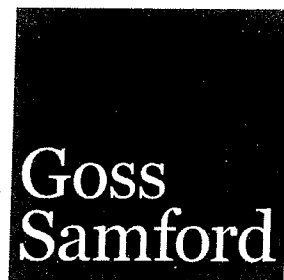


REPORT OF FINDINGS,
CONCLUSIONS AND RECOMMENDATIONS
TO THE CITY OF BEREA, KENTUCKY
REGARDING CERTAIN ENERGY,
CAPACITY AND TRANSMISSION
AGREEMENTS

FEBRUARY 9, 2018



ATTORNEYS AT LAW PLLC

A handwritten signature in black ink, appearing to read "Mark D. Goss".

Mark David Goss
Goss Samford, PLLC
2365 Harrodsburg Road
Suite B-325
Lexington, KY 40504
859.368.7740
mdgoss@gosssamfordlaw.com



SCANNED

I. INTRODUCTION OF GOSS SAMFORD, PLLC

Mark David Goss is an Owner-Member in the law firm Goss Samford, PLLC (“Goss Samford”).¹ Goss Samford, located in Lexington, Kentucky, is a small but dynamic law firm concentrating its practice in the utility and energy industries and frequently assisting clients with regulatory, transactional, litigation and consultative matters. Goss Samford consists of four attorneys, two government relations professionals and support staff. By way of example, Goss Samford has provided legal and regulatory counsel for large utility mergers, in multiple general rate cases for both investor-owned and cooperative utilities, in multi-million-dollar financing cases and in complex purchase power agreements, contract review and negotiation, and a multitude of other energy-related matters.

II. NATURE OF ENGAGEMENT AND SCOPE OF ANALYSIS

In late November 2017, Steve Connelly, Esq., Mayor of the City of Berea (“Berea”), engaged Goss Samford to “review certain commercial power and transmission contracts to which [Berea] is a party, along with other documentation, in order to advise [Berea] in connection with its rights and obligations existing under those contracts.” The contracts in question involved transactions between Berea and the newly-formed Kentucky Municipal Energy Agency (“KMEA”), and between Berea and American Municipal Power, Inc. (“AMP”), for the provision of energy, capacity and transmission service to Berea for ultimate use by electric customers of Berea Municipal Utilities (“BMU”). Apparently, a disagreement had arisen within Berea City Government with respect to these transactions, primarily concerning the obligations of the respective contracting parties to each other and whether the amounts Berea was paying KMEA on an annual basis matched the parties’ original agreement under the contracts.

¹ Mr. Goss’ qualifications and experience are contained in Attachment 1 to this Report.

Mayor Connelly, individually and through Berea Staff (namely, Randy Stone, Berea City Administrator, and Ed Fortner, Jr., BMU's Utilities Director), requested that Goss Samford:

- (1) Review and comment on KMEA's formation in mid-2015 through the execution of an Interlocal Cooperation Agreement ("Interlocal Agreement"), and Berea's subsequent membership in KMEA completed in 2016;
- (2) Review the several contracts between Berea and KMEA and Berea and AMP to determine if they were properly formed, have been properly performed according to their terms, and whether they comport generally with industry standards in Kentucky;
- (3) Analyze and explain the principal legal and financial obligations which Berea has to KMEA under both the Interlocal Agreement and Agency Agreement for Transmission Services ("Transmission Agreement"), and identify any unusual legal or financial risk they may place on Berea, especially if Berea acts to withdraw from them; and
- (4) Provide any recommendations or suggestions appropriate to assist Berea with the future administration of these transactions.

III. LIST OF DOCUMENTS REVIEWED AND INDIVIDUALS CONTACTED

Goss Samford was provided a multitude of contracts, presentations, emails, and other documents from Berea officials, staff, council members, and outside parties. Below is a partial list of the key documents that were reviewed during the course of this engagement:

- Berea City Ordinance #16-2016 (September 6, 2016)
- Berea City Resolution #19-16 (August 16, 2016)
- Kentucky Revised Statutes §§65.210 to 65.300 (Interlocal Cooperation Act)

- Interlocal Cooperation Agreement creating the Kentucky Municipal Energy Agency
- Bylaws of Kentucky Municipal Energy Agency
- Agency Agreement Between City of Berea, Kentucky, and Kentucky Municipal Energy Agency for Procurement of Berea Transmission Services
- Master Services Agreement among the City of Berea, Kentucky, and American Municipal Power, Inc. and AMP Affiliated Entities
- 2019-2024 Full Requirements Energy Supply Schedule (a Schedule to Master Service Agreement)
- Transaction Confirmation for Energy, May 1, 2019 – April 30, 2024, between American Municipal Power, Inc., and NextEra Energy Power Marketing, LLC (“NextEra”)
- Letter dated January 2, 2018, from Charles S. Musson, Esq., Rubin & Hays Attorneys, to Mark David Goss, with First Addendum to the KMEA Interlocal Cooperation Agreement included
- KMEA Proposed Terms and Conditions for Seasonal Capacity Sale to Berea for Winter Planning Reserves (undated)
- PowerPoint Presentation from New Gen Strategies and Solutions, entitled “Seasonal Capacity Sale to Berea” and dated July 26, 2017
- Miscellaneous invoices, spreadsheets, written and electronic correspondence between Berea and KMEA pertaining to Agency assessments and costs

- Miscellaneous media articles and reports
- Miscellaneous other correspondence and documentation

Goss Samford contacted and spoke at length with the following individuals in order to obtain information and context to better understand the history of the transactions, the concerns and opinions of the participants, and the essential issues to address in this Report:

- Steve Connelly, Esq., Mayor of the City of Berea
- Randy Stone, Berea City Administrator
- Ed Fortner, Jr., Utilities Director, Berea Municipal Utilities
- Jerry Little, Berea Council Member
- Bruce Fraley, Berea Council Member
- Jerry Hensley, C.P.A., Ray Foley Hensley

IV. SUMMARY OF TRANSACTIONS

In order to better understand the issues requiring analysis and discussion in this Report, a summary of the various transactional activities involving Berea is in order.²

For decades Berea's electric power needs were served by Kentucky Utilities Company ("KU"), presumably by franchise with the City. Later, when Berea acquired Berea College's utility system and formed BMU, KU became a wholesale provider of electricity. However, in 2014, Berea, along with a host of other municipalities, served notice on KU that five (5) years

² While every effort has been made to accurately summarize these activities in chronological order, it should be remembered that Goss Samford played no part in any of them and is only now trying to reconstruct them from the several verbal conversations held with the participants, and the documentation provided at different times and from multiple sources. Any misunderstanding by the undersigned of the documents, the discussions leading to their formation, or the intent of the parties at the time is completely unintentional and should not alter the findings, conclusions, and recommendations in this Report.

thereafter (April 2019), Berea would cease purchasing its wholesale power requirements from KU. This notice provided Berea a period of time to identify a power provider capable of replacing KU under terms more advantageous to Berea than what it already received from KU.

Beginning in September 2016, Berea entered into several contracts meant to replace the energy, capacity and transmission service provided by KU and which were to take effect on or about May 1, 2019.³ First, Berea contracted with AMP to become a member of that organization and purchase energy and capacity at a fixed price for a period of five (5) years beginning in 2019 and ending in 2024. Second, Berea (almost simultaneously) contracted with KMEA to become a member of that organization and signed the Transmission Agreement authorizing KMEA to procure transmission service necessary to deliver the AMP power from AMP's delivery point to Berea's two (2) substations so that it could then be distributed to Berea's retail customers.

Following the execution of the KMEA contracts, Berea has been billed and apparently routinely remitted payment to KMEA for both general and transmission-related administrative expenses. It is the payment of these two (2) tiers of expenses that concerns some of Berea's City Council Members.

Following several months of discussion on the subject, on September 19, 2017, the Berea City Council voted 6-1 to terminate all contracts with KMEA. In response to this action, Mayor Connelly initiated a process of "due diligence" meant to gather information from "knowledgeable parties" on whether the facts supported a conclusion that the KMEA Agreements exposed Berea and the customers of BMU to any unacceptable risk, unappreciated potential cost, or unreasonable likelihood of service reliability issues.

³ These series of contracts are more fully discussed in Section V below.

Mayor Connelly's stated "due diligence" process was to consist of: (1) a request of each City Council Member to voice in detail his or her concerns; (2) obtaining relevant comment from the BMU Advisory Board; (3) an opinion from Berea's auditor on the financial risks imposed by the contracts; (4) an analysis from Mr. Fortner on the steps necessary to void Berea's transmission contract with KMEA and obtain a replacement transmission contract with AMP; and (5) an opinion from an independent law firm routinely practicing energy, utility and regulatory law on the legal risks attendant to the KMEA contracts and whether they comply with accepted industry standards. It is this last piece of Mayor Connelly's process which is the subject of this Report.

V. SUMMARY AND DISCUSSION OF FINDINGS AND OPINIONS REGARDING
KEY DOCUMENTS REVIEWED

A. KMEA's formation using the "Interlocal Cooperation Agreement" under authority of the Interlocal Cooperation Act (K.R.S. 65.210, et seq.), ("The Act") is problematical.

KMEA was formed in 2015⁴ as a "joint public agency" between and among the Electric and Water Plant Board of the City of Benham, the Utility Commissions of the Cities of Owensboro, Barbourville and Corbin, and the cities of Bardwell, Falmouth, Madisonville, Paris and Providence.⁵ As stated above, its formation was accomplished by the drafting and execution of a document called "Interlocal Cooperation Agreement Creating the Kentucky Municipal Energy Agency."⁶

⁴ KMEA's initial organizational meeting of Directors occurred on September 24, 2015.

⁵ Berea was not a charter member of KMEA but joined approximately one year later on or about September 6, 2016.

⁶ A copy of that document is included in this Report as Attachment 2.

It is very clear from this document that the intent of the Organizers of KMEA was to, among other things:

- Create a joint public agency (Article I, Section I and Recitals) for the purposes of coordinating all aspects of the provision of electric services to the retail customers of its member-municipalities including power supply, dispatch, construction, permitting, operating, financing and even owning electric power supply projects or resources (Article II and Recitals);
- Provide that KMEA could authorize, issue and sell bonds and bond anticipation notes to finance its activities (Article II, Sections 2(f) and 2(g));
- Authorize unto itself the exercise of the power of eminent domain (Article II, Section 2(h));
- Provide the authority to enter into binding contracts with its own members (Article II, Sections 3(a) through 3(g));
- Set up a mechanism by which the costs for operating the organization were to be shared by the members and the amounts to be paid determined by periodic resolutions of the KMEA Board of Directors adopting a schedule of assessments to be paid by each member “to support the administrative budget and operations of the Agency.” (Article V); and
- Allow a KMEA member to resign its membership by providing at least one (1) year’s advance notice but requiring such member to pay, or arrange to pay, any indebtedness or obligations owed to KMEA resulting from its membership (Article VI, Sections 9(a) through 9(d)).

According to the Interlocal Agreement, Kentucky’s Interlocal Cooperation Act (found in

K.R.S. Section 65.210, et seq.) provides the authority for KMEA's formation and existence. A summary of certain key provisions of the Act are instructive to the issue of KMEA's formation and existence:

- KRS 65.230 defines "public agency" to mean "...any political subdivision of this state...[or] any agency of the state government...";
- KRS 65.240(2) provides that "[any] two (2) or more public agencies may enter into agreements with one another for joint or cooperative action... [appropriate] action by ordinance, resolution or otherwise pursuant to law of the governing bodies of the participating public agencies shall be necessary before any such agreement may enter into force" (emphasis added);
- KRS 65.250(1)(b) provides that any agreement between public agencies shall specify, among other things, "[t]he precise organization, composition and nature of any separate legal or administrative entity created thereby together with a statement of the powers delegated thereto; provided such legal entity may be legally created." (emphasis added);
- KRS 65.260(2) provides that "every agreement made pursuant to [the Act] shall, prior to and as a condition precedent to its entry into force, be submitted to the Kentucky Attorney General who shall determine whether it is in proper form and compatible with [Kentucky law], except for interlocal agreements between cities...which shall be submitted to the Department for Local Government." (emphasis added);
- KRS 65.270 provides that any public agencies entering into an agreement for joint or cooperative action pursuant to the Act may independently borrow money and issue bonds under the Act pursuant to authority from their governing bodies (city council,

fiscal court, etc.). When such approval is given, the authorizing order, resolution or ordinance shall provide that the joint or cooperative action is being undertaken pursuant to the Act and shall specifically set aside and pledge the income and revenue from the joint cooperative action to be applied to the payment on the bonds and the costs of operations necessary to effectuate the joint or cooperative action.

Several aspects of the Interlocal Agreement are troubling and call into question the validity of KMEA's formation and subsequent activities. First, the Act allows two or more existing public agencies (as defined narrowly in the Act) to enter into agreements for joint or cooperative action. While it is true that the Act also allows for the creation of separate legal entities and the form of such entities shall be specified, they are permissible only if they can be legally created under Kentucky law. The definition of "public agencies" in the Act is limited to "any political subdivision of this state...[or] any agency of state government." There is nothing in the Act that authorizes two or more public agencies to join together and form a completely new and independent "public agency," meaning, for example, that the cities of Bardwell and Benham have no authority to contractually form a completely new "political subdivision of the state" or a new "agency of state government" for some cooperative purpose. The Act merely sanctions the creation of "agreements" by already-existing public agencies to effectuate interlocal cooperation under the Act as written.

One can reasonably speculate that KMEA chose to create and call itself a "public agency" so it could enjoy the enhanced rights, privileges and authority of a subdivision of state government without having to resort to its individual Members to exercise such powers as eminent domain and bond issuance. It could have formed the "Kentucky Municipal Energy Corporation" under the Act, but it chose instead to form an independent "agency." The differences between the powers of a corporation, for instance, and an agency are stark. Without KMEA's self-designation as a

“public agency,” its powers and authority are much more circumscribed and must be exercised on a case-by-case basis by its individual Members who are the real Public Agencies.

In its current form, KMEA strongly resembles an investor-owned utility or a generation and transmission rural electric cooperative. This resemblance is likely not coincidental and there appears to be no authority in the Act for it.

Moreover, the Act is clear that before any interlocal agreement between cities is placed into force it must be submitted to the Kentucky Department for Local Government (“DLG”) for review and approval. However, in this case the interlocal agreement was instead submitted to the Kentucky Attorney General, who apparently conducted a review and gave his blessing to the arrangement.⁷ The procedure followed for review and approval of the Interlocal Agreement does not appear to comply with KRS 62.260(2). A fair reading of that section indicates that interlocal agreements between “state” public agencies are to be reviewed and approved by the Attorney General, and interlocal agreements between “local” public agencies (such as cities and city-run utility commissions) are to be reviewed and approved by the Department for Local Government. One can reasonably infer that the General Assembly required Interlocal Agreements between cities to be reviewed by the DLG because that agency has special expertise in dealing with the unique issues and problems facing Kentucky’s cities and other local public agencies.

In summary, there are several problematical issues involving KMEA’s formation and existence which should cause Berea and others to delve deeper into the issue. The concerns expressed in this Report are made from studying the Interlocal Agreement against what is authorized in the Act and does not constitute a formal legal opinion on the matter. Additional,

⁷ Please refer to letter from Charles S. Musson, Esq., Rubin & Hays Attorneys, dated January 2, 2018. This letter is appended to this Report as Attachment 3. The Attorney General’s opinion that KMEA’s documents were in order provides no special legal status to KMEA, nor does it automatically validate KMEA’s formation under the Act.

very extensive legal research would be necessary to arrive at any such opinion.⁸ Ultimately, the question of whether KMEA was legally formed and its ongoing legal status would be a matter for a Court to decide by utilization of its declaratory judgment authority.

B. Berea's participation in KMEA is limited to being a "transmission-only" Member, but Berea is being charged assessments in a two-tiered fashion.

The final action necessary for Berea to become a Member of KMEA apparently occurred at the meeting of the Berea City Council held September 6, 2016, at which Ordinance #16-2016 was given its second reading.⁹ This Ordinance provided that Berea would become a Member of KMEA¹⁰ and appointed Ed Fortner, Jr., as Berea's representative and director on the KMEA Board of Directors (with Kevin Howard as alternate). The Ordinance also expressed Berea's recognition that KMEA will need funds to maintain its operations and that, as a Member, Berea "will be assessed, from time to time, its proportionate share, of such expenses in accordance with the [Interlocal] Agreement and the actions of the KMEA Board of Directors."

A review of the minutes from the September 6, 2016, Council Meeting reflect that once Corporate Counsel read the Ordinance, it was motioned and seconded for approval. However, following Council discussion the motion to approve the Ordinance was amended "...to include billing and payment of the transmission, contingent on approval of this Ordinance..." This amended motion passed by a vote of 5-3. It is unclear from these Minutes exactly what was meant

⁸ It is worth noting that in each of the three (3) most-recent completed legislative sessions (2015-2017), a "Joint Action" bill authorizing the very action taken by KMEA in its formation has been introduced (primarily by Rep. Jim Gooch, Jr. (R)) yet failed to emerge from committee. One could speculate that the creation and utilization of KMEA by employing the Interlocal Cooperation Act is a convenient way to ignore this reality and is akin to "skinning the cat another way."

⁹ A copy of Ordinance #16-2016 and a page excerpt from the Minutes of the September 6, 2016 meeting discussing passage of the Ordinance are provided in this Report as Attachment 4.

¹⁰ The Ordinance only recites that Berea was to become a Member of KMEA. There is no language in the Ordinance itself limiting Berea's participation to transmission-related activities only.

by the Amendment. If the Amendment was intended to provide that the Ordinance should reflect that Berea would only be billed for transmission-related costs, it failed because the Ordinance itself was not revised to reflect it since the Minutes clearly state “Ordinance adopted.” In other words, it appears that the amended motion to approve with the transmission component addition does not coincide with the Ordinance as finally approved.

To add further confusion to the matter, in addition to signing the Interlocal Agreement and other documents necessary to become a Member of KMEA, Berea simultaneously signed the Transmission Agreement.¹¹ The primary purpose of this Agreement was to provide a mechanism by which KMEA would act as Berea’s agent to procure transmission services for Berea from the Indiana Hub (where AMP/NextEra intended to deliver Berea’s energy) to Berea’s two (2) substations. This would require KMEA to enter into a Network Integration Transmission Services (“NITS”) Agreement with KU on Berea’s behalf. The key components of this Transmission Agreement are:

- “Berea anticipates becoming a member of [KMEA] for the limited purpose of saving money in the procurement of Berea Transmission Services.” (Agreement Recitals, emphasis added);
- By becoming a “transmission-only” member of KMEA, Berea would have the opportunity to reduce total transmission costs by sharing with other similarly-situated KMEA members the costs associated with transmission studies and KMEA administrative expenses related directly to the transmission needs of those members (Agreement Recitals);
- KMEA will purchase Transmission Services for Berea, pay the transmission

¹¹ A copy of this Transmission Agreement is provided in this Report as Attachment 5.

service provider, and will be reimbursed its costs for such services by Berea without markup (Section 4.1);

- Berea will reimburse KMEA for Berea's proportionate share of any transmission study costs that KMEA incurs for Berea and other KMEA members (Section 4.1);
- KMEA's assessments to Berea for Berea's share of KMEA's administrative costs is to be "limited to a proportionate share of only those administrative costs that are attributable to [KMEA's] procurement and administration of transmission services." (Section 4.1, emphasis added). For the avoidance of doubt regarding the meaning of this provision, an example was given which clearly demonstrates the parties' intent that Berea should only pay KMEA that portion of KMEA's administrative costs which Berea's load-proportionate share of transmission services bears to KMEA's costs attributable only to transmission services.

There is apparently no dispute whatsoever that KMEA is invoicing and receiving periodic payments from Berea for both transmission and non-transmission related administrative costs. The transmission-related costs are being assessed pursuant to Section 4.1 of the Transmission Agreement discussed above. The non-transmission related costs are being assessed pursuant to Article V of the Interlocal Agreement authorizing general assessments to KMEA members to defray KMEA's recurring operational costs.

There exists a significant dispute within Berea regarding whether the intent of the parties evidenced in the two (2) KMEA documents, the Interlocal Agreement, and the Transmission Agreement was for Berea to pay two (2) sets of administrative costs, or only one (1). From review of the Minutes of the Berea Council Meeting held August 16, 2016, Berea staff, and specifically Mr. Stone, apparently believed that Berea would only be responsible to pay transmission-related

administrative costs to KMEA and expressed those beliefs to City Council. By way of example, the August 16, 2016 meeting Minutes reflect Mr. Stone's statement that Berea's "estimated cost to be a member of KMEA is an average of \$12,000 per year."

This statement and apparent belief on the part of Berea staff comports with the plain wording of the Transmission Agreement that Berea's total obligation to pay any KMEA assessments were limited to transmission-related activities. It is further supported by the discussion held by City Council during the September 6, 2016 meeting where the amended motion was apparently made to pass an Ordinance joining KMEA, but only to the extent of Berea's transmission needs and associated costs. Unfortunately, the matter was apparently not documented adequately since the Ordinance that was passed only provided for Berea's general membership in KMEA and did not refer to the special status as a "transmission-only" member.

What is presented here, while confusing and unsettling, is actually fairly simple and straightforward. There are two (2) contracts between KMEA and Berea: (i) a general "membership" contract which Berea and the other ten (10) municipalities (or their affiliates) signed with KMEA to become KMEA members (presumably, the language in each of these eleven (11) contracts is identical); and (ii) a specific "transmission-only" contract whereby KMEA carves out Berea's participation in the organization to only include transmission-related activities. It is assumed that these contracts were negotiated, discussed, approved and executed simultaneously or nearly simultaneously. As such, and consistent with general legal principles of statutory construction, where there is a dispute between the same parties arising from inconsistent contracts, all else being equal, specific language controls over general language. The Transmission Agreement provides special restrictions on the relationship between KMEA and Berea and a specific formulaic method for determining Berea's cost obligations to KMEA. The Interlocal Agreement, on the other hand, is a "membership" document containing general terms applicable

to all signatories, including a very broad statement concerning member assessments providing for wide latitude and broad discretion on the part of KMEA's Board of Directors in setting assessments to support the administrative budget and operations of the organization.

From the documentation, it appears evident that both KMEA and Berea desired for KMEA to only procure transmission services for Berea with Berea paying all such transmission-related costs; however, in order for that to occur, Berea had to first become a member of KMEA because KMEA was authorized by the Interlocal Agreement to provide services only to its members. Therefore, Berea became a member of KMEA and KMEA immediately agreed to carve out Berea's participation as a member into those transmission-only services, as evidenced by the special Transmission Agreement entered into by the parties simultaneously or nearly simultaneously with the Interlocal Agreement. This arrangement is analogous, for instance, to membership in country club; one must become a member of the club in order to enjoy the privileges of using the property and facilities, but the cost to be paid by the member may vary based on the category of membership selected. Indeed, a member may pay one cost if she/he is a "full facilities member," another cost if a "part-time member," another cost if an "out-of-town member," another cost if a "social member," and so on.

While the undersigned is convinced the above analysis is accurate, a significant problem persists for Berea in the event it decides to challenge KMEA on its two-tiered assessments of Berea. Apparently, since September 2016, Berea has been receiving and paying KMEA invoices for both tiers of assessments without meaningful complaint nor request for resolution. This course of conduct could make it very difficult for Berea to now convince KMEA it was wrong all along by charging Berea both a general membership assessment and for transmission-related costs.

On September 19, 2017, Council voted to terminate all KMEA contracts. Part of the legal engagement embodied in this Report involves an analysis of the procedures and risks associated

with such action. Clearly, the Interlocal Agreement contemplates and allows for the resignation of a member of KMEA and provides a mechanism to be followed to accomplish it with minimal disruptions to the organization and other members. The details of such a resignation are contained in Article VI, Section 9 of the Interlocal Agreement. The Transmission Agreement (Section 2.2) may be terminated immediately by mutual agreement of KMEA and Berea, or unilaterally by one of the parties upon 30-days advance written notice. So it is not impossible, nor even particularly difficult, for Berea to terminate its contracts and commercial relationship with KMEA. However, there are at least three (3) important issues for Berea to ponder before that action is finally taken.

First, upon notice of termination of the Interlocal Agreement, Berea would remain a KMEA member for one (1) year before its resignation would take effect and would likely be obligated to pay whatever membership assessments it has been paying since September 2016. If Berea chose to terminate such payments during the one-year waiting period, KMEA could (and probably would) sue Berea for recovery of those payments. Given Berea's history of making those payments since 2016, even if incorrectly or mistakenly, Berea could be at substantial risk for having to continue them.

Second, upon termination or resignation Berea would remain obligated to satisfy any contractual or other obligations which KMEA undertook for Berea's benefit, either by payment and/or performance (Interlocal Agreement, Article VI, Section 9; Transmission Agreement, Section 2.2 and 2.3). The undersigned has no current knowledge, nor has he been informed of the nature, scope or terms of any transmission studies, cost studies, permitting or transmission agreements which are in process or have been executed which could potentially obligate Berea for payment.

Finally, May 1, 2019, is a scant fifteen (15) months away. It would be imprudent for Berea to sever its relationship with KMEA unless and until it determined the current status of any NITS

agreement which KMEA may have entered into on Berea's behalf, and simultaneously be prepared to have firm transmission in place on May 1, 2019 from another provider. Failure to take these steps could leave Berea significantly exposed both in terms of the reliable delivery of the power it is purchasing from AMP, and the cost for it.

While a divorce from KMEA is possible, it would be imprudent for Berea to finalize this course of action until a thorough assessment of all operational and financial obligations attendant to its KMEA membership can be made and discussed. Such an assessment is beyond the scope of this Report.

C. The purchase of 10 MW of seasonal capacity by Berea is a business decision requiring an analysis of cost/benefit and risk/reward.

Another issue that is evident from the documents reviewed in the course of compiling this Report is whether Berea should purchase an additional 10 MW of firm capacity from KMEA for a period of five (5) years during the months of January, February and March at a price of \$3.85/KW-month, or approximately \$128.00/MW-day, for the first three (3) years with the last two (2) years being subject to a Consumer Price Index Adjustment. Berea's load is winter peaking, hence the suggestion for extra capacity during that season. The approximate cost to Berea of such capacity during these months would be \$115,000:

$$\text{\$128.00/MW-day} \times 10 \text{ MW} \times 90 \text{ days} = \text{\$115,000}$$

The cost of the capacity seems a bit high considering current capacity market prices. However, the ability to purchase this capacity on a seasonal basis is very attractive and probably justifies a slightly-higher fixed capacity cost. Most capacity purchases are required to be in 12-month increments and the opportunity for Berea to purchase capacity for only three (3) months during its peak load season is advantageous. While recommendation to Berea on this matter is

beyond the scope of this Report, it is recommended that Berea task its energy consultant to model the last several winters' peak loads to assess whether such a capacity purchase is warranted.

D. Berea's commercial relationship with AMP appears to be reasonable (although expensive) and consistent with current standards for such agreements.

Berea became a member of AMP by virtue of Resolution #19-16, dated August 16, 2016. Berea and AMP have agreed that beginning May 1, 2019, AMP will provide Berea with sufficient energy to meet its load for all hours of the day at a contract price of \$40.51/MWh for a period of five years.¹² In addition to the energy price, Berea must also pay AMP "actual monthly congestion charges, ancillary services" and other fees and costs (Article II, Section 201 A, of the Master Services Agreement). Moreover, the Master Services Agreement provides (at Article II, Section 201) that AMP shall purchase sufficient long-term capacity (designated as "planning reserves" in the Master Services Agreement) for the term May 1, 2019 to April 30, 2024 in an unstated amount for a price not to exceed \$1.50/kW-month. The details of this capacity purchase are not contained anywhere in the Master Services Agreement. When the undersigned questioned the status of this purchase, he was told by e-mail from Mr. Fortner that the amount of the capacity Berea has purchased is 25 MW and the final price is \$3.00/kW-month price, twice the amount of the maximum allowed by the Master Services Agreement. When asked to provide the Transaction Confirmation supporting this capacity purchase, Mr. Fortner advised that one did not exist, but was summarized in a handful of e-mails and PowerPoint presentations given by Mike Migliore of AMP. When the undersigned advised Mr. Fortner that the \$3.00/kW-month price was double the maximum allowed by the Master Services Agreement, Mr. Fortner stated that the \$1.50/kW-month amount was a "mistake."¹³ Further, when the undersigned advised Mr. Fortner that there needed

¹² This price is reflected in the NextEra Transaction Confirmation which is contained within the Master Services Agreement between Berea and AMP dated September 1, 2016, and provided in this Report as Attachment 6.

¹³ This "mistake" in the Master Services Agreement, resulting in a doubling of the price to \$3.00/kW-month, was

to be a definite Transaction Confirmation or other document evidencing the terms of this capacity purchase which will cost Berea approximately \$75,000/month, he promised to have AMP provide adequate documentation to close this gap in the AMP transaction, and that he would provide same to the undersigned. As of the date of this Report, no such document has been provided by Mr. Fortner or any other representative of Berea and its current status is unknown.

Considering the historically-low natural gas prices currently found in the power generation industry resulting in attractive long-term fixed energy prices, the \$40.51/MWh five-year fixed energy price seems high, especially considering that Berea will have to also pay additional transmission costs with KMEA through a NITS Agreement in order to deliver the energy to Berea's distribution system.

Besides the matters of costs for the energy and its delivery and the urgent need to properly document the terms of the capacity purchase, the documents between Berea and AMP appear to be in order and in compliance with industry standards.

IV. CONCLUSORY RECOMMENDATIONS

As a result of Goss Samford's analysis of this global transaction, the following suggested recommendations are offered:

- (1) Because Berea has apparently erroneously paid both general membership and transmission-related assessments to KMEA since becoming a member in September 2016, it should consider having its KMEA Board Member, Ed Fortner, Jr., and its City Attorney, J.T. Gilbert, correspond and meet with KMEA representatives to attempt a satisfactory resolution of the matter.

apparently accepted without Council approval to amend the amount, without sufficient documentation to evidence the "mistake," and was done close in time to KMEA's offer to provide 10MW of seasonal capacity at \$3.85/kW-month.

- (2) Should a satisfactory resolution prove elusive, Berea has the option to move forward with its resignation from KMEA membership. However, it should proceed very cautiously and, before providing formal notice of its resignation, make itself fully aware of the myriad operational and financial ramifications of such action.¹⁴ To do otherwise would be highly imprudent.
- (3) Berea should immediately contact AMP and obtain documentation sufficient to provide certainty around the terms of Berea's purchase of 25 MW of capacity from AMP. If the capacity price agreed upon in fact exceeds the minimum price contained in the Master Services Agreement, Berea staff should inform City Council of that fact, the reasons why this is the case, and obtain approval for the change.
- (4) Berea should consider whether it wishes to challenge the validity of KMEA's formation and existence for the reasons discussed earlier in this Report. This would prove to be a very expensive, time-consuming and labor-intensive endeavor and, because Berea is supposed to be a transmission-only member, may not be worth the extensive resources that would inevitably be expended.

¹⁴ Berea's auditing firm, Ray Foley Hensley, is to provide an analysis of the financial aspects of this transaction. Perhaps Berea could request that the firm also perform additional work to analyze the financial repercussions if the city is to formally terminate its KMEA membership.