

SULLIVAN, MOUNTJOY, STAINBACK & MILLER PSC  
ATTORNEYS AT LAW

Ronald M. Sullivan  
Jesse T. Mountjoy  
Frank Stainback  
James M. Miller  
Michael A. Fiorella  
Allen W. Holbrook  
R. Michael Sullivan  
Bryan R. Reynolds  
Tyson A. Kamuf  
Mark W. Starnes  
C. Ellsworth Mountjoy  
Mary L. Moorhouse

October 1, 2012

Jeff DeRouen  
Executive Director  
Public Service Commission  
211 Sower Boulevard, P.O. Box 615  
Frankfort, Kentucky 40602-0615

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OCT 01 2012

PUBLIC SERVICE  
COMMISSION

**Re: *In the Matter of: Notice and Application of Big Rivers  
Electric Corporation for a General Adjustment in  
Rates, PSC Case No. 2011-00036***

Dear Mr. DeRouen:

Enclosed for filing on behalf of Big Rivers Electric Corporation ("Big Rivers") are an original and ten copies of the Rehearing Brief for Big Rivers. I certify that copies of this letter and attachments have been served on each party of record.

Sincerely yours,



James M. Miller

JMM/ej  
Enclosures

cc: Mark A. Bailey  
Albert Yockey  
Douglas Beresford, Esq.  
Service List

Telephone (270) 926-4000  
Telecopier (270) 683-6694

100 St. Ann Building  
PO Box 727  
Owensboro, Kentucky  
42302-0727

SERVICE LIST  
BIG RIVERS ELECTRIC CORPORATION  
PSC CASE NO. 2011-00036

Dennis G. Howard, II, Esq.  
Lawrence W. Cook, Esq.  
Jennifer Hans, Esq.  
Assistant Attorneys General  
1024 Capital Center Drive  
Suite 200  
Frankfort, KY 40601-8204

Michael L. Kurtz, Esq.  
Boehm, Kurtz & Lowry  
36 East Seventh Street  
Suite 1510  
Cincinnati, OH 45202  
**COUNSEL FOR KENTUCKY  
INDUSTRIAL UTILITY CUSTOMERS,  
INC.**

David C. Brown, Esq.  
Stites & Harbison  
1800 Providian Center  
400 West Market Street  
Louisville, KY 40202  
**COUNSEL FOR ALCAN PRIMARY  
PRODUCTS CORPORATION**

J. Christopher Hopgood, Esq.  
Dorsey, King, Gray, Norment & Hopgood  
318 Second Street  
Henderson, KY 42420  
**COUNSEL FOR KENERGY CORP.**

Melissa D. Yates  
Denton & Keuler, LLP  
555 Jefferson Street  
P.O. Box 929  
Paducah, KY 42002-0929  
**COUNSEL FOR JACKSON PURCHASE  
ENERGY CORPORATION**

Gregory J. Starheim  
President and CEO  
Kenergy Corp.  
3111 Fairview Drive  
P.O. Box 1389  
Owensboro, Kentucky 42302-1389

G. Kelly Nuckols  
President and CEO  
Jackson Purchase Energy Corporation  
2900 Irvin Cobb Drive  
P.O. Box 4030  
Paducah, KY 42002-4030

Burns E. Mercer  
President/CEO  
Meade County R.E.C.C.  
1351 Highway 79  
P.O. Box 489  
Brandenburg, KY 40108-0489

1 Commonwealth of Kentucky  
2 Before the Public Service Commission of Kentucky  
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10 In the Matter of:

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12 Application of Big Rivers Electric Corporation ) Case No.  
13 for a General Adjustment in Rates ) 2011-00036  
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October 1, 2012

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1 Commonwealth of Kentucky  
2 Before the Public Service Commission  
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5 In the Matter of:

6  
7 Application of Big Rivers Electric Corporation ) Case No.  
8 for a General Adjustment in Rates ) 2011-00036  
9

10  
11 *Rehearing Brief of Big Rivers Electric Corporation*  
12

13 Comes Big Rivers Electric Corporation (“Big Rivers”), and for its rehearing  
14 brief, states as follows:

15 *I. Introduction*

16 The Kentucky Public Service Commission (“Commission”) issued an order in  
17 this matter on November 17, 2011, granting a rate increase to Big Rivers (the  
18 “November 17 Order”). Big Rivers filed a petition for rehearing on December 6,  
19 2011 (“Rehearing Petition”). In that Rehearing Petition, Big Rivers sought  
20 rehearing on four issues:

- 21 • [t]he Commission erroneously failed to allow Big Rivers to  
22 recover its expenses incurred in this proceeding[;]
- 23 • [t]he Commission’s recalculation of Big Rivers’ *pro forma*  
24 depreciation adjustment is mathematically erroneous[;]
- 25 • [t]he Commission erroneously failed to allow Big Rivers to  
26 include the test period-end Construction Work in Progress  
27 (“CWIP”) balances in the determination of depreciation  
28 expense[; and]
- 29 • [t]he Commission incorrectly made a finding of fact that “[t]he  
30 financial model Big Rivers relied upon in conjunction with the

1 Unwind Transaction did not include any Smelter TIER  
2 Adjustment revenues.”<sup>1</sup>

3 On December 8, 2011, the Commission entered an order (the “December 8 Order”)  
4 granting rehearing on the four issues for which Big Rivers sought rehearing.  
5 Intervenor Kentucky Industrial Utility Customers, Inc. (“KIUC”) filed a motion on  
6 December 12, 2011, to dismiss the rehearing and vacate the December 8 Order. The  
7 Commission entered an order on December 20, 2011, establishing a procedural  
8 schedule for consideration of KIUC’s motion. The Commission denied KIUC’s  
9 motion to dismiss by order dated February 14, 2012. In the meantime, in  
10 accordance with the procedural schedule established in the December 8 Order, on  
11 January 5, 2012, Big Rivers filed testimony in support of the issues it raised on  
12 rehearing.

13 The Commission established a new procedural schedule for the rehearing by  
14 order dated March 7, 2012. Following the filing by KIUC of direct rehearing  
15 testimony on April 5, 2012, the Commission entered an order on April 12, 2012 (the  
16 “April 12 Order”), expanding its investigation in the rehearing to include all three  
17 issues that KIUC had raised in an earlier appeal of the November 17 Order to the  
18 Franklin Circuit Court, and establishing a new procedural schedule consistent with  
19 that change in the scope of the rehearing. The three KIUC issues are that the  
20 November 17 Order:

21 (1) should have eliminated interclass rate subsidies; (2) should have  
22 exempted all non-rural customers from payment of any [demand-side

---

<sup>1</sup> Rehearing Petition at pages 1-2.

1 management (“DSM”)-related expenses; and (3) should have accepted  
2 the KIUC proposed depreciation rates.<sup>2</sup>

3  
4 The Commission held a hearing on September 12, 2012, to consider the seven  
5 issues raised by the parties. As explained below, the Commission should grant Big  
6 Rivers’ request to correct the four errors Big Rivers identified and make no change  
7 in the November 17 Order in response to the three issues asserted by KIUC.

8 *II. The Commission should correct its November 17 Order to allow Big Rivers to*  
9 *recover its expenses incurred in this proceeding*

10  
11 As explained in the Rehearing Petition, Big Rivers’ first request on rehearing  
12 is that the Commission grant Big Rivers a *pro forma* adjustment to its test period  
13 operating expenses to include one-third of the total amount of the actual rate case  
14 expenses that Big Rivers incurred in this proceeding through August 15, 2012, less  
15 the amount of rate case expenses Big Rivers incurred during the test year.<sup>3</sup> Big  
16 Rivers sought this adjustment in its application and its post-hearing brief,<sup>4</sup> and the  
17 proposed adjustment is consistent with long-standing Commission practice.<sup>5</sup>

---

<sup>2</sup> April 12 Order at page 2.

<sup>3</sup> Rehearing Petition at pages 2-4; Big Rivers’ August 18, 2011, Fifth Supplemental Response to Item 52c of the Commission Staff’s First Information Request.

<sup>4</sup> See Application Exhibit 51, Direct Testimony of John Wolfram, Exhibit Wolfram-2, Reference Schedule 2.13; Application Exhibit 55, Direct Testimony of Mark A. Hite, at page 24, lines 7 through 16; Big Rivers’ August 11, 2011, Post-Hearing Brief at page 48.

<sup>5</sup> See Rehearing Petition at pages 3-4; Application Exhibit 51, Direct Testimony of John Wolfram, at page 12; Order dated October 21, 2010, in *In the Matter of: Application of Delta Natural Gas Company, Inc., for an Adjustment of Rates*, PSC Case No. 2010-00116, at pages 12-13; Order dated September 27, 2000, in *In the Matter of: Application of Louisville Gas and Electric Company to Adjust its Gas Rates and to Increase its Charges for Disconnecting Service, Reconnecting Service, and Returned Checks*, PSC Case No. 2000-00080, at page 39; Order dated November 10, 2004, in *In the Matter of: Application of Delta Natural Gas Company, Inc., for an Adjustment of Rates*, PSC Case No. 2004-00067; Order dated July 30, 2010, in *In the Matter of: Application of Kentucky Utilities Company for an Adjustment of Base Rates*, PSC Case No. 2009-00548; Order dated July 30, 2010, in *In the Matter of: Application of Louisville Gas and Electric Company for an Adjustment of Electric*

1 However, the Commission's November 17 Order was silent on Big Rivers' request.<sup>6</sup>  
2 Big Rivers performed a reconciliation of the revenue adjustments noted in the  
3 Commission's November 17 Order, which verified that the Commission's calculation  
4 did not include any adjustment for rate case expenses.<sup>7</sup>

5 The total expenses incurred by Big Rivers through August 15, 2011, were  
6 \$1,976,029.71 (which does not include significant expenses that Big Rivers has  
7 incurred in this rehearing and in the Franklin Circuit Court actions related to the  
8 Commission's November 17 Order).<sup>8</sup> The actual test period rate case expense  
9 amount was \$17,924.<sup>9</sup> Accordingly, the *pro forma* adjustment should be \$640,753  
10  $[(\$1,976,029.71 / 3) - \$17,924]$ .<sup>10</sup>

11 Although no party contested this proposed *pro forma* adjustment relating to  
12 Big Rivers' rate case expenses prior to the Commission's November 17 Order,<sup>11</sup>  
13 KIUC now argues that the Commission should depart from its historic practice of  
14 allowing recovery of actual rate case expenses and restrict Big Rivers' rate case

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*and Gas Base Rates*, PSC Case No. 2009-00549; Order dated June 30, 2004, in *In the Matter of: Application of Louisville Gas and Electric Company for an Adjustment of its Gas and Electric Rates, Terms and Conditions*, PSC Case No. 2003- 00433; Order dated June 30, 2004, in *In the Matter of: Application of Kentucky Utilities Company for an Adjustment of its Electric Rates, Terms and Conditions*, PSC Case No. 2003-00434.

<sup>6</sup> Rehearing Petition at pages 2-4.

<sup>7</sup> Big Rivers' March 22, 2012, response to Item 1 of the Commission Staff's First Request for Information on Big Rivers Electric Corporation's Rehearing Request..

<sup>8</sup> Big Rivers' August 18, 2011, Fifth Supplemental Response to Item 52c of the Commission Staff's First Information Request.

<sup>9</sup> Rehearing Petition at 2.

<sup>10</sup> *Id.* at 3.

<sup>11</sup> Big Rivers' August 11, 2011, Post-Hearing Brief at page 49.

1 expense recovery to the amount Big Rivers estimated at the beginning of this  
2 proceeding.<sup>12, 13</sup>

3 KIUC's complaint about rate case expenses is obviously focused on the extent  
4 to which the final charges from the Hogan Lovells law firm shown in the August 18  
5 update to Big Rivers' response to Item 52 of the Commission Staff's First Request  
6 for Information ("PSC 1-52") (approximately \$900,000.00) exceeded the original  
7 estimate of what those charges would be (approximately \$174,000.00). That  
8 increase represents most of the difference between Big Rivers' last submittal of rate  
9 case expenses on August 18, 2011, and the original estimate.<sup>14</sup>

10 The Hogan Lovells charges are reasonable and well-justified in the record.  
11 Big Rivers acted reasonably when it initially engaged Hogan Lovells for what Big  
12 Rivers thought would be a limited role in this proceeding.<sup>15</sup> Hogan Lovells'  
13 attorneys had expertise in ratemaking issues, and long experience with Big Rivers.

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<sup>12</sup> Rehearing Testimony of Lane Kollen filed April 5, 2012, at pages 3-4.

<sup>13</sup> On page 3, line 23 through page 4, line 3 of his rehearing testimony, Mr. Kollen states that Big Rivers should be entitled to an adjustment based on the amount of rate case expenses it initially estimated. Rehearing Testimony of Lane Kollen filed April 5, 2012, at page 4. Mr. Kollen states this amount is \$893,390. *Id.* However, Big Rivers' initial estimate of its rate case expenses was actually \$898,930. Application Exhibit 51, Direct Testimony of John Wolfram, Exhibit Wolfram-2, Reference Schedule 2.13. Big Rivers proposed an adjustment of one-third of its actual rate case expenses less the \$17,924 of rate case expenses in the test year, for a total adjustment estimated to be \$281,719 at the time of the filing of the application. *Id.* Mr. Kollen does correctly state that the initially estimated adjustment was \$281,719. Rehearing Testimony of Lane Kollen filed April 5, 2012, at page 4. However, on page 4, line 21 of his rehearing testimony, Mr. Kollen incorrectly states that Big Rivers' rehearing request of \$640,753 is \$341,110 more than the estimated adjustment of \$281,719. *See* KIUC's May 30, 2012, response to Item 4 of Big Rivers' First Request for Information on Rehearing. The difference between \$640,753 and \$281,719 is actually \$359,034. *Id.* Mr. Kollen acknowledged this fact in KIUC's May 30, 2012, response to Item 4 of Big Rivers' First Request for Information on Rehearing.

<sup>14</sup> *See* attachment to Big Rivers' March 22, 2012, response to Item 7a of KIUC's First Set of Data Requests on Rehearing.

<sup>15</sup> Testimony of Ralph Ashworth, September 12, 2012, Tr. 11:26'08-11:26'30.

1 In fact, they had represented Big Rivers with respect to Midwest Independent  
2 Transmission System Operator, Inc. issues and in the unwind transaction  
3 proceeding, and were quite familiar with the smelter contracts and smelter issues.  
4 All of these subjects were involved in the present proceeding.<sup>16</sup>

5 Big Rivers chose to hire Hogan Lovells over other Kentucky law firms  
6 because of Hogan Lovells' experience and expertise related directly to the issues in  
7 this case and because of the limited options in Kentucky due to conflicts of interest,  
8 lack of expertise in the field, and lack of basic knowledge about Big Rivers and  
9 cooperatives in general.<sup>17</sup>

10 The fact that Hogan Lovells' total charges substantially exceeded the initial  
11 estimate has no bearing on whether Hogan Lovells' charges were reasonable. It  
12 only demonstrates that Big Rivers underestimated the role Hogan Lovells would  
13 need to play in the case. As explained in Big Rivers' response to Item 7c of KIUC's  
14 First Set of Data Requests on Rehearing, the modest role Big Rivers contemplated  
15 for Hogan Lovells' participation in the rate case grew exponentially with the  
16 admittedly unanticipated complexity of issues and volume of data requests in the  
17 case.<sup>18</sup> For example, Big Rivers mistakenly thought that involving the smelters in  
18 the development of its depreciation study would reduce the amount of time that Big

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<sup>16</sup> See Testimony of Ralph Ashworth, September 12, 2012, Tr. 11:25'20-11:25'56.

<sup>17</sup> Big Rivers' March 22, 2012, responses to Items 8a-h of KIUC's First Set of Data Requests on Rehearing.

<sup>18</sup> See also Testimony of Ralph Ashworth, September 12, 2012, Tr. 11:26'08-11:26'30

1 Rivers and its consultants would have to devote to that subject during the case, but  
2 that assumption proved incorrect.<sup>19</sup>

3 In an effort to reduce ongoing expenses between rate proceedings that would  
4 need to be recovered in rates, Big Rivers does not have a full-time in-house rate  
5 department or legal department. Even though Big Rivers fully utilized the  
6 available resources of its local counsel, the time demands of the case were simply  
7 too great for the combined capabilities of Big Rivers' staff, consultants and local  
8 counsel.<sup>20</sup> Big Rivers had no practical choice but to turn to its other counsel already  
9 involved in the case, from the Hogan Lovells firm. However, as even Mr. Kollen  
10 points out,<sup>21</sup> Big Rivers mitigated the higher Washington, D.C. rates by obtaining  
11 Hogan Lovells' agreement not to charge for travel time, and by obtaining its  
12 agreement to discount its rates by 5% in the early months and by 10% in the later  
13 months.

14 As with the Hogan Lovells expenses, the fact that Big Rivers' actual  
15 expenses for other outside professionals were more than its original estimate  
16 does not mean that Big Rivers' actual costs were unreasonable. The difference  
17 between the original estimate and the actual amount only demonstrates that  
18 Big Rivers underestimated the time this case would require of its outside  
19 professionals.<sup>22</sup>

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<sup>19</sup> See Testimony of Ralph Ashworth, September 12, 2012, Tr. 11:31'35-11:32'54.

<sup>20</sup> See Testimony of Ralph Ashworth, September 12, 2012, Tr. 11:16'15-11:17'32.

<sup>21</sup> See Rehearing Testimony of Lane Kollen filed April 5, 2012, at page 6, line 3.

<sup>22</sup> Big Rivers' March 22, 2012, response to Item 7c of KIUC's First Set of Data Requests on Rehearing.

1           The fact that Big Rivers' actual expenses exceeded its original estimate also  
2 does not mean that Big Rivers failed to manage its expenses, despite Mr. Kollen's  
3 assertions to the contrary. Big Rivers competitively bid the work for the  
4 depreciation study and the cost of service and rate design study,<sup>23</sup> and as Big Rivers  
5 has explained, the professionals used in this case "that were not selected through a  
6 bidding process were retained because of their institutional knowledge of Big Rivers  
7 and their expertise. For example, Big Rivers chose Mr. Spen to testify regarding  
8 the credit rating process because of his experience and superior reputation in that  
9 area."<sup>24</sup> Big Rivers likewise negotiated caps or discounts from professionals other  
10 than Hogan Lovells involved in this proceeding.<sup>25</sup> Given the importance of the  
11 outcome of this proceeding and the expanding requirements of the case, Big Rivers'  
12 management believed it was necessary to incur the additional expense of Hogan  
13 Lovells to effectively prosecute the case.

14           Mr. Kollen's contention that there was no opportunity to properly analyze the  
15 amount of Big Rivers' rate case expense because it was "not even known until  
16 shortly before the Commission issue[d] its Order"<sup>26</sup> is disingenuous. Big Rivers put  
17 all parties on notice that it was seeking recovery of its actual rate case expenses by  
18 stating that request in its application. As Mr. Hite recites in Big Rivers' response to  
19 Item 7a of KIUC's First Set of Data Requests on Rehearing, beginning on page 2 at  
20 line 9, the changes in Big Rivers' actual rate case expenses were thoroughly and

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<sup>23</sup> Big Rivers' March 22, 2012, responses to Items 8a-h of KIUC's First Set of Data Requests on Rehearing.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Rehearing Testimony of Lane Kollen filed April 5, 2012, at page 8, lines 13-22.

1 timely documented in the record of this case. Big Rivers' Fourth Supplemental  
2 Response to PSC 1-52c, filed July 18, 2011, showed rate case expenses of  
3 \$890,985.29 incurred by Big Rivers through May of 2011. Even a cursory review of  
4 the invoices paid by Big Rivers through that date would have disclosed that Big  
5 Rivers had only received Hogan Lovells' invoices for the months of January,  
6 February and March, and that the total of those invoices was already \$223,546.28<sup>27</sup>  
7 with five months of intense activity remaining before the proceeding concluded. Big  
8 Rivers' Hearing Exhibit 1, Revised Exhibit Wolfram Rebuttal-1 (reconciliation of  
9 revenue requirement revised July 26, 2011) shows on line 16 column 3, an updated  
10 adjustment of \$482,076.00 for one-third of the estimated rate case expenses total of  
11 \$1,446,228.00 as of the hearing.

12 The final, August 18, 2011, update of rate case expenses totaled  
13 \$1,976,029.71 after payment of all outstanding invoices to that date, including  
14 invoices for a three day hearing and preparation of a 100-plus page brief. Big  
15 Rivers' rate case expenses were incurred to prepare Big Rivers' rate case, including  
16 the depreciation study and a full cost of service study, to respond to hundreds of  
17 information requests (the vast majority of which came from intervenors) and to  
18 carry the burden of proof obligation, which KIUC is quick to point out belongs to Big  
19 Rivers. KIUC had the luxury of selecting its issues for focused analysis, and yet  
20 incurred expenses of \$982,277.00 in that gadfly role.

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<sup>27</sup> \$223,546.28 is the sum of \$58,324.88 (January invoice), \$110,013.10 (February invoice) and \$55,208.30 (March invoice).

1           Mr. Kollen is simply incorrect when he contends that the Big Rivers law  
2 firms' invoices produced in this case provide no information about the nature of the  
3 services performed by Big Rivers' counsel because the descriptions of services in the  
4 invoices are redacted. First, that complaint is now moot because Big Rivers has  
5 refiled those invoices with most of the redaction deleted. But even the redacted  
6 invoices provide considerable information. Each of those invoices is accompanied by  
7 a summary which shows that charges related to Big Rivers' rate case are segregated  
8 from all other work performed by the firm for Big Rivers. The detailed portion of  
9 each invoice is expressly identified as containing charges for the Big Rivers rate  
10 case, and includes the date of each charge, the attorney performing the service, the  
11 amount of time spent by the attorney performing the service, the hourly rate of that  
12 attorney and the extended charge for that time (not including exclusions and  
13 discounts). No objection to Big Rivers' rate case expenses was raised by KIUC's  
14 witnesses nor in KIUC's brief in the principal case in this matter, despite the fact  
15 that Big Rivers updated its estimate to almost \$1.5 million on July 26, 2011, the  
16 first day of the principal hearing in this case. KIUC did not object to that level of  
17 estimated expense, nor did it or any other party file a motion to compel Big Rivers  
18 to produce unredacted invoices.

19           Big Rivers did incorrectly estimate its rate case expenses for the reasons  
20 stated above. But the rate case expenses incurred by Big Rivers were reasonable,  
21 and the parties to this proceeding had ample opportunity to inquire into those  
22 expenses in the principal case. Big Rivers' application requested recovery of its

1 actual rate case expenses. Big Rivers reported on the accumulation of actual rate  
2 case expenses in accordance with the Commission's directive in PSC 1-52. The  
3 detail in those supplemental filings would put anyone on notice that Big Rivers' rate  
4 case expenses were substantially exceeding its original estimate. The Hogan  
5 Lovells hourly rates were shown on the first Hogan Lovells invoice. At the hearing  
6 in the principal case, Big Rivers boosted its estimate of its rate case expenses to  
7 \$1,500,000, and a few questions were asked about rate case expenses at the  
8 hearing. Yet not one party mentioned in its brief the amount of Big Rivers' rate  
9 case expenses, the amount of the Hogan Lovells invoices, the Hogan Lovells hourly  
10 rates, difficulty analyzing Big Rivers' legal invoices, alleged mismanagement by Big  
11 Rivers of its legal services in the rate case or Big Rivers' failure to more accurately  
12 predict its total rate case expenses. Moreover, there is great irony in the fact that  
13 the party that largely drove the complexity and difficulty of this case now complains  
14 about the cost to Big Rivers of responding to its actions.

15         The expenses Big Rivers incurred in prosecuting this case were reasonable,  
16 and the proposed *pro forma* adjustment relating to Big Rivers' rate case expenses is  
17 consistent with long-standing Commission practice. The Commission should reject  
18 KIUC's arguments and correct the omission of rate case expenses from its  
19 November 17 Order by granting Big Rivers the proposed *pro forma* adjustment for  
20 Big Rivers' actual rate case expenses.

21

1 *III. The Commission's recalculation of Big Rivers' pro forma depreciation*  
2 *adjustment is mathematically erroneous*

3  
4 Big Rivers' second request on rehearing is that the Commission correct a  
5 mathematical error in the November 17 Order. As explained in Big Rivers'  
6 Rehearing Petition:

7 In its November 17 Order, the Commission disallowed the portion of  
8 Big Rivers' proposed depreciation adjustment related to CWIP, and  
9 recalculated the proposed depreciation adjustment to reflect that  
10 disallowance. Order, page 20. Big Rivers submits that an apparent  
11 mathematical error resulted in the recalculated depreciation expense  
12 adjustment being \$450,000 too low.

13  
14 The Commission states on page 20 [of the November 17 Order] that it  
15 will "limit the adjustment to the amount derived by applying Big  
16 Rivers' proposed depreciation rates to its test period-end plant in  
17 service balances. This results in an adjustment that increases Big  
18 Rivers' depreciation expense by \$3,489,340 and an adjusted  
19 depreciation expense level of \$40,218,778." In its footnote 44, the  
20 Commission correctly notes that Big Rivers' proposed depreciation  
21 expense of \$42,532,089 less depreciation on test period-end CWIP  
22 balance of \$2,313,311 = \$40,218,778. However, when the adjusted  
23 depreciation expense of \$40,218,778 is compared to the uncontested  
24 test period amount of \$36,279,438, the difference – and thus the *pro*  
25 *forma* adjustment for depreciation expenses required by this Order –  
26 equals \$3,939,340. In the Order, however, the Commission states that  
27 this difference is \$3,489,340. The correct difference (\$3,939,340) varies  
28 from the amount cited in the Commission Order (\$3,489,340) by  
29 \$450,000, to the detriment of Big Rivers.<sup>28</sup>

30  
31 Big Rivers requests that the Commission correct the mathematical error in  
32 the determination of the depreciation expense adjustment by increasing Big Rivers'  
33 depreciation expenses by an additional \$450,000, for a total upward adjustment of  
34 depreciation expense by \$3,939,340 (rather than the \$3,489,340 stated in the

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<sup>28</sup> Big Rivers' Rehearing Petition at pages 4-5; *see also* Direct Testimony on Rehearing of John Wolfram filed January 5, 2012, at page 9.

1 November 17 Order), so that the total adjusted level of depreciation expense is  
2 \$40,218,778.<sup>29</sup> KIUC agrees that the Commission should correct this error.<sup>30</sup>

3 *IV. The Commission should correct its November 17 Order to allow Big Rivers to*  
4 *include a portion of its test-period-end CWIP balance in the determination of*  
5 *depreciation expense*

6  
7 Big Rivers' third request on rehearing is that the Commission allow Big  
8 Rivers to include in its depreciation expense adjustment depreciation on the portion  
9 of Big Rivers' test-period-end CWIP balance that represents funds spent prior to the  
10 end of the test year on projects placed in service prior to the date on which Big  
11 Rivers' new rates became effective, September 1, 2011. In the November 17 Order,  
12 the Commission stated:

13 [W]e will not authorize a level of depreciation expense that reflects the  
14 accrual of depreciation on Big Rivers' test-year-end balance. Going  
15 beyond the end of test year plant in service balances is inconsistent  
16 with the concept of a historical test year and a violation of the broad  
17 'matching principle' described previously in this Order. For this  
18 reason, we will limit the adjustment to the amount derived by applying  
19 Big Rivers' proposed depreciation rates to its test-year-end plant in  
20 service balances.<sup>31</sup>

21  
22 However, Big Rivers' request is consistent with prior decisions of the  
23 Commission,<sup>32</sup> and it does not violate the historical test year or the "matching  
24 principle." As explained in Big Rivers' Rehearing Petition:

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<sup>29</sup> Big Rivers' Rehearing Petition at pages 4-5; *see also* Direct Testimony on Rehearing of John Wolfram filed January 5, 2012, Exhibit Wolfram Rehearing-1.

<sup>30</sup> Rehearing Testimony of Lane Kollen filed April 5, 2012, at page 4 ("I also recommend that the Commission correct the error in depreciation expense identified by the Company and described by Mr. Wolfram in his Rehearing Testimony. The amount of the error is \$450,000").

<sup>31</sup> November 17 Order at page 20.

<sup>32</sup> *See* Big Rivers' March 22, 2012, response to Item Rehearing 4a of the Commission Staff's First Request for Information on Big Rivers Electric Corporation's Rehearing Request.

1 In Case No. 90-158, the Commission allowed LG&E to include CWIP  
2 as of the end of its test period in the depreciation adjustment.  
3 Furthermore, the Commission has explicitly allowed the inclusion of  
4 CWIP balances as of the end of the test period to be included in the  
5 calculation of adjusted depreciation expenses for Delta Natural Gas  
6 Company. The Commission has allowed the same treatment in other  
7 cases for Kentucky Utilities and for LG&E. The Commission has  
8 encouraged taking depreciation on CWIP under circumstances where  
9 there is no issue about matching the depreciation expense against  
10 revenue created by the project.

11  
12 None of the CWIP projects Big Rivers proposes to depreciate generate  
13 additional revenue that would offset the impact on revenue  
14 requirement of the depreciation expenses on the CWIP projects.  
15 Therefore, there is no matching issue with respect to those projects.  
16 The depreciation expenses on these CWIP projects are known and  
17 measurable, and it is necessary to include these expenses in revenue  
18 requirements in order for rates to reflect an appropriate level of  
19 expenses on a going-forward basis.

20  
21 As of the end of the test period, \$18,654,606.93 of the CWIP balance of  
22 \$46,802,137.97 was in service. And an additional \$16,109,062.14 of the  
23 test year-end CWIP balance of \$46,802,137.97 was placed in service  
24 after the end of the test period, but prior to the date Big Rivers' new  
25 rates became effective. Together, \$34,763,669.07 of the \$46,802,137.97  
26 CWIP balance was placed in service prior to the effective date of the  
27 new rates, representing \$1,644,154.07 [which is "net of the City of  
28 Henderson's share of additions to Station Two and estimated  
29 retirements"<sup>33</sup>] of the \$2,313,311 in depreciation expense disallowed by  
30 the Commission. Accordingly, Big Rivers seeks on rehearing to add  
31 \$1,644,154.07 of depreciation expense.<sup>34</sup>

32  
33 It should be noted that the test-year-end CWIP balance includes only funds spent  
34 prior to the end of the test year (October 31, 2010).<sup>35</sup> So, even though the test-year-  
35 end CWIP balance includes some projects that were not in service at the end of the  
36 test year, Big Rivers is not seeking any adjustment for funds spent on those projects  
37 after the end of the test year. Thus, the total proposed depreciation expense

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<sup>33</sup> Rehearing Petition at page 8, n. 10.

<sup>34</sup> *Id.* at pages 6-8 (original footnotes omitted).

<sup>35</sup> Testimony of John Wolfram, September 12, 2012, Tr. 14:07'26-14:08'10.

1 adjustment of \$1,644,154.07 relates to all projects placed in service prior to  
2 September 1, 2011. But that amount only includes the \$34,763,669.07 of funds  
3 spent on those projects prior to the end of the test year and as such, includes no  
4 expenses incurred after the end of the test year. There are no revenues associated  
5 with the projects represented in the proposed adjustment, and the proposed  
6 adjustment is net of estimated retirements. For these reasons, Big Rivers believes  
7 all of the proposed adjustment is in line with the matching principle. In contrast,  
8 the fact that Big Rivers has had depreciation expense on the CWIP projects since  
9 they were placed in service (prior to September 1, 2011) but has not had any  
10 offsetting revenues does violate the matching principle.

11 Also, as noted in Mr. Wolfram's rehearing testimony, the proposed  
12 adjustment does not violate the concept of a historical test year because "[t]he  
13 historical test year approach allows for *pro forma* adjustments for known and  
14 measurable changes, so that electric rates can reflect the appropriate level of  
15 expenses and revenues for the time period when the rates take effect."<sup>36</sup> Big Rivers  
16 is seeking a *pro forma* adjustment for depreciation expense based on its test-year  
17 end CWIP balance amount spent prior to the end of the test year for projects placed  
18 in service prior to September 1, 2011. Because all of the projects were placed in  
19 service prior to September 1, 2011, it is a known and measurable adjustment. As  
20 such, it is appropriate for the Commission to grant the adjustment so that Big  
21 Rivers' rates reflect an appropriate level of depreciation expense going forward.

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<sup>36</sup> Direct Testimony on Rehearing of John Wolfram filed January 5, 2012, at page 13.

1           It is especially appropriate to correct the depreciation adjustment for the  
2 projects placed in service *prior to* the end of the test year. As noted in the quote on  
3 the previous page, \$18,654,606.93 of the test-year-end CWIP balance represents  
4 projects that were in service at the end of the test period. The depreciation expense  
5 on that \$18,654,606.93 is \$359,678 (net of the City of Henderson’s share of Station  
6 Two and estimated retirements).<sup>37</sup>

7           Mr. Kollen’s argument that the Commission should reject Big Rivers’ request  
8 is based on the faulty presumption that Big Rivers’ accounting books were in error  
9 and the claim that Big Rivers’ request violates the Commission’s “conceptual  
10 framework” of rejecting “all post-test year adjustments as a matter of ratemaking  
11 principle.”<sup>38</sup> However, Big Rivers’ accounting books were not in error,<sup>39</sup> and as  
12 explained above, Big Rivers’ request is consistent with prior Commission decisions  
13 and with the matching principle. Mr. Kollen did not make this argument in the  
14 principal case.

15           Mr. Kollen tells the Commission that it should be careful not to “accept the  
16 Company’s adjustment as ‘known and measurable’ today when it could not have  
17 accepted it on that basis, at least in its entirety, when the issue was originally  
18 decided.”<sup>40</sup> However, as Mr. Kollen implicitly acknowledges, Big Rivers’ proposed  
19 adjustment based on the test-year-end CWIP balance for projects that were in  
20 service prior to September 1, 2011, is a known and measurable adjustment. As

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<sup>37</sup> Direct Testimony on Rehearing of Mark A. Hite filed January 5, 2012, at page 8.

<sup>38</sup> Rehearing Testimony of Lane Kollen filed April 5, 2012, at page 3.

<sup>39</sup> Big Rivers’ March 22, 2012, response to Items 1 and 2 of KIUC’s First Set of Data Requests on Rehearing.

<sup>40</sup> Rehearing Testimony of Lane Kollen filed April 5, 2012, at pages 10-15.

1 noted above, the projects included in the test-year-end CWIP balance for which Big  
2 Rivers seeks the adjustment are in service and have been in service since prior to  
3 September 1, 2011. As such, including them in plant in service is a known and  
4 measurable adjustment. Once again, Mr. Kollen did not make this argument in the  
5 principal case.

6 If Big Rivers is not allowed recovery of the proposed adjustment, Big Rivers  
7 will be denied recovery of depreciation on a significant portion of the projects  
8 constituting the test-year-end CWIP balance. For example, with regard to the  
9 Oracle R12 project:

10 The annual depreciation rate in the 2010 Depreciation Study for  
11 account 391.2, the account for the Oracle R12 project, is 10.29% under  
12 the Commission-approved depreciation rates. If Big Rivers cannot  
13 begin recovering depreciation on this 10-year property until the  
14 conclusion of its next rate case, it will be denied recovery of a  
15 significant portion of the Oracle R12 project cost.<sup>41</sup>

16  
17 The amount of depreciation for which Big Rivers would be denied recovery if  
18 the Commission does not correct the November 17 Order on this request is material  
19 to Big Rivers. The annual depreciation on the amount of the test-year-end CWIP  
20 balance for the Oracle R12 project is \$1,125,840.38,<sup>42</sup> which is significant when  
21 compared against Big Rivers' margin of error (*i.e.*, the approximately \$2.3 million  
22 between the Big Rivers' fiscal year 2010 margins and what those margins would  
23 have been had Big Rivers achieved only the minimum 1.10 Margins for Interest  
24 Ratio required by its loan covenants).<sup>43</sup>

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<sup>41</sup> Rehearing Petition at page 10.

<sup>42</sup> *Id.* at page 8.

<sup>43</sup> *Id.*

1           Big Rivers believes the Oracle R12 project presents a compelling case for  
2 allowing Big Rivers to recover the depreciation expense thereon.<sup>44</sup> As noted in the  
3 Rehearing Petition, “The Oracle R12 project comprised \$10,941,111.58 of the  
4 \$16,109,062.14”<sup>45</sup> of CWIP placed in service after the end of the test period, but  
5 prior to September 1, 2011 (the date Big Rivers’ new rates became effective). In  
6 addition, the Oracle R12 project has no retirements nor revenues associated with  
7 it.<sup>46</sup> The Oracle R12 project was placed in service in December of 2010, less than  
8 two months after the end of the test period, and depreciation expense on that  
9 amount is reflected on Big Rivers’ books effective as of January of 2011.<sup>47</sup> As  
10 explained in the Rehearing Petition, “Big Rivers’ ratepayers were receiving the  
11 benefits of that project before this case was filed, and months before the proposed  
12 rates went into effect on September 1, 2011.”<sup>48</sup>

13           Big Rivers requests a \$1,644,154 depreciation expense adjustment, which is  
14 the depreciation expense on the \$34,763,669 of the test-year-end CWIP balance that  
15 was placed in service prior to September 1, 2011, net of the City of Henderson’s  
16 share of Station Two and net of estimated retirements.<sup>49</sup> Of this amount, \$359,678  
17 represents depreciation expense on projects placed in service before the end of the  
18 test year, and another \$1,125,840 represents depreciation expense on the Oracle  
19 project, which was placed in service within 60 days of the end of the test year.

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*; see also Rebuttal Testimony of Mark A. Hite filed July 6, 2011, at page 15.

<sup>46</sup> Rehearing Petition at page 10; Rebuttal Testimony of Mark Hite filed July 6, 2011, page 15, lines 4-9.

<sup>47</sup> Rehearing Petition at page 9.

<sup>48</sup> *Id.*

<sup>49</sup> Direct Testimony on Rehearing of Mark A. Hite filed January 5, 2012, at page 11.

1 Mr. Kollen argues that if the Commission grants Big Rivers' request, it  
2 should also "adopt the post-test year adjustment to reduce interest expense  
3 on the prepayment of the RUS Series A Note proposed by KIUC and rejected  
4 in the Order."<sup>50</sup> This finding by the Commission in the November 17 Order  
5 was not raised by KIUC in its appeal, has not otherwise been preserved for  
6 review, and is not properly before the Commission in this rehearing. In any  
7 event, the Commission properly rejected Mr. Kollen's request in the  
8 November 17 Order,<sup>51</sup> and Mr. Kollen has offered nothing new to support his  
9 argument.

10 For the foregoing reasons, the Commission should grant Big Rivers' request  
11 for a *pro forma* adjustment to increase depreciation expense by \$1,644,154.07, and  
12 the Commission should reaffirm its rejection of Mr. Kollen's argument.

13 *V. The Commission should correct the finding of fact in its November 17 Order*  
14 *that "the financial model Big Rivers relied upon in conjunction with the Unwind*  
15 *Transaction did not include any Smelter TIER Adjustment revenues"*

16  
17 The Commission should correct the erroneous finding in the November 17  
18 Order that "[t]he financial model Big Rivers relied upon in conjunction with the  
19 Unwind Transaction did not include any Smelter TIER Adjustment revenues."<sup>52</sup> At  
20 the time of the November 17 Order, the Unwind Financial Model was not part of the  
21 proceeding in this matter, nor was there any evidence in the record to support the

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<sup>50</sup> Rehearing Testimony of Lane Kollen filed April 5, 2012, at page 3.

<sup>51</sup> See November 17 Order at page 10.

<sup>52</sup> See *id.* at page 6.

1 Commission's finding.<sup>53</sup> Moreover, while it is true that the Unwind Financial Model  
2 did not include TIER Adjustment revenues in either 2009 or 2010, the Unwind  
3 Financial Model does, in fact, show TIER Adjustment revenues in each of the years  
4 2011 through 2023.<sup>54</sup> As noted in Big Rivers' response to Item 3 of the Commission  
5 Staff's First Request for Information on Big Rivers Electric Corporation's Rehearing  
6 Request, "Big Rivers' concern is that the November 17 Order states that the model  
7 did not include any smelter TIER Adjustment revenues."<sup>55</sup>

8 Big Rivers suggests that the sentence in question in the November 17 Order  
9 be revised to read as follows: "The financial model Big Rivers relied upon in  
10 conjunction with the Unwind Transaction did not include any Smelter TIER  
11 Adjustment revenues *in the years 2009 and 2010.*" This addition would correct the  
12 erroneous finding. KIUC did not dispute this claim of error in its rehearing  
13 testimony.

14 *VI. The Commission correctly allocated the revenue increase granted to Big*  
15 *Rivers in the November 17 Order*

16  
17 KIUC argues that the Commission should remove the subsidy the Rural class  
18 receives from the smelters.<sup>56</sup> However, KIUC offers the same arguments it did prior  
19 to the November 17 Order, and that alone is reason enough for the Commission to  
20 deny KIUC's rehearing request.

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<sup>53</sup> Rehearing Petition at page 11; *see also* Direct Testimony on Rehearing of Mark A. Hite filed January 5, 2012, at page 14.

<sup>54</sup> Big Rivers' March 22, 2012, response to Item 3 of the Commission Staff's First Request for Information on Big Rivers Electric Corporation's Rehearing Request; Direct Testimony on Rehearing of Mark A. Hite filed January 5, 2012, at page 15.

<sup>55</sup> Big Rivers' March 22, 2012, response to Item 3 of the Commission Staff's First Request for Information on Big Rivers Electric Corporation's Rehearing Request.

<sup>56</sup> Direct Rehearing Testimony of Stephen J. Baron filed April 5, 2012, at pages 3-5.

1           Additionally, KIUC's request is contrary to the smelter agreements and the  
2 principle of gradualism, and is therefore not fair, just, and reasonable. In the  
3 smelter contracts, in exchange for Big Rivers and its members agreeing to take on  
4 the risks and higher rates associated with serving the smelters, the smelters agreed  
5 to pay contractual subsidies to the other customer classes.<sup>57</sup> Even KIUC recognizes  
6 this, although at the same time, it argues that all Rural subsidies should be  
7 immediately eliminated. The smelters received significant benefits from the  
8 unwind transaction, including a long-term power contract and financial incentives.  
9 However, they now want to saddle the non-smelter customers with virtually all of  
10 the additional revenue that Big Rivers now needs as a result of the unwind  
11 transaction. KIUC's proposal is not fair, just, and reasonable. It is reasonable to  
12 eliminate the non-contractual subsidies paid by the smelters, over time, consistent  
13 with the principle of gradualism.<sup>58</sup> Full elimination of the subsidies at one time  
14 does not ensure the viability of the smelters, and thus does not justify a departure  
15 from the practice of employing the principle of gradualism.<sup>59</sup>

16       *VII. The Commission has correctly assigned responsibility for the DSM expenses*  
17 *granted to Big Rivers in the November 17 Order.*

18           KIUC alleges that the November 17 Order “unintentionally assigns a portion  
19 of Rural DSM costs to the smelters.”<sup>60</sup> KIUC seems to argue that the Commission  
20 does not have the ability to assign certain costs to certain customers. However,  
21

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<sup>57</sup> See Application Exhibit 49, Direct Testimony of C. William Blackburn, at page 24; Big Rivers' August 11, 2011, Post-Hearing Brief at page 56.

<sup>58</sup> Big Rivers' August 11, 2011, Post-Hearing Brief at pages 74-75.

<sup>59</sup> Rehearing Rebuttal Testimony of John Wolfram filed June 15, 2012, at pages 5-6.

<sup>60</sup> Direct Rehearing Testimony of Stephen J. Baron filed April 5, 2012, at pages 15-17.

1 KIUC offers no legal or factual basis for this conclusion. The November 17 Order  
2 clearly assigns the \$1,000,000 revenue increase for DSM expenses to the Rural  
3 class:

4 We will make one other adjustment to Big Rivers' COSS which relates  
5 to the \$1 million cost of the energy efficiency programs authorized by  
6 this Order. As discussed previously in this Order, the Commission  
7 agrees in theory with Big Rivers' argument that all customers benefit  
8 from programs that defer the need for additional capacity. However,  
9 for purposes of revenue allocation, it has been our practice to allow the  
10 costs of programs to be assigned only to the customer classes that are  
11 eligible to participate in the programs. Here, Big Rivers has not shown  
12 a sufficient basis to allocate the costs of these DSM programs to  
13 customer classes not eligible to participate in the programs. Therefore,  
14 the Commission will make an adjustment to reflect the assignment of  
15 the full \$1 million cost for Big Rivers' energy efficiency programs to the  
16 Rural rate class.<sup>61</sup>

17  
18 The Commission's allocation of the total revenue increase in the November 17 Order  
19 would surely have been different if the Commission did not allocate 100% of the  
20 DSM expenses to the Rural class. KIUC offers no support for its argument, and  
21 that argument should be rejected.

22 *VIII. The Commission correctly adopted the depreciation rates proposed by Big*  
23 *Rivers.*

24 KIUC clearly does not have its heart in its objection to the Big Rivers'  
25 proposed depreciation rates, which the Commission approved in its November 17  
26 Order. While KIUC made those depreciation rates the subject of its appeal to  
27 Franklin Circuit Court, it did not raise the issue in its initial testimony on  
28 rehearing. When the Commission directed KIUC to address the depreciation issue,  
29 it did not even produce its original depreciation expert, Mr. King, but rather

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<sup>61</sup> November 17 Order at page 29.

1 substituted Mr. Kollen. Mr. Kollen merely rehashed evidence that was in the  
2 record as of the date of the original hearing in this matter, in July of 2011. He  
3 produced no new arguments or new evidence “that could not with reasonable  
4 diligence had been offered on the formal hearing.” KRS 278.400. If KIUC had  
5 sought rehearing under KRS 278.400 using Mr. Kollen’s testimony, there is a  
6 substantial question about whether rehearing would have been granted since a  
7 rehash of original testimony with only an assertion that “the Commission got it  
8 wrong” does not justify grant of a rehearing.<sup>62</sup>

9 KIUC argues that the Commission erred by not adopting KIUC’s proposed  
10 depreciation rates in the November 17 Order.<sup>63</sup> However, KIUC offers no new  
11 arguments for why the Commission should choose its rates over the rates proposed  
12 by Big Rivers, approved by the Rural Utilities Service, and adopted by the  
13 Commission.

14 One of the arguments KIUC reiterates is that Mr. Kelly’s analysis was  
15 allegedly flawed because he used different dates in determining remaining lives and  
16 net plant balances.<sup>64</sup> However, this is not an error because remaining lives are used  
17 to determine depreciation rates, which are fixed when set. Then the depreciation

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<sup>62</sup> See Order dated February 15, 2008, in *In the Matter of: Brandenburg Telecom, LLC v. Bellsouth Telecommunications, Inc.*, PSC Case No. 2006-00447 (“No provision is made [in KRS 278.400] for presenting arguments that had previously been rejected”); Order dated January 18, 2008, in *In the Matter of: Petition of Bellsouth Telecommunications, Inc. to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, PSC Case No. 2004-00427 (“AT&T Kentucky has presented no new arguments or evidence which were not previously considered by the Commission. Accordingly, the standards required by KRS 278.400 have not been met, and rehearing of Issue 14 is denied”).

<sup>63</sup> Supplemental Rehearing Testimony of Lane Kollen filed April 27, 2012, at page 1.

<sup>64</sup> *Id.* at page 11.

1 rates are applied to the *current* plant balance to determine depreciation expense.  
2 Thus fixed depreciation rates are applied to current plant balances which are  
3 continuously changing over time.<sup>65</sup>

4 Prior to the November 17 Order, and as a result of Big Rivers' previous  
5 depreciation rates being too low, Big Rivers was sustaining deferred losses on  
6 retirements.<sup>66</sup> The rates proposed by Big Rivers and adopted by the Commission  
7 improve but do not eliminate that issue.<sup>67</sup> KIUC's proposal was, and is, to reduce  
8 the depreciation rates even lower than they were, exacerbating the problem.<sup>68</sup>  
9 KIUC's proposed depreciation rates do not result in rates for electric service that  
10 are fair, just, and reasonable.

11 As KIUC acknowledges, setting depreciation rates is not an exact science and  
12 requires the exercise of judgment.<sup>69</sup> KIUC's depreciation witnesses (Mr. King and  
13 Mr. Kollen) do not seem to be exercising appropriate judgment by recommending  
14 depreciation rates that ignore the problem that Big Rivers has actually been  
15 experiencing. Neither Mr. King nor Mr. Kollen performed a full depreciation study.  
16 They simply took the depreciation study prepared by Burns & McDonnell for Big  
17 Rivers and selected the highest remaining lives (and thus the lowest depreciation  
18 rates) available from the study for every plant. Mr. Kelly, on the other hand, based  
19 his reasoned judgment on a detailed engineering study of each Big Rivers  
20 generating unit, along with other qualitative factors such as maintenance reports,

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<sup>65</sup> Rehearing Rebuttal Testimony of Ted J. Kelly filed June 15, 2012, at page 13.

<sup>66</sup> Big Rivers' August 11, 2011, Post-Hearing Brief at page 28.

<sup>67</sup> Rehearing Rebuttal Testimony of Ted J. Kelly filed June 15, 2012, at page 7.

<sup>68</sup> *See id.*

<sup>69</sup> *Id.* at page 8.

1 forced outage reports, two Investigation Reports and a Recommendation Form for  
2 the fire at the Wilson plant, plant operating statistics, major maintenance  
3 schedules, 2010 outages and descriptions, the prior 1998 Depreciation Study and its  
4 Engineering Assessment, capital budgets, the 2010 to 2013 Capital Plan, the 2010  
5 Capital Budget, Capital Appropriations Summaries from 2006 to 2009, plant O&M  
6 expenses for the Coleman, Sebree (net) and Wilson plants, Boiler Condition  
7 Assessments, various fuel agreements, organization charts, status of air permits,  
8 2009 Title V Compliance Documentation including Air Inspection reports, and  
9 transmission and substation maintenance summaries. The six scenarios Mr. Kelly  
10 then developed were based on different operating assumptions and conditions, in  
11 addition to the consideration of a maximum 65-year life for Wilson.<sup>70</sup> KIUC's  
12 criticisms of Mr. Kelly's depreciation study have been fully addressed in the  
13 proceeding,<sup>71</sup> and they cannot mask the fact that KIUC's witnesses arbitrarily chose  
14 the maximum useful lives that in turn resulted in the lowest possible depreciation  
15 rates, whereas Mr. Kelly's more reasonable and balanced approach relied upon a  
16 range of useful lives. The Commission should deny KIUC's request.

17 *IX. The Commission should allocate any additional revenue increase allowed to*  
18 *Big Rivers as a result of this rehearing using the same allocation methodology*  
19 *adopted in the November 17 Order.*

20 Big Rivers believes that it is fair, just, and reasonable to allocate any  
21 additional increase awarded to Big Rivers in this rehearing using the same

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<sup>70</sup> Rebuttal Testimony of Ted J. Kelly filed July 6, 2011, at page 5-7.

<sup>71</sup> See, e.g., *id.*; Rehearing Rebuttal Testimony of Ted J. Kelly filed June 15, 2012.

1 percentages as the original increase.<sup>72</sup> Contrary to this view, KIUC recommends  
2 that if the Rural class subsidy is not fully eliminated, that any additional increase  
3 should be assigned to the Rural class.<sup>73</sup> KIUC supports this claim only by relying  
4 on the same argument noted earlier, that the Commission should remove the  
5 subsidy the Rural class receives from the smelters. As discussed above, this  
6 position is contrary to the smelter agreements and the principle of gradualism, and  
7 is therefore not fair, just, and reasonable. Big Rivers asks that the Commission  
8 grant it the relief it seeks, deny the relief KIUC seeks, and allocate the resulting  
9 increase in the same manner as was done in the November 17 Order.

10 *X. Even though an interclass subsidy remains, the remaining subsidy is not per*  
11 *se unlawful under Kentucky law.*  
12

13 In *Public Service Com'n of Kentucky v. Com.*, the Kentucky Supreme Court  
14 upheld Duke Energy Kentucky, Inc.'s economic development rates that had been  
15 approved by the Commission.<sup>74</sup> The Court held that the Commission had the  
16 authority to approve such rates under KRS 278.030 and KRS 278.170, so long as the  
17 rates were otherwise fair, just, and reasonable and not unreasonably  
18 discriminatory.<sup>75</sup> The fact that one class' rates were being subsidized did not, by  
19 itself, make the rates unlawful. The Commission itself has issued numerous orders  
20 allowing an interclass subsidy to continue.<sup>76</sup> Thus, having rates in which one class

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<sup>72</sup> Rehearing Rebuttal Testimony of John Wolfram filed June 15, 2012, at page 10.

<sup>73</sup> Direct Rehearing Testimony of Stephen J. Baron filed April 5, 2012, at page 17.

<sup>74</sup> See *Public Service Com'n of Kentucky v. Com.*, Ky., 320 S.W.3d 660 (2010).

<sup>75</sup> See *id.*

<sup>76</sup> See, e.g., Order dated September 27, 2000, in *In the Matter of: Adjustment of Gas Rates of Louisville Gas and Electric Company*, Case No. 2000-080; Order dated May 16, 1984, in

1 subsidizes another class is not unlawful *per se* under Kentucky law. This supports  
2 the Commission's application of the principle of gradualism in the November 17  
3 Order.

4 *XI. Any additional increase that the Commission grants to Big Rivers in this*  
5 *rehearing should be made retroactive to September 1, 2011.*

6  
7 The Commission clearly has the authority to correct errors in its orders, and  
8 to make the corrections effective retroactively. For example, in *In the Matter of:*  
9 *Adjustment of Rates of Columbia Gas of Kentucky, Inc.*, the Commission granted a  
10 rate increase to Columbia Gas of Kentucky, Inc. by order dated October 6, 1989, and  
11 on October 17, 1989, the Commission issued an order correcting a mistake in the  
12 October 6 order and granting an additional increase effective October 6.<sup>77</sup>

13 The types of errors the Commission may correct retroactively are limited to  
14 cases involving clerical and calculation errors where the mistake is shown in the  
15 record, and to cases involving the misapplication or misinterpretation of the law  
16 rather than a change to a factual finding.<sup>78</sup> In the present case, Big Rivers is asking  
17 the Commission to find that it made an inadvertent calculation error and that it  
18 failed to make any adjustment for Big Rivers' rate case expenses (which, if

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*In the Matter of: General Adjustments in Electric and Gas Rates of Louisville Gas and Electric Company*, Case No. 8924.

<sup>77</sup> Order dated October 17, 1989, in *In the Matter of: Adjustment of Rates of Columbia Gas of Kentucky, Inc.*, Case No. 10498; see also Order dated June 8, 2011, in *In the Matter of: Alternative Rate Filing of Coolbrook Utilities, LLC*, Case No. 2010-00314.

<sup>78</sup> See *Mike Little Gas Co., Inc. v. Public Service Commission*, Ky. App., 574 S.W.2d 926, 926 (1978); Order dated May 9, 2001, in *In the Matter of: Adjustment of the Rates of Kentucky-American Water Company*, Case No. 2000-120; *Western Kraft Paper Group v. Department for Natural Resources and Environmental Protection*, Ky. App., 632 S.W.2d 454 (1981); *Union Light, Heat & Power Co. v. Public Service Com'n*, Ky., 271 S.W.2d 361 (1954).

1 inadvertent, would be a clerical error). Big Rivers identified both of these errors in  
2 its December 8, 2011, rehearing petition, shortly after the November 17 Order was  
3 issued, they are clearly shown in the record (as explained in Sections II and III,  
4 above), and they are clearly the types of errors the Commission should correct  
5 retroactively.

6 Big Rivers is also seeking correction of the erroneous denial of an adjustment  
7 to depreciation expense based on projects reflected in the test-year-end CWIP  
8 balance that were placed in service prior to September 1, 2011. While not as  
9 obvious as the first two errors, this error should also be corrected retroactively  
10 because in denying the proposed adjustment, the Commission misapplied and  
11 misinterpreted the law. In the November 17 Order, the Commission stated, “Going  
12 beyond the end of test year plant in service balances is inconsistent with the concept  
13 of a historical test year and a violation of the broad ‘matching principle’ described  
14 previously in this Order.”<sup>79</sup> However, as explained in Section IV above, the  
15 proposed adjustment violates neither the concept of a historical test year nor the  
16 matching principle. The Commission has previously allowed a similar depreciation  
17 expense adjustment to other utilities that filed rate cases based on historical test  
18 years; and so, in denying the same adjustment to Big Rivers, the Commission  
19 misinterpreted or misapplied the law relating to the concept of a historical test year  
20 and the matching principle as a bar to the adjustment. Thus, the proposed  
21 adjustment should be made retroactively.

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<sup>79</sup> November 17 Order at page 20.

1 Note that KIUC's alleged errors, on the other hand, are not the types of  
2 errors that can be changed retroactively, because KIUC is asking the Commission to  
3 change its mind and make different factual findings than it made in the November  
4 17 Order. KIUC does not allege that the errors it alleges were clerical or calculation  
5 errors or involved the misapplication or misinterpretation of a statute.

6 For the reasons stated above, the Commission should retroactively correct the  
7 errors that Big Rivers has identified. More specifically, any additional increase the  
8 Commission grants as a result of the issues Big Rivers raised in this rehearing  
9 should be made retroactive to September 1, 2011. On December 14, 2011, the  
10 Commission issued a *nunc pro tunc* order in this case, making the rates approved in  
11 the November 17 Order effective as of September 1, 2011. If the Commission issues  
12 another *nunc pro tunc* order to correct the errors Big Rivers has identified, the rates  
13 should still be effective as of September 1, 2011, which is appropriate because had  
14 the Commission not made the errors identified by Big Rivers, Big Rivers would have  
15 been collecting the additional amounts since September 1, 2011.

16 Big Rivers believes the most appropriate method for recovering the difference  
17 between what it has collected since September 1, 2011, under the rates approved  
18 November 17, 2011, and what it would have collected absent the errors the  
19 Commission identifies in its order on rehearing would be as follows:

- 20 • Calculate Big Rivers' revenue billed, by class, from September 1 through the  
21 date of a final order on rehearing, which will show the effect of the rates  
22 approved in the November 17 Order. Calculate what Big Rivers' revenue

1 billed by class would have been through the date of the order on rehearing if  
2 Big Rivers rates had included the additional amounts approved by the  
3 Commission in its order on rehearing to be collected from September 1, 2011.  
4 Subtract the first set of numbers from the second set of numbers to determine  
5 the amount of revenue that needs to be collected to correct the under-recovery  
6 under the November 17 Order rates (“Additional Revenue”).

- 7 • Big Rivers would then divide the Additional Revenue amounts by the number  
8 of calendar months that remain between the date of the order on rehearing  
9 and August 1, 2013, and bill that amount to its members in each of those  
10 months on a revenue-proportionate basis. The amount billed to a member in  
11 a month would show up on its billing form on the “Adjustment” line. Having  
12 the last of the Additional Revenue billed for July of 2013 assures that the  
13 retail customers who would have otherwise been responsible for Additional  
14 Revenue will pay those amounts.

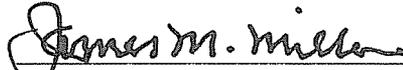
- 15 • For accounting purposes, Additional Revenue allowed in the order on  
16 rehearing would be debited to account 173 (Accrued Utility Revenue) and  
17 credited to account 447 (Sales for Resale – Electric Revenue). Additional  
18 Revenue would be recognized in 2012, and would contribute to Big Rivers’  
19 margins for 2012. When increments of Additional Revenue are billed, Big  
20 Rivers would book a credit to account 173, and would debit account 142.1  
21 (Customer Accounts Receivable – Electric).

22

1 *XII. Conclusion*

2  
3 Based on the foregoing, Big Rivers asks that the Commission correct the  
4 errors for which Big Rivers sought rehearing and deny KIUC's requests for relief.

5 On this the 1<sup>st</sup> day of October, 2012,

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8 

9 James M. Miller  
10 Tyson Kamuf  
11 SULLIVAN, MOUNTJOY,  
12 STAINBACK & MILLER, P.S.C.  
13 100 St. Ann Street, P. O. Box 727  
14 Owensboro, Kentucky 42302-0727  
15 (270) 926-4000

16  
17 Douglas L. Beresford  
18 HOGAN LOVELLS U.S., LLP  
19 Columbia Square  
20 555 Thirteenth Street, NW  
21 Washington, D.C. 20004  
22 (202) 637-5600

23  
24 Counsel for Big Rivers Electric  
25 Corporation