE PUBLIC SERVICE COMMISSION**
4
5 **IN THE MATTER OF:**
6

7 **APPLICATION OF BIG RIVERS**	)	
8 **ELECTRIC CORPORATION**	)	**CASE NO. 2019-00269**
9 **FOR ENFORCEMENT OF RATE**	)	
10 **AND SERVICE STANDARDS**	)	

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19 **DIRECT TESTIMONY**
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21 **OF**
22
23 **CHRISTOPHER HEIMGARTNER**
24 **GENERAL MANAGER OF HENDERSON MUNICIPAL POWER & LIGHT**
25
26 **ON BEHALF OF**
27
28 **INTERVENOR CITY OF HENDERSON, KENTUCKY, AND**
29 **HENDERSON UTILITY COMMISSION d/b/a**
30 **HENDERSON MUNICIPAL POWER & LIGHT**
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10 **Table of Contents**
11
12
13 **Page**
14
15 **I. INTRODUCTION……………………………………………………………3**
16
17 **II. PURPOSE OF TESTIMONY…………………………………………………4**
18
19 **III. RELATIONSHIP OF THE PARTIES……………………………………6**
20
21 **IV. UNWANTED ENERGY VARIABLE COSTS & REVENUE…………...17**
22
23 **V. BUDGET SETTLEMENTS FOR FISCAL YEARS 2018 & 2019……....19**
24
25 **VI. MISO FEES…………………………………………………………………20**
26
27 **VII. DECOMMISSIONING COSTS………………………………………………20**
28
29 **VIII. SEVERANCE COSTS…………………………………………………………21**
30
31 **IX. GREEN LANDFILL…………………………………………………………...22**
32
33 **X. JOINT-USE FACILITIES……………………………………………………23**
34
35 **XI. CONCLUSION…………………………………………………………………24**
36
37
38
39
40
41
42
43
44
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2 I. INTRODUCTION

3 **Q. Please state your name, business address, and position, and provide a brief summary**
4 **of your professional experience.**

5 A. My name is Christopher Heimgartner. I am the General Manager of Henderson Municipal
6 Power & Light ("HMP&L"), an electric utility owned by the City of Henderson and
7 governed by the City of Henderson Utility Commission (jointly "Henderson"). The utility
8 is located at 100 Fifth Street, Henderson, Kentucky, 42420. I have held the position of
9 General Manager since 2017. Since that time, I have overseen the negotiation and
10 implementation of power-supply contracts to serve the City of Henderson and its
11 inhabitants following the closure of the Station Two generating plant. I have also overseen
12 the utility's integration into the Midwest ISO (MISO) market and the requisite designation
13 of HMP&L as a market participant for the purpose of securing an additional power supply
14 capable of meeting the needs of the utility's 12,000 customers. My responsibilities also
15 include oversight of all other utility operations, including compliance, safety, emergency
16 response and mutual aid, and board and community relations. I am familiar with the Station
17 Two contracts as well as the numerous and complicated disputes that still exist between
18 Henderson and Big Rivers and that Big Rivers is now asking the Commission to settle,
19 manage, and oversee, presumably forever. Prior to serving as HMP&L's General Manager,
20 I was employed for 25 years in various capacities with Pacific Gas & Electric Co., first as
21 an engineer and later as a superintendent overseeing gas and electric operations and
22 construction and maintenance crews in a high-growth area. I then spent three years as
23 Customer Service and Energy Delivery Officer for Seattle City Light. After that, I served
24 as Assistant General Manager of Distribution and Engineering Services for Snohomish

1 County Public Utility District in Everett, Wash., from 2009 until 2016. All told, I have
2 some 39 years of experience in the utility industry.

3 II. PURPOSE OF TESTIMONY

4 **Q. What is the purpose of your testimony?**
5
6 A. The primary purpose of my testimony is to articulate Henderson's interest in this
7 proceeding and its position with respect to the financial and other contractual disputes Big
8 Rivers is asking the Commission to resolve. My intent is to correct the most significant
9 misstatements and mischaracterizations Big Rivers has placed into the record concerning
10 the history of its relationship with Henderson, the nature and extent of the remaining
11 liabilities associated with the retirement of Station Two, and the reasons the parties to date
12 have been unable to resolve their differences. Another purpose of my testimony is to point
13 out for the Commission's benefit the complexity of and seemingly unlimited scope of the
14 task Big Rivers wants the Commission to undertake. My testimony will also support
15 Henderson's position that i) Big Rivers has miscalculated the amounts due from one party
16 to the other to settle their financial disputes; ii) Henderson has correctly defined
17 decommissioning and determined that the decommissioning of Station Two is complete;
18 iii) Henderson has no further liability with respect to the Green Landfill; and iv) Henderson
19 has not tried to keep Big Rivers from using city-owned joint-use facilities.

20 **Q. Are you sponsoring any exhibits?**

21 A. Yes. I have prepared the following exhibits:

22 - Exhibit Heimgartner-1: Resume
23 - Exhibit Heimgartner-2: May 25, 2016, letter
24 - Exhibit Heimgartner-3: PSC Order dated January 5, 2018

1 • Exhibit Heimgartner-4: February 16, 2018, letter

2 • Exhibit Heimgartner-5: November 10, 2017 email

3 • Exhibit Heimgartner-6: April 11, 2019, letter

4 **Q. Please identify any additional witnesses who will testify on behalf of Henderson and**
5 **the issue or issues each witness will address.**

6 A. The following witnesses will provide additional testimony:

7 • Barbara Moll, Chief Financial Officer for HMP&L. Ms. Moll will verify the accuracy of
8 the figures contained in the HMP&L Accounting Summary and will provide the
9 methodology used to arrive at the amounts owed between HMP&L and Big Rivers to
10 resolve their financial disputes.

11 • Brad Bickett, Reliability Compliance Manager for HMP&L. Mr. Bickett will confirm the
12 adequacy of HMP&L's capacity reservation prior to the closure of Station Two and
13 HMP&L's compliance with regulatory requirements for operating reserves. Mr. Bickett
14 will identify and describe those Midcontinent Independent System Operator Inc. ("MISO")
15 fees which Big Rivers incurred and which are attributable to HMP&L's load and will
16 provide the correct calculation of MISO fees owed to Big Rivers.

17 • Seth Brown, Vice President of Transmission Services Department for GDS Associates Inc.
18 Mr. Brown will describe two (2) specific types of MISO fees (Schedule 17 fees and
19 Schedule 23 fees) that together account for a substantial portion of the fees Big Rivers
20 seeks to recover from HMP&L and will explain why recovery of those fees would
21 constitute a double recovery in violation of the MISO tariff.

22

1 **III. <u>RELATIONSHIP OF THE PARTIES</u>**

2 **Q. Has Big Rivers accurately described the history of the parties' relationship?**

3 A. While I believe the Commission is generally familiar with the relationship, I do
4 find it necessary to correct certain misstatements and mischaracterizations contained in the
5 Direct Testimony of Big Rivers President & CEO Robert Berry.

6 It is true that the deterioration of the parties' relationship is traceable in part to 2009,
7 when Big Rivers emerged from a period of receivership and assorted other legal troubles
8 to regain control of its electrical system and resume responsibility for its rights and
9 obligations under the Station Two contracts. A dispute soon developed concerning which
10 party was entitled to take and sell surplus Station Two energy which exceeded what
11 Henderson needed to serve its customers but which fell within the amount of generating
12 capacity Henderson had reserved. Both parties wanted the energy because the market was
13 strong and the energy was capable of being sold at a profit. At Big Rivers' request, the
14 dispute was referred to arbitration, where a panel ultimately concluded the energy belonged
15 to Henderson. Big Rivers nonetheless continued to deny Henderson access to the energy,
16 claiming Henderson had failed to submit an acceptable scheduling protocol. In the absence
17 of an approved protocol, Big Rivers continued to exploit what was then a robust power
18 market and profit from sales of Henderson's energy. Henderson later brought suit in the
19 Henderson Circuit Court to recover the revenue Big Rivers had received for sales of
20 Henderson's energy between 2009 and 2016. The parties eventually resolved their dispute
21 over this wanted energy and signed a Settlement Agreement specifically referencing the
22 Henderson Circuit Court action, Civil Action No. 09-CI-693, on December 15, 2017.
23 Energy provider E.ON, as guarantor for Western Kentucky Energy (WKE), paid

1 Henderson $6,250,000 on behalf of Big Rivers pursuant to the terms of a 2009
2 Indemnification Agreement in which WKE indemnified Big Rivers for any losses Big
3 Rivers might suffer in the event Big Rivers were deprived of the ability to take and sell
4 Excess Henderson Energy and to pay Henderson the nominal sum of $1.50 per megawatt
5 hour.
6 During the time the parties were litigating their rights with respect to energy both
7 parties wanted, market forces were creating a new category of energy which was not
8 contemplated and not in existence at the time the Station Two contracts were drafted and
9 executed and which was not considered an issue in the Settlement Agreement: unprofitable
10 energy unwanted by either party. This new category of energy gave rise to a new dispute
11 concerning which party should have to take and pay for energy which was not wanted by
12 either party, but which had to be generated to keep the Station Two units in continuous
13 operation under the terms of the contracts. Big Rivers responded by notifying Henderson
14 that, beginning on June 1, 2016, it would no longer take and sell Henderson's energy unless
15 the energy happened to be profitable. Otherwise, Big Rivers would sell the unwanted
16 energy into the market on Henderson's behalf and allocate to Henderson the revenues,
17 minus variable production costs. The new strategy would enable Big Rivers to preserve its
18 ability to capture profits when the market was strong and shift losses to Henderson when
19 the market was weak. The May 25, 2016, letter in which Big Rivers announced its new
20 practice is attached as Heimgartner Exhibit -2. Big Rivers later confirmed to the
21 Commission that, also beginning on June 1, 2016, Big Rivers had changed the sequence in
22 which it generated power from Station Two. Historically, Big Rivers operated Station Two
23 so as to first generate the energy Henderson needed to serve its native load, followed by

1 energy associated with the Station Two capacity allocated to Big Rivers. Any excess
2 associated with Henderson's reserved capacity was generated last. Beginning on June 1,
3 2016, Big Rivers arbitrarily flipped the generation sequence so that all unwanted energy
4 was generated immediately after Henderson's native load so as to ensure the unwanted
5 energy was assigned to Henderson's capacity reservation. This meant the units, when
6 operated at what Big Rivers represented to be minimum operating levels, would produce
7 little or no uneconomic energy attributable to Big Rivers' allocation. And yet Big Rivers
8 would retain the ability to cherry pick profitable energy with wide profit margins. The
9 change in generation sequence violated the practice Big Rivers had agreed to follow under
10 its Indemnification Agreement with WKE and violated the course of dealing the parties
11 had followed for more than four decades.

12 On July 29, 2016, with the Henderson Circuit Court action involving wanted energy
13 still pending, Big Rivers filed an application asking the Commission to declare Big Rivers
14 not responsible for variable costs associated with the production of unwanted energy and
15 to assign those costs to Henderson instead. There is no mistaking Big Rivers'
16 understanding of the type of energy at issue before the Commission. Big Rivers President
17 & CEO Robert W. Berry described the distinction in his rebuttal testimony filed in that
18 case:

19 "The difference in the definitions, which centers on whether energy
20 within Henderson's reserved capacity that is subject to a third party
21 sale is characterized as Excess Henderson Energy, is immaterial to
22 the question of who is responsible for the variable costs of producing
23 energy within Henderson's capacity reservation that neither
24 Henderson nor Big Rivers wants. Henderson acknowledges that it is
25 responsible for the variable costs of energy it sells to a third party.
26 It is the responsibility for the variable costs of producing the
27 remaining Excess Henderson Energy, which I refer to as the
28 "unwanted Excess Henderson Energy," that is the subject of this

1 proceeding." (PSC Case No. 2016-278, Rebuttal Testimony of
2 Robert W. Berry, p. 7, lines 11-18).
3
4 Big Rivers represented to the Commission both in its application and in sworn
5 testimony that its newly minted practice was to sell unwanted energy on Henderson's
6 behalf and credit Henderson with the revenue to offset variable production costs. For
7 example, Mr. Berry testified in response to a question from Commission counsel at the
8 February 7, 2017, hearing on Big Rivers' application:

9 Q. For the actual costs of the coal and reagent that is being used
10 to generate the energy attributable to Henderson, are those
11 costs being netted in any way from the energy that Big
12 Rivers uses to sell into the market?
13
14 A. We are, we are netting the cost with Henderson on the MISO
15 revenues that we receive from that energy going into MISO.
16 We net that difference between that revenue and the expense
17 of the refuel and reagent and send Henderson checks,
18 although they have returned those checks. (PSC Hearing,
19 Case No. 2016-278 Robert W. Berry testimony at 25:12
20 through 25:56; February 7, 2017)
21
22 On January 5, 2018, three weeks after the parties had executed the December 2017
23 Settlement Agreement resolving the Henderson Circuit Court dispute involving *wanted*
24 energy, the Commission entered an Order finding Big Rivers not obligated to take or pay
25 the variable costs of producing *unwanted* energy. The language of the 2018 PSC Order
26 confirms that any energy Henderson wanted to take and schedule for sale to a third party,
27 i.e. wanted energy, was excluded from the issue Big Rivers had asked the Commission to
28 decide. The issue before the Commission was whether Big Rivers was responsible for
29 paying the variable production costs of energy neither party wanted to take or sell. This
30 issue was separate and distinct from the issue Henderson had raised in the Henderson

1 Circuit Court claim, namely Henderson's right to receive revenue associated with the
2 energy Henderson wanted to access and had a contractual right to take and sell.

3 Soon after the parties settled the Henderson Circuit Court claim, the parties jointly
4 filed an Agreed Order dismissing the case as settled. No such dismissal was filed with the
5 Commission because the issue Big Rivers had raised in its application was still alive and
6 well. Big Rivers did not take any steps to withdraw its application and still has not asked
7 the Commission to set aside its Order. If Big Rivers believed the December 2017
8 Settlement Agreement resolved the issue involving unwanted energy, then Big Rivers
9 would have to have done one or both of those things. If Big Rivers believes the Settlement
10 Agreement resolves the unwanted-energy issues, then Big Rivers' remedy is to seek
11 enforcement of the agreement in the Henderson Circuit Court.

12 No sooner had the Commission entered its Order than Big Rivers reversed the
13 position Big Rivers had taken in front of the Commission. Big Rivers now claimed that,
14 even if Henderson were to agree with Big Rivers and accept responsibility for the variable
15 production costs of unwanted energy, Henderson would owe Big Rivers the variable costs,
16 but would not be entitled to the revenue associated with the sale of that energy. Big Rivers
17 began to take the position that Henderson received all of the revenue it was entitled to
18 receive for the sale of excess energy, regardless of whether the energy was wanted or
19 unwanted, when the parties settled the Henderson Circuit Court claim (see Big Rivers'
20 response to Item No. 11 of Henderson's first data requests). Big Rivers appears to have
21 overlooked the fact that the claim for wanted energy is the only type of claim for which
22 WKE indemnified Big Rivers as part of the 2009 "unwind" transaction. Had the claim

1 involved energy Big Rivers did not want and could not have sold at a profit, E.ON would
2 not have paid a settlement.
3 Nevertheless, letters from Big Rivers to Henderson dated after the date of the
4 Commission's Order began to characterize the remittance of the unwanted-energy revenue
5 as a "settlement" offer. The revenue Big Rivers told the Commission it was passing through
6 to Henderson now became leverage to extract further concessions from Henderson. A letter
7 dated February 16, 2018, attached to my testimony as Heimgartner Exhibit-4, includes an
8 exhibit reflecting the net amount due Henderson as a result of Big Rivers' having used
9 Henderson's coal and lime to generate unwanted energy until Henderson's supply was
10 depleted and then supplying the shortfall. However, the offer to remit the revenue was
11 conditioned upon Henderson's acceptance of other proposed settlement terms.
12 Big Rivers was aware prior to the signing of the Settlement Agreement that the only
13 dispute addressed in the settlement was the dispute involving wanted energy and raised in
14 Civil Action No. 09-CI-693. Not only does the Settlement Agreement explicitly say so, but
15 Big Rivers' counsel acknowledged in an email dated November 10, 2017, that "nothing in
16 this settlement agreement affects or has anything to do with the PSC case." A copy of the
17 email is attached to my testimony as Heimgartner Exhibit-5. Big Rivers cannot assert the
18 Settlement Agreement as a basis for its position and yet ask the Commission to interpret
19 the agreement. Jurisdiction over the substance and scope of the Settlement Agreement
20 likely lies with the Henderson Circuit Court.
21 In the absence of Henderson's agreement to accept other liabilities, Big Rivers now
22 wants Henderson to pay millions to reimburse Big Rivers for coal and lime purportedly
23 used to generate unwanted energy, write off millions more in Henderson-owned coal and

lime used until the supply was depleted, and forego millions in MISO revenue to help offset those costs. Such a result would produce a windfall to Big Rivers, threaten Henderson's financial stability, and harm Henderson taxpayers at a time when funding for municipal services is in serious jeopardy.

Big Rivers' post-settlement attempt to erase the well-documented distinction between wanted and unwanted energy is a glaring example of the disingenuous approach Big Rivers has often taken in its dealings with Henderson and is one of the main reasons the parties have reached a stalemate. Others include i) the unauthorized registration of the Station Two units in the Midcontinent Independent System Operator (MISO) market and the assignment of related fees to Henderson without corresponding benefit; ii) a unilateral attempt to raise Henderson's capacity reservation for Fiscal Year 2018-2019; iii) a demand without contractual basis for Henderson to help fund a Green Landfill expansion; iv) a demand that Henderson agree to decommissioning costs unlimited in scope or duration; v) the surreptitious inclusion of employee severance costs in the proposed Station Two operating plan for Fiscal Year 2018-2019 after Henderson clearly declined an invitation to share in those costs; and vi) the discontinuance of Big Rivers' longstanding practice of providing Local Balancing Authority (LBA), Market Participation (MP) and Meter Data Management Agent (MDMA) services immediately upon securing Henderson's agreement to retire Station Two earlier than previously agreed.

Most recently, Big Rivers denied a wholly unrelated request from the Henderson Water District to install a pump in the intake structure at Big Rivers' Sebree plant for no apparent reason other than to create leverage in its dispute with Henderson.

1 **Q. Does Henderson have any objection to the Commission deciding the disputed issues?**

2 A. Yes. My understanding is that the Commission's job is to regulate utility rates and
3 service standards, neither of which is implicated in Big Rivers' application. It is also my
4 understanding that the Commission's authority does not extend to cities, except in those
5 narrow circumstances where a city and a utility execute a contract that fixes a rate or service
6 standard. The issues remaining in dispute between Henderson and Big Rivers are so
7 complex in nature and so far removed from issues of utility rates or service, it is difficult
8 at first blush to understand why Big Rivers thinks the Commission can or should get
9 involved. If Big Rivers can invoke Commission jurisdiction simply by claiming a
10 contractual obligation might eventually cause it to raise rates, then every person, branch of
11 government, and private business considering entering into a contract with a regulated
12 utility should exercise caution lest it find itself unwittingly subject to Commission
13 jurisdiction rather than the jurisdiction of the courts.

14 Big Rivers appears to take the position that no dispute involving Big Rivers should
15 escape Commission scrutiny. An examination of the Commission's mission points to the
16 reason. The Commission's mission statement plainly states the Commission's charge is to
17 "foster the provision of safe and reliable service at a reasonable price to the customers of
18 jurisdictional utilities while providing for the financial stability of those utilities by setting
19 fair and just rates, and supporting their operational competence by overseeing regulated
20 activities." Big Rivers is well aware of the standard the Commission must apply and
21 repeatedly exploits the Commission's mission to Big Rivers' advantage. Big Rivers has
22 made a routine practice of manipulating its contractual relationship with Henderson to Big
23 Rivers' advantage and then bringing the inevitable dispute to the Commission under the

1 guise of a rates and service issue. Because Henderson is being treated as a jurisdictional
2 utility based on the alleged contractual impact on Big Rivers' rates and service,
3 Henderson's customers should be afforded the same standard of reasonableness and
4 fairness as Big Rivers' customers and Henderson should be subject to the same standard
5 of fairness as any other regulated utility.

6 However, to circumvent the judicial limitation applicable to Commission review of
7 contract issues, Big Rivers simply announces a new practice that contravenes the parties'
8 course of dealing, unilaterally and arbitrarily assigns new or higher expenses to Henderson
9 that Henderson is not obligated to pay, asserts that every expense always affects rates, and
10 then exploits its character as a regulated utility to gain approval for its decisions. Big Rivers
11 now wants the Commission to interpret at least one contract and potentially two if the
12 Settlement Agreement resolving the Henderson Circuit Court case requires interpretation.
13 Big Rivers also, among other things, wants the Commission to simply rubber stamp those
14 expenses Big Rivers deems to be decommissioning expenses when even the power industry
15 has not adopted a universally applicable definition of what constitutes decommissioning.
16 The Commission simply is not designed to function in this way.

17 **Q. What is the status of the other litigation between Henderson and Big Rivers?**

18 A. Henderson has appealed the Commission's Order issued in Case No. 2016-278 to
19 the Franklin Circuit Court on jurisdictional and other grounds and has asked the Court to
20 set aside the Order. Big Rivers has filed a Counterclaim to enforce the Order and recover
21 the variable production costs of unwanted energy. Henderson has filed a responsive
22 Counterclaim to demonstrate that the amount of revenue Big Rivers received from the sale
23 of unwanted energy exceeded the variable costs of producing that energy and that Big

1 Rivers thus could not maintain a claim. The appeal and counterclaims are stayed pending
2 the Commission's decision in this proceeding.

3 Henderson has also brought suit against Big Rivers in the Henderson Circuit Court
4 to recover amounts due to Henderson in settlement of the Station Two budgets for the fiscal
5 years that ended in 2018 and 2019. Henderson Circuit Court Judge Karen Wilson has
6 recused herself to avoid any appearance of conflict and the parties are awaiting
7 appointment of a special judge.

8 Two other actions remain pending in the Webster Circuit Court. In the first,
9 Henderson is seeking a declaratory order concerning the validity of a provision in the
10 Station Two deed, which provides that title to the Station Two property shall revert to Big
11 Rivers when plant operations cease and when bonds related to the completion of Station
12 Two are retired. On July 2, 2020, the Court issued an Order confirming the validity of the
13 reversion provision. The Court found questions of fact concerning the date plant operations
14 ceased and the date related bonds were retired and denied competing motions for Summary
15 Judgment. The second action pending in the Webster Circuit Court is Henderson's request
16 for a declaratory order that Henderson has correctly calculated its share of expenses related
17 to closure and post-closure care of the Reid-HMPL Ash Pond. Big Rivers has moved for a
18 stay, but the hearing on that motion has not been held.

19 **Q. Has Henderson made any further attempts to resolve its disputes with Big Rivers**
20 **since the date of the Informal Settlement Conference?**

21 A. Henderson has communicated to Big Rivers its interest in a fair settlement of all
22 issues on numerous occasions. However, the only resolution that appears to interest Big
23 Rivers is one in which Henderson incurs unlimited expense without a contractual

1 obligation to do so and without receiving a corresponding benefit. As a steward of public
2 funds, Henderson cannot and will not voluntarily obligate our ratepayers to subsidize Big
3 Rivers' members.

4 For example, Big Rivers wants Henderson to write off millions of dollars in fuel
5 and reagent Big Rivers arbitrarily used from Henderson's supply to generate unwanted
6 energy. Big Rivers also wants Henderson to reimburse Big Rivers for fuel and reagent Big
7 Rivers claims to have used from its own supply when Henderson supposedly did not have
8 enough to generate unwanted energy. On top of all this, Big Rivers wants to keep all
9 revenue received from the sale of unwanted energy, a position directly at odds with what
10 Big Rivers previously testified to before the Commission.

11 Big Rivers also wants Henderson to help fund an expansion of Big Rivers' Green
12 Landfill for the sole purpose of extending the life of the landfill, despite the fact that
13 Henderson has already paid its share of landfill expenses and despite the fact that the
14 existing dimensions of the landfill are adequate to contain any ash-pond dredgings
15 attributable to Henderson. The list goes on. Big Rivers wants Henderson to incur unlimited
16 and as-yet unconfirmed decommissioning expenses based solely upon Big Rivers' notion
17 of what constitutes "prudent utility practice."

18 At the request of Henderson Mayor Steve Austin, Henderson and Big Rivers
19 recently attempted to renew settlement negotiations, but the attempt was not successful.
20 Henderson has suggested to Big Rivers that the parties try to resolve the dispute in
21 mediation, but Big Rivers has declined the offer. Given the complexity and scope of the
22 issues, it seems reasonable that an experienced mediator would be better suited to resolve

1 these contractual, environmental, decommissioning, and financial issues than an agency
2 focused on rates and service issues.

3 **IV. <u>UNWANTED ENERGY VARIABLE COSTS AND REVENUE</u>**

4 **Q. How does Henderson believe the dispute concerning the costs and revenue associated**
5 **with unwanted energy should be resolved?**

6 Big Rivers is aware - and was aware at the time the Commission issued its Order
7 in Case No. 2016-278 – that the unwanted energy then at issue before the Commission is
8 and was separate and distinct from the wanted energy which was at issue in a civil action
9 pending before the Henderson Circuit Court at the time Case No. 2016-278 was filed and
10 which was the subject of a Settlement Agreement dated December 15, 2017. The
11 Commission's Order in Case No. 2016-278 was based upon Big Rivers' representations
12 and upon the equitable premise that whichever party would be held responsible for the
13 variable production costs of unwanted energy would also be entitled to the MISO revenue
14 or to a credit against those costs in the amount of the MISO revenue. Section 6.7 of the
15 parties' Power Sales Contract, as amended in 2005, provides support for the premise that
16 the party taking the energy is responsible for the variable costs of producing that energy. It
17 follows that whichever party takes the energy and pays the variable production costs is
18 entitled to receive the revenue from the sale of that energy.

19 Henderson's appeal of the Commission's Order remains pending and Henderson
20 has not accepted responsibility for the variable costs at issue in Case No. 2016-278. Even
21 if Henderson were to accept responsibility for those costs, however, Big Rivers has taken
22 a position contradictory to the position it took before the Commission and now claims any
23 revenue that would be due Henderson was included in the resolution of the wanted-energy

1 claim. (Direct Testimony of Paul Smith, p. 7, lines 4-19; Big Rivers response to Item No.
2 13 of Henderson's First Data Requests).
3 In a letter dated April 11, 2019, attached to my testimony as Exhibit Heimgartner-
4 6, Big Rivers provided Henderson with an updated version of the Exhibit A attached to its
5 letter of February 16, 2018. The updated exhibit again indicates that Big Rivers used
6 Henderson's supply of coal and lime to generate unwanted energy until the supply was
7 depleted and then used Big Rivers' coal and lime to generate the remainder. The exhibit
8 reflects Big Rivers' receipt of MISO revenue in the sum of $16,955,597 for the sale of
9 unwanted energy from June 1, 2016, the date Big Rivers implemented its new practice,
10 through January 31, 2019, the date Station Two ceased operation. Big Rivers has
11 acknowledged that Henderson is entitled to the MISO revenue, less variable costs,
12 associated with unwanted energy generated after the date of the 2017 settlement payment.
13 Accordingly, Big Rivers has credited Henderson for revenue net of costs in the amount of
14 $3,310,482 for that time period in the Interim Accounting Summary attached to the Direct
15 Testimony of Big Rivers Chief Financial Officer Paul Smith in Big Rivers' pending
16 application. The exhibit indicates that Big Rivers made up coal and lime shortfalls after
17 Henderson's supply was depleted and paid other costs so that the total cost to Big Rivers
18 of generating unwanted energy from June 1, 2016, through January 31, 2019, was
19 $15,810,204. It is important to note that these figures do not account for the $2,149,084 in
20 Henderson-owned coal and $1,351,135 in Henderson-owned lime Big Rivers purportedly
21 used to generate unwanted energy before declaring Henderson's supply depleted. Under
22 this scenario, Henderson must absorb $15,810,204 in variable costs and must write off coal
23 and lime totaling $3,500,219. Henderson also would have to accept payment of $88,191

1 for energy Big Rivers elected to take and which produced net revenue to Big Rivers totaling
2 $2,482,079 (Big Rivers' response to Item No. 11 of Henderson's First Data Requests). If
3 Henderson is to consider accepting Big Rivers' position and incur responsibility for the
4 variable production costs of unwanted energy, then Big Rivers must remit to Henderson
5 the full amount of revenue collected since June 1, 2016 - including the $10,696,158
6 collected from June 1 through December 31, 2017 - and not just the $6,259,439 collected
7 after the date of the settlement payment and already credited to Henderson's account. As
8 Big Rivers correctly represents in Exhibit Moll-2, this calculation results in a net total
9 payment from Big Rivers to Henderson in the amount of $1,233,584, not including the coal
10 and lime Henderson would have to write off. The payment would have to be made and not
11 conditioned upon any other settlement terms.

12 **V. BUDGET SETTLEMENTS FOR FISCAL YEARS 2018 AND 2019**

13 **Q. What is Henderson's position concerning amounts due from one party to the other in**
14 **settlement of the Station Two operating plans for Fiscal Years 2018 and 2019?**

15 A. Henderson Chief Financial Officer Barbara Moll has prepared an accurate accounting of
16 the amounts due between the parties in settlement of the Station Two budgets for the last
17 two fiscal years the plant was in operation. Henderson's Accounting Summary, attached to
18 Ms. Moll's testimony as Exhibit Moll-4 corrects Big Rivers' miscalculations, which are
19 based upon an inaccurate capacity reservation for Henderson and which assign expenses
20 to Henderson that Henderson is not obligated to pay. After adjusting to reflect the correct
21 capacity reservation and to eliminate expenses Henderson is not obligated to pay, my
22 calculations indicate that Big Rivers owes Henderson $6,359,736 in settlement of the
23 operating plans for those fiscal years.

1 **VI. MISO FEES**

2 **Q. Is Henderson contesting the fees Big Rivers has assessed to Henderson as a result of**
3 **Big Rivers having acted as Henderson's market participant in the MISO market?**

4 A. Yes. While Henderson is not contesting responsibility for legitimate MISO fees for which
5 Henderson received a service or corresponding benefit, Henderson is not responsible for
6 most of the fees Big Rivers wants Henderson to pay dating back to the date Big Rivers
7 registered the Station Two units in the MISO market over Henderson's objection and with
8 knowledge Henderson was in the process of negotiating with another potential market
9 participant. As explained in greater detail in the testimony of Brad Bickett, HMP&L
10 Reliability Compliance Manager, Henderson is responsible for only a fraction of the $1.4
11 million in MISO fees Big Rivers wants Henderson to pay. Another witness, Seth Brown,
12 Vice President of Transmission Services of GDS Associates Inc., will explain that the
13 assessment of charges under certain schedules constitute double recovery and a violation
14 of Big Rivers' MISO tariff. Other fees are not recoverable because Big Rivers failed to file
15 the appropriate Service Agreement with the Federal Energy Regulatory Commission
16 (FERC).

17 **VII. DECOMMISSIONING COSTS**

18 **Q. What, if any, responsibility does Henderson have with respect to the decommissioning**
19 **of the Station Two plant?**

20 A. Section 8 of the parties' Joint Facilities Agreement provides for the parties to share
21 decommissioning costs in the proportion in which they shared capacity during the life of
22 Station Two. Henderson's position is that the Station Two plant has been decommissioned
23 since the plant was brought to "safe, dark, and dry" status in April 2019. Big Rivers has

1 not cited any legal requirement or industrywide justification for the plant to be
2 decommissioned in the manner or to the extent Big Rivers recommends, nor is there a
3 requirement that activities associated with decommissioning be completed on a particular
4 timeline. Additionally, the Webster Circuit Court on July 2, 2020, upheld the validity of a
5 deed provision calling for title to the Station Two property to revert to Big Rivers when
6 plant operations cease and when bonds related to the completion of the plant are retired.
7 The plant ceased to operate on January 31, 2019, and has since been brought to "safe, dark,
8 and dry" status. Station Two thus has been decommissioned. Upon transfer to Big Rivers,
9 any decisions to perform further activities and any costs associated with those activities
10 belong solely to Big Rivers.

11 **VIII. SEVERANCE COSTS**

12 **Q. Is Henderson contesting responsibility for a share of severance costs Big Rivers paid**
13 **to its employees?**

14 A. Yes. As an employer who assigned a portion of its work force to staff Station Two,
15 Big Rivers decided when the plant closed to offer severance packages to certain employees
16 formerly assigned to the plant. Henderson has never knowingly paid severance costs for
17 other Big Rivers employees and has no contractual obligation to do so. As a result,
18 Henderson declined Big Rivers' invitation to share in the cost of the severance packages it
19 had offered certain employees. Nevertheless, Henderson discovered in reviewing the
20 proposed operating plan for Fiscal Year 2019 that Big Rivers had assigned Henderson a
21 share of the severance costs, although the costs were not delineated as such. Even if
22 Henderson were to agree to absorb a share of severance expenses, which it does not, its
23 share would not be calculated the way Big Rivers wants. Not only are the costs calculated

1 according to an improper capacity reservation, it is my understanding that some employees
2 who received severance packages were categorized under the General and Administrative
3 (G&A) budget, meaning Henderson paid a lesser percentage of their salaries during the life
4 of Station Two. Big Rivers can reassign employees or incentivize separation in any manner
5 it chooses. But Big Rivers is not entitled to assign unapproved costs to Henderson without
6 contractual authority and with full knowledge that Henderson has no obligation to pay.

7 **IX. GREEN LANDFILL**

8 **Q. Does Henderson contest responsibility for costs associated with Big Rivers' Green**
9 **Landfill?**

10 A. Yes. Section 6.1 of the Joint Facilities Agreement obligates Henderson to share in
11 the costs of operating and maintaining joint-use facilities, including the Station Two ash-
12 pond dredgings, "so as to assure the continuous operation of the parties' respective
13 generating station or stations served thereby." Section 8.1 of the agreement states that this
14 obligation remains in effect "so long as either party continues to operate or maintain a
15 generating station which is served by any such joint-use facility." Neither party is currently
16 operating or maintaining a generating station which is "served by" the Station Two ash-
17 pond dredgings. Therefore, Henderson no longer has a contractual obligation to operate or
18 maintain any joint-use facilities, including the Station Two ash-pond dredgings.

19 It is my understanding that Big Rivers has undertaken a three-phase expansion of
20 its landfill, which is expected to extend the life of the landfill by some 20 years. My
21 knowledge of this project is limited to that contained in the statements Big Rivers has made
22 in its application and exhibits, along with its responses to data requests. There is nothing
23 to indicate Big Rivers used competitive-bidding procedures to secure bids for the landfill

1 project as Big Rivers would have to have done if Henderson were obligated to commit
2 public funds to the project. However, to the best of my knowledge, there is nothing in the
3 Station Two contracts that obligates Henderson to incur any additional expenses with
4 respect to the operation or maintenance of the ash-pond dredgings, much less to continue
5 incurring expenses for the next 20 years or more until Big Rivers decides to retire its
6 landfill. Henderson has already paid the costs it was contractually obligated to pay with
7 respect to the operation, maintenance, and disposal of the ash-pond dredgings.

8 **X. JOINT-USE FACILITIES**

9 **Q. Describe the dispute concerning Big Rivers' use of joint-use facilities owned by**
10 **Henderson and located on Big Rivers' property.**

11 A. Henderson does not object to Big Rivers' continued use of joint-use facilities. However,
12 Henderson does not agree with Big Rivers' calculations as to how the costs of
13 decommissioning those facilities should be allocated. For example, the ash pond is
14 identified in the Joint Facilities Agreement as a joint-use facility and is subject to shared
15 closure costs. Henderson and Big Rivers have reached differing conclusions concerning
16 each party's share of closure costs. Henderson has filed an action seeking a declaratory
17 order from the Webster Circuit Court confirming that Henderson's calculation of its
18 responsibility for ash-pond closure costs is correct. That action remains pending.

19 **XI. <u>CONCLUSION</u>**

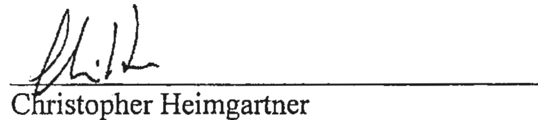
20 **Q. Does this conclude your testimony?**

21 A. Yes.

BEFORE THE PUBLIC SERVICE COMMISSION
IN THE MATTER OF
BIG RIVERS ELECTRIC CORPORATION
APPLICATION OF BIG RIVERS ELECTRIC CORPORATION FOR ENFORCEMENT OF RATE AND SERVICE STANDARDS
CASE NO. 2019-269

VERIFICATION

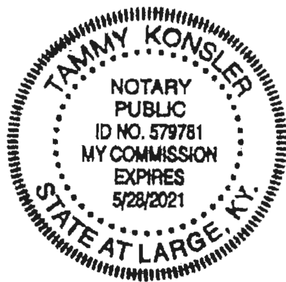
I, Christopher Heimgartner, verify, state and affirm that I prepared or supervised the preparation of the Direct Testimony filed with this Verification, and that Direct Testimony is true and accurate to the best of my knowledge, information and belief formed after a reasonable inquiry.

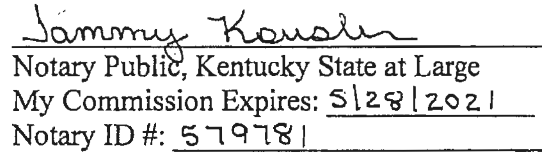


Christopher Heimgartner

COMMONWEALTH OF KENTUCKY)
COUNTY OF HENDERSON)

SUBSCRIBED AND SWORN to before me by Christopher Heimgartner on this the 13th day of July, 2020.





Notary Public, Kentucky State at Large
My Commission Expires: 5|28|2021
Notary ID #: 579781

Christopher Heimgartner

(425)315-2939 Heimgartner@comcast.net

UTILITY EXECUTIVE

Senior executive acknowledged for delivering superior results in utility operations. Created industry leading team for grid modernization and integrated utility scale energy storage. Drove all emergency response at two public utilities. Successful in focusing utility on basic functions related to delivering great customer service and value. Delivered solid financial results in challenging environments. Created utility- wide Asset Management program, initiatives to improve service quality, and Security and Emergency Management functions.

Professional Strengths Include:

* Operations Management
* Communications
* Infrastructure renewal
* Employee Development
* Emergency Management
* Internal Controls
* Customer Service
* Productivity / Efficiency Improvements
* Labor Relations
* Energy Storage
* Recruiting

Professional Experience

Henderson Municipal Power and Light **2017 to Present**
General Manager (CEO)

I lead a public power utility, in Western Kentucky. HMP&L has 12,000 electric customers, a small telecommunications business, and NERC covered transmission and substations. All power is currently purchased through contracts or on the MISO market. I lead all operations at the utility including P&L, compliance, safety, emergency response and mutual aid, and Board and Community relations.

Contributions and Results:

- Created a Strategic Plan for the Utility.
- Completed first ever IRP for the Utility.
- Completed and implemented a Succession Plan for all critical utility positions.
- Settled some of the outstanding litigation, and secured a substantial settlement.
- Created and implemented a LED streetlight replacement plan.
- Created and implemented an Asset Management program.
- Created and implemented a technology roadmap for the Utility.

Snohomish County PUD **2009 to 2016**
Assistant General Manager – Distribution and Engineering Services (D&ES)

D&ES includes all aspects of T&D and Substations: Metering, Telecommunications, Vegetation Management, Apprenticeship training, Fleet, Real Estate, Energy Control Center, and Environmental Affairs. D&ES has over 500 employees, a budget of $100 million capital, and $40 million in O&M, with employees in 7 headquarters covering a 2,200 square mile service territory, and serving 335,000 customers.

Contributions and Results:

- Created a formal Emergency Response organization delivering efficient restoration for the two largest storms in the utilities' history (both in 2015). Restoration 50% faster than historical norms.
- Created high performing team to build Smart Grid infrastructure for rapidly growing Utility. Major components include: Fiber-optic communications between all substations and facilities, Distribution Automation pilot with embedded Field Area Network, converting over 65 analog substations to digital controls and meters, building test lab, installing and operating Distribution Management System, and installing the first two of four utility scale energy storage devices.
- Improved reliability performance, and financial performance as COO for the Utility. SAIDI is 80 for 2015 and SAIFI is 1.0. Met all budgets and completed all budgeted work.
- Replaced aged SCADA system with modern EMS/DMS/OMS from GE. Created OT department to oversee new systems. Established small self-healing grid (FISR) with new DMS system, saving 5 minutes of SAIDI for system each year.
- Replaced over 5,000 deteriorated poles and 250 miles of deteriorated cable. Brought utility onto a 5-year trimming cycle. Initiated program to replace all HPS streetlights with LED fixtures, to be completed in 2018.
- Built four new substations, connecting over 27,000 new customers, and constructed new Control Center and Local Office.
- Installed first utility scale storage system in the Northwest, with three operating by early 2017. Automated 83 of 90 substations, and completed the fiber communications ring. Recognized as national leaders in implementation and integration of Smart Grid technologies on distribution systems.
- Created and implemented succession plan for the Division. Filled the last four direct report positions with top internally-developed talent.

Seattle City Light, Seattle, Washington **2006 to 2009**
Customer Service and Energy Delivery Officer (CSED)

CSED takes care of the 395,000 retail electric customers of Seattle City Light. CSED's 1,000 employees handled the billing cycle as well as the emergency response, transmission, distribution, and substations, engineering, operations, and construction for the utility.

Hired in 2006 to create, organize, and staff, six new Divisions within CSED. Reorganization began with hiring new Superintendent in 2004 as part of recovery from the West Coast Energy Crisis of 2000 and 2001.

Contributions and Results:

- Created Asset Management program ($30 million over 5 years). Involved staffing additions, software implementation, business process changes, and asset inventory changes.
- Led recovery effort after major area windstorm of December 2006. Created work team and processes to institutionalize lessons learned from this devastating storm.
- Led effort to rebuild relationships with 14 unions representing over 85% of employees.
- Brought culture based safety improvement effort into Seattle City Light. Since late 2006 the rate of reportable injuries has fallen more than 50%.

Pacific Gas and Electric Company **1981 to 2006**

Superintendent – Fresno Division **2003 to 2006**

Managed compliance operations, general maintenance, customer connections, and emergency response, for Fresno, Kings, and Tulare county operations of PG&E. Led 220 gas & electric construction and maintenance workers.

Superintendent – General Construction (Fresno) **1995 to 2003**

Managed all heavy gas and electric construction crews for southern end of PG&E system. Directed workforce of 200 regular employees, 100 contract. Mutual Aid point of contact.

Superintendent – Fresno Division **1991 to 1995**

Newly created position to oversee all gas and electric maintenance and light construction for Fresno, Kings, and Tulare county operations for PG&E. Line responsibility for eight service centers and 360+ employees.

Senior Electric Distribution Engineer – Oakland **1987 to 1991**

Provided technical leadership for electric distribution group of capacity and protection engineers, distribution designers, and facility mappers. Involved in emergency response for 1989 Loma Prieta Earthquake, and 1991 Oakland Hills fire.

Engineer Trainee, Engineer, Distribution Engineer **1981 to 1986**
Entry level engineer in high growth area just north of Silicon Valley. Promoted to Supervisor in this group in 1983.

Education

Master of Business Administration, St. Mary's College, Moraga, California

Bachelor of Science, Electric Power, Rensselaer Polytechnic Institute, Troy, New York

Associations

Kentucky Municipal Utility Association Board Member
APPA Mutual Aid Working Group
Western Energy Institute, Board of Directors Member (Past)

201 Third Street
P.O. Box 24
Henderson, KY 42419-0024
270-827-2561
www.bigrivers.com

May 25, 2016

Mr. Gary Quick
Henderson Municipal Power & Light
P.O. Box 8
Henderson, KY 42419

Re: Power Sales Contract between the City of Henderson, Kentucky and Big Rivers Rural Electric Co-Operative Corporation dated August 1, 1970, as amended – Section 3.8

Dear Gary:

As you are aware, Big Rivers Electric Corporation (hereinafter "Big Rivers") has for some time now been in discussions with the City of Henderson, Kentucky (hereinafter "City") regarding the ongoing costs associated with generating power from Station Two. On multiple occasions over the last year, Big Rivers has advised the City that power often can be purchased on the wholesale market for less than the variable costs associated with producing power at Station Two. Because the power generated from Station Two during these time periods is not economically competitive, Big Rivers has recommended various alternatives to the City regarding modifications that should be made to the ongoing operations of Station Two to help maintain the economic competitiveness of the power being produced from Station Two and lower the costs of serving the load of both Big Rivers and the City. In particular, Big Rivers recommended to the City that at least one of the Station Two units be idled until such time as it becomes economically competitive to resume generation of electricity from both units on a full time basis. Up to this point, however, the City has not been interested in this approach, or any other approach recommended by Big Rivers to address the economic competitiveness of these units. Rather, the City has insisted that both Station Two units be operated on a must run basis despite the fact that they are frequently not producing economically competitive electricity. As such, during these times, Big Rivers has been forced to address the reliability issues associated with the generation of power from Station Two when it is not needed to serve either party's existing load by selling the Excess Henderson Energy into the market at a loss.

As a general matter, Big Rivers has historically exercised its rights under Section 3.8(a) of the Power Sales Contract between the City and Big Rivers dated August 1, 1970, as amended (hereinafter "Contract") by purchasing energy associated with the City's reserved capacity from Station Two that has not been scheduled or taken by the City (such energy being referred to hereinafter as "Excess Henderson Energy"). In addition, Big Rivers has compensated the City in accordance with the terms of Section 3.8(c) of the Contract when it has exercised this right to purchase and utilize the Excess Henderson Energy, including providing, at its own cost, the full replacement of all fuels and reagents consumed from Station Two fuel and reagent reserves for the production of the Excess Henderson Energy and paying the portion of the sludge disposal costs attributable to the Excess Henderson Energy (hereinafter collectively referred to as

"Variable Costs"). Given changes in the marketplace, particularly the low price of natural gas, there have been an increasing number of hours when Big Rivers has purchased Excess Henderson Energy even when the Variable Costs of producing it have exceeded the prevailing market price for energy, resulting in Big Rivers assuming responsibility for the Excess Henderson Energy at a financial loss to itself.

While it has historically been Big Rivers' practice to take and utilize the Excess Henderson Energy each month, thereby allowing the City to avoid the Variable Costs noted above, and Big Rivers has compensated the City accordingly, there is nothing in Section 3.8(a) that imposes upon Big Rivers any obligation to take and pay for the Excess Henderson Energy and associated Variable Costs. To the contrary, Section 3.8(a) provides that in the event that the City does not take the full amount of energy associated with its reserved capacity from Station Two, Big Rivers *may, at its discretion,* take and utilize all such energy (or any portion thereof designated by Big Rivers) not scheduled or taken by the City. The purpose of this letter is to provide you with notice that beginning no later than June 1, 2016, from time to time Big Rivers may not take and utilize the Excess Henderson Energy generated from Station Two as it has voluntarily done in the past, especially in light of the fact that the Excess Henderson Energy being produced is often not economically competitive. Please understand that this does not mean that Big Rivers will never exercise its rights under Section 3.8(a) to take and utilize all, or a portion of, such energy not scheduled or taken by the City as permitted under the Contract. Indeed, at times, Big Rivers fully intends to take and utilize the Excess Henderson Energy. But, in the spirit of cooperation and in consideration of the longstanding relationship of the parties, Big Rivers deems it advisable to provide you with advance notice of its change in practice concerning the Excess Henderson Energy described above. Hopefully, this notice will allow the City to plan accordingly for this change as it deems necessary or advisable.

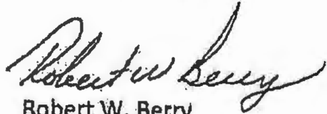
Going forward, Big Rivers will continue to provide the City with notice at the end of each calendar month of the amount of Excess Henderson Energy, if any, taken by Big Rivers during the previous month as set forth in Section 3.8(c) of the Contract. In addition, Big Rivers will continue to pay the City for such Excess Henderson Energy, and will continue to be responsible for the associated Variable Costs, in the manner set forth in the Contract for that portion of the Excess Henderson Energy, if any, taken by Big Rivers during the previous month. In the event that there is Excess Henderson Energy generated that Big Rivers has not taken pursuant to Section 3.8(a), the City will remain responsible for the Variable Costs attributable to the Excess Henderson Energy in accordance with the terms of the various agreements between the parties. Additionally, the City will no longer receive the $1.50 per MWh for that portion of the Excess Henderson Energy not taken by Big Rivers during the previous calendar month.

As you know from my letter dated March 28, 2016, Big Rivers and the City are continuing to make progress toward reaching a mutually acceptable agreement whereby The Energy Authority (hereinafter "TEA") will act as a Market Participant on behalf of the City related to Excess Henderson Energy. To date, however, the City has not responded to that letter. Therefore, until such time as Big Rivers and the City are able to reach an agreement on the manner in which TEA will assist the City with the sale of the Excess Henderson

Energy into the market, Big Rivers will continue to assist the City in delivery of the Excess Henderson Energy which is generated yet not taken by Big Rivers and will allocate to the City the revenues, if any, from the Excess Henderson Energy not taken by Big Rivers less any associated costs of delivery incurred by Big Rivers.

In the event this letter generates any questions or warrants further discussion, please do not hesitate to contact me.

Sincerely yours,



Robert W. Berry
President and CEO
Big Rivers Electric Corporation

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF BIG RIVERS ELECTRIC CORPORATION FOR A DECLARATORY ORDER	)))	CASE NO. 2016-00278

ORDER

On July 29, 2016, Big Rivers Electric Corporation ("Big Rivers") filed an application seeking an order declaring that the rate and service standards under Big Rivers' existing Power Sales Contract with the City of Henderson, Kentucky, and City of Henderson Utility Commission (jointly "Henderson"), as amended, require Henderson to be responsible for the variable production costs of any Excess Henderson Energy generated by Henderson's Station Two Generating Station ("Station Two"), as that term is defined in the Power Sales Contract, that Big Rivers declines to take and utilize.[1] In the alternative, Big Rivers requests an order pursuant to KRS 278.030 and KRS 278.200 finding that the Power Sales Contract is unfair, unjust, and unreasonable unless Henderson is deemed to be responsible for the variable costs of Excess Henderson Energy that Big Rivers declines to take and utilize, and declaring that Henderson is responsible for such variable costs.[2]

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[1] Big Rivers Application at 1.

[2] *Id.*

Exhibit Heimgartner-3

On August 5, 2016, the Commission issued an Order, pursuant to 807 KAR 5:001, Section 19(8), establishing a procedural schedule in this matter. The procedural schedule provided for a deadline to request intervention, two rounds of discovery upon Big Rivers, an opportunity for any intervenor to file testimony, discovery upon intervenor testimony, and an opportunity for Big Rivers to file rebuttal testimony. Pursuant to an Order issued on August 24, 2016, Henderson was granted intervention in this matter. An evidentiary hearing was held on February 7, 2017. Big Rivers filed responses to post-hearing data requests on February 16, 2017. Big Rivers filed its post-hearing brief on February 28, 2017. Henderson filed its post-hearing response brief on March 14, 2017. Big Rivers filed a post-hearing reply brief on March 21, 2017. At the parties' requests, the matter was held in abeyance so that the parties could engage in settlement discussions to resolve the issues involved herein. While the parties were able to reach an informal settlement, they were unable to produce a document formalizing their agreement. The matter now stands submitted to the Commission for a decision.

BACKGROUND

Big Rivers is a member-owned rural electric generation and transmission cooperative organized pursuant to KRS Chapter 279. As a rural electric cooperative, Big Rivers "shall be subject to all the provisions of KRS 278.010 to KRS 278.450 inclusive, and KRS 278.990."[3] Big Rivers owns and operates generating assets, and purchases, transmits, and sells electricity at wholesale. Its three distribution cooperative member-owners, Jackson Purchase Energy Corporation, Kenergy Corp., and Meade County

[3] KRS 279.210(1).

Rural Electric Cooperative Corporation, sell electricity to approximately 114,000 retail customers in 22 western Kentucky counties.

Henderson owns Station Two, which is a two-unit coal-fired electric generating station with a total capacity of 312 megawatts ("MW").[4] Big Rivers operates and maintains Station Two under a series of contracts that originally were executed on August 1, 1970, and that have since been amended.[5] One of those contracts is the Power Sales Contract, which sets forth the methodology for allocating the Station Two capacity between Henderson and Big Rivers. Specifically, under the Power Sales Contract, Henderson each year elects a portion of Station Two's 312 MW to be reserved to it for serving the City of Henderson and its inhabitants by way of a rolling five-year reservation methodology.[6] After electing its reserved capacity, Henderson then allots the balance of the capacity of Station Two to Big Rivers.[7] Big Rivers is then entitled to, and obligated to pay the capacity charges for, the allotted Station Two capacity.[8]

Henderson's reserved capacity for the 2016–2017 contract year is 115 MW and Big Rivers' allotted capacity share is 197 MW.[9] Big Rivers and Henderson are separately responsible for the variable costs associated with the energy each of them uses in a given hour, including the obligation that each party must replace at its cost all

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[4] Application at 5.

[5] *Id.*

[6] *Id.* at 7.

[7] *Id.*

[8] *Id.*

[9] *Id.*

fuels, reagents, and sludge disposal consumed in producing the energy used by that party.[10]

Under the 1998 amendments to the Power Sales Contract, a provision was added to address the situation in which Henderson takes less energy than is actually available to Henderson under its reserved capacity in any given hour. The term Excess Henderson Energy is defined in Section 3.8(a) of the 1998 amendments and provides, in full, as follows:

> Big Rivers and City hereby agree that the following provisions shall apply to energy from capacity not utilized by City or from capacity in excess of the capacity calculated in accordance with Section 3.6 of this Agreement.
>
> (a) In the event that at any time and from time to time City does not take the full amount of energy associated with its reserved capacity from Station Two (determined in accordance with this Agreement), Big Rivers may, at its discretion, take and utilize all such energy (or any portion thereof designated by Big Rivers) not scheduled or taken by City (the "Excess Henderson Energy"), in accordance with Section 3.8(c).

Big Rivers asserts that the central issue in the dispute over the Excess Henderson Energy is whether Big Rivers is responsible for the variable costs associated with Henderson's Excess Henderson Energy that Big Rivers does not take and utilize.[11] From July 15, 1998, the effective date of the 1998 amendments to the Power Sales Contract, until June 1, 2016, Big Rivers elected to take the Excess Henderson Energy even when it was uneconomic to do so.[12] However, by letter dated May 25, 2016, Big

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[10] *Id.*

[11] Direct Testimony of Robert W. Berry ("Berry Testimony") at 6.

[12] *Id.*

Rivers notified Henderson that after June 1, 2016, Big Rivers may, at its discretion, decline to take Excess Henderson Energy, particularly during those times when the cost to generate the energy is higher than the cost of energy in the Midcontinent Independent System Operator ("MISO") wholesale power market.[13] The Big Rivers' letter also notified Henderson that if Big Rivers did not take any Excess Henderson Energy, Big Rivers also would not be responsible for the variable costs associated with the production of that energy.[14] Big Rivers notes that there has been a significant increase in the number of hours in which Station Two is not competitive in the MISO energy market, due to recent competition from natural gas generating units and other market forces.[15] For the period from June 1, 2016, through October, 31, 2016, Big Rivers states that the variable production costs associated with the unwanted Excess Henderson Energy total $3,888,843, compared to revenues produced by such energy of only $2,818,628.[16] Big Rivers contends that Section 3.8 of the 1998 amendments gives Big Rivers the option, but not the obligation, to take and utilize all or any portion of the Excess Henderson Energy that Henderson chooses not to take.[17] Big Rivers further contends that, under the 1998 amendments, it is not required to replace the fuel and reagents or pay the sludge disposal costs for the Excess Henderson Energy that Big Rivers does not take.[18]

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[13] *Id.*

[14] *Id.*

[15] Berry Testimony at 10.

[16] Rebuttal Testimony of Robert W. Berry ("Berry Rebuttal") at 5–6.

[17] Berry Testimony at 8–9.

[18] *Id.*

Henderson interprets Excess Henderson Energy, as provided in Section 3.8 of the 1998 amendments, as energy which is within Henderson's reserved capacity and which is not scheduled or taken by Henderson.[19] Thus, it is Henderson's contention that Excess Henderson Energy is that energy which Henderson, for whatever reason, has neither scheduled or taken for the use of the City of Henderson and its inhabitants, nor scheduled or taken by Henderson for sale to third parties.[20] Henderson contends that Excess Henderson Energy is a defined contractual term and should not be confused with mere "excess" or "surplus" energy, which is that energy which exceeds the amount Henderson needs to serve its native load in a given period of time, but is equal to or less than the amount of energy associated with Henderson's reserved capacity for that given time period.[21] According to Henderson, in the event that Henderson's reserved capacity is used to generate energy above Henderson's native load, the energy above native load does not become Excess Henderson Energy until and unless Henderson elects to either not schedule or not take the energy for its own use, or offer the energy for sale to third parties.[22]

Henderson asserts that Big Rivers is required to generate only that energy which Henderson schedules or takes, up to Henderson's reserved capacity.[23] Henderson points out that Big Rivers has operated Station Two in the past to generate only the minimum amount of capacity, i.e., 115 MW for Unit 1 and 120 MW for Unit 2, required to

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[19] Direct Testimony of Gary Quick ("Quick Testimony") at 6.

[20] *Id.*

[21] *Id.*

[22] Quick Testimony at 6–7.

[23] Quick Testimony at 7.

maintain safe and reliable operation.[24] In the event Big Rivers elects to operate Station Two at minimum operating levels that require the generation of energy which exceeds Henderson's native load, plus energy scheduled or taken by Henderson, Henderson contends that such energy should be considered attributable to the capacity that is allocated to Big Rivers.

Henderson argues that Big Rivers' position is contrary to the arbitration award issued in May 31, 2012 ("2012 Arbitration") involving a dispute between parties concerning whether Henderson had a contractual right to sell Excess Henderson Energy directly to a third party without first offering the energy to Big Rivers at a certain price.[25] Henderson also argues that Big Rivers' interpretation of Excess Henderson Energy represents a unilateral change in practice by Big Rivers regarding the generation of Station Two energy and the assignment of responsibility for variable production costs, and is inconsistent with Exhibit A of the Indemnification Agreement that Big Rivers and Western Kentucky Energy Corp. ("WKE") executed in 2009 with respect to the operation of Station Two.[26]

Lastly, Henderson contends that the Commission does not have jurisdiction to resolve any issues related to the Power Sales Contract because that contract does not implicate Big Rivers' rates or service and because the only issue presented in Big Rivers' application relates to an interpretation of a contract, an issue that lies solely within the jurisdiction of a court and not within that of the Commission.[27].

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[24] *Id.*

[25] Quick Testimony at 5.

[26] *Id.* at 5–6.

[27] Henderson Post-Hearing Brief at 4–6.

On rebuttal, Big Rivers argues that its interpretation of Excess Henderson Energy is supported by the Power Sales Contract and consistent with the 2012 Arbitration decision.[28] Big Rivers notes that the 2012 Arbitration decision, on page 4, refers to Excess Henderson Energy as energy that is within Henderson's reserved capacity but is not needed to serve its native load, and which Henderson may sell to a third party.[29] Big Rivers contends that the phrase "not scheduled or taken by the City" as provided in Section 3.8(c) is taken out of context by Henderson.[30] Big Rivers asserts that this phrase applies to energy that Henderson uses to meet its native load.[31] Big Rivers maintains that this phrase, contrary to Henderson's interpretation, does not apply to energy that Henderson may want to sell to a third party[32] Big Rivers also references a March 14, 2008 letter from Henderson to WKE in which Henderson admits that Excess Henderson Energy includes energy within Henderson's reserved capacity that Henderson may sell to a third party. Big Rivers asserts that this admission is contrary to Henderson's position in the instant proceeding.[33]

Big Rivers contends that Henderson's reliance on the Indemnification Agreement is misplaced because Henderson was not a party to that agreement and because none of the Station Two contracts, including the Power Sales Contract, require Big Rivers to

[28] Berry Rebuttal at 5.

[29] Berry Rebuttal at 7.

[30] Berry Rebuttal at 7–8.

[31] Berry Rebuttal at 8.

[32] *Id.*

[33] Berry Rebuttal at 8–9.

utilize the calculation methodology set forth in the Indemnification Agreement.[34] Big Rivers points out that, in Henderson's response to Big Rivers' discovery request, Henderson agrees that the amount of Excess Henderson Energy should not be calculated in accordance with the Indemnification Agreement.[35] Big Rivers notes, however, that even if the calculation of Excess Henderson Energy were done pursuant to the Indemnification Agreement, there would continue to be Excess Henderson Energy that Big Rivers would not want to generate or that Henderson would insist that Big Rivers must generate and pay the variable costs of producing.[36]

Big Rivers avers that its calculation of the Excess Henderson Energy is reasonable and appropriate under the Purchase Sales Contract.[37] Big Rivers explains that, under the Power Sales Contract, Henderson requires that its reserved capacity and the associated energy be available continuously for the needs of itself, its inhabitants, and its third-party sales.[38] Based upon Henderson's response to Big Rivers' discovery request, Big Rivers states that this capacity and energy is the first to come from the Station Two generation.[39] Using this as the starting point, Big Rivers

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[34] Berry Rebuttal at 12–13. Under the Indemnification Agreement, Excess Henderson Energy came after both Henderson's native load and Big Rivers' capacity allocation when both units were operating. When only one unit was operating, Excess Henderson Energy came before any energy associated with Big Rivers' capacity allocation. *See* Big Rivers response to Commission Staff's First Request for Information, Item 8.

[35] Berry Rebuttal at 13.

[36] *Id.*

[37] Berry Rebuttal at 9.

[38] Berry Rebuttal at 11.

[39] *Id.*

asserts that first 115 MW in an hour from Station Two belongs to Henderson.[40] According to Big Rivers, the difference between the 115 MW and the actual requirements of Henderson and its inhabitants in any given hour is Excess Henderson Energy, as defined by the Section 3.8 of the Power Sales Contract and the 2012 Arbitration decision.[41] Big Rivers further contends that Henderson's calculation of the amount of Excess Henderson Energy is unreasonable because it is inconsistent with the Power Sales Contract, past practices, and the 2012 Arbitration decision.[42]

Henderson states that Excess Henderson Energy should be calculated according to the following stacking methodology: 1) generated energy within Henderson's reserved capacity for Henderson's native load; 2) generated energy within Henderson's reserved capacity scheduled or taken by Henderson; 3) energy associated with Station Two capacity allocated to Big Rivers; and 4) energy generated and taken by Big Rivers from Henderson's reserved capacity.[43] Big Rivers contends that Henderson's stacking methodology, which also seeks to divide Excess Henderson Energy into two parts – the part used for third-party sales and the part not used for third-party sales, is not contemplated under the Power Sales Contract.[44] Big Rivers asserts that Henderson's methodology would ensure that the Excess Henderson Energy it wants always will be available for Henderson, and that when the cost of producing energy from Station Two is less than the market price of energy, Henderson will get its full 115 MW allocation,

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[40] *Id.*

[41] *Id.*

[42] Berry Rebuttal at 9.

[43] Henderson response to Big Rivers First Request for Information, Item 4.

[44] Berry Rebuttal at 10.

including Excess Henderson Energy that Henderson sells to third parties, before Big Rivers gets any energy from Station Two.[45] Big Rivers further asserts that, under Henderson's methodology, when the energy is uneconomic, Henderson avoids the variable costs associated with generating that energy and imposes that obligation upon Big Rivers.[46]

Lastly, Big Rivers contends that the Power Sales Contract falls under the exclusive jurisdiction of the Commission pursuant to KRS 278.200, which governs the rate and service terms of a contract between a jurisdictional utility and a city.

DISCUSSION

Having reviewed the record and being otherwise sufficiently advised, the Commission finds that it has jurisdiction over this matter pursuant to KRS 278.200. That statute provides, in full, as follows:

> The 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.

The issues in this matter involve a Power Sales Contract, as amended, entered into between Big Rivers, a utility within the Commission's regulatory jurisdiction, and the City of Henderson. The inherent nature of the Power Sales Contract necessarily involves

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[45] Big Rivers Post-Hearing Brief at 16.

[46] *Id.*

Exhibit Heimgartner-3

rates and service in that the contract sets forth terms relating to Big Rivers's obligations to purchase Station Two capacity and energy from Henderson and Henderson's obligations to provide that capacity and energy to Big Rivers. Likewise, the specific issue that is raised in Big Rivers' application pertains to the quantity and costs of Excess Henderson Energy that is not elected to be taken by Big Rivers. This issue implicates the service and rates under the Power Sales Contract, and such issue is clearly within the ambit of the Commission's jurisdiction under KRS 278.200. We note that under KRS 278.030(1), Big Rivers' rates must be fair, just and reasonable. Consequently, the costs associated with Excess Henderson Energy purchased by Big Rivers would be passed on to Big Rivers' three distribution cooperative owner-members and those costs would ultimately be recovered through the rates charged to the retail consumers of those distribution cooperatives.

Despite their attempts to do so, the parties have been unable to reach an agreement on the issue of whether the Power Sales Contract requires Big Rivers to pay the variable costs of Excess Henderson Energy that is not taken by Big Rivers. Given the parties' inability to settle their differences, the Commission must now address Big Rivers' application for a declaratory order. It is well settled law that in the absence of ambiguity, the terms of a contract should be interpreted by assigning language its ordinary meaning and without resort to extrinsic evidence.[47] Having reviewed the record and, in particular, the 1998 amendments to the Power Sales Contract, the Commission finds that the clear and unambiguous terms as set forth in Section 3.8 of the 1998 amendments allow Big Rivers the option, at its discretion, to either take or decline to

[47] *Board of Trustees of Kentucky School Boards Insurance Trust v. Pope*, 528 S.W.3d 901, 906 (Ky. 2017).

take any Excess Henderson Energy. Section 3.8(a) of the 1998 amendments provides that "[i]n the event that...[Henderson] does not take the full amount of energy associated with its reserved capacity from Station Two . . .Big Rivers may, at its discretion, take and utilize all such energy...not scheduled or taken by [Henderson] (the "Excess Henderson Energy")" A plain reading of this section reveals that Excess Henderson Energy constitutes energy 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.

The Commission further finds that Big Rivers is not required to pay for any variable costs associated with Excess Henderson Energy that Big Rivers elects not to take. Section 3.8(d) of the 1998 amendments provides, in relevant part, as follows:

> [Henderson] further agrees that it shall not at any time be permitted to sell or commit to any person other than Big Rivers any Excess Henderson Energy without having first offered Big Rivers the opportunity to purchase such Excess Henderson Energy. Big Rivers shall have a reasonable period of time after submission of the City's scheduled energy requirements to decide whether to purchase any Excess Henderson Energy not scheduled by [Henderson]. Big Rivers agrees to notify [Henderson] thereafter if it does not intend to purchase such energy, and agrees to give [Henderson] a response within a reasonable time so that [Henderson] may take efforts to resell this power to third-parties.

This section clearly and unambiguously provides Big Rivers the discretion to purchase or not to purchase any Excess Henderson Energy. Because the Power Sales Contract requires each party to pay for the variable costs associated with the power

Exhibit Heimgartner-3

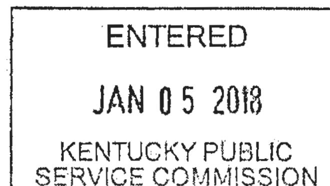
taken or used by that party during any month, the Commission finds that Big Rivers is not obligated, under the express terms of the Power Sales Contract, as amended, to pay for any Excess Henderson Energy that is declined to be taken by Big Rivers at its discretion.

IT IS THEREFORE ORDERED that:

1. Big Rivers request for a declaration that, under the terms of the Power Sales Contract, as amended, it is not required to pay for any variable costs associated with Excess Henderson Energy that it declines to take is granted.

2. Big Rivers alternative request that, in the event that the Commission finds that Big Rivers is required to pay for the variable costs associated with Excess Henderson Energy, the Commission declare the provision not fair, just, and reasonable, is denied as moot.

By the Commission



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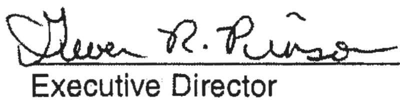

Executive Director

201 Third Street
P.O. Box 24
Henderson, KY 42419-0024
270-827-2561
www.bigrivers.com

February 16, 2018

Mr. Chris Heimgartner
General Manager
Henderson Municipal Power & Light
P.O. Box 8
Henderson, KY 42419

Mayor
City of Henderson
222 First Street
Henderson, KY 42420

FOR SETTLEMENT PURPOSES ONLY

Re: Summary of Revenue & Costs Associated with Excess Henderson Energy – June 2016 – December 2017

Gentlemen:

As you will recall, I notified you by letter dated May 25, 2016 that effective June 1, 2016, Big Rivers Electric Corporation (hereinafter "Big Rivers"), from time to time, may not take and utilize the full amount of Excess Henderson Energy[1] generated from Station Two as Big Rivers had voluntarily done in the past. That letter also stated that in the event Excess Henderson Energy is generated that Big Rivers does not take pursuant to Section 3.8(a) of the Power Sales Contract, Big Rivers' position was that the City would remain responsible for the Variable Costs attributable to the Excess Henderson Energy in accordance with the terms of the various agreements between the parties. The City disagreed with Big Rivers' position and since that time, the City has refused to pay the Variable Costs of the Excess Henderson Energy that Big Rivers declined to take in accordance with the terms of the Power Sales Contract. In light of the dispute between the parties on this issue, in July 2016, Big Rivers sought a declaratory order from the Kentucky Public Service Commission on the issue of responsibility for Variable Costs associated with Excess Henderson Energy that Big Rivers declined to take under the Power Sales Contract. On January 5, 2018, the Commission entered an Order which granted the relief sought by Big Rivers, namely that Big Rivers was not responsible for the Variable Costs associated with Excess Henderson Energy that Big Rivers declines to take under the Power Sales Contract.

Since June 1, 2016 and through December 31, 2017, in order to continually operate Station Two during this time period in the manner directed by the City, Big Rivers supplied coal, fuel oil and reagent at its own cost and expense to generate Excess Henderson Energy on behalf of the City that Big Rivers did not ultimately take. Because this Excess Henderson Energy was unwanted by either party, it was sold into the MISO market so that the revenues could be used to offset the costs associated with generating it. I have attached to this letter a Summary of Revenue and Costs associated with this unwanted Excess Henderson Energy (Exhibit "A") for your review and consideration.

As you can see, Big Rivers has presented this information in two formats. The first calculation assumes that the City's fuel and lime inventories were used when available to generate the unwanted Excess

[1] All capitalized terms in this letter have the same meaning as contained in my May 25, 2016 letter to Gary Quick.

Exhibit Heimgartner-4

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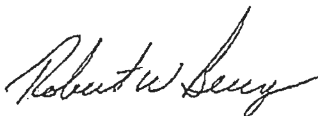
Henderson Energy, and Big Rivers only supplied the difference. The second calculation assumes that the City's fuel and lime inventories were never used, regardless of whether or not they were available, and Big Rivers instead supplied all of the coal and lime used to generate the unwanted Excess Henderson Energy on behalf of the City. Under the first scenario, the City will be due $7,771.55, but will have significant adjustments to make to its fuel and lime inventories. Specifically, the fuel inventory will need to be adjusted to 38,003.27 tons, and the lime inventory will need to be adjusted to 3,773 tons as of December 31, 2017. Under the second scenario, the City's fuel and lime inventory will remain as they were as of December 31, 2017, but the City will owe Big Rivers damages in the amount of $3,069,203.62. In either scenario, the calculations reflect that Big Rivers will retain the MISO revenue associated with the unwanted Excess Henderson Energy as an offset to variable costs as shown on Exhibit A. Please note that Exhibit A does not include certain expenses associated with unwanted Excess Henderson Energy (i.e., fixation lime, sludge, grit, etc.). These expenses are part of the fiscal year end settlement process, and Big Rivers expects the City to remain responsible for these expenses associated with the generation of unwanted Excess Henderson Energy in the same proportion during the annual settlement process.

In addition to the above, and as we have discussed on multiple occasions, Big Rivers has also incurred expenses each year since 2013 associated with securing additional capacity (i.e., System Reserves) on account of the City's load as required by the MISO tariff. As of February 13, 2018, these expenses totaled $203,655.82 and remain unpaid by the City. I have attached to this letter an invoice detailing these unpaid MISO Capacity Purchase charges (Exhibit "B"). Finally, I am attaching a separate invoice to this letter associated with the low chlorine coal shortfall that the City incurred during the month of January 2018 (Exhibit "C"). As you will recall, the City did not have enough low chlorine coal delivered to Station Two during the month of January to blend with its higher chlorine coal on the ground, thereby creating a shortfall of blended coal which is necessary to enable Station Two to remain compliant with environmental regulations. As such, Big Rivers was required to supply the City with the necessary low chlorine fuel needed during the month of January in order to continue operating Station Two in accordance with the direction of the City and environmental regulations. This resulted in additional costs to Big Rivers totaling $486,236.25.

After you've had a chance to review this information, please contact me at your earliest convenience to discuss any questions that you may have as well as to discuss how the City would like to resolve these outstanding issues moving forward. I look forward to hearing from you soon.

Respectfully,



Robert W. Berry
President and CEO
Big Rivers Electric Corporation

Attachments

EXHIBIT A

Big Rivers Electric Corporation
Summary of Revenue & Costs associated with Excess Henderson Energy*
June 2016 - December 2017

HMPL Coal When Available		
Revenues:		
	MISO Rev for Unwanted EHE	$10,696,158.05
	Subtotal Revenue	**$10,696,158.05**
Costs:		
	Coal Shortfall	($8,741,528.17)
	Lime Shortfall	($915,742.28)
	Fuel Oil (Load & Unwanted EHE)	($600,933.26)
	2016 Coal Stock Pile Inventory Adj	($430,182.79)
	Subtotal Costs	**($10,688,386.50)**
	Net due HMPL	**$7,771.55**

	HMPL
Station II Coal Inventory Tons as of 12/31/17	38,003.27
Station II Lime Inventory Tons as of 12/31/17	3,773.00

BREC Supplies All Coal		
Revenues:		
	MISO Rev for Unwanted EHE	$10,696,158.05
	Subtotal Revenue	**$10,696,158.05**
Costs:		
	Coal Burn	($11,730,611.52)
	Lime Burn	($1,433,816.89)
	Fuel Oil (Unwanted EHE Only)	($198,428.78)
	Fuel Oil (HMPL Load)	($402,504.48)
	Subtotal Costs	**($13,765,361.67)**
	Net due BREC	**($3,069,203.62)**

	HMPL
Station II Coal Inventory Tons as of 12/31/17	80,812.23
Station II Lime Inventory Tons as of 12/31/17	8,502.00

Note:
* This summary excludes some expenses (Fixation Lime, Sludge, Grit, etc) associated with Excess Henderson Energy. These expenses are part of the fiscal year end settlement process.

Exhibit Heimgartner-4

Sharon Farmer

From: Jim Miller <jmiller@smsmlaw.com>
Sent: Friday, November 10, 2017 11:16 AM
To: Randall Redding
Cc: Sharon Farmer; Mike Sullivan
Subject: RE: Release and Settlement Agreement

Randall,

We have reviewed your proposed edits to the settlement agreement with Big Rivers. Big Rivers is unwilling to accept the edits to the second recital in front of the definition of Disputed Excess Energy. There is no way to know or determine what energy HMP&L has "scheduled" or "taken" since 2009. That was one of the issues in the arbitration. Big Rivers' position is that nothing in this settlement agreement affects or has anything to do with the PSC case. Big Rivers is willing to sign the settlement agreement in the form you returned with your message on November 8, if the words "and which Henderson desires to take and schedule for sale" are removed from the second recital.

Jim

James M. Miller
Sullivan, Mountjoy, Stainback & Miller, P.S.C.
100 St. Ann Street (42303)
P. O. Box 727
Owensboro, Kentucky 42302-0727
Telephone (270) 926-4000
Direct Dial (270) 691-1640
Fax (270) 683-6694

SULLIVAN, MOUNTJOY, STAINBACK & MILLER

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From: Randall Redding [mailto:rredding@kdblaw.com]
Sent: Wednesday, November 08, 2017 3:33 PM
To: Jim Miller
Cc: Sharon Farmer
Subject: Release and Settlement Agreement

Dear Jim,

Exhibit Heimgartner-5

In an effort to avoid confusion concerning the nature of the claims covered in this Release and Settlement Agreement, we would like to make clear that it is Henderson's intent to release all claims related to the energy which was within Henderson's reservation and which Henderson would have called for or sold.

It is not HMP&L's intent to accept responsibility for variable costs associated with that energy which neither party wanted or wants.

With that in mind, we have added language in the recital in an attempt to clarify that distinction.

We are hopeful that this additional clarification will resolve our issues and allow the parties to execute the Release and Settlement Agreement.

If you have any questions, please feel free to contact us.

Sincerely yours,

KING, DEEP & BRANAMAN
Hon. H. Randall Redding
127 N. Main Street
Henderson, KY 42420
270-827-1852
Fax 270-826-7729
rredding@kdblaw.com

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FOR SETTLEMENT PURPOSES ONLY

April 11, 2019

COPY

Mr. Chris Heimgartner
Henderson Municipal Power & Light
P.O. Box 8
Henderson, KY 42419-0008

Mayor Steve Austin
City of Henderson
222 First Street
Henderson, KY 42420

Gentlemen:

As you know, on March 21, 2019, Chris emailed me a redlined version of the comprehensive term sheet showing the City's proposed changes, along with a proposed Exhibit A. Unexpectedly, two weeks later on April 5th, Randall Redding sent to Big Rivers' outside counsel a letter proposing to resolve the Excess Henderson Energy issue in a manner that is contradictory to Chris' March 21st term sheet.

Needless to say, I am confused by the City's current settlement offer for a number of reasons:

1. I am uncertain why the City is tendering multiple disparate offers as proposed by what appears to be two different decision makers,

2. The City appears to continually change its preferred "all-or-nothing" settlement structure. As you recall, during the January 15th meeting in the Mayor's office, Chris expressed a desire to settle in piecemeal a few agreeable issues rather than a comprehensive settlement of all issues. However, in an email from Chris dated March 1st, the City refused to even proceed with the asbestos abatement absent the larger settlement. Now, Randall's letter appears to attempt to resolve only the Excess Henderson Energy issue, rather than the all-or-nothing settlement approach expressed by Chris on March 1st, and as proposed on March 21st, and

3. The City's offers regarding the Excess Henderson Energy issue appear to contradict one another. Chris' March 21st term sheet proposes that Big Rivers retain all revenues, and be responsible for all variable costs associated with the production of Excess Henderson Energy. Conversely, Randall's April 5th letter proposes that HMP&L receive the MISO revenues, and HMP&L will be responsible for all variable cost associated with the production of Excess Henderson Energy including all costs when HMP&L did not have sufficient coal and reagents to produce the

Exhibit Heimgartner-6

generation. As I have previously stated, for settlement purposes, Big Rivers is indifferent as to whether HMP&L or Big Rivers receives the MISO revenues as long as the same party also supplies the coal and reagents for purposes of generating the Excess Henderson Energy.

I need to understand the City's position, and clarify the above confusion, if we are to continue settlement discussions.

Further, as a partial response to Randall's April 5th letter, I would like to point out that my February 16, 2018 letter, which expressly states that it is for settlement purposes only, included as an exhibit a "Summary of Revenue & Costs associated with Excess Henderson Energy" from June 1, 2016, through December 31, 2017. That exhibit presented two scenarios: one assuming that HMP&L's fuel and lime inventories were used when available to generate the unwanted Excess Henderson Energy, with Big Rivers only supplying the difference; and the other assuming that Big Rivers supplied all of the coal and lime used to generate the unwanted Excess Henderson Energy on behalf of the City.

I explained in my February 16, 2018 letter that under the first scenario, HMP&L would be required to make adjustments to its fuel and lime inventories to reflect that its fuel and lime were used, when available, to generate the unwanted Excess Henderson Energy; that the calculation that was presented assumed Big Rivers would retain all MISO revenues associated with the unwanted Excess Henderson Energy as an offset to the costs shown in the calculation; and that the calculation did not include other expenses associated with the unwanted Excess Henderson Energy (such as fixation lime, sludge, grit, etc.) that are part of the fiscal year-end settlement process and for which HMP&L would remain responsible. My February 16, 2018 letter also referenced additional damages Big Rivers has suffered, such as MISO Capacity Purchase charges that Big Rivers incurred to secure additional capacity on account of HMP&L's load and the cost Big Rivers incurred to supply low-chlorine coal that the City failed to supply.

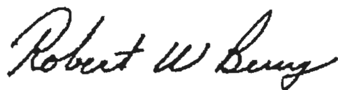
Since HMP&L has previously denied any responsibility for the costs associated with the unwanted Excess Henderson Energy, I was pleased that Randall's April 5th letter stated that the first scenario from my February 16, 2018 letter "accurately reflects the events as they occurred, and is the way in which revenue and costs associated with the generation of unwanted Excess Henderson should be calculated." From this language, it is clear that HMP&L now agrees with the amount of unwanted Excess Henderson Energy reflected in Big Rivers' invoices, that that energy belongs to HMP&L, that HMP&L is responsible for the variable costs associated with that energy, and that Big Rivers may credit the MISO revenue from the sale of unwanted Excess Henderson Energy against the variable costs incurred by Big Rivers associated with that energy. An updated Exhibit "A" summary reflecting all of the activity through January 31, 2019, is enclosed. Given these acknowledgements, I feel we are very close to an agreement on the Excess Henderson Energy issue and may be able to resolve Big Rivers' counterclaim currently pending in Franklin Circuit Court without either party having to incur the costs of further litigation.

Also, Randall's letter did not mention that the City would make an adjustment to its fuel and lime inventories, nor did it mention the other revenues, expenses, and damages referenced in my February 16, 2018 letter.

I think the best way to clarify the confusion and to resolve the remaining details is to get the decision makers from both sides in a room together. I am requesting that both parties come to the meeting with the objective to either come to a settlement or agree that a settlement is not achievable and it is time to go to court. As I mentioned in my April 5, 2019 email to Chris, we can meet at Big Rivers, and we will make a breakout room available for your team to have private discussions during the process.

Please provide some dates and times that work for you, and we will get the meeting scheduled.

Respectfully,



Robert W. Berry
President and CEO
Big Rivers Electric Corporation

Enclosure
c: H. Randall Redding
Sharon W. Farmer

EXHIBIT A

Big Rivers Electric Corporation
Summary of Revenue & Costs associated with Excess Henderson Energy*
June 2016 - January 2019

HMPL Coal When Available

Revenues:	
MISO Rev for Unwanted EHE	$16,955,597.28
BREC EHE Utilization ($1.50/MWh)	$88,191.00
Subtotal EHE MISO Revenue	**$17,043,788.28**
Costs:	
Coal Shortfall	($12,790,320.29)
Lime Shortfall	($915,742.28)
Fuel Oil	($1,489,602.65)
2016 Coal Stock Pile Inventory Adj	($430,182.79)
2018 Coal Stock Pile Inventory Adj	($124,300.00)
2019 Coal Stock Pile Inventory Adj	($52,525.00)
2019 Coal Stock Pile Inventory Survey Cost	($7,531.50)
Subtotal Costs	**($15,810,204.51)**
Net due HMPL	**$1,233,583.77**

	HMPL Share
Station II Coal Inventory Tons as of 03/31/19	-
Station II Lime Inventory Tons as of 03/31/19	481.00

BREC Supplies All Coal

Revenues:	
MISO Rev for Unwanted EHE	$16,955,597.28
BREC EHE Utilization ($1.50/MWh)	$88,191.00
Subtotal EHE MISO Revenue	**$17,043,788.28**
Costs:	
Coal Burn - EHE	($15,616,275.80)
Lime Burn - EHE	($2,163,773.85)
Fuel Oil (Unwanted EHE Only)	($569,558.76)
Fuel Oil (HMPL Load)	($920,043.89)
2019 Coal Stock Pile Inventory Survey Cost	($7,531.50)
Subtotal Costs	**($19,277,183.80)**
Net due BREC	**($2,233,395.52)**

	HMPL Share
Station II Coal Inventory Tons as of 03/31/19	48,278.42
Station II Lime Inventory Tons as of 03/31/19	10,147.00

Note:
* This summary excludes some expenses (Fixation Lime, Dredge, Sludge, Grit, etc) associated with Excess Henderson Energy which are part of the fiscal year end settlement process. Additionally, this summary excludes other costs including, but not limited to, capacity purchases ($203,655.82), transmission charges ($1,422,761.54) and auxiliary power.

Exhibit Heimgartner-6