

**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

**ELECTRONIC APPLICATION OF))
BIG RIVERS ELECTRIC CORPORATION) Case No. 2022-00296
FOR APPROVAL OF AMENDMENT)
TO POWER PURCHASE AGREEMENT)**

ATTORNEY GENERAL'S BRIEF

On September 22, 2022, Big Rivers Electric Corporation (“BREC” or the “Company”) filed an Application requesting that the Commission issue an order approving the amendment of a Power Purchase Agreement between it and Unbridled Solar, LLC (“Unbridled Solar”). The PPA was one of three PPAs approved by the Public Service Commission (“Commission”) on September 28, 2020 in Case No. 2020-00183. BREC represents that the generation supplied by this PPA, and distributed through Meade County RECC, would supply Nucor Corporation (“Nucor”). If the Commission were to reject this application, BREC would be under a continuing obligation to procure renewable generation to supply Nucor.

When the Commission initially approved the PPA with Unbridled Solar, the contract called for BREC to pay a levelized rate of \$29.60/mWh for the generation provided under the PPA. The amended agreement increases this price to \$38.10/mWh. According to BREC, after the Commission approved the PPA, the developers of Unbridled Solar, National Grid Renewables (“NGR”), became “unwilling to move

forward” with development of the project.¹ According to BREC, delays in the interconnection process, cost increases, labor shortages, supply chain disruptions, and an investigation by the U.S. Commerce Department into circumvention of solar panel tariffs have all contributed to this unwillingness.² Needless to say, the increased price ratepayers will be required to pay makes the proposed amended PPA much less economically advantageous relative to the pricing under the approved PPA. However, NGR was no longer willing to honor the original PPA. Based on the changed market dynamics, NGR was willing to surrender \$8 million in security, and walk away.³ BREC does not have the ability to enforce the agreement to compel compliance with the original pricing.

Nonetheless, BREC needs to procure solar power. BREC is under an obligation to supply a certain amount of solar power to Nucor under a Retail Agreement, which governs BREC’s service of Nucor through Meade County RECC. Under the Retail Agreement between Meade County RECC and Nucor, BREC is required [REDACTED] [REDACTED]. However, the PPA procures the output of a 160 MW solar facility. In addition to meeting its obligation to Nucor, BREC represents that that the excess energy procured under the PPA would assist in resolving, “a short-term capacity deficit in 2025-2026.”⁵

¹ Application at 5.

² Application at 5.

³ See Direct Testimony of Mark Eacret at 13.

⁴ Response to AG 1-10(a) and 1-18(a).

⁵ Application at 8.

The Attorney General is committed to supporting economic development across the Commonwealth. However, when a utility procures generation at the behest of a specific ratepayer, the transaction must not negatively affect other ratepayers. The Commission has said as much in an almost identical situation where Louisville Gas & Electric Company and Kentucky Utilities Company (“LG&E/KU”) sought to procure solar generation for specific industrial customers.⁶ In that case, LG&E/KU also requested to procure more solar generation than was necessary to serve specific industrial customers.⁷ In approving those contracts, the Commission stated, “[s]pecial contracts entered into to promote corporate sustainability goals should ensure that non-participating customers are no worse off than if the special contracts for renewable energy did not exist. Non-participating customers must not bear additional costs that arise from a jurisdictional utilities['] actions in attempting to meet a corporation’s own self-imposed sustainability goal.”⁸

The PPA procures more generation than is necessary to meet the obligation to Nucor. To the extent that the procured resources exceed those [REDACTED], existing ratepayers are being required to purchase energy and capacity that they would not have purchased otherwise. Effectively, by procuring more energy than is needed to serve the Nucor obligation, BREC is allowing resource selection to be dictated by outside interests.

⁶ *Electronic Application of Louisville Gas and Electric Company and Kentucky Utilities Company for Approval of a Solar Power Contract and Two Renewable Power Agreements to Satisfy Customer Requests for a Renewable Energy Source Under Green Tariff Option #3*, Case No. 2020-00016. Order of May 8, 2020.

⁷ *Id.*

⁸ *Id.*

Those outside interests include the corporate interests who have requested specific types of resources, but also, groups who have not invested in the Commonwealth but are nonetheless increasingly dictating utilities' resource selection decision-making. In support of the proposed PPA, BREC offered testimony that, "we found that the market value of the capacity, energy, ancillary services, and environmental attributes was more than the fixed PPA price, creating economic value for our Members."⁹ Regarding those environmental attributes, BREC stated, "credit rating agencies are putting increased emphasis on Environmental, Social, and Governance ("ESG") criteria, which place a value on moving from coal to renewable generation."¹⁰

The fundamental goal of the ESG movement is the destruction of fossil fuel industries. Kentucky is an energy state. We benefit from the competitive advantage that comes with having abundant fossil fuels and using them to produce low-cost electricity to power our homes and businesses. Kentucky is the seventh-largest coal-producing state in America. We possess about one-sixth of the country's operating coal mines. Our one oil refinery can process over 290,000 barrels of oil per day and is the fifteenth-largest U.S. oil refinery. Kentucky also houses 22 natural gas storage sites, which collectively can hold almost 222 billion cubic feet of natural gas. Because of these resources, Kentucky averages the twelfth-lowest electricity prices of any state and the second-lowest prices of states east of the Mississippi River. Because of Kentucky's place in the energy landscape, the Attorney General has fought back against misguided ESG practices. The Attorney

⁹ See Direct Testimony of Mark Eacret at 7.

¹⁰ *Id.*

General has launched an investigation into ESG investment practices, practices that necessarily put the pursuit of the climate agenda ahead of the satisfaction of fiduciary responsibilities,¹¹ opined that these practices violate fiduciary duties of investment managers,¹² and advocated that ESG factors be eliminated from the consideration of investment managers of the Commonwealth's pension systems in order to protect the investments of public employees, among other actions.¹³ Kentucky should embrace and take pride in both our heritage and position of leadership as an energy state. Rather than surrendering to climate alarmism, we must leverage the competitive advantage and economic strength provided by our God-given resources. As applied here, the Commission should disregard any purported benefits the PPA is asserted to confer due to ESG considerations. The Commission should not allow credit rating agencies to jeopardize the reliability of Kentucky's electric grid.

The Attorney General is committed to an "all-of-the-above" energy policy that is focused on achieving the least cost for ratepayers while maintaining grid reliability to which ratepayers have become accustomed and some take for granted. Based on today's technology, achieving grid reliability requires reliance on Kentucky's abundant fossil fuels.

¹¹ *Attorney General Cameron Launches Investigation into ESG-Related Investment Practices of Vanguard, State Street Bank*, <https://www.kentucky.gov/Pages/Activity-stream.aspx?n=AttorneyGeneral&prId=1282>; *Attorney General Cameron Announces Multi-State Investigation into Six Major Banks for ESG Investment Practices*, <https://www.kentucky.gov/Pages/Activity-stream.aspx?n=AttorneyGeneral&prId=1269>.

¹² OAG 22-05.

¹³ *Treasurer Ball, Attorney General Cameron Request Information on Role of ESG-Investment Practices in Kentucky's Public Retirement Systems*, <https://www.kentucky.gov/Pages/Activity-stream.aspx?n=KentuckyStateTreasurer&prId=95>.

The Commission has already determined that BREC should be required to demonstrate that ratepayers need the excess energy they would purchase under the PPA and that the procurement is cost-effective. In approving the original PPAs, the Commission held that KRS 278.300 and KRS 278.020(1) applied.¹⁴ In order to satisfy these standards, BREC must demonstrate that it needs the generation supplied by the PPA and the procurement will not result in wasteful duplication. A showing of need requires a showing of, “a substantial inadequacy of existing service[.]”¹⁵ Wasteful duplication is defined as, “an excess of capacity over need and an excessive investment in relation to productivity or efficiency, and an unnecessary multiplicity of physical properties.”¹⁶ “Selection of a proposal that ultimately costs more than an alternative does not necessarily result in wasteful duplication. All relevant factors must be balanced.”¹⁷

BREC provided only cursory treatment of whether it needs the excess energy and capacity. “Big Rivers has a short-term capacity deficit in 2025-26, and this shortfall would increase slightly absent the Unbridled Solar PPA.”¹⁸ The Commission also provided treatment of this issue in approving the original PPA.

[A]s BREC acknowledged, the sum of the capacity that will be provided by the Solar Contracts exceeds the capacity that must be provided pursuant to the Nucor Contract. Nevertheless, the Commission finds that the capacity that exceeds that required by the Nucor Contract will fill other needs identified by BREC in this matter, including a capacity short fall that is expected to arise when BREC begins serving Nucor’s load, the hedging of price risk related to the Nucor Contract, demand from potential economic

¹⁴ *Id.* at 10. “[T]he Commission finds that it must review them pursuant to KRS 278.300 and KRS 278.020(1).”

¹⁵ *Id.* at 11.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Application at 8.

development candidates seeking to meet corporate sustainability goals, and credit risks arising from BRECs heavy dependence on coal-fired generation. Further, based on BRECs analysis, the Commission finds that the Solar Contracts have a substantial net present value because the current and projected value of the energy, capacity, and other ancillary products BRECs will receive pursuant to the Solar Contracts exceeds the firm contract prices BRECs obtained from other generators. Given the identified need for additional capacity necessary to serve native load, such an outcome from an analysis comparing the economics of the PPAs against a number of other options BRECs would likely consider to meet the requirements of native load, obtaining the additional capacity is reasonable.¹⁹

While the Commission has already opined on this issue, circumstances have changed since the Commission's Order approving the original PPAs. These changed circumstances are a relevant factor that the Commission should consider when balancing the interests.

Policy-makers in the Commonwealth are increasingly concerned about the reliability of the electric grid. The General Assembly recently passed Senate Bill 4. The preamble of the Bill states, "[w]hereas, the United States is retiring coal-fired electric generating units at an unprecedented rate, with retirements potentially affecting ... utility rates, and compromising the reliability of electric power service and resilience of the electric grid, an emergency is declared to exist..."²⁰ Senate Bill 4 requires that, before the Commission may approve the retirement of fossil fuel-fired electric generating unit, a utility must demonstrate that the retirement will not negatively impact the reliability and resilience of the electric grid.²¹ It does this, in part, by requiring replacement generation

¹⁹ *Electronic Application of Big Rivers Electric Corporation for Approval of Solar Power Contracts, Case No. 2020-00183*. Order of September 28, 2020 at 13.

²⁰ 23 RS SB 4.

²¹ 23 RS SB 4.

to be dispatchable.²² BREC proposes no retirements here, but the addition of intermittent resources implicates the same policy considerations enumerated in Senate Bill 4. The extent to which BREC's system relies on intermittent resources, and the corresponding impact of that reliance on grid reliability, are questions that have not received adequate consideration here. BREC has stated that, "the percentage as a whole for coal-fired energy naturally goes down but does not present any directly related reliability risks to the Big Rivers system."²³ BREC goes on to admit that, "MISO, other RTO[]s, and other balancing authorities have all experienced an increasing number of reliability issues over the recent years. Volatile extreme weather coupled with the retirement of traditional thermal resources often being replaced by intermittent resources are key drivers of this trend. Valid concerns exist on the reliability of the country's electric system."²⁴ When intermittent resources are added to serve native load, the utility should be required to analyze reliability impacts that could result from the shifting functionality of the portfolio.

Additionally, even if utilization of intermittent resources is determined to be appropriate, the evidence regarding whether the energy procured under the PPA is the least-cost resource is incomplete. BREC's witness, Mr. Eacret, represents that the PPA represents good value to ratepayers.²⁵ However, that analysis is limited to a comparison

²² 23 RS SB 4.

²³ Response to AG 2-11(a)

²⁴ Response to AG 2-11(b).

²⁵ See Direct Testimony of Mark Eacret at 16 and Exhibit 7.

of PPA costs to projected market costs for energy and capacity. A full analysis would include modeling other types of generation, not just market purchases.

In sum, BREC has failed to meet its burden to demonstrate a need for the excess energy under the PPA. And even if it had met that burden, the evidence regarding whether the PPA is least-cost is incomplete. Therefore, the Commission should conditionally approve the amended PPA if and only if BREC and NGR are willing to amend it to limit its scope to allow for the purchase of only the amount of solar output needed to meet the obligations of the Nucor contract. Alternatively, inasmuch as BREC represents that, “economic development candidates considering locating in the Big Rivers footprint are asking more and more about our generation resource mix and decarbonization efforts,” BREC could agree with another customer to pass through the excess procurement to another company if one can be identified.²⁶ BREC can utilize its 2023 Integrated Resource Planning docket to explore options to provide least-cost, reliable power for its ratepayers generally. Resource selection should not be dictated to utilities, or ratepayers, as a corollary to a procurement accomplished to serve a private party pursuing its private interest—an interest which may not be consistent with the interest of ratepayers at large.

²⁶ See Direct Testimony of Mark Eacret at 7.

Respectfully submitted,

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Certificate of Service and Filing

Pursuant to the Commission's Order dated March 17, 2020 in Case No. 2020-00085, and in accord with all other applicable law, Counsel certifies that, on April 12th, 2023, a copy of the forgoing was served via the Commission's electronic filing system.

This 12th day of April, 2023.



Assistant Attorney General