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AUG 06 2013

PUBLIC SERVICE  
COMMISSION

**Via Overnight Mail**

August 5, 2013

Mr. Jeff Derouen, Executive Director  
Kentucky Public Service Commission  
211 Sower Boulevard  
Frankfort, Kentucky 40602

**Re: Case No. 2013-00221**

Dear Mr. Derouen:

Please find enclosed the original and ten (10) copies of the PUBLIC VERSION of the MAIN BRIEF OF KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC. for filing in the above-referenced matter. I also enclose a copy of the CONFIDENTIAL pages to be filed under seal.

The information filed under seal is information that Big Rivers sought confidential treatment through a Petition for Confidential Treatment dated July 11, 2013. KIUC redacted this information in order to protect Big River's interests in keeping this information confidential.

By copy of this letter, all parties listed on the Certificate of Service have been served. Please place these documents of file.

Very Truly Yours,



Michael L. Kurtz, Esq.

Kurt J. Boehm, Esq.

Jody Kyler Cohn, Esq.


**BOEHM, KURTZ & LOWRY**

MLKkew  
Attachment

cc: Certificate of Service  
Quang Nyugen, Esq.  
Richard Raff, Esq.  
Jeff Cline (cover ltr only)

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by electronic mail (when available) and by U.S. Mail, unless other noted, this 5<sup>th</sup> day of August, 2013 to the following:

  
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COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

AUG 06 2013

In The Matter of: The Joint Application of Kenergy Corp. :  
and Big Rivers Electric Corporation for Approval of :  
Contracts and For a Declaratory Order :

Case No. 2013-00221  
PUBLIC SERVICE  
COMMISSION

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**PUBLIC VERSION**

**MAIN BRIEF OF**

**KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC.**

---

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August 5, 2013

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COMMONWEALTH OF KENTUCKY  
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**PUBLIC VERSION**

**MAIN BRIEF OF**

**KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC.**

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Kentucky Industrial Utility Customers, Inc. ("KIUC") representing the interests of Domtar Paper Co., LLC, Kimberly Clark Corporation and Aleris International, Inc. submits its Main Brief to the Kentucky Public Service Commission ("Commission"):

**I. INTRODUCTION AND SUMMARY**

It is in everyone's best interest for the smelters to continue to operate. But it is also critical that the Commission take steps in this case and in the related rate cases to ensure that Big Rivers' rates will remain fair, just, and reasonable for the remaining customers. To do so, the Commission should approve the proposed electric service agreements subject to certain modifications and conditions.

First, the Commission should modify the dispute resolution provisions of the proposed agreements to expressly preserve its jurisdiction over contract disputes. The electric service contracts at issue are rates under Kentucky law, and Big Rivers and Century have no legal authority to agree among themselves to outsource the Commission's jurisdiction to an arbitrator and then to the Henderson Circuit Court.

Second, the Commission should approve the proposed agreements with the condition that if the Hawesville smelter is profitable in the future, then the Commission may prospectively establish a just and reasonable market access charge by which Century would pay for a portion of the costs of Big Rivers' excess capacity resulting from granting Century market pricing. This provision is necessary to strike a reasonable balance between Century's 30% (\$61.2 million) rate reduction and the 72% Rural and 110% Large Industrial rate increases.

Finally, the Commission should order Big Rivers to substantiate its position that "live line" maintenance is not a prudent utility practice. "Live line" maintenance is essential to alleviate the "must-run"/SSR status of Coleman. Eliminating Century's SSR obligation as soon as possible will benefit consumers by: a) eliminating the \$7.7 million to \$10.8 million transmission revenue offset; b) allowing for Coleman to be physically idled and the resulting \$6.2 million in annual depreciation savings; and c) improving the profitability of the Hawesville smelter thus increasing its ability to pay a market access charge to mitigate the fixed stranded costs it caused.

## II. ARGUMENT

### A. **The Commission Should Modify the Proposed Agreements to Expressly Preserve Its Jurisdiction Over the Resolution of Disputes.**

The Electric Service Agreement between Kenergy Corp. ("Kenergy") and Century is a rate under Kentucky law.<sup>1</sup> That is why approval from the Commission is being sought here. However, the agreements that Big Rivers, Kenergy and Century seek Commission approval of contain provisions that attempt to limit the Commission's jurisdiction over this rate. Section 16.2 of the Electric Service Agreement between Kenergy and Century, addressing Dispute Resolution, provides:

*"Absent resolution of the dispute pursuant to Section 16.1, and subject to a minimum amount in controversy of \$ 100,000.00, the Parties shall submit the matter to be settled, subject to Section 16.2.7, by binding arbitration by a tribunal of three (3) arbitrators constituted and acting under*

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<sup>1</sup> KRS 278.010 (12) provides: "Rate means any individual or joint fare, toll, charge, rental, or other compensation for service rendered or to be rendered by any utility, and any rule, regulation, practice, act, requirement, or privilege in any way relating to such fare, toll, charge, rental, or other compensation, and any schedule or tariff or part of a schedule or tariff thereof."

*the International Arbitration Rules then in effect of the International Centre for Dispute Resolution ("ICDR") of the American Arbitration Association (the "AAA Rules")...<sup>2</sup>*

Section 16.2.7 provides that “[t]he award of the arbitral tribunal shall be subject to appeal to, or requests for rehearing by, a court in accordance with Section 18.2.” Section 18.2 of the Electric Service Agreement, provides in part:

*“Subject to Section 16.2, the Parties hereby agree that the courts of the Commonwealth of Kentucky will have exclusive jurisdiction over any and all disputes; provided that the subject matter of such dispute is not a matter reserved to the U.S. federal judicial system (in which event exclusive jurisdiction and venue will lie with the U.S. District Court for the Western District of Kentucky), and the Parties hereby agree to submit to the jurisdiction of Kentucky courts for such purpose. Venue in state court actions will be in the Henderson Circuit Court as the court in which venue will lie for the resolution of any related disputes under this Agreement...Nothing in Section 16.2 or this Section prohibits a Party from referring to FERC or any other Governmental Authority any matter properly within its jurisdiction. In any proceeding hereunder, each Party irrevocably waives, to the fullest extent allowed by law, its right, if any, to trial by jury....”*

A similar provision appears in other proposed agreements.<sup>3</sup>

These provisions restricting the Commission’s authority are contrary to Kentucky law and Commission precedent and should not be approved by the Commission. The Commission has exclusive jurisdiction over the regulation of rates and services of utilities.<sup>4</sup> It is empowered to “*investigate the methods and practices of utilities to require them to conform to the laws of this state, and to all reasonable rules, regulations and orders of the commission not contrary to law.*”<sup>5</sup> The Supreme Court of Kentucky “*has long recognized the expansive reach of the PSC's authority, concluding that jurisdiction is ‘exclusively and primarily’ in the commission to ‘fix rates [and] establish reasonable regulation of service,’ subject to the judicial review provided in the statute.*”<sup>6</sup> The Court has stated that “[w]hile the [Commission] is a ‘creature of statute’ and has only those powers granted by the General Assembly, it has ‘such powers as are conferred expressly or by necessity or fair implication.’”<sup>7</sup>

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<sup>2</sup> Application, Ex. 4 (Electric Service Agreement By and Between Kenergy Corp. and Century).

<sup>3</sup> See e.g. Application, Ex. 5 (Arrangement and Procurement Agreement By and Between Big Rivers and Kenergy Corp.), Section 18.2.

<sup>4</sup> *Public Serv. Comm'n of Kentucky v. Comm. Of Kentucky*, 320 S.W. 3d 660, 665 (2010) (citing KRS 278.040).

<sup>5</sup> Id.

<sup>6</sup> Id. (citing *Smith v. Southern Bell Telephone & Telegraph Co.*, 268 Ky. 421, 104 S.W.2d 961, 963 (1937)).

<sup>7</sup> Id. (citing *Boone County Water and Sewer Dist. v. PSC*, 949 S.W.2d 588, 591 (Ky.1997)).

In light of its broad legal authority, the Commission should modify the provisions of the proposed agreements to explicitly state that the Commission will have jurisdiction over any and all disputes related to those agreements. It would be unlawful for an arbitrator or the Henderson Circuit Court to make a determination that changes the rates paid by Century to Kenergy and/or Big Rivers. If an arbitrator or the Henderson Circuit Court ultimately resolved a dispute in a way that changed a charge that Century pays to either Kenergy or Big Rivers, this would constitute ratemaking that could also impact the revenue requirements those entities collect from other retail customers. To prevent this unlawful outcome, the Commission should preserve its authority to resolve disputes related to the proposed agreements. If either Kenergy or Century disagrees with the Commission's ultimate resolution of those disputes, either party would then have the right to appeal the Commission's decision pursuant to KRS 278.410 and 278.450.

**B. The Commission Should Approve the Proposed Agreements So That Century Will Have the Ability to Continue Operating the Hawesville Smelter, But Only If That Approval is Conditioned on the Commission's Right to Prospectively Assess a Just and Reasonable Market Access Charge To Mitigate Rate Impacts on Big Rivers' Remaining Customers Resulting From Granting Century Market Pricing.**

As discussed at length in the pending Century rate case,<sup>8</sup> the departure of the two smelters from Big Rivers' system will result in the Company having 1,000 MW of excess capacity that is not "used and useful" in providing service to its remaining customers. Nevertheless, Big Rivers seeks Commission approval to recover 100% of the costs of that excess capacity from its remaining non-smelter customers.<sup>9</sup> Although Kenergy President and CEO, Gregory Starheim conceded that Big Rivers request to force its remaining customers to pay for 1,000 MW of excess capacity "*certainly is a big burden [on those customers] and we're very concerned about it;*"<sup>10</sup> the proposed agreements between Kenergy, Big Rivers and Century do not address any scenario in which Century would be required to pay for a portion of the excess capacity that was built to serve the Hawesville smelter if the Hawesville smelter returns to profitability in the future.

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<sup>8</sup> Case No. 2012-00535.

<sup>9</sup> See Case Nos. 2012-00535 and 2013-00199.

<sup>10</sup> Tr. July 30, 2013 at 13:04:21.



The cumulative impacts of the Century and Alcan rate cases would raise rates, including all billing components, to Large Industrials by 110% on an “all-in” basis as of July 2014 (when the Economic Reserve is projected to be exhausted), and to the average residential household by 72.3% on an “all in” basis as of April 2015 (when the Rural Reserve is projected to be exhausted), which amounts to an increase to the average residential customer of \$881 per year:

**Proposed Increases for Large Industrial Customers  
Due to “Century” and “Alcan” Rate Cases**

<b>Current Rates<sup>11</sup></b>	3.7556¢/kWh	N/A
<b>Century Rate Case Request<sup>12</sup></b>	4.7203¢/kWh	25.6%
<b>Alcan Rate Case Request<sup>13</sup></b>	7.91¢/kWh	67.6%
<b>Combined Impact of Century and Alcan Rate Cases</b>	<b>7.91¢/kWh</b>	<b>110%</b>

**Proposed Increases for Rural Customers  
Due to “Century” and “Alcan” Rate Cases**

<b>Current Rates<sup>14</sup></b>	7.8103¢/kWh	N/A	N/A
<b>Century Rate Case Request<sup>15</sup></b>	9.5346¢/kWh	23.8%	\$269
<b>Alcan Rate Case Request<sup>16</sup></b>	13.46/kWh	41.2%	\$612
<b>Combined Impact of Century and Alcan Rate Cases on Average Residential Customer</b>	<b>13.46/kWh</b>	<b>72.3%</b>	<b>\$881</b>

<sup>11</sup> KIUC Ex. 2.

<sup>12</sup> Direct Testimony of Lane Kollen (July 22, 2013)(“Kollen Testimony”) at 7:1-2 (citing Case No. 2012-00535, KIUC Ex. 8).

<sup>13</sup> KIUC Ex. 1. (Case No. 2013-00199, Ex. Wolfram-8 at 2).

<sup>14</sup> KIUC Ex. 2.

<sup>15</sup> Kollen Testimony at 7:1-2 (citing Case No. 2012-00535, KIUC Ex. 8).

<sup>16</sup> KIUC Ex. 1 (Case No. 2013-00199 Ex. Wolfram-8 at 1).

While Big Rivers proposes substantial rate *increases* to its remaining non-smelter customers in its pending rate cases, Big Rivers offers a substantial rate *reduction* to Century through the proposed electric service agreements at issue in this case. The evidence in this record indicates that Century would get a \$61.2 million rate reduction as a result of the proposed agreements.<sup>17</sup> Based on current market conditions Century will pay a power rate of \$34.0/MWh,<sup>18</sup> almost ten percent below the average power rate for aluminum smelters operating in the United States of approximately \$37/MWh.<sup>19</sup>

When Century Aluminum of Kentucky General Partnership provided notice that it was terminating its existing electric contract with Big Rivers on August 20, 2012, it represented that it had “*made a business judgment in good faith to terminate and cease all aluminum smelting at the Hawesville Smelter*” and certified that it had “*no current intention of recommencing smelting operations at the Hawesville smelter.*”<sup>20</sup> Shortly thereafter, Century began negotiations that would ultimately result in the electric service agreements proposed in this case.<sup>21</sup>

Big Rivers offered Century this 30% rate reduction (\$61.2 million) without knowledge of the Hawesville smelter’s actual profitability.<sup>22</sup> Apparently neither Big Rivers nor Kenergy deemed this to be a relevant consideration. This decision was unreasonable in light of the fact that Century’s existing power contract ran through 2023 and it could only be terminated if Century made a good faith business decision to shut the Hawesville smelter. Big Rivers’ Vice President of Production, and principal negotiator Robert Berry testified:

Q: “*Now...during that 11 month negotiation [with Century], did you review their actual finances, the plant finances?*”

A: “*No sir.*”

Q: “*So all you had to go on is their statements that the Hawesville smelter was not profitable and they needed to get market pricing. You’d never really saw evidence of that?*”

A: “*No sir.*”<sup>23</sup>

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<sup>17</sup> Direct Testimony of Sean Byrne (July 19, 2013)(“Byrne Testimony”) at 4:2-3 (“The Hawesville Smelter’s electricity bill is approximately \$17 million a month at the current power rate.”). \$17 million per month x 12 months = \$204 million per year. Id. at 5:11-13 (“Current prices for electricity in the competitive market are about 30% lower than the power rates that smelters pay today.”). 30% of \$204 million = \$61.2 million; Tr. July 30, 2013 at 11:39:23.

<sup>18</sup> Byrne Testimony at 5:11-13.

<sup>19</sup> Century Response to On-The-Record Data Request from Hearing on July 30, 2013 (Aug 1, 2013).

<sup>20</sup> Kollen Testimony at 9:3-13.

<sup>21</sup> Tr. July 30, 2013 at 15:04:52.

<sup>22</sup> Tr. July 30, 2013 at 11:41:57 and at 16:10:12.

<sup>23</sup> Tr. July 30, 2013 at 11:42:35.

Mr. Starheim also confirmed that Kenergy did not inquire into Big Rivers' finances before agreeing to an effective rate decrease of \$61.2 million.

Q: *"Now during the negotiation process, did you review the finances of the Hawesville smelter to determine whether or not they needed a \$60 million rate reduction to stay viable?"*

A: *"No we did not. We took the philosophy that we would try to entertain their request as long as it was not a burden for our other members."*<sup>24</sup>

The Hawesville smelter's profitability is largely a function of its power rate and the current London Metal Exchange ("LME") price of aluminum. Although the current LME price is at a depressed level of \$1,776,<sup>25</sup> it is entirely possible that with its new \$34/MWh power rate and an increase in the LME price, Century could become profitable in the future and would therefore be able to pay a market access charge and share in the burden of paying for the excess capacity it caused. Century's Plant Manager testified that it is currently losing between \$6 and \$8 million per month.<sup>26</sup> But there are no facts or figures to back this up. During negotiations neither Big Rivers nor Kenergy even questioned Century's financial status, and since it was not an applicant in this case Century was not subject to discovery.

This is what we do know about Century's finances. The approximately \$61.2 million rate reduction proposed in this case would save Century more than \$5 million per month. If Century's Plant Manager is accurate, this would bring the Hawesville smelter almost to a breakeven point. Century also receives a Midwest Premium, currently \$260 per ton,<sup>27</sup> and a premium for high purity aluminum of about \$45 per ton.<sup>28</sup> Consequently, if aluminum prices rose and electricity market prices stay low, the Hawesville smelter could reemerge as a profitable entity. If adopted, KIUC's formula rate approach, described in KIUC's Brief in Case No. 2012-00535,<sup>29</sup> would provide an additional two years in which this could occur.

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<sup>24</sup> Tr. July 30, 2013 at 15:05:06.

<sup>25</sup> <http://www.lme.com/metals/non-ferrous/aluminium/>.

<sup>26</sup> Tr. July 30, 2013 at 16:21:40.

<sup>27</sup> Tr. July 30, 2013 at 16:16:22.

<sup>28</sup> Tr. July 30, 2013 at 16:17:06.

<sup>29</sup> Brief at 54-57.

Additionally, in a recent West Virginia case, Century projected significantly higher future LMEs averaging over the next ten years \$2,450 per ton.<sup>30</sup> In contrast, the current price of aluminum is \$1,776 per ton. If Century is ultimately able to sell aluminum for \$674 per ton more than current prices, Century could make an additional \$164.4 million per year.<sup>31</sup> Moreover, Century appears to have confidence in the future profitability of the smelting industry given that it recently purchased Alcan's Sebree smelter<sup>32</sup> and it has recently attempted to secure an incentive from the State of West Virginia to enable it to restart its mothballed, Ravenswood, West Virginia smelter.<sup>33</sup>

Although Big Rivers may be comfortable with offering substantial rate reductions to certain customers while forcing other customers to pick up 100% of the costs of its excess capacity, the Commission should not be. The Commission is statutorily obligated to set rates for all consumers that are at fair, just, and reasonable levels on a non-discriminatory basis. Accordingly, when deciding the interrelated cases associated with the smelter contract terminations, the Commission should balance the equities and competing economic interests of Big Rivers' remaining customers, the smelters, and its creditors.

The Commission has addressed Big Rivers' financial issues using such a balanced approach in the past. In Big Rivers' financial workout plan case, the Commission determined that customers should not be held responsible for 100% of Big Rivers' debts, "*emphatically*" declaring:

*We emphatically reject the claims of REA, the banks, and Big Rivers that the members of the cooperative ultimately bear the total risk and responsibility for the utility's debts. The distribution cooperatives and their members do not stand in the same position as shareholders of an investor-owned company. The REA, with its oversight and monitoring responsibility, bears a substantial amount of the risk associated with Big Rivers' actions. The creditor banks are compensated for the risks they take. Cooperative members must shoulder a portion of the risk, too, since they have a say in the affairs of the utility. Nor are the aluminum companies exempt from responsibility. Until the downturn of recent years, these companies or their predecessors were in frequent contact with Big Rivers' management. Rather than allocate the risk among all*

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<sup>30</sup> See *Century Aluminum of West Virginia, Inc. Petition for Consent and Approval of a Special Rate for Purchase of Electricity*, Case No. 12-0613-E-PC, Order (Oct. 4, 2012) ("WV Order") at 26.

<sup>31</sup> Byrne Testimony at 1:23-24 (stating that Century has a rated production capacity of 244,000 metric tons per year). \$674/ton x 244,000 metric tons = \$164.4 million.

<sup>32</sup> Kollen Testimony at 10:1-2.

<sup>33</sup> <http://www.statejournal.com/story/21301444/century-aluminum-says-it-has-support-for-ravenswood-power-price>.

*parties now, we have chosen to give the participants an opportunity to discuss the allocation among themselves as a revised workout plan is negotiated.*<sup>34</sup>

In the Century rate case, KIUC has recommended a formula rate plan approach that seeks to achieve such a balance between Big Rivers, its creditors, and all of its customers. Under that approach, the Commission would take the following actions:

- Approve a reasonable base rate increase of \$21.7 million for Big Rivers' remaining customers for the five months prior to the Commission's order in the pending Alcan rate case (September 1, 2013 through January 31, 2014);
- Direct Big Rivers to use the \$135 million in the ratepayer Reserve Funds to provide the additional compensation the Company needs to meet a 1.24 TIER on a monthly basis;
- Explicitly direct Big Rivers to work with all stakeholders to equitably address excess capacity costs and require Big Rivers to retain a workout specialist to assist in this process.

Big Rivers can use the Economic and Rural Reserve Funds (but not the Transition Reserve Funds) to meet its minimum MFIR and TIER requirements. Big Rivers witness Siewert correctly stated that the amounts withdrawn from the Economic Reserve and the Rural Economic Reserve "*are booked as revenue,*"<sup>35</sup> and therefore can be used to help Big Rivers meet its minimum MFIR requirements. The Transition Reserve was taken to income on the date of the Unwind Transaction and is no longer available for income purposes. In contrast, the Economic Reserve and Rural Reserve were not taken to income, but instead were accounted for as deferred revenue at time of the Unwind. Those reserves are now reported as revenue as funds are withdrawn. It is therefore possible to use those reserves to meet Big Rivers' minimum MFIR requirements

If adopted, KIUC's approach would provide all stakeholders, including the smelters, additional time to devise a financial workout plan for Big Rivers, which could ultimately result in the smelters paying for a reasonable amount of the costs of Big Rivers' excess capacity. If such a result occurred, it would mitigate the substantial rate impacts that Big Rivers' remaining customers would otherwise experience as a result of granting the smelters market pricing.

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<sup>34</sup> *In the Matter of Big Rivers Electric Corporation's Notice of Changes in Rates and Tariffs for Wholesale Electric Service and of a Financial Workout Plan*, Case No. 9613, Order (March 17, 1987) at 19.

<sup>35</sup> Case No. 2013-00535, Big Rivers Post-Hearing Brief at 113-114.

To enable such a result to occur, the Commission should preserve its authority to prospectively order the smelters to pay for a portion of Big Rivers' excess capacity costs through a market access charge. Such a market access charge would only come into play if the Hawesville smelter is profitable enough to contribute while continuing to operate in Kentucky, and the level of that charge could vary based upon the smelter's profitability. For example, if the Hawesville smelter is unprofitable in a given month, it would contribute \$0 to paying back its portion of the excess capacity costs. But in months where the smelter is profitable, it would pay some market access charge at a level based upon its profitability. Nothing in KIUC's proposal would alter the terms of Century's existing contract, it would merely make Century's new contract fair, just and reasonable.

Though the ultimate structure of a market access charge can be worked out at a later time, the prospective establishment of such a charge for Century is well within the Commission's legal authority. The Commission has a statutory obligation to ensure that a utility's rates are "fair, just, and reasonable."<sup>36</sup> Doing so requires the Commission to use its broad authority to carefully balance the interests of ratepayers and those of utilities and their investors.<sup>37</sup> Rather than adhering to one rigid methodology, the Commission has "some discretion" in choosing the best methodology for achieving this balance.<sup>38</sup> The critical question is whether the rates resulting from the Commission's decision are fair, just, and reasonable.<sup>39</sup> The Supreme Court of Kentucky recognized this principle when it acknowledged the Commission's authority to establish a rider not specifically authorized by statute outside of a general rate case:

*"We hold that so long as the rates established by the utility were fair, just, and reasonable, the PSC has broad ratemaking power to allow recovery of such costs outside the parameters of a general rate case and even in the absence of a statute specifically authorizing recovery of such costs."*<sup>40</sup>

Although the proposed House Bill 211 and Senate Bill 71, which were an attempt by Century to allow the smelters to access the market without having to pay costs associated with Coleman's SSR status and to get a

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<sup>36</sup> KRS § 278.030(1); KRS § 278.040; *Kentucky Public Service Comm'n v. Corn. ex ret. Conway*, 324 S.W.3d 373, 377 (Ky. 2010).

<sup>37</sup> *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944); *National-Southwire Aluminum Co. v. Big Rivers Electric Corp.*, 785 S.W.2d 503, 514 (Ky. Ct. App. 1990) (upholding Commission rate determination in which "interests of all parties are reasonably balanced.").

<sup>38</sup> *National-Southwire*, 785 S.W.2d at 516.

<sup>39</sup> *Kentucky Public Serv. Comm'n*, 324 S.W.3d at 383 (2010) (citing *Hope Natural Gas*).

<sup>40</sup> *Kentucky Public Service Commission v. Com. Ex. rel. Conway*, 324 S.W.3d 373, 374 (2010).

statutory mandate that the Commission cannot establish a market-access charge, may have effectively precluded the Commission from establishing such a market access charge, that legislation ultimately did not pass. The Commission has the authority to prospectively establish a market access charge for Century, even outside the context of a general rate case. The Commission should explicitly preserve its authority to establish such a market access charge in this case. Otherwise, if the Commission simply approves the proposed electric service arrangements on an unconditional basis, the Commission may foreclose the possibility of future contributions from the smelters that could help mitigate rate increases to Big Rivers' non-smelter customers.

At the hearing, representatives of Big Rivers, Kenergy, and Century did not rigidly adhere to the premise that even one change to the proposed contracts would be enough to render those contracts unacceptable, but instead stated that they would consider the contracts in light of any changes made by the Commission. In response to questions about potential Commission changes to the proposed agreements, Big Rivers' witness Berry stated “[w]e just have to see what the Order looks like and then we’ll make a decision to go forward.”<sup>41</sup> In response to Staff’s cross-examination, he added:

*Q: “Is it the position of Big Rivers that the Commission must approve all of the agreements without any changes and if there are any changes, Big Rivers will refuse to sign the agreements?”*

*A: “Well, Big Rivers is willing to sign the agreements as filed. If there are any changes, then obviously Big Rivers would want to look at those changes and decide if it had a negative impact on its members, but I don’t want to say that we would not sign it if there were any changes, until we know what the changes might be.”<sup>42</sup>*

Kenergy witness Mr. Starheim stated that a market access charge was not part of their negotiation strategy, but acknowledged that “I’m sure our members would be very pleased if we could keep the rate increases down to as low as possible.”<sup>43</sup> When asked by Staff about changes to the proposed contracts by the Commission, Century witness Michael Early said: “I think I would be asked to assess the changes in terms of how they change the risk associated with the arrangement and to give them a judgment as to whether the risk had changed dramatically or materially enough to not go forward.”<sup>44</sup>

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<sup>41</sup> Tr. July 30, 2013 at 11:50:51.

<sup>42</sup> Tr. July 30, 2013 at 13:11:25.

<sup>43</sup> Tr. July 30, 2013 at 13:09:09.

<sup>44</sup> Tr. July 30, 2013 at 17:23:00.

This Commission has adopted a variable rate for Century in the past.<sup>45</sup> And Century has recently recommended a variable rate approach in West Virginia.<sup>46</sup> It is appropriate for the Commission to keep open the possibility of a variable market access charge that could help mitigate the rate impacts on Big Rivers' remaining customers. It should also be noted that under the proposed Electric Service Agreement, Century would have the right to terminate its contract with Kenergy upon 60 days notice,<sup>47</sup> giving Century flexibility to withdraw from the contract and potentially adopt a new contract (upon Commission approval) at a later date if circumstances required a change. Although KIUC is not proposing that the Commission establish a specific market access fee for Century at this time, it is reasonable for the Commission to preserve its authority to do so as an explicit condition to the approval of the proposed agreements.

**C. The Commission Should Order Big Rivers To Substantiate Its Position That Live-Line Maintenance Is Not A Prudent Utility Practice.**

**1. "Live Line" Maintenance Will Allow Coleman to be Physically Idled, Which Will Financially Benefit All Interested Parties - Century, Big Rivers and Its Remaining Customers.**

Century requests that the Commission order Big Rivers to allow "live line" maintenance to be performed on transmission lines in order to alleviate the need to designate Coleman as a MISO "must-run"/SSR generator. According to Century witness Donald Morrow, "live line" maintenance (along with the installation of relays and capacitors) will allow Coleman to escape MISO "must-run" status by May 2014 at the latest. It is critical for all stakeholders that Coleman be stripped of its "must-run" designation as quickly as possible. Coleman's SSR status creates significant and unnecessary additional costs for Century, prevents millions of dollars per year in transmission revenues from flowing to Big Rivers' customers and prevents depreciation expense from being suspended.

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<sup>45</sup> *An Investigation of Big Rivers Electric Corporation's Rates for Wholesale Electric Service*, Case No. 9885, Order (Aug. 10, 1987).

<sup>46</sup> WV Order at 25.

<sup>47</sup> Electric Service Agreement, Section 7.3.1 ("Century may terminate this Agreement as of a date not less than 60 days from the date it provides written notice to Kenergy and Big Rivers of the termination of this Agreement.")



Per its Direct Agreement with Big Rivers and Kenergy, Century is required to reimburse Big Rivers for its SSR costs. Through May 2014, the SSR costs that Century will be responsible for paying will not include capital costs and will amount to approximately \$[REDACTED] million in 2014.<sup>48</sup> After May of 2014, if Coleman is considered a “must-run” unit, Century would be responsible for SSR costs, plus capital costs. At that time, Century’s annual payments are projected to increase to approximately \$[REDACTED] million.<sup>49</sup> These payments from Century provide Big Rivers with the financial equivalent of the savings it would receive from physically idling Coleman.

Under Section 4.1(a) of the Direct Agreement, the amount that Century is required to pay for SSR Costs is reduced by revenues received by Big Rivers from Century for transmission services. There is some uncertainty regarding the amount of these transmission charges. Big Rivers estimates that transmission revenue from Century’s Hawesville smelter will total approximately \$7.7 million per year, while Attorney General witness Holloway previously estimated the transmission charges to be \$10.8 million per year.<sup>50</sup> Whatever the correct amount may be, Big Rivers and its customers will not be credited with any transmission revenue from Century while Coleman is considered a “must-run” unit because any transmission charges collected from Century will go to offset its SSR payments. As soon as Coleman is allowed to be idled, however, Century will stop paying SSR charges, and the transmission revenues from Century will be available to reduce rates in the future.

Big Rivers’ customers should also benefit from avoiding paying approximately \$6.2 million per year in depreciation on Coleman while it is idled.<sup>51</sup> As explained in KIUC’s Brief in the pending Century rate case, ceasing depreciation on idled plants is consistent with the RUS USOA accounting requirements, which do not allow depreciation expense on plant that is not in service for accounting purposes.<sup>52</sup>

Avoiding MISO “must-run” status for Coleman benefits everyone. When Coleman is physically idled, Century will save \$[REDACTED] to \$[REDACTED] million per year (minus the transmission offset) in SSR charges. Big Rivers will receive \$7.7 to \$10.8 million per year in transmission revenues, will save approximately \$[REDACTED] from

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<sup>48</sup> Response to the Office of the Attorney General’s Initial Request for Information (July 11, 2013), Confidential Attachment at 1.

<sup>49</sup> Id.

<sup>50</sup> Direct Testimony of Robert Berry (June 12, 2013) at 43:16-19; Case No. 2012-00535, Ex. Holloway-6.

<sup>51</sup> Case No. 2012-00535, Rebuttal Testimony of Billie Richert at 16:2-4.

<sup>52</sup> Case No. 2012-00535, KIUC Brief at 40-47.

physically idling Coleman, and will save \$6.2 million in depreciation expense.<sup>53</sup> Big Rivers' financial struggles in the wake of losing both smelter loads have been well documented and any additional revenue or savings can be used to reduce the rates paid by Big Rivers' greatly diminished customer base.

It is also in the best interest of Big Rivers and its ratepayers for Century to reduce its costs and return to profitability. If Century can reduce its costs by avoiding SSR payments (and the LME price of aluminum recovers from its present depressed level), the Commission may be in a position to impose a market access fee on Century based on solid earnings. As discussed above, such a charge is just and reasonable given the fact that Century is receiving a 30% rate decrease (\$61.2 million) while the Rural and Large Industrial customers may be forced to pay rate increases of 72% and 110%, respectively.

Given these benefits, the Commission should do everything in its power to help expedite Coleman's transition from MISO "must-run" status to idled plant. We strongly agree with Century on this issue and are baffled by Big Rivers' position which once again fails to adequately consider the effects on consumers. Customers cannot afford for Big Rivers to leave any money on the table when they are facing historic rate increases.

## **2. The Evidence in the Record Indicates That "Live Line" Maintenance is a Safe and Prudent Utility Practice.**

Century submitted the testimony of Donald Morrow, Vice President Transmission at Quanta Technology ("QES"), which contained a comprehensive review of the safety history of "live line" maintenance practices as performed by QES. Mr. Morrow noted that QES has performed "live line" maintenance for numerous U.S. utilities, including Kentucky Utilities.<sup>54</sup> According to Mr. Morrow, QES has logged over 4.6 million person-hours on energized maintenance and construction since 1998 with only two incidents (neither were fatalities) that were reportable to the Occupational Safety and Health Administration ("OSHA"). One of these reportable incidents resulted in a loss time injury. This record translates to an average Loss Time Incident Rate for QES of .0435 over the 15-year period.<sup>55</sup>

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<sup>53</sup> Case No. 2012-00535, Confidential Ex. Berry Rebuttal-2.

<sup>54</sup> Direct Testimony of Donald J. Morrow (July 19, 2013) ("Morrow Testimony") at 10:4-15.

<sup>55</sup> Morrow Testimony at 11:4-17.

Big Rivers' primary objection to the use of "live line" maintenance by either its employees or by a third-party contractor is that, according to Mr. Berry, "*live line maintenance is more dangerous than maintenance performed on a transmission line that is out of service.*"<sup>56</sup> But neither Mr. Berry nor any other Big Rivers witness cites a single statistic, study, or other evidence in support of its conclusion that "live line" maintenance represents an unacceptable risk. At the hearing, Mr. Berry stated that he did not have any knowledge regarding: 1) the prevalence of "live line" maintenance practices in the U.S.; 2) Institute of Electrical and Electronics Engineers standards concerning "live line" maintenance; 3) OSHA work rules for "live line" maintenance; or 4) OSHA data related to the incidence of accidents in the course of performing "live line" maintenance.<sup>57</sup> Counsel for Century asked Mr. Berry:

Q: "*You don't know whether the OSHA data would indicate that live line maintenance work involves less incidents per worker, or more incidents per worker than de-energized maintenance?*"

A: "*I do not know.*"<sup>58</sup>

Big Rivers' opposition to the use of "live line" maintenance does not appear to be based on tangible evidence that the practice is not safe or prudent. Rather than basing its position on valid safety concerns, it appears that management's true motivation is to keep Coleman operating, even if it is not economic to do so, in order to maintain employment at the plant and justify additional capital spending.

KIUC recognizes that the disagreement between Big Rivers and Century over the use of "live line" maintenance puts the Commission in the awkward position of perhaps ordering a utility to perform or allow a third-party contractor to perform "live line" maintenance against the objection of the utility. However, Big Rivers has not presented any compelling evidence in support of its position that "live line" maintenance should not be performed, and the economic benefit of performing "live line" maintenance is substantial. KIUC recommends that the Commission order Big Rivers to substantiate its position that "live line" maintenance involves an unacceptable level of risk to maintenance workers. If Big Rivers cannot support this claim, the Commission should order that Big Rivers allow a contractor to perform "live line" maintenance, consistent with Century's proposal.

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<sup>56</sup> Rebuttal Testimony of Robert W. Berry (July 25, 2013) at 22:18-19.

<sup>57</sup> Tr. July 30, 2013 at 11:30:14.

<sup>58</sup> Tr. July 30, 2013 at 11:32:00.

### III. CONCLUSION

WHEREFORE, KIUC respectfully requests that the Commission take the following actions:

- Modify the proposed arrangements to expressly preserve the Commission's jurisdiction over the resolution of disputes.
- Approve the electric service arrangements on the condition that the Commission has the right to prospectively assess a just and reasonable market access charge to mitigate the rate impacts on remaining customers resulting from Century receiving market pricing.
- Order Big Rivers to substantiate its position that live-line maintenance is not a prudent utility practice.

Respectfully submitted,



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