COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

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

AMENDED DIRECT TESTIMONY

OF

CHRISTOPHER HEIMGARTNER
GENERAL MANAGER OF HENDERSON MUNICIPAL POWER & LIGHT

ON BEHALF OF

INTERVENOR CITY OF HENDERSON, KENTUCKY, AND
HENDERSON UTILITY COMMISSION d/b/a
HENDERSON MUNICIPAL POWER & LIGHT

DIRECT TESTIMONY

OF

CHRISTOPHER HEIMGARTNER

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I. INTRODUCTION

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

A. My name is Christopher Heimgartner. I am the General Manager of Henderson Municipal Power & Light ("HMP&L"), an electric utility owned by the City of Henderson and governed by the City of Henderson Utility Commission (jointly "Henderson"). The utility is located at 100 Fifth Street, Henderson, Kentucky, 42420. I have held the position of General Manager since 2017. Since that time, I have overseen the negotiation and implementation of power-supply contracts to serve the City of Henderson and its inhabitants following the closure of the Station Two generating plant. I have also overseen the utility's integration into the Midwest ISO (MISO) market and the requisite designation of HMP&L as a market participant for the purpose of securing an additional power supply capable of meeting the needs of the utility's 12,000 customers. My responsibilities also include oversight of all other utility operations, including compliance, safety, emergency response and mutual aid, and board and community relations. I am familiar with the Station Two contracts as well as the numerous and complicated disputes that still exist between Henderson and Big Rivers and that Big Rivers is now asking the Commission to settle, manage, and oversee, presumably forever. Prior to serving as HMP&L's General Manager, I was employed for 25 years in various capacities with Pacific Gas & Electric Co., first as an engineer and later as a superintendent overseeing gas and electric operations and construction and maintenance crews in a high-growth area. I then spent three years as Customer Service and Energy Delivery Officer for Seattle City Light. After that, I served as Assistant General Manager of Distribution and Engineering Services for Snohomish County Public Utility District in Everett, Wash., from 2009 until 2016. All told, I have some 39 years of experience in the utility industry.

II. PURPOSE OF TESTIMONY

Q. What is the purpose of your testimony?

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

Q. Are you sponsoring any exhibits?

A. Yes. I have prepared the following exhibits:

- Exhibit Heimgartner-1: Resume

- Exhibit Heimgartner-2: May 25, 2016, letter
- Exhibit Heimgartner-3: PSC Order dated January 5, 2018
- Exhibit Heimgartner-4: February 16, 2018, letter
- Exhibit Heimgartner-5: November 10, 2017 email
- Exhibit Heimgartner-6: April 11, 2019, letter

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

A. The following witnesses will provide additional testimony:

- Barbara Moll, Chief Financial Officer for HMP&L. Ms. Moll will verify the accuracy of the figures contained in the HMP&L Accounting Summary and will provide the methodology used to arrive at the amounts owed between HMP&L and Big Rivers to resolve their financial disputes.
- Brad Bickett, Reliability Compliance Manager for HMP&L. Mr. Bickett will confirm the adequacy of HMP&L's capacity reservation prior to the closure of Station Two and HMP&L's compliance with regulatory requirements for operating reserves. Mr. Bickett will identify and describe those Midcontinent Independent System Operator Inc. ("MISO") fees which Big Rivers incurred and which are attributable to HMP&L's load and will provide the correct calculation of MISO fees owed to Big Rivers.
- Seth Brown, Vice President of Transmission Services Department for GDS Associates Inc. Mr. Brown will describe two (2) specific types of MISO fees (Schedule 17 fees and Schedule 23 fees) that together account for a substantial portion of the fees Big Rivers seeks to recover from HMP&L and will explain why recovery of those fees would constitute a double recovery in violation of the MISO tariff.

III. RELATIONSHIP OF THE PARTIES

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

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

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

Energy (WKE), paid Henderson $6,250,000 on behalf of Big Rivers pursuant to the terms of a 2009 Indemnification Agreement in which WKE indemnified Big Rivers for any losses Big Rivers might suffer in the event Big Rivers were deprived of the ability to take and sell Excess Henderson Energy and to pay Henderson the nominal sum of $1.50 per megawatt hour.

During the time the parties were litigating their rights with respect to energy both parties wanted, market forces were creating a new category of energy which was not contemplated and not in existence at the time the Station Two contracts were drafted and executed and which was not considered an issue in the Settlement Agreement: unprofitable energy unwanted by either party. This new category of energy gave rise to a new dispute concerning which party should have to take and pay for energy which was not wanted by either party, but which had to be generated to keep the Station Two units in continuous operation under the terms of the contracts. Big Rivers responded by notifying Henderson that, beginning on June 1, 2016, it would no longer take and sell Henderson's energy unless the energy happened to be profitable. Otherwise, Big Rivers would sell the unwanted energy into the market on Henderson's behalf and allocate to Henderson the revenues, minus variable production costs. The new strategy would enable Big Rivers to preserve its ability to capture profits when the market was strong and shift losses to Henderson when the market was weak. The May 25, 2016, letter in which Big Rivers announced its new practice is attached as Heimgartner Exhibit -2. Big Rivers later confirmed to the Commission that, also beginning on June 1, 2016, Big Rivers had changed the sequence in which it generated power from Station Two. Historically, Big Rivers operated Station Two so as to first generate the energy Henderson needed to serve its native load, followed by energy associated with the Station Two capacity allocated to Big Rivers. Any excess associated with Henderson's reserved capacity was generated last. Beginning on June 1, 2016, Big Rivers arbitrarily flipped the generation sequence so that all unwanted energy was generated immediately after Henderson's native load so as to ensure the unwanted energy was assigned to Henderson's capacity reservation. This meant the units, when operated at what Big Rivers represented to be minimum operating levels, would produce little or no uneconomic energy attributable to Big Rivers' allocation. And yet Big Rivers would retain the ability to cherry pick profitable energy with wide profit margins. The change in generation sequence violated the practice Big Rivers had agreed to follow under its Indemnification Agreement with WKE and violated the course of dealing the parties had followed for more than four decades.

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

> "The difference in the definitions, which centers on whether energy within Henderson's reserved capacity that is subject to a third party sale is characterized as Excess Henderson Energy, is immaterial to the question of who is responsible for the variable costs of producing energy within Henderson's capacity reservation that neither Henderson nor Big Rivers wants. Henderson acknowledges that it is responsible for the variable costs of energy it sells to a third party. It is the responsibility for the variable costs of producing the remaining Excess Henderson Energy, <u>which I refer to as the "unwanted Excess Henderson Energy</u>," that is the

> subject of this proceeding." (PSC Case No. 2016-278, Rebuttal Testimony of Robert W. Berry, p. 7, lines 11-18).

Big Rivers represented to the Commission both in its application and in sworn testimony that its newly minted practice was to sell unwanted energy on Henderson's behalf and credit Henderson with the revenue to offset variable production costs. For example, Mr. Berry testified in response to a question from Commission counsel at the February 7, 2017, hearing on Big Rivers' application:

> Q. For the actual costs of the coal and reagent that is being used to generate the energy attributable to Henderson, are those costs being netted in any way from the energy that Big Rivers uses to sell into the market?
>
> A. We are, we are netting the cost with Henderson on the MISO revenues that we receive from that energy going into MISO. We net that difference between that revenue and the expense of the refuel and reagent and send Henderson checks, although they have returned those checks. (PSC Hearing, Case No. 2016-278 Robert W. Berry testimony at 25:12 through 25:56; February 7, 2017)

On January 5, 2018, three weeks after the parties had executed the December 2017 Settlement Agreement resolving the Henderson Circuit Court dispute involving *wanted* energy, the Commission entered an Order finding Big Rivers not obligated to take or pay the variable costs of producing *unwanted* energy. The language of the 2018 PSC Order confirms that any energy Henderson wanted to take and schedule for sale to a third party, i.e. wanted energy, was excluded from the issue Big Rivers had asked the Commission to decide. The issue before the Commission was whether Big Rivers was responsible for paying the variable production costs of energy neither party wanted to take or sell. This issue was separate and distinct from the issue Henderson had raised in the Henderson Circuit Court claim, namely Henderson's right to receive revenue associated with the energy Henderson wanted to access and had a contractual right to take and sell.

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

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

Had the claim involved energy Big Rivers did not want and could not have sold at a profit, E.ON would not have paid a settlement.

Nevertheless, letters from Big Rivers to Henderson dated after the date of the Commission's Order began to characterize the remittance of the unwanted-energy revenue as a "settlement" offer. The revenue Big Rivers told the Commission it was passing through to Henderson now became leverage to extract further concessions from Henderson. A letter dated February 16, 2018, attached to my testimony as Heimgartner Exhibit-4, includes an exhibit reflecting the net amount due Henderson as a result of Big Rivers' having used Henderson's coal and lime to generate unwanted energy until Henderson's supply was depleted and then supplying the shortfall. However, the offer to remit the revenue was conditioned upon Henderson's acceptance of other proposed settlement terms.

Big Rivers was aware prior to the signing of the Settlement Agreement that the only dispute addressed in the settlement was the dispute involving wanted energy and raised in Civil Action No. 09-CI-693. Not only does the Settlement Agreement explicitly say so, but Big Rivers' counsel acknowledged in an email dated November 10, 2017, that "nothing in this settlement agreement affects or has anything to do with the PSC case." A copy of the email is attached to my testimony as Heimgartner Exhibit-5. Big Rivers cannot assert the Settlement Agreement as a basis for its position and yet ask the Commission to interpret the agreement. Jurisdiction over the substance and scope of the Settlement Agreement likely lies with the Henderson Circuit Court.

In the absence of Henderson's agreement to accept other liabilities, Big Rivers now wants Henderson to pay millions to reimburse Big Rivers for coal and lime purportedly 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.

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

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

Big Rivers appears to take the position that no dispute involving Big Rivers should escape Commission scrutiny. An examination of the Commission's mission points to the reason. The Commission's mission statement plainly states the Commission's charge is to "foster the provision of safe and reliable service at a reasonable price to the customers of jurisdictional utilities while providing for the financial stability of those utilities by setting fair and just rates, and supporting their operational competence by overseeing regulated activities." Big Rivers is well aware of the standard the Commission must apply and repeatedly exploits the Commission's mission to Big Rivers' advantage. Big Rivers has made a routine practice of manipulating its contractual relationship with Henderson to Big Rivers' advantage and then bringing the inevitable dispute to the Commission under the guise of a rates and service issue. Because Henderson is being treated as a jurisdictional utility based on the alleged contractual impact on Big Rivers' rates and service, Henderson's customers should be afforded the same standard of reasonableness and fairness as Big Rivers' customers and Henderson should be subject to the same standard of fairness as any other regulated utility.

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

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

A. Henderson has appealed the Commission's Order issued in Case No. 2016-278 to the Franklin Circuit Court on jurisdictional and other grounds and has asked the Court to set aside the Order. Big Rivers has filed a Counterclaim to enforce the Order and recover the variable production costs of unwanted energy. Henderson has filed a responsive Counterclaim to demonstrate that the amount of revenue Big Rivers received from the sale of unwanted energy exceeded the variable costs of producing that energy and that Big Rivers thus could not maintain a claim. The appeal and counterclaims are stayed pending the Commission's decision in this proceeding.

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

Two other actions remain pending in the Webster Circuit Court. In the first, Henderson is seeking a declaratory order concerning the validity of a provision in the Station Two deed, which provides that title to the Station Two property shall revert to Big Rivers when plant operations cease and when bonds related to the completion of Station Two are retired. On July 2, 2020, the Court issued an Order confirming the validity of the reversion provision. The Court found questions of fact concerning the date plant operations ceased and the date related bonds were retired and denied competing motions for Summary Judgment. A copy of the July 2, 2020, Order is attached hereto as Exhibit Heimgartner-7. The second action pending in the Webster Circuit Court is Henderson's request for a declaratory order that Henderson has correctly calculated its share of expenses related to closure and post-closure care of the Reid-HMPL Ash Pond.

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

A. Henderson has communicated to Big Rivers its interest in a fair settlement of all issues on numerous occasions. However, the only resolution that appears to interest Big Rivers is one in which Henderson incurs unlimited expense without a contractual obligation to do so and without receiving a corresponding benefit. As a steward of public funds, Henderson cannot and will not voluntarily obligate our ratepayers to subsidize Big Rivers' members.

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

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

At the request of Henderson Mayor Steve Austin, Henderson and Big Rivers recently attempted to renew settlement negotiations, but the attempt was not successful. Henderson has suggested to Big Rivers that the parties try to resolve the dispute in mediation, but Big Rivers has declined the offer. Given the complexity and scope of the issues, it seems reasonable that an experienced mediator would be better suited to resolve these contractual, environmental, decommissioning, and financial issues than an agency focused on rates and service issues.

IV. UNWANTED ENERGY VARIABLE COSTS AND REVENUE

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

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

Henderson's appeal of the Commission's Order remains pending and Henderson has not accepted responsibility for the variable costs at issue in Case No. 2016-278. Even if Henderson were to accept responsibility for those costs, however, Big Rivers has taken a position contradictory to the position it took before the Commission and now claims any revenue that would be due Henderson was included in the resolution of the wanted-energy claim. (Direct Testimony of Paul Smith, p. 7, lines 4-19; Big Rivers response to Item No. 13 of Henderson's First Data Requests).

In a letter dated April 11, 2019, attached to my testimony as Exhibit Heimgartner-6, Big Rivers provided Henderson with an updated version of the Exhibit A attached to its letter of February 16, 2018. The updated exhibit again indicates that Big Rivers used Henderson's supply of coal and lime to generate unwanted energy until the supply was depleted and then used Big Rivers' coal and lime to generate the remainder. The exhibit reflects Big Rivers' receipt of MISO revenue in the sum of $16,955,597 for the sale of unwanted energy from June 1, 2016, the date Big Rivers implemented its new practice, through January 31, 2019, the date Station Two ceased operation. Big Rivers has acknowledged that Henderson is entitled to the MISO revenue, less variable costs, associated with unwanted energy generated after the date of the 2017 settlement payment. Accordingly, Big Rivers has credited Henderson for revenue net of costs in the amount of $3,310,482 for that time period in the Interim Accounting Summary attached to the Direct Testimony of Big Rivers Chief Financial Officer Paul Smith in Big Rivers' pending application. The exhibit indicates that Big Rivers made up coal and lime shortfalls after Henderson's supply was depleted and paid other costs so that the total cost to Big Rivers of generating unwanted energy from June 1, 2016, through January 31, 2019, was $15,810,204. It is important to note that these figures do not account for the $2,149,084 in Henderson-owned coal and $1,351,135 in Henderson-owned lime Big Rivers purportedly used to generate unwanted energy before declaring Henderson's supply depleted. Under this scenario, Henderson must pay $15,810,204 in variable costs and must write off coal and lime totaling $3,500,219. Henderson also would have to accept payment of $88,191 for energy Big Rivers elected to take and which produced net revenue to Big Rivers totaling $2,482,079 (Big Rivers' response to Item No. 11 of Henderson's First Data Requests). Meanwhile, Big Rivers would enjoy a windfall of $10,696,158 in sales revenue for energy Henderson paid to generate. If Henderson is to consider accepting Big Rivers' position and incur responsibility for the variable production costs of unwanted energy, then Big Rivers must remit to Henderson the full amount of revenue collected since June 1, 2016 - including the $10,696,158 collected from June 1 through December 31, 2017 - and not just the $6,259,439 collected after the date of the settlement payment and already credited to Henderson's account. As Big Rivers correctly represents in Exhibit Moll-2, this calculation results in a net total payment from Big Rivers to Henderson in the amount of $1,233,584, not including the coal and lime Henderson would have to write off. The payment would have to be made and not conditioned upon any other settlement terms.

V. BUDGET SETTLEMENTS FOR FISCAL YEARS 2018 AND 2019

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

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

VI. MISO FEES

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

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

VII. DECOMMISSIONING COSTS

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

A. Section 8 of the parties' Joint Facilities Agreement provides for the parties to share decommissioning costs in the proportion in which they shared capacity during the life of Station Two. Henderson's position is that the Station Two plant has been decommissioned since the plant was brought to "safe, dark, and dry" status in April 2019. Big Rivers has not cited any legal requirement or industrywide justification for the plant to be decommissioned in the manner or to the extent Big Rivers recommends, nor is there a requirement that activities associated with decommissioning be completed on a particular timeline. Additionally, the Webster Circuit Court on July 2, 2020, upheld the validity of a deed provision calling for title to the Station Two property to revert to Big Rivers when plant operations cease and when bonds related to the completion of the plant are retired. The plant ceased to operate on January 31, 2019, and has since been brought to "safe, dark, and dry" status. Station Two thus has been decommissioned. Upon transfer to Big Rivers, any decisions to perform further activities and any costs associated with those activities belong solely to Big Rivers.

VIII. SEVERANCE COSTS

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

A. Yes. As an employer who assigned a portion of its work force to staff Station Two, Big Rivers decided when the plant closed to offer severance packages to certain employees formerly assigned to the plant. Henderson has never knowingly paid severance costs for other Big Rivers employees and has no contractual obligation to do so. As a result, Henderson declined Big Rivers' invitation to share in the cost of the severance packages it had offered certain employees. Nevertheless, Henderson discovered in reviewing the proposed operating plan for Fiscal Year 2019 that Big Rivers had assigned Henderson a share of the severance costs, although the costs were not delineated as such. Even if Henderson were to agree to absorb a share of severance expenses, which it does not, its share would not be calculated the way Big Rivers wants. Not only are the costs calculated according to an improper capacity reservation, it is my understanding that some employees who received severance packages were categorized under the General and Administrative (G&A) budget, meaning Henderson paid a lesser percentage of their salaries during the life of Station Two. Big Rivers can reassign employees or incentivize separation in any manner it chooses. But Big Rivers is not entitled to assign unapproved costs to Henderson without contractual authority and with full knowledge that Henderson has no obligation to pay.

IX. GREEN LANDFILL

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

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

It is my understanding that Big Rivers has undertaken a three-phase expansion of its landfill, which is expected to extend the life of the landfill by some 20 years. My knowledge of this project is limited to that contained in the statements Big Rivers has made in its application and exhibits, along with its responses to data requests. There is nothing to indicate Big Rivers used competitive-bidding procedures to secure bids for the landfill project as Big Rivers would have to have done if Henderson were obligated to commit public funds to the project. However, to the best of my knowledge, there is nothing in the Station Two contracts that obligates Henderson to incur any additional expenses with respect to the operation or maintenance of the ash-pond dredgings, much less to continue incurring expenses for the next 20 years or more until Big Rivers decides to retire its landfill. Henderson has already paid the costs it was contractually obligated to pay with respect to the operation, maintenance, and disposal of the ash-pond dredgings.

X. JOINT-USE FACILITIES

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

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

XI. CONCLUSION

Q. Does this conclude your testimony?

A. Yes.

COMMONWEALTH OF KENTUCKY
WEBSTER CIRCUIT COUNTY
CIVIL ACTION NO. 18-CI-00200

ENTERED
JANET COLE, CLERK
JUL 0 2 2020
WEBSTER CIRCUIT CLERK
BY: PLAINTIFFS D.C.

CITY OF HENDERSON, KENTUCKY, ET. AL.,

V.

BIG RIVERS ELECTRIC CORPORATION DEFENDANT

ORDER

ORDER

This case comes before the Court on the both the Defendant's and the Plaintiffs' Motions for Summary Judgment. A hearing was held on this matter. All parties have fully briefed each issue before the Court. The Court has reviewed the motions and responsive pleadings, the record, all relevant law and being otherwise duly advised renders the following Opinion and Order.

INTRODUCTION

This case was initiated by the City of Henderson (hereinafter referred to as the "City") and City of Henderson Utility Commission, d/b/a Henderson Municipal Power and Light (hereinafter jointly referred to as "Henderson") seeking declaratory relief against Big Rivers Electric Corporation (hereinafter referred to as "Big Rivers"). On August 1, 1970, Henderson and Big Rivers entered into a series of contracts authorized pursuant to KRS 96.520, and providing in part for the construction, operation, and maintenance of two coal-fired generating units to be owned by the City (hereinafter referred to as "Station Two"), and to be located on real property owned by Big Rivers. One of the Station Two contracts is the Power Plant Construction and Operation Agreement (hereinafter referred to as the "C&O Agreement"), provides in Section 1.9 that "Big Rivers has agreed, subject to the terms of this Agreement that it

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Exhibit Heimgartner -7

will sell and convey such site and all required easements to City." Section 3.1 provides that "Big Rivers shall sell and convey to the City a site with necessary easements and rights-of-way for City's construction and operation of its Station Two, all in accordance with the parties Purchase-Sale Agreement of even date herewith." Section 13.1 provides, "except as otherwise provided herein, City shall have full ownership, management, operation, and control of its Station Two." Pursuant to Section 3.1 of the C&O Agreement, by deed dated March 18, 1971 (hereinafter referred to as the "Deed"), Big Rivers conveyed to the City two tracts of land on which the City constructed portions of its Station Two electric generating plant. Due to an error in the property description for the second tract, the parties executed a deed of correction dated December 9, 1971. The language in the Deed that is at issue provides in pertinent part:

> Big Rivers has bargained and sold and by these presents does hereby grant and convey unto City, its successors and assigns, **in fee simple** the following described tracts of land . . .
>
> **Provided, however, that upon the discontinuance by City**, its successors or assigns, of the use of said tracts of land, or either of them, for the operation and/or maintenance thereon of City's Station Two electric generating plant, units one and two only, or any related facilities thereof, and the retirement of all outstanding City of Henderson Electric Light and Power Revenue Bonds, Station Two Series, dated March 1, 1971, and any additional bonds which may be sold and issued by City for the completion of said Station Two electric generating plant, units one and two only, title to the above described tracts, or either of them, **shall revert to Big Rivers**, its successors or assigns, but with right of City, its successors or assigns, to remove any improvements placed thereon by it or them, provided, however, City shall not remove any facility installed by it which shall have become a joint-use facility with Big Rivers. [emphasis added by the Court].

Big Rivers also conveyed to City in this deed all easements and rights-of-way necessary for the construction, operation and maintenance of the portions of Station Two located on said real estate, and provided that those easements and rights-of-way would terminate upon the same terms and conditions set forth above. On May 1, 2018, Big Rivers notified Henderson that the Station Two units were no longer capable of normal, continuous, reliable operation for the economically competitive production of electricity, and that the Station Two contracts, with the exception of the Joint Facilities Agreement) had also terminated pursuant to their own terms. Also, on May 1, 2018, Big Rivers filed with the Kentucky Public Service Commission a "Notice of Termination of Contracts and Application of Big Rivers Electric Corporation for a Declaratory Order and for Authority to Establish a Regulatory Asset." The application sought a Commission finding supporting Big Rivers' determination that the Station Two units were no longer capable of normal, continuous, reliable operation for the economically competitive production of electricity and that, as a result, the contracts had terminated pursuant to the 1993 and 1998 contract amendments. On July 27, 2018, Big Rivers submitted a notice to the energy market operator Midcontinent ISO (MISO), stating an intent to retire the Station Two generating units, effective February 1, 2019. MISO thereafter approved the retirement of Station Two. In a letter dated October 8, 2018, MISO approved the retirement of the units, and advised that the retirement decision was final and would take effect on February 1, 2019. Henderson has stated it does not intend to exercise its right under the Deed to remove any improvements from the land. The City filed this action seeking a declaration of its rights under the Station Two deed and a determination that the land reverts to Big Rivers on February 1, 2019.

ARGUMENTS OF DEFENDANT, BIG RIVERS

Defendant argues that based on the unambiguous language in the Deed, there are only two possible interests that Big Rivers conveyed to the City, (1) a fee simple determinable with right of reverter in Big Rivers, or (2) a fee simple subject to Big Rivers' right of entry for condition broken. Because KRS 381.218 abolished the interest in real estate known as a fee simple determinable with right of reverter and converted that interest to a fee simple subject to a right of entry for condition broken, as a matter of law this Court should find that the Deed conveyed to the City a fee simple title in the real estate subject to Big Rivers' right of entry for condition broken. Also, because KRS 381.219 provides that this interest in real estate converts to a fee simple absolute if the contingency specified in the Deed does not occur within thirty years after its effective date, which is undisputed here, the Court should rule that the City now owns fee simple absolute title in the Real Estate.

Defendant argues that in the second paragraph of the Deed, Big Rivers conveyed a "fee simple" estate to the City. The Deed then provides a forfeiture provision conditioned on the occurrence of certain events. A fee simple estate that is not subject to forfeiture is known as fee simple absolute. Restatement of Property, Section 15, and Dennis v. Bird, 941 S.W.2d 486, 488-89. A fee simple estate subject to possible forfeiture is known as a fee simple defeasible, which is what City owns.

Kentucky law recognizes three types of fee simple defeasible estates in real property:

> A fee simple defeasible estate is a general type of estate and specifically includes a fee simple determinable estate, a fee simple subject to condition subsequent estate, and a fee simple subject to executory interest. With a fee simple determinable estate and a fee simple subject to a condition subsequent, the future interests created by these two defeasible estates are held by the grantor. By contrast, a fee simple estate subject to executory interest creates a future interest (executory interest) in favor of a second grantee.

Lee v. Tipton, 2012 Ky.App. LEXIS 72, *13, fn. 9. The third type of defeasible fee simple estate, fee simple subject to executory interest, does not apply here because with that estate the future interest is held by a second grantee, and here we only have one grantee, the City. *Id.* The other two, being a fee simple determinable and fee simple subject to condition subsequent, may apply.

Defendant argues that the grantor who conveys a fee simple determinable retains an interest called a possibility of reverter, whereby the fee simple interest conveyed to the grantee will automatically terminate at the occurrence of a specified event. Barren County Bd. of Education v. Jordan, 249 S.W.2d 814, 815 (Ky. 1952). The grantor conveying a fee simple subject to condition subsequent conveys a fee simple interest subject to the contingency of being defeated as provided in the condition, the grantor having the power to re-enter upon condition broken. Bd. of Councilmen of City of Frankfort v. Capital Hotel Co., 224 S.W. 197, 198 (Ky. 1920). Thus, the difference between these two fee simple interests is one automatically terminates on the happening of an event (fee simple determinable) and with the other an affirmative action is necessary to enforce the right on the happening of the event (fee simple subject to condition subsequent). Stumbo v. Bd. of Education of Floyd County, 200-CA-000559-MR, 2001 WL 34800010 (Ky.App. February 16, 2001); see also Dennis v. Bird, supra, at 489 ("Would it automatically terminate if A & B [grantees] moved or wanted to sell (fee simple determinable with possibility of reverter), or would O [grantor] have to take affirmative action to enforce his right (fee simple on condition subsequent with a power of termination/right of re-entry)?").

Defendant argues that while one may argue that the Deed conveyed to the City was a fee simple determinable since the Deed uses the word "revert," another may argue that the Deed conveyed to the City a fee simple subject to a condition subsequent since it used the words, "Provided, however, that upon…" when describing the conditions that would cause the City to forfeit its title. See, e.g., Bd. of Councilmen of City of Frankfort, supra, at 757 (the usual words of condition subsequent include "provided" and "upon"). However, the General Assembly rendered this issue moot when it enacted the 1960 Kentucky Perpetuities Act, KRS 381.218-381.222, and abolished the fee simple determinable estate. KRS 318.218 provides:

> The estate known at common law as the fee simple determinable and the interest known as the possibility of reverter are abolished. Words which at common law would create a fee simple determinable shall be construed to create a fee simple subject to right of entry for condition broken. In any case where a person would have a possibility of reverter at common law, he shall have a right of entry.

Thus, whether the language in a deed appears to create the fee simple determinable estate or the fee simple subject to condition subsequent, KRS 318.218 mandates that the estate shall be the latter.

Defendant argues that in the instant case, the unambiguous language in the Deed creates in the City a fee simple defeasible estate. First, the Deed confirms that the nature of the estate conveyed to the City is a fee simple estate. The granting clause found in the second paragraph of the Deed states "Big Rivers...does hereby grant and convey unto City...in fee simple the following described tracts of land...." Second, the deed provides that upon the occurrence of certain events, the "title to the above described tracts, or either of them, shall revert to Big Rivers." Thus, the Deed clearly describes both the estate conveyed to the City, a fee simple estate, and the language limiting that fee simple estate, i.e., a forfeiture of that title to Big Rivers if certain conditions occur. Pursuant to KRS 381.218, the Deed conveyed to the City a fee simple subject to a right of entry for condition broken, and Big Rivers has a right of entry.

Defendant further argues the City's estate converted to a fee simple absolute because the conditions set forth in the Deed did not occur within thirty years of the date of the Deed, March 18, 1971. KRS 381.219, which applies to rights of entry created after 1960, provides in pertinent part, "A fee simple subject to a right of entry for condition broken shall become a fee simple absolute if the specified contingency does not occur within thirty (30) years from the effective date of the instrument creating such fee simple subject to a right of entry." Because the condition for forfeiture contained in the Deed did not occur within thirty years of the date of the conveyance, City now owns a fee simple absolute interest in the real estate. What the parties might have envisioned at the time of the Deed has been superseded by KRS 381.218.

ARGUMENTS OF PLAINTIFFS, HENDERSON

Plaintiffs argue the language of the Deed is not ambiguous. The Deed plainly states that the property at issue shall revert to Big Rivers upon the discontinuance of its use for the operation and/or maintenance of the power plant. It must be assumed that the parties to a Deed intended each of its provisions to have some effect from the very fact that the words were used. Villas at Woodson Bend Condo. Ass'n v. S. Fork Dev. Inc., 387 S.W.3d 352, 357 (Ky. App. 2012). The rule is well settled that words in a Deed that are not technical must be construed as having their ordinary connotation. Id. The court is required to use the common meaning and understanding of the words utilized in a Deed and will not infer or substitute intent for what was actually said. Id.

Plaintiffs argue the only defense Big Rivers raises to the obvious interpretation of the Deed is that by statute the Deed must be interpreted as granting fee simple title to the City and that those portions of the conveyance relating to the return of title to Big Rivers should simply be ignored. This Court cannot do so. In fact, Big Rivers can only prevail if this Court takes the position that the statute in fact requires that all Deeds of the type described in the statute must now be interpreted as fee simple grants without conditions.

Plaintiffs argue that Big Rivers is mistaken in its argument that the statute operates to convert its interest into a right of entry that must be exercised if the reversion is to become effective. As pointed out earlier, KRS 381.218 is inapplicable to the case at bar, as the estate conveyed to Henderson was not a fee simple determinable, and the interest retained by Big Rivers was not a possibility of reverter, as those terms have been interpreted under Kentucky law. A simple reading of the Deed confirms this. The Deed does not speak of a contingency triggering a reversion. It speaks of reversion as a certainty. The word used is "upon" not "if." The Deed does not speak of the reversion as a possibility, but rather as an eventuality. The mandatory word "shall" is used, not something that can be read as creating an option. A reversionary interest is any future interest left in a transferor or his successor in interest. Brandt Trust v. United States, 572 U.S. 93, 105 (U.S. 2014). It arises when the grantor transfers less than his entire interest in a piece of land, and it is either certain or possible that he will retake the transferred interest at a future date. Id. The occurrence that triggers the automatic reversion here is not a contingency that the parties understood might happen, and also might not happen, as would be the case in the conveyance of a fee simple determinable estate. All generating plants have a finite lifespan, even if the precise lifespan of Station Two was unknowable at the time the Deed was drafted. Accordingly, the reversionary interest Big Rivers retained was more than the mere possibility of a possessory future interest associated with the interest known as a possibility of reverter. KRS 381.218 does not operate to convert the estate into a fee simple accompanied by a right of entry that Big Rivers would have to exercise to reacquire title. Big Rivers' reversionary interest in the Station Two property is, and always has been, a vested interest that becomes a possessory present interest by operation of law on the date operations and/or maintenance cease at Station Two. The end of the power plant's operating life is not a broken condition that allows Big Rivers an optional right of entry to reclaim the land. Rather, the occurrence is one which the parties always knew would occur pursuant to the laws of physics and which triggers the reversion provision the parties to the Deed created. The Deed plainly states that the property at issue <u>shall revert</u> to Big Rivers <u>upon</u> the discontinuance of its use for the operation and/or maintenance of the power plant. All events required to trigger reversion of title to Big Rivers have occurred.

<u>FINDINGS OF FACT/CONCLUSIONS OF LAW</u>

The Kentucky rule regarding summary judgment, CR 56.03, authorizes such a judgment "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky's summary judgment standard was articulated in the case of *Steelvest v. Scansteel Service Center, Inc.*, Ky., 807 S.W.2d 476 (1991). In *Steelvest*, the Court concluded that the movant should not succeed unless his right to judgment is shown with such clarity that there is no room left for controversy. *Id.* at 482. Summary judgment should be granted "only when it appears impossible for the nonmoving party to produce evidence at trial warranting judgment in his favor..." *Id.* at 482. "It is vital that we not sever litigants from their right of trial, if they do in fact have valid issues to try, just for the sake of efficiency and expediency. *Id.* at 483. The Kentucky Supreme Court has also noted that ". . . a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." *Hubble v. Johnson*, Ky., 841 S.W.2d 169 (1991).

It is well-established that interpretation of a Deed presents an issue of law for the court. <u>Brewick v. Brewick</u>, 121 S.W.3d 524, 526 (Ky. App. 2003); <u>Smith v. Vest</u>, 265 S.W.3d 246 (Ky. App. 2007). When interpreting a Deed, the intention of the parties is paramount and should be gleaned from the four corners of the instrument. <u>Kentucky-West Virginia Gas Co. v. Browning</u>, 521 S.W.2d 516, 517 (Ky. 1975). In the absence of ambiguity, a written instrument will be enforced strictly according to its terms, and a court will interpret the contract's terms by assigning language its ordinary meaning and without resort to extrinsic evidence. Frear v. P.T.A. Industries, Inc. 103 S.W.3d 99, 106 (Ky 2003).

The Court does not find it necessary to characterize or "label" the property interest of the parties since the clear and unambiguous language of the Deed sets forth the occurrences upon which the property would revert back to Big Rivers. From a review of the Deed, title to Station Two reverts to Big Rivers upon the occurrence of two events: the discontinued use of Station Two by the City for the operation and/or maintenance and the retirement of all bonds associated with the construction and completion of Station Two. A review of the language contained in the deed eliminates any doubt as to the character of title. The word "shall" has only one meaning. It is important to note that pursuant to the clear and unambiguous language contained in the Deed, all easements and rights-of-way necessary for the construction, operation and maintenance of Station Two were also to terminate upon the discontinuance by the City of the use of Station Two and retirement of the bonds. The Court finds that the absence of provisions for access after the City discontinued the use of Station Two make it clear that the intentions of the parties was that Big Rivers would receive the land back; therefore, there was no need to provide continued access to the City after the City's discontinued use of Station Two. It is also important to note that counsel for Big Rivers prepared the Deed and any ambiguity shall be resolved against the interest of Big Rivers.

The Court finds that under the plain and unambiguous terms of the Deed, the real property at issue reverts to Big Rivers by operation of law on the date operations ceased at the Station Two generating plant **and** when all bonds sold or issued for the completion of Station

Two are retired. The language contained in the Deed reflects the clear intent of the parties. When the intent of the parties is clear from a reading of the Deed, the Court is of the opinion that no further analysis is needed. The date upon which operations by the City ceased at Station Two remains a genuine issue of material fact. In its response to Henderson' Request for Admissions No. 1, Big Rivers denied that the property has ceased being used for operation and maintenance of Station Two and in its response to Big Rivers' Interrogatory No. 13, Henderson stated that "activities that can fairly be characterized as maintenance are performed only on an as-needed basis." Further, whether all bonds related to the completion of the Station Two have been retired remains a genuine issue of material fact. In its response to Big Rivers' Interrogatory No. 14, Henderson stated that there were outstanding Series 2011A Bonds and the purpose of the bonds was "to pay and discharge a previously issued note; to pay a portion of the remaining costs of acquisition, construction and installation of capital improvements and additions to the City's …and the Station Two generating plant…" Henderson also stated there were Series 2011B Bonds that were outstanding; however, it is unclear if these are related to the completion of Station Two.

THEREFORE, for the reasons stated above, the Court **DENIES** Plaintiffs' Motion for Summary Judgment and **DENIES** Defendant's Motion for Summary Judgment.

This the 2nd day of July 2020.

C. René' Williams
/s/ HON. C. RENE' WILLIAMS
electronically signed
7/2/2020 3:40:20 PM ET

RENE' WILLIAMS, CIRCUIT JUDGE

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