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PSC Case No. 2013-00221

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY

In the Matter of:

Joint Application of Kenergy Corp.)
and Big Rivers Electric Corporation)
for Approval of Contracts and for)
A Declaratory Order)

Case No. 2013-00221

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PUBLIC SERVICE
COMMISSION

JOINT POST-HEARING BRIEF OF
KENERGY CORP. AND BIG RIVERS ELECTRIC CORPORATION

August 5, 2013

TABLE OF CONTENTS

I. <u>INTRODUCTION</u>	1
II. <u>LEGAL STANDARD</u>	3
III. <u>FACTUAL BACKGROUND</u>	3
IV. <u>LEGAL ANALYSIS</u>	5
A. The Century Transaction Is Reasonable and Should Be Approved.....	5
1. The Century Transaction is consistent with Kentucky’s regulatory framework and prior approved electric service arrangements.	5
2. The Century Transaction benefits the members of Kenergy and Big Rivers, as well as Western Kentucky.....	10
B. The Commission Should Approve the Alternate Service Agreement and Authorize the Disconnection of Service to the Hawesville Smelter.....	13
C. The Commission Should Approve the Century Transaction as Filed and Decline to Make Any Material Changes.	15
D. Big Rivers Should Be Permitted to Manage Its Own Transmission Line Maintenance Means, Methods, and Techniques.....	16
V. <u>CONCLUSION</u>	20

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**POST-HEARING BRIEF OF JOINT APPLICANTS KENERGY CORP. AND
BIG RIVERS ELECTRIC CORPORATION**

I. INTRODUCTION

Kenergy Corp. (“Kenergy”) and Big Rivers Electric Corporation (“Big Rivers”) jointly submitted the application (the “Application”) in this proceeding seeking an order of the Kentucky Public Service Commission (the “Commission”) granting:

- (i) approval of certain agreements establishing electric service arrangements (“Century Transaction”) between and among Kenergy, Big Rivers, and Century Aluminum of Kentucky General Partnership (“Century”);
- (ii) approval of alternate electric service arrangements for non-smelting purposes to the Century smelter facility in Hawesville, Kentucky (the “Hawesville Smelter”); and
- (iii) a declaratory order confirming the right of Kenergy and Big Rivers to disconnect service to the Hawesville Smelter in the absence of appropriate, approved, and effective contractual arrangements for electric service to the Hawesville Smelter for the period beginning immediately after 11:59 p.m. CPT on August 19, 2013.

The Office of the Attorney General of the Commonwealth of Kentucky (the “Attorney General”), Kentucky Industrial Utility Customers, Inc. (“KIUC”) and Century intervened in this proceeding, filed comments or testimony, and participated in the hearing on July 30, 2013. KIUC advocates approval of the Century Transaction but seeks to impose unrealistic conditions that would make the arrangement unworkable.¹ The Attorney General “does not support the

¹ Direct Testimony of Lane Kollen (“Kollen Direct Testimony”), p. 5:15-16 (July 19, 2013).

agreements,”² and it mistakenly claims that they constitute retail wheeling and that they are somehow dependent on the outcome of Big Rivers’ rate cases. Century supports the transaction and has indicated its willingness to sign the agreements as filed, although it now maintains that the Commission should require Big Rivers to perform live line transmission maintenance to alleviate its risk of having to bear the System Support Resource (“SSR”) costs imposed by the agreements when Coleman Station is in a must-run condition.

The record establishes that the Century Transaction is consistent with Kentucky law and prior Commission-approved retail electric service agreements between the same parties. The Century Transaction will benefit Kenergy’s and Big Rivers’ members, as well as Western Kentucky, by helping to retain the economic benefits of the Hawesville Smelter’s continued operations while simultaneously protecting Kenergy’s and Big Rivers’ members from any incremental costs associated with serving the Hawesville Smelter. For these reasons, as set forth more fully below, the Commission should issue the approvals required for Kenergy and Big Rivers to enter into the Century Transaction and otherwise manage retail service to the Hawesville Smelter. These approvals include the requested declaratory order.

² Attorney General’s Comments in Lieu of Testimony (“Attorney General Comments”), p. 12 (July 19, 2013).

II. LEGAL STANDARD

Pursuant to the special contracts in the Century Transaction described in the application, Kenergy will furnish retail electric service to the Hawesville Smelter. The Commission has the authority to approve these special contracts under KRS 278.160 and 807 KAR 5:011(13).³ When considering whether to approve special arrangements such as these, the Commission determines whether the rates and conditions of service contained in those agreements are “reasonable.”⁴ If so, it will approve the agreements.⁵

III. FACTUAL BACKGROUND

On August 20, 2012, Century Kentucky notified Kenergy that—effective August 20, 2013—it was terminating its July 1, 2009 retail electric service agreement (the “2009 Retail Agreement”).⁶ In September of 2012, Century’s CEO, Michael Bless, sent Big Rivers a letter requesting that Big Rivers discuss contractual arrangements that would be required for Century to obtain, through Kenergy, electricity from the wholesale market at market rates commencing

³ See *In the Matter of Submission of Kenergy Corp. for a Determination of Whether Certain Letter Agreements Stating Supplemental Terms for a Market Energy Transaction Pursuant to Its Wholesale Agreement Require Prior Commission Approval*, Order, P.S.C. Case No. 2012-00270, at *6 (June 29, 2012) (Commission must approve special contracts); *In the Matter of Ky. Utils. Co. Revised Special Contract with North American Stainless, L.P.*, Order, Case No. 2003-00137 (October 19, 2005) (any “special contract that touches upon rates (or services) . . . [must be] filed with the Commission in the same manner as the utility’s generally available tariffs”).

⁴ See *In the Matter of Application of Hardin Cty Water Dist. No. 1 for Approval of a Contract with the U.S. Army to Provide Water Service to the Fort Knox Military Installation*, Order, P.S.C. Case No. 2011-00416, *22 (Jan. 27, 2012); *In the Matter of Stivers v. Henry Cnty. Water Dist. No. 2*, Order, P.S.C. Case No. 2002-00045, *7 (June 14, 2002) (noting that Commission “sought to review the reasonableness of two of the special contracts”).

⁵ For example, in approving the special contracts that were part of Big Rivers’ unwind transaction, the Commission simply noted that the “new power contracts . . . are reasonable and should also be approved” subject to certain conditions. *In the Matter of the Applications of Big Rivers Elec. Corp. for: (1) Approval of Wholesale Tariff Additions for Big Rivers Elec. Corp., (2) Approval of Transactions, (3) Approval to Issue Evidences of Indebtedness, and (4) Approval of Amendments to Contracts; and of E.ON U.S., LLC, Western Ky. Energy Corp., and LG&E Marketing, Inc. for Approval of Transactions*, Order, P.S.C. Case No. 2007-00455 *67 (Mar 6, 2009).

⁶ See Letter from J. Hoerner to G. Starheim, Aug. 20, 2012, Application Exhibit 1.

upon the termination of Century's retail service agreement on August 20, 2013.⁷ Disappointed, but in order to help retain the economic benefits of the Hawesville Smelter's operations, Kenergy and Big Rivers negotiated for months to create a new power supply arrangement that would enable Century to continue smelting operations. The resulting Century Transaction contracts were filed with the Commission on June 12, 2013. Kenergy, Big Rivers, and Century have committed to sign the agreements as filed, if approved.⁸

The Application in this proceeding details all agreements submitted, but only three agreements directly related to electric service for Century's smelting operations require Commission approval:

- (i) the Electric Service Agreement, which is described in detail in paragraph 10(a) of the Application,⁹ and attached to the Application as Exhibit 4;
- (ii) the Arrangement Agreement, which is described in detail in paragraph 10(b) of the Application,¹⁰ and attached to the Application as Exhibit 5; and
- (iii) the Direct Agreement, which is described in detail in paragraph 10(c) of the Application,¹¹ and attached to the Application as Exhibit 6.

These three agreements set forth the parties' principal service and payment obligations in the Century Transaction. Additional financial and operational protections for Kenergy's and Big Rivers' customers are set forth in the supporting agreements submitted with the Application.¹²

⁷ See Berry Hearing Testimony at Tr. 13:05'43" (the negotiations began "shortly after September when Mr. Bailey received a message from Century CEO Michael Bless asking to try to put a structure together to try to begin negotiations")

⁸ Hearing Testimony of Robert W. Berry ("Berry Hearing Testimony"), July 30, 2013, Tr. 13:11'10" ("Big Rivers is willing to sign the contracts as filed"); Direct Testimony of Gregory J. Starheim ("Starheim Direct Testimony"), p. 21:4-5 (Century Transaction was approved by Kenergy's Board of Directors) (June 12, 2013); Hearing Testimony of Michael Early ("Early Hearing Testimony"), July 30, 2013, Tr. 16:24'49" (Century is "prepared to sign the agreements as submitted").

⁹ See also Starheim Direct Testimony at pp. 7:11-14:2.

¹⁰ See also Direct Testimony of Robert W. Berry ("Berry Direct Testimony"), pp. 14:16-15:21 (June 12, 2013).

¹¹ See also Berry Direct Testimony at pp. 16:1-17:8.

In addition, Kenergy and Big Rivers seek the Commission's approval of the Alternate Service Agreement and the Wholesale Letter Agreement, which are described in detail in paragraphs 12 and 13 of the Application, and attached to the Application as Exhibits 13 and 14, respectively.¹³

IV. LEGAL ANALYSIS

A. **The Century Transaction Is Reasonable and Should Be Approved.**

1. **The Century Transaction is consistent with Kentucky's regulatory framework and prior approved electric service arrangements.**

The Century Transaction should be approved because it is consistent with the Kentucky regulatory framework for provision of retail electric service and with the parties' prior approved retail electric service arrangements.

Despite Century's notice of termination for the 2009 Retail Agreement, Kenergy remains the retail electric supplier to the Hawesville Smelter¹⁴ and will continue to have an obligation to provide "adequate service," including "not only the distribution of electric energy to [Kenergy's] customers, but also the selection and acquisition of an adequate source of supply to meet the foreseeable needs of [Kenergy's] customers."¹⁵ However, these service obligations are not

¹² See Application, Exhibits 7-12. These agreements are described in more detail in Berry Direct Testimony pp. 16:12-21:4 and Starheim Direct Testimony p. 14:5-20.

¹³ See also Starheim Direct Testimony at pp. 23:1-24:3.

¹⁴ See KRS 278.010(4) (defining "retail electric supplier"); KRS 278.010(5) (defining "certified territory"); KRS 278.010(8) (defining "electric-consuming facility"); KRS 278.016-.018.

¹⁵ *In the Matter of the Application of Big Rivers Elec. Corp., LG&E, Western Ky. Energy Corp., Western Ky. Leasing Corp., and LG&E Station Two, Inc. for Approval of Wholesale Rate Adjustment for Big Rivers Elec. Corp. and for Approval of Transaction*, Order, P.S.C. Case No. 97-204, p. 20 (April 30, 1998) (the "97-204 Order") (specifically discussing the service obligations of "Big Rivers' distribution cooperatives") (attached to the Rebuttal Testimony of Gregory J. Starheim ("Starheim Rebuttal Testimony") as Exhibit GJS Rebuttal 1). Kenergy has a similar obligation to the United States Department of Agriculture's Rural Utilities Service ("RUS"), its principal creditor. See 7 C.F.R. § 1710.103(a) ("[b]orrowers shall make a diligent effort to extend electric service to all unserved persons within their service area who: (1) Desire

absolute. The Kentucky Court of Appeals has held that the Commission cannot “compel a utility to furnish service without any compensation, or to provide service over and above what is adequate and reasonable, or to forego the use of reasonable classifications as to service and rates.”¹⁶ Accordingly, Kenergy must enter into an arrangement that enables it to provide adequate service to the Hawesville Smelter—including the “selection and acquisition of an adequate source of supply”—but that also ensures that Kenergy is properly compensated, protected from risks associated with service to this load, and is not forced to extend services “over and above” those required by law. The Century Transaction accomplishes these goals.

The Century Transaction establishes familiar electric service arrangements that are based on past contracts among the parties. Century contracts with Kenergy for retail electric service pursuant to the Electric Service Agreement, and Kenergy contracts with Big Rivers, as the initial Market Participant,¹⁷ for the necessary wholesale power supply service pursuant to the Arrangement Agreement. The Direct Agreement between Big Rivers and Century essentially serves as an indemnification or hold-harmless agreement to protect Big Rivers and its members from costs and risk exposures created by the Electric Service Agreement between Kenergy and Century.

In 1998, the Commission approved similar arrangements between the predecessors of Kenergy and Century (the “1998 Retail Agreement”).¹⁸ At the same time, Big Rivers and

electric service; and (2) Meet all reasonable requirements established by the borrower as a condition of service.”).

¹⁶ *Marshall County v. South Central Bell Tel. Co.*, Ky., 519 S.W.2d 616, 618 (1975)

¹⁷ Starheim Direct Testimony at pp. 8:6-9:2; Berry Direct Testimony at p. 15:1-21.

¹⁸ This agreement is attached to the Starheim Rebuttal Testimony as Exhibit GJS Rebuttal 5. It was reviewed and approved by the Commission as part of Big Rivers’ broader plan of reorganization. Starheim Rebuttal Testimony at p. 7:3-18. See 97-204 Order; *In the Matter of the Application of Big Rivers Elec. Corp. for Approval of the 1998 Amendments to Station Two Contracts Between Big Rivers Elec. Corp. and the City of Henderson, Ky. and the Utility*

Kenergy's predecessor, Green River Electric Corporation ("Green River"), carved-out service to the Hawesville Smelter from the all-requirements contract.¹⁹ That carve-out was approved by the Commission and the RUS, and it continues to be reflected in the Arrangement Agreement that is part of the Century Transaction.²⁰ As a result of those 1998 agreements, Green River (and later Kenergy) purchased the entire power supply for the Hawesville Smelter from LG&E Energy Marketing, Inc. ("LEM")²¹ and other parties in the wholesale market from 1998 until 2009.²²

The 1998 Retail Agreement would have expired by its own terms on December 31, 2010, meaning that Kenergy, as the retail electric supplier for Century, would have been in the wholesale market looking for 100% of the power requirements of the Hawesville Smelter prior to that termination date.²³ Before that occurred, the 1998 Retail Agreement was replaced by the 2009 Retail Agreement. While Kenergy acquired most of Century's power supply for the 2009 Retail Agreement from Big Rivers, it had the obligation to go to the wholesale market for any "Market Energy" purchases requested by Century.²⁴ Kenergy was never asked to make a Market

Comm'n of the City of Henderson, Order, P.S.C. Case No. 98-267 (July 14, 1998) (the "98-267 Order") (attached to Starheim Rebuttal Testimony as Exhibit GJS Rebuttal 3).

¹⁹ Starheim Rebuttal Testimony at p. 8:1-4. See Amendment dated July 15, 1998 to Wholesale Power Agreements Between Big Rivers Elec. Corp. and Green River Elec. Corp., Starheim Rebuttal Testimony, Exhibit GJS Rebuttal 4. This agreement was reviewed and approved by the Commission as part of Big Rivers' broader plan of reorganization. Starheim Rebuttal Testimony at p. 7:3-18; 97-204 Order; 98-267 Order.

²⁰ Starheim Rebuttal Testimony at p. 7:9-18, p. 8:4.

²¹ *Id.* at p. 7:3-15.

²² *Id.* at p. 8:15-19.

²³ See 1998 Retail Agreement, Starheim Rebuttal Testimony, Ex. GJS Rebuttal 5, p. 14, section 7.1.

²⁴ Starheim Rebuttal Testimony at p. 9:8-22.

Energy purchase for Century, although it made two such purchases for the other smelter on its system, Alcan Primary Products Corporation, which operated under identical provisions.²⁵

Despite the persistence of these previously-approved energy procurement arrangements, the Attorney General (and only the Attorney General) contends that the Century Transaction constitutes “retail wheeling.”²⁶ The Century Transaction is not retail wheeling. For 15 years, the parties’ retail electric service arrangements have provided that all of the energy necessary to serve the Hawesville Smelter should be acquired from a source other than Big Rivers’ all-requirements contract with Kenergy, and allowed for or required some or all of that energy to be acquired from entities other than Big Rivers, including suppliers in the wholesale energy market.²⁷ Despite this long history, since the approval of the 1998 Retail Agreement, no one has criticized this approach as being part of an illegal retail wheeling scheme.²⁸ The Century Transaction simply continues the well-established and lawful practice whereby “electricity is acquired by and delivered by Kenergy to the Hawesville [S]melter, just as . . . it has been since the Hawesville [S]melter now owned by Century was constructed.”²⁹

If the Attorney General intended to suggest through cross-examination at the hearing that the amount of power purchased in the wholesale market by Kenergy for delivery under the 1998 Retail Agreement and the 2009 Retail Agreement somehow makes a difference in whether that activity is illegal retail wheeling, that distinction fails. The Attorney General’s definition of

²⁵ *Id.* at p. 10:1-11.

²⁶ The Attorney General defines “retail wheeling” to mean “[t]he transmission of electricity from a wholesale supplier to a retail customer by a third party.” Attorney General Comments at p. 5. *See also* Attorney General Comments at pp. 6-9.

²⁷ Starheim Rebuttal Testimony at p. 6:16-19 (“[p]urchases of electricity by Kenergy for Century have been market purchases since 1998, when the all-requirements contract between Big Rivers and Kenergy was amended to ‘carve out’ the wholesale power supply obligation of Big Rivers as it related to the load of . . . Century.”).

²⁸ *Id.* at p. 10:12-18.

²⁹ *Id.* at p. 6:1-4.

retail wheeling makes no distinction regarding the amount of energy being purchased. In addition, that approach overlooks the fact that the Commission-approved 1998 Retail Agreement permitted Kenergy to provide all of Century's energy from the market upon the expiration of the power purchase agreement with LEM. Moreover, the Commission has never characterized any of Kenergy's contractual market purchase obligations as "experimental" or "pilot programs," as also suggested by the Attorney General.

The traditional statutory and regulatory framework of Kentucky public utility law has been followed in the Century Transaction. Kenergy remains the retail electric supplier to the Hawesville Smelter. Century will continue to acquire electric service from Kenergy. Century has no right to make direct market purchases, and it has no unqualified right to require its desires about market purchases to be followed by Kenergy.³⁰ And, the Commission is reviewing the transaction, as required by law.

The Century Transaction also does not violate any "policy" established by the Commission in its July 14, 1998 order in Case No. 98-267 (the "98-267 Order"), as asserted by the Attorney General in his comments.³¹ The only "policy" established by the Commission in that order was that if a utility obtains "approv[al] in principle" of a document based upon a representation of assumed financial outcomes, and then changes the document so that the

³⁰ *Id.* at pp. 11:3-14:22 (Century "will not have the ability to unconditionally select the ultimate provider of Electric Services to be provided under the Electric Service Agreement.") *See also* Hearing Testimony of Gregory J. Starheim ("Starheim Hearing Testimony"), July 30, 2013, Tr. 14:47'14" (explaining that Kenergy and Century will collaborate to select the ultimate provider of electric services, and that the suggestion that Century will unilaterally make that determination "is not what's envisioned with the contract"); Electric Service Agreement, Application Ex. 4, Sections 2.4.1, 3.1.3 (imposing various limitations on bilateral contracts and market participants).

³¹ Attorney General Comments at p. 10.

financial outcomes change, the Commission may withdraw the approval in principle.³² The transaction presented here for the first time is not a change in a previous version of a transaction approved in principle by the Commission, so there is no analogy. The “transmission revenue” issue in the 98-267 Order involved a cap on Big Rivers’ ability to collect increases in its transmission rates.³³ There is no limit in any respect on Big Rivers’ ability to collect its full transmission rate from Century under the Century Transaction, again eliminating any relevancy of that point to this proceeding.

For these reasons, the Century Transaction is entirely consistent with the existing framework of public utility regulation in Kentucky, including all applicable laws and Commission orders, including those directly related to the parties in this case. The Commission should approve the Electric Service Agreement, Direct Agreement, and Arrangement Agreement as submitted.

2. The Century Transaction benefits the members of Kenergy and Big Rivers, as well as Western Kentucky.

Without a new electric service arrangement in place, the Hawesville Smelter would shut down upon the effective termination of the 2009 Retail Agreement, leading to significant negative economic consequences for Kenergy’s and Big Rivers’ members, as well as Western Kentucky generally.³⁴ Kenergy and Big Rivers “believe that the economic benefits to the members of Kenergy and Big Rivers of pursuing the Century Transaction in the form presented is superior to simply standing by and allowing Century to terminate its smelting operations....”³⁵

Nevertheless, throughout the negotiations of the Century Transaction, both Kenergy and Big Rivers recognized that the economic benefits of the Hawesville Smelter’s operations could

³² See generally 98-267 Order.

³³ See 98-267 Order at *3-8.

³⁴ Berry Direct Testimony at p. 47:4-14; Starheim Direct Testimony at pp. 10:15-11:8.

³⁵ Starheim Rebuttal Testimony at p. 4:8-18.

not come at the expense of their member-owners. Both were adamant that their members have no more exposure to risks and costs with the Century Transaction than would be experienced if Century ceased smelting operations.³⁶ The Century Transaction achieves that goal.³⁷ In fact, the only two ways the Century Transaction might impact Big Rivers' rates are both positive. If the Coleman Station runs under SSR, Big Rivers will be able to defer severance until the plant is idled.³⁸ And even though Century's responsibility for SSR costs will be credited by an amount equal to what it pays for transmission during the SSR period, Big Rivers' members will still be no more adversely affected than if Century had ceased smelting operations. If the Coleman Station is idled, Big Rivers will receive transmission revenues from Century through Kenergy.³⁹

Most notably, Century agreed to pay all SSR costs if the Coleman Station is identified by MISO as a "must-run" plant.⁴⁰ While the ultimate terms of the SSR Agreement are yet to be negotiated, Mr. Berry stated in his testimony that Big Rivers will seek to have Century remain responsible for any capital expenditures incurred as a result of Century's operation of the Hawesville Smelter.⁴¹ Mr. Berry further testified that, in his view, "Century would be responsible for those costs until such time as Big Rivers started that unit up for its own uses."⁴² This could be accomplished by recovery of capital costs over the term of the SSR Agreement or

³⁶ Berry Direct Testimony at p. 45:14-20 ("The question of who would bear the costs of Century 'going to market' was central to the negotiations of the Century Transaction."); Starheim Direct Testimony at p. 11:6-8. *See also* Berry Direct Testimony at pp. 26:10-33:19 (describing the various costs and charges related to the Century Transaction).

³⁷ Berry Direct Testimony at pp. 44:16-46:2 (if the Century Transaction is approved, Big Rivers' Members will be "in no worse position than they would have been if Century ceased smelting operations.").

³⁸ Berry Hearing Testimony at Tr. 10:43'47".

³⁹ *Id.* at Tr. 10:44'20".

⁴⁰ *Id.* at pp. 10:17-11:14, pp. 43:7-44:15. *See also* Berry Hearing Testimony at Tr. 10:49'22".

⁴¹ Berry Hearing Testimony at Tr. 13:36'27" ("if there's a gap between the time Century ceases operations and Big Rivers starts up the plant, we would expect Century to pay" those capital expenditures).

⁴² *Id.* at Tr. 10:58'13".

by Century's commitment to be responsible for those costs pending Big Rivers' decision to restart the Coleman Station. Furthermore, the Direct Agreement provides that, even if there is a delay in the entry into or approval of an SSR Agreement, Century will reimburse Big Rivers for these costs in the interim.⁴³

The Attorney General and KIUC claim some "inextricable link" between this case and Case No. 2012-00535 (the "Century Rate Case") as a pretense to continue litigating the Century Rate Case in this proceeding. But the Commission has ruled that "[t]o the extent that [a party] desire[s] to address the impacts of the Century Kentucky contract on the rates of all other ratepayers and on generating resources, the proper venue for those issues is Big Rivers pending rate case where those issues were raised."⁴⁴ The Commission Chair further admonished at the hearing in this case that "we're only going to hear one case today"⁴⁵

Contrary to their claim, the Century Transaction's benefits are not dependent on the outcome of the rate case, nor does the Century Transaction contain or turn on any assumptions about the outcome of the rate case.⁴⁶ This was a deliberate decision. As Mr. Berry testified, "[n]o one desired for the approval of the proposed agreements to be dependent on resolution of the rate cases."⁴⁷ The rate impact of the Century transaction, if any, will be properly addressed in the rate case.

In his direct testimony, Mr. Kollen also continued his misrepresentation that Big Rivers is "seeking massive rate increases of 72% on the Rural and 110% on the Large Industrial

⁴³ See Direct Agreement, Section 4.

⁴⁴ Order, P.S.C. Case No. 2013-00221, p. 7 (July 19, 2013).

⁴⁵ Statement of Chairman Armstrong, July 30, 2013, at Tr. 11:11'44".

⁴⁶ Berry Rebuttal Testimony at pp. 4:17-7:24.

⁴⁷ *Id.* at p. 6:10-11.

classes....”⁴⁸ At the hearing, however, Mr. Kollen conceded that his calculations were a “combination of different components,” including not only the base rate increases actually sought by Big Rivers but also the effects of the automatic expiration of the smelter surcharge provided for in contracts approved by the Commission, environmental surcharge changes resulting from a reduced number of generating units in service, and increases in the fuel adjustment clause.⁴⁹ As explained more thoroughly in Mr. Berry’s testimony,⁵⁰ the actual aggregate base rate increases sought by Big Rivers in the two rate cases, without including the effects of the MRSM and RER, are 62.4% and 44.9% for the Rurals and Large Industrials, respectively.⁵¹ Big Rivers has not sought any rate adjustments beyond this.

In short, the Century Transaction helps protect Kenergy’s and Big Rivers’ members from the consequences of the Hawesville Smelter ceasing operations. It helps protect the economic well-being of the entire region. Consequently, its approval serves best interests of Kenergy’s and Big Rivers’ members and the best interests of the Commonwealth.

B. The Commission Should Approve the Alternate Service Agreement and Authorize the Disconnection of Service to the Hawesville Smelter.

The Alternate Service Agreement, and the related Wholesale Letter Agreement, are intended to be available for security, lighting, maintenance, safety, and other non-smelting purposes⁵² during any periods in which the Hawesville Smelter is not operating.⁵³ Because there is no assurance that the Electric Service Agreement will be in effect on August 20, 2013—and even if it is in effect, it can be terminated thereafter on only 60-days’ notice—approval of the

⁴⁸ Kollen Direct Testimony at p. 5:5-8.

⁴⁹ Kollen Hearing Testimony at Tr. 15:43’25”. *See also* Berry Rebuttal Testimony at pp. 15:21-16:9.

⁵⁰ *See* Berry Rebuttal Testimony at pp. 14-18.

⁵¹ Berry Rebuttal Testimony at p. 17:14-20.

⁵² Starheim Hearing Testimony at Tr. 15:11’47”; Starheim Direct Testimony at p. 23:10-19.

⁵³ Starheim Direct Testimony at p. 23:1-19.

Alternate Service Agreement and the Wholesale Letter Agreement are necessary to cover these contingencies.

Kenergy can only provide service pursuant to filed rates and schedules,⁵⁴ and it cannot be compelled to “furnish service without any compensation, or to provide service over and above what is adequate and reasonable, or to forego the use of reasonable classifications as to service and rates.”⁵⁵ Consequently, if the Commission does not approve the Century Transaction to be in effect by August 20, 2013, if RUS does not approve the contracts as filed, if Century refuses to execute the contracts as filed, or if Century terminates the new Electric Service Agreement in the future (which can occur on 60 days’ notice), Kenergy will have no service arrangement in place and thus no legal authority to continue providing retail electric service to the Hawesville Smelter.⁵⁶ That service must be physically disconnected and terminated pursuant to the terms of the 2009 Retail Agreement and 2009 Wholesale Agreement, as well as 807 KAR 5:006 Section 15.⁵⁷

Although disconnection in these circumstances is the obvious potential outcome of Century’s unilateral contract termination, Kenergy and Big Rivers would expect this to occur only in the absence of any contractual agreement to serve the smelter, and they seek the declaratory order to prudently address all possible scenarios. No party has contested the authority of Kenergy or Big Rivers to disconnect service to the Hawesville Smelter under those circumstances.

⁵⁴ See KRS 278.160 (requiring utility to file “all rates and conditions for service established by it and collected or enforced” and prohibiting any person from receiving “any service from any utility for a compensation greater or less than that prescribed in such schedules”).

⁵⁵ *Marshall County v. South Central Bell Tel. Co.*, Ky., 519 S.W.2d 616, 618 (1975)

⁵⁶ Berry Direct Testimony at p. 40:1-12; Starheim Direct Testimony at p. 22:1-19; Starheim Hearing Testimony at Tr. 15:11’02”.

⁵⁷ See Berry Direct Testimony at pp. 40:13-41:11; Starheim Direct Testimony at pp. 22:16-19. See Application pp. 11-12.

C. The Commission Should Approve the Century Transaction as Filed and Decline to Make Any Material Changes.

The Commission should approve, as filed and unconditionally, all five Century Transaction documents for which approval is sought. Those documents represent the agreements of the parties to them, and they are designed to deal with any purported uncertainty raised by any party to this proceeding.

KIUC recognizes the importance of the Century Transaction and agrees that the Commission should accept it.⁵⁸ Nevertheless, it seeks to impose unacceptable conditions on that approval, including: (i) the right of the Commission to audit Big Rivers' and Kenergy's revenues and costs related to serving Century; and (ii) the imposition of monthly filing requirements on Big Rivers and Kenergy. In effect, KIUC wants to preserve the Century Transaction while pursuing collateral arguments on pending rate cases. The Commission should reject these conditions and approve the Century Transaction as filed.

KIUC's conditions address "issues" that are not actually at issue. Big Rivers has already committed to taking the necessary actions before the Commission to ensure that any benefits received as a result of the Century Transaction flow through to its members.⁵⁹ Big Rivers and Kenergy both remain regulated by the Commission, and Kenergy will remain Century's retail electric service provider. The Commission will be able to address these matters in the Century Rate Case without imposing any of KIUC's conditions on the Century Transaction.

Even setting aside the fact that KIUC's proposals are a solution in search of a problem, KIUC's proposal of a "workout plan" is substantively flawed. As Big Rivers explained in detail

⁵⁸ Kollen Direct Testimony at p. 5:15-16; Kollen Hearing Testimony at Tr. 15:42'16" ("everybody recognizes the severe effects on the local economy of the shutdown of the smelter").

⁵⁹ Berry Hearing Testimony at Tr. 14:01'53".

in its post-hearing brief in the Century Rate Case,⁶⁰ KIUC's "workout" is unrealistic because there is insufficient time,⁶¹ it requires unrealistic creditor concessions,⁶² and it violates Big Rivers' philosophy to "honor [its] commitments...."⁶³ Following KIUC's proposal would be "potentially ruinous for Big Rivers."⁶⁴

For these reasons, the Commission should approve the Century Transaction as filed and refuse to impose KIUC's proposed conditions.

D. Big Rivers Should Be Permitted to Manage Its Own Transmission Line Maintenance Means, Methods, and Techniques.

Big Rivers refused Century's eleventh-hour demand that Big Rivers permanently maintain approximately 42 miles of 161 kV and 345 kV transmission lines using "live line" techniques, with Century paying any incremental increase in maintenance costs. Century responded in this case by seeking, through a request made in the testimony of Mr. Michael Early, findings from the Commission that live line maintenance on three lines that affect Century's plan to operate with Coleman Station idled is "consistent with good utility practice, and is both necessary and appropriate to allow Century to operate at load levels that are sufficient to continue full operation of the Hawesville Smelter." Mr. Early believes these findings could help Big Rivers change its mind on the live-line maintenance concept, or provide a basis on which Century could pursue legal remedies to force Big Rivers to accept Century's demands.⁶⁵ Kenergy and Big Rivers are the applicants in this matter, and no portion of the application seeks

⁶⁰ See Big Rivers Elec. Corp's Post-Hearing Brief, Case No. 2012-00535, pp. 53-74 (July 26, 2013).

⁶¹ Berry Rebuttal Testimony at pp. 12:19-13:10.

⁶² *Id.* at p. 13:11-14:14.

⁶³ *Id.* at p. 12:8-18.

⁶⁴ *Id.* at p. 14:15-16.

⁶⁵ Early Hearing Testimony at Tr. 18:11'53".

a finding about whether live line maintenance should be considered “good utility practices,” as Century now requests. The Commission should decline to make these findings.

Big Rivers’ transmission line maintenance practices should not be controlled by a single customer’s conclusion about what practice would best serve that customer’s individual economic interests. Big Rivers’ decisions about transmission line maintenance practices are driven by Big Rivers’ corporate devotion to safety. As Mr. Berry explains, “Big Rivers’ number one value is safety and its philosophy is simply: ‘Safety is a way of life so no operating condition or urgency of service can ever justify endangering the health and well-being of anyone.’”⁶⁶ Big Rivers has concluded as a matter of common sense that performing maintenance on an energized transmission line is more dangerous to human life than performing the same work on a de-energized transmission line.⁶⁷ Big Rivers distinguishes between taking risks “to protect the reliability of a transmission system serving an entire system” versus doing so “just to protect the profits of a single customer.”⁶⁸ Furthermore, transmission maintenance is typically performed de-energized.⁶⁹ Century’s stated goal for imposing a live line transmission maintenance requirement is simply to “get out from under the SSR agreement” before Century becomes exposed to the financial risks associated with the SSR costs it agreed to pay.⁷⁰

Findings about live line maintenance also would not solve Century’s concerns about “avoid[ing] an unnecessary outage that would likely close the smelter.”⁷¹ Live line maintenance does not affect other equally significant transmission outage risks that do not even afford Century time for a measured shutdown of its pot lines. For example:

⁶⁶ Berry Rebuttal Testimony at p. 22:20-22.

⁶⁷ *Id.* at p. 23:1-22.

⁶⁸ *Id.* at p.23:8-11.

⁶⁹ Direct Testimony of Donald J. Morrow, p. 19:13 (July 19, 2013).

⁷⁰ Early Hearing Testimony at Tr. 16:58’28”.

⁷¹ Direct Testimony of Michael Early (“Early Direct Testimony”), p. 13:3-4 (July 19, 2013).

- Only scheduled maintenance would be affected by live line maintenance, leaving the transmission lines vulnerable to the inevitable instantaneous forced outages caused by weather, aircraft encounters, and countless other exposures.⁷²
- Big Rivers only owns a portion of the Coleman to Newtonville transmission line.⁷³ The Commission has no jurisdiction over the Indiana co-owner of this line, and there is no evidence that the Indiana co-owner is willing to perform live line maintenance on its portion of that transmission line at Century's request.
- Breaker work at the Coleman Station on the 161kV Coleman to Newtonville transmission line cannot be physically performed without taking that line out of service.⁷⁴

Century offered no explanation about how unavoidable exposure to these continuing risks could provide “[a]n outcome in which the Hawesville Smelter was subject only to a limited risk of infrequent, relatively small and short-duration load reductions [that] would justify continued operations.”⁷⁵ In short, live line maintenance on portions of three of Big Rivers’ transmission lines will not cause Century to achieve its goals and, in addition to the risks to human life, it will expose Big Rivers to risks associated with its statutory, regulatory, and common law duties related to injuries to contractor employees and other individuals and property.⁷⁶

As Mr. Berry noted in his rebuttal testimony, the subject of live line maintenance “was first raised by Century on the next-to-last day before the forms of the Century Transaction documents were completed and turned over for filing with the Commission.”⁷⁷ Even according to the testimony of Mr. Michael Early, Century Parent’s Corporate Energy Director, though the parties had been negotiating for approximately eight months, Century did not raise the question

⁷² Berry Rebuttal Testimony at p. 24:15-17.

⁷³ *Id.* at p. 24:20-25:01.

⁷⁴ *Id.* at p. 25:1-3.

⁷⁵ Early Direct Testimony at p. 11:7-9.

⁷⁶ Berry Rebuttal Testimony at p. 23:04-08.

⁷⁷ Berry Rebuttal Testimony at pp. 20:22-21:2.

of live wire maintenance as a possible “tool” until “late May”⁷⁸ of 2013 at the earliest, and Century did not propose the contract terminology until even later.⁷⁹ The Application in this proceeding was filed on June 12, 2013.

Mr. Berry testified before the Commission that it was his understanding that Century was willing to sign the Century Transaction agreements as filed.⁸⁰ And although Mr. Berry had informed Century that Big Rivers would not agree to perform live line maintenance, Century agreed to the filing of the Century Transaction documents in their present form.⁸¹ Century also did not mention the live line maintenance issue during the July 12, 2013 informal conference.⁸²

The Commission should decline to make any of the findings on this matter suggested by Century.

⁷⁸ Early Hearing Testimony at Tr. 17:26’10” (issue raised in a conference call with MISO staff), 17:27’48” (that conference call occurred in late May).

⁷⁹ *Id.* at Tr. 17:27’01”.

⁸⁰ Berry Hearing Testimony at Tr. 13:12’03”.

⁸¹ *Id.* at Tr. 13:12’23” (“This was a joint effort among all three parties, and we all agreed to file the documents as they are filed today.”).

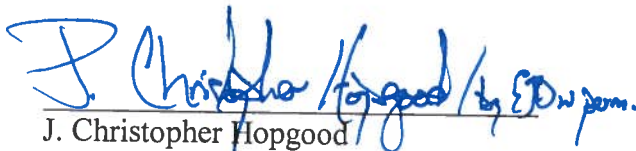
⁸² Early Hearing Testimony at Tr. 17:35’44” (acknowledging in response to Staff’s questioning that Century did not raise the issue at the informal conference).

V. CONCLUSION

For all of the foregoing reasons, the Commission should disregard the comments of the Attorney General and reject the proposals of KIUC and Century. The Commission should approve the Electric Service Agreement, Direct Agreement, Arrangement Agreement, Alternate Service Agreement, and Wholesale Letter Agreement as filed, and it should issue the requested declaratory order.

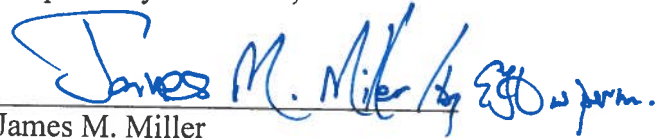
On this the 5th day of August, 2013.

Respectfully submitted,



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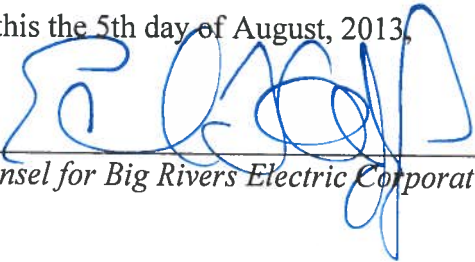
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CERTIFICATE OF SERVICE

I certify that a true and accurate courtesy copy of the foregoing Post-Hearing Brief has been provided by electronic mail and Federal Express to the persons listed on the attached service list, on the date this Post-Hearing Brief is filed with the Kentucky Public Service Commission.

On this the 5th day of August, 2013,



Counsel for Big Rivers Electric Corporation

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