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January 14, 2014

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JAN 14 2014

PUBLIC SERVICE
COMMISSION

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HAND DELIVERY

Mr. Jeff R. Derouen
Executive Director
Kentucky Public Service Commission
211 Sower Blvd.
Frankfort, KY 40601


**Re: Joint Application of Kenergy Corp. and Big Rivers Electric Corporation
for Approval of Contracts
Case No. 2013-00413**

Dear Mr. Derouen:

Enclosed for filing in the above matter are an original and ten copies of the Post-Hearing Brief of Century Aluminum Sebree LLC.

If you have any questions please let us know.

Very truly yours,


David C. Brown

DCB
Enclosures

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JAN 14 2014

**PUBLIC SERVICE
COMMISSION**

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

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. 2013-00413

**POST-HEARING BRIEF OF
CENTURY ALUMINUM SEBREE, LLC**

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Dated: January 14, 2014

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Comes now, Century Aluminum Sebree, LLC ("Century") and submits its Post-Hearing Brief to the Kentucky Public Service Commission ("Commission").

I. EXECUTIVE SUMMARY

Century respectfully requests that the Commission issue an order granting approval of certain electric service arrangements between and among Kenergy Corp. ("Kenergy"), Big Rivers Electric Corporation ("BREC"), and Century (together, the "Century Transaction") for which Commission approval may be necessary.¹ The Century Transaction agreements are fair, just, and reasonable; are consistent with Kentucky law; and closely track the agreements that the Commission approved for Century's Hawesville Smelter. Given the benefits associated with approval of the agreements, particularly when weighed against the consequences of closing the Sebree Smelter, the Century Transaction should be approved without modification.

The Commission should reject KIUC's efforts to impose a "market access charge" on the Century Transaction. Such a surcharge is inconsistent with previously approved agreements, is inherently flawed, and will force the closure of the Sebree Smelter.

Consistent with the finding in its August 14, 2013 Order² that the use of live-line maintenance is consistent with good and prudent utility practice, and in light of circumstances that have arisen since the issuance of that Order, the Commission should find that the use of live-line maintenance on certain BREC transmission facilities is necessary for operation consistent with good and reasonable utility practice and to ensure reliability of service.

The Commission should find that the Load Curtailment Agreement ("LCA") by and among Century, BREC, and Kenergy is subject to the Commission's jurisdiction, and that the Commission is the appropriate body to adjudicate any dispute arising under the LCA.

¹ See *Joint Application of Kenergy Corp. and Big Rivers Electric Corporation For Approval of Contracts and for a Declaratory Order*, P.S.C. Case No. 2013-0413, p. 6 (Nov. 19, 2013) ("Application").

² See *Joint Application of Kenergy Corp. and Big Rivers Electric Corporation for Approval of Contracts and for a Declaratory Order*, Case No. 2013-00221, Order (Ky. P.S.C. Aug. 14, 2013) ("Hawesville Order").

Century appreciates the Commission's expedited review of the Application, and the Commission's understanding of the critical issues presented by the Application.

II. ARGUMENT

A. THE COMMISSION SHOULD APPROVE THE CENTURY TRANSACTION AGREEMENTS WITHOUT MODIFICATION.

Century fully supports the Century Transaction agreements that were filed with the Commission on November 19, 2013, with the few amendments that BREC filed with the Commission on December 30, 2013, and is prepared to consummate the Century Transaction if the agreements are approved as filed.³ The Century Transaction is a product of extensive negotiations among BREC, Kenergy, and Century, and represents an opportunity for the Sebree Smelter to remain operational beyond January 31, 2014. Pursuant to the Century Transaction, Century will direct BREC, as the authorized Market Participant when the agreements go into effect, to purchase electric generation in wholesale power markets. Kenergy will continue to be the exclusive retail service provider to Century,⁴ as required by statute.⁵ Electricity will not be provided "by a third party."⁶

The Century Transaction ensures that the Sebree Smelter will not be subsidized by, and will not impose any costs on, other Kenergy or BREC customers. The Century Transaction imposes significant new supply risks on Century that will not be borne by any other Kenergy or BREC customers.⁷ The Transaction will, in fact, provide a net benefit to those customers in the form of transmission revenue paid by Century.⁸ The Century Transaction aligns the Sebree Smelter's viability with competitive, market-based prices for energy and capacity. Given the

³ See Direct Testimony of Michael Early, pp. 4: 4-6, 5: 20-22 and 6: 1-4 (Dec. 20, 2013) ("Early Direct Testimony").

⁴ Application, pp. 5-6.

⁵ KRS 278.018

⁶ *Cf. id.*

⁷ See Early Direct Testimony at p. 4: 1-3.

⁸ See *id.* at p. 9: 10-15. See also Testimony of Michael Early at January 6, 2014 Hearing, Tr. 16:09 ("Early Hearing Testimony").

substantial public interest and benefit in continued operation of the Sebree Smelter, and the direct benefit to Kenergy, BREC, and their ratepayers, the Commission should approve the Century Transaction as fair, just, and reasonable.

The continued operation of the Sebree Smelter will provide significant regional economic benefits, including the retention of more than 500 well-paying positions at the Smelter that are important to the economic vitality of Western Kentucky.⁹ Century makes substantial contributions to Henderson County in the form of property and other local taxes, and the total economic benefit of the Sebree Smelter's operations is approximately \$200 million per year.¹⁰

If the Commission does not approve the Century Transaction agreements as filed, the Sebree Smelter will close. The Sebree Smelter cannot survive under rates that are well above market rates. The current average electric rate to the Sebree Smelter is approximately \$56/MWh, and it was projected to reach approximately \$60/MWh even without the Hawesville Smelter's termination, nearly 62% higher than the average power rate for U.S.-based aluminum smelters.¹¹ Commission approval of the Century Transaction, combined with the requested findings on live-line maintenance, will allow the Sebree Smelter to continue to operate; without Commission approval of the Century Transaction, Century will be forced to close the Sebree Smelter when the current contract terminates.¹²

The Century Transaction provides tangible benefits to BREC's customers that would not be realized if the Sebree Smelter were to close. BREC will receive approximately \$6 million in annual transmission revenue from Century for firm transmission service, at BREC's current

⁹ See Direct Testimony of Jason Young, p. 5: 4-16 (Dec. 20, 2013) ("Young Direct Testimony").

¹⁰ See *id.* at pp. 2: 17-22 and 5: 11-13.

¹¹ See *id.*, p. 4: 2-5; see also Century Response to On-The-Record Data Request, Case No. 2013-00221 (Aug. 1, 2013) (average power rate for U.S.-based smelters that are currently operating is \$37/mWh).

¹² See Young Direct Testimony at p. 5: 4-11 (only options are approval or closure).

transmission rates.¹³ In addition to these benefits, the Transaction ensures that Kenergy and BREC ratepayers experience no adverse impacts as a result of the Century Transaction.

The ongoing analysis by the Midcontinent Independent Transmission System Operator, Inc. ("MISO") of the potential need to operate the Wilson generation station ("Wilson") as a System Support Resource ("SSR") does not preclude Commission approval of the Century Transaction. Based on MISO's preliminary study for the closure of Wilson, Sebree may operate at full capacity when the transmission system is intact or a single contingency event occurs during shoulder months.¹⁴ MISO has circulated to certain parties its draft Attachment Y Report, which purportedly shows that Wilson will not be required to operate as an SSR.¹⁵ Thus, unlike the Kenneth C. Coleman Station at issue in the Hawesville proceeding, an SSR agreement will likely not be necessary to accommodate the Sebree Smelter operating at the Base Load plus any Curtailable Load upon closure of Wilson on February 1, 2014.¹⁶ Nevertheless, the Century Transaction does include an agreement that would enable implementation of a protective relay scheme, which would mitigate against potentially crippling curtailments of the Sebree Smelter.¹⁷

Century respectfully requests that the Commission issue an order on or about January 24, 2014, approving the Century Transaction, as filed, which would allow the parties to consummate the Transaction without irreversibly disrupting operations at the Sebree Smelter.

¹³ Direct Testimony of Robert E. Berry, p. 40: 3 – 9 ("Berry Direct Testimony").

¹⁴ See Early Direct Testimony at p. 5: 2-8.

¹⁵ See Testimony of Robert E. Berry at January 6, 2014 Hearing, Tr. 13:07-13:08 ("Berry Hearing Testimony"). Although MISO's draft Attachment Y Report would allow BREC to idle Wilson beginning on February 1, 2014, the Century Transaction agreements are structured to accommodate the lack of finality over Wilson's SSR status. The Direct Agreement and Electric Services Agreement ensure that Century pays all costs to keep Wilson running for reliability purposes, if necessary, to accommodate the Sebree Smelter operating above the Base Load plus any Curtailable Load, as ultimately determined by MISO.

¹⁶ See Early Direct Testimony at p. 5: 4-8.

¹⁷ See *id.* at p. 5: 11-15.

B. THE PROPOSAL TO CONDITION APPROVAL OF THE CENTURY TRANSACTION ON THE IMPOSITION OF A "MARKET ACCESS CHARGE" IS UNJUST AND UNREASONABLE.

Kentucky Industrial Utility Customers, Inc. ("KIUC") argues that approval of the Century Transaction should be conditioned on the imposition of a "market access charge" on the Sebree Smelter, purportedly to mitigate the rate impact of "[BREC's] problems of excess capacity and financial integrity."¹⁸ KIUC proposes that Century be required to pay, into a reserve fund, a market access charge equal to the monthly difference between "all-in" market prices and \$43/MWh. The charge would be \$0 if all-in market prices are \$43/MWh or greater.¹⁹ The charge would remain in effect for the entire term of the Century Transaction.²⁰

The Commission should reject KIUC's proposed market access charge, for a number of reasons. First, the Commission has already rejected a market access charge in approving the transaction agreements for the Hawesville Smelter.²¹ Second, any imposition of a market access charge will result in closure of the Sebree Smelter. Century simply cannot assume the risk of a market access charge. Third, KIUC's proposed market access charge is flawed and unreasonable, because it is based on the incorrect premise that the Sebree Smelter is profitable and because the charge would apply regardless of whether the charge would cause the Sebree Smelter to become unprofitable in any given month. Finally, the proposed market access charge violates the terms of the 2009 Agreement approved by the Commission.

I. The Commission Has Already Determined That A Market Access Charge Is Unreasonable.

KIUC proposed a market access charge as a condition of the Commission's approval of transactions agreements related to the Hawesville Smelter.²² In support of its proposal, KIUC

¹⁸ Direct Testimony of Lane Kollen, p. 6: 4-11 (Dec. 20, 2013) ("Kollen Direct Testimony").

¹⁹ *See id.* at p. 18: 12-15.

²⁰ Testimony of Lane Kollen at January 6, 2014 Hearing, Tr. 14:41-43 ("Kollen Hearing Testimony").

²¹ Hawesville Order at 23.

²² *Id.* at 20.

argued that BREC incurred generation investments to serve the Hawesville Smelter load, and that Century's termination of the 2009 agreements leaves BREC with excess generating capacity resulting in rate increases for BREC's remaining customers.²³ KIUC argued that, because Century was "responsible" for the fixed costs related to BREC's excess generating capacity, it should be required to pay for that excess capacity in the form of a market access charge if and when such a charge becomes economically viable for the Hawesville Smelter.²⁴

In the Hawesville Order, the Commission flatly rejected KIUC's proposal for a market access charge.²⁵ The Commission found that the proposed contracts "were a product of extensive and good faith negotiations among [BREC], Kenergy [and Century] with the goal of keeping the Hawesville smelter viable while not subjecting the remaining customers to any additional incremental costs"²⁶ As such, the proposed market access charge "would jeopardize the balance reached by the proposed agreements" and was, therefore, unreasonable. KIUC challenged the Hawesville Order in the Franklin Circuit Court, but later withdrew that challenge, with prejudice.²⁷ The Commission's determination is now settled law.

The Century Transaction, like the transaction approved by the Commission in the Hawesville Order, is the product of extensive and good faith negotiations among BREC, Kenergy, and Century, and carefully balances competing interests in order to keep the Sebree Smelter operational beyond January 31, 2014.²⁸ The Century Transaction is not meaningfully different from the Hawesville Smelter transaction, and cannot justify a different decision. The market access charge imposed on the Century Transaction would "jeopardize the balance"

²³ *Id.*

²⁴ *Id.* at 21.

²⁵ *See id.* at 23.

²⁶ *Id.*

²⁷ *See* Big Rivers Exh. 2, January 6, 2014 Hearing.

²⁸ *See* Application at 4.

reached by the parties. Accordingly, the Commission should reject KIUC's proposed market access charge as unreasonable, consistent with the Commission's prior determination.

2. Any Imposition Of A Market Access Charge Will Result in Closure of the Sebree Smelter.

Century is faced with two stark alternatives: (1) continue operations under the Century Transaction, or (2) close.²⁹ Century and BREC have negotiated a "market pass-through arrangement that doesn't have any adders . . . and that means that [Century] assume[s] [the] risk with market prices that customers are not assuming."³⁰ Century is prepared to accept the risks associated with market pricing in order to keep the smelter open, but "if additional risks or costs are factored in . . . that pushes [Century] beyond the point" at which is it prepared to assume financial risks. Consequently, without approval of the Century Transaction documents as filed, Sebree will cease operations on January 31, 2014. There is "no second chance for the Sebree Smelter."³¹ The proposed market access charge, if included as a condition of approval of the Transaction, would trigger the irrevocable closure of Sebree and should, therefore, be rejected.

3. KIUC's Proposed Market Access Charge is Inherently Flawed and Unreasonable.

In support of its proposed market access charge, KIUC relies heavily on the premise that the Sebree Smelter is highly profitable. In support of this argument, KIUC cites to profitability data obtained from two Alcan employee newsletters, dated December 2012 and May 2013.³² According to KIUC's interpretation of the data in these newsletters, the Sebree Smelter made \$29 million in profits in 2012 and \$30 million in profits in the 12 months ending April 2013. KIUC

²⁹ Young Direct Testimony at 5: 4-7.

³⁰ Early Hearing Testimony, Tr. 15:40-41.

³¹ *Id.*

³² Kollen Direct Testimony at p. 9: 1-3.

contends that Sebree's annual profits would increase by an additional \$39 million with market based power.³³ KIUC's assumptions are incorrect.

As a threshold matter, the question of the Sebree Smelter's profitability is not relevant to the Commission's approval of the Century Transaction. The Commission has previously declined to delve into the smelter's profitability, finding that:

An aluminum company is in a vastly different position than a regulated utility. There is no monopoly franchise and no obligation to serve. Even a relatively profitable plant can be closed if its owner decides that other considerations outweigh its continued operation. One such consideration is uncertainty about the cost of its major raw material: electricity.³⁴

Consistent with its prior findings, the Commission should, in this case, decline to put itself in the position of regularly reviewing an aluminum smelter's profitability.

Even if the Commission were to take this leap, it would find that Sebree was unprofitable in 2012 and 2013, when measured on a basis that determines whether smelters continue to operate or close. KIUC based its determination of \$29 million in profits for 2012 on the Sebree Smelter's Earnings Before Interest, Tax, Depreciation, and Amortization ("EBITDA").³⁵ Century does not rely on the EBITDA metric in evaluating whether or not to continue to operate Sebree, because EBITDA does not reflect a number of actual cash costs necessary to run the plant, including capital expenditures required to maintain the plant.³⁶ These capital expenditures must be deducted from EBITDA to calculate the true cash loss (or profit) of a smelter.

Under United States Generally Accepted Accounting Principles ("GAAP"), which Century applies but Rio Tinto Alcan did not, Sebree's 2012 financial results are properly

³³ Young Direct Testimony at p. 5: 7-8.

³⁴ *Big Rivers Electric Corporation's Notice of Changes In Rates and Tariffs for Wholesale Electric Service and of a Financial Workout Plan*. Order at 15, Case No. 9613 (Ky. P.S.C. Mar. 17, 1987).

³⁵ Kollen Hearing Testimony, Tr. 14:21; *see also* Century Response to On-the-Record Data Request From January 6, 2014 Hearing at 1 (Jan. 9, 2014). ("Century Response").

³⁶ *See* Century Response at 1-2.

accounted for as a \$12.5 million loss.³⁷ The losses continued into 2013, after Century assumed ownership of the Sebree Smelter and, even if it had been taking marked-based power, Sebree was at best "break even" financially.³⁸ KIUC attempted to distinguish its ultimate decision not to pursue a market access charge for the Hawesville Smelter from its decision to pursue such a charge for Sebree based on its perception of Sebree's profitability.³⁹ In light of the additional clarifying evidence about Sebree's profitability, KIUC's distinction is no longer valid and its market access charge proposal in this case is no different than the market access charge that the Commission rejected (and KIUC ultimately decided not to pursue) in the Hawesville case.

The proposed market access charge is further unreasonable because it would apply even if the Sebree Smelter were at break-even profitability when paying market-based prices, meaning that the imposition of the market access charge alone could cause the Sebree Smelter to go from being marginally profitable or "break-even" to being highly unprofitable.⁴⁰

Finally, the proposed market access charge ignores the risks assumed by Century under the Century Transaction and fundamentally defeats the purpose of the Century Transaction. The Century Transaction poses significant power pricing risks on Century than are not borne by any other Kenergy customer.⁴¹ The Transaction is structured to ensure that all net incremental costs incurred by Kenergy and BREC to provide service to Sebree are borne by Century alone. Century also bears the full risk that Reliability Costs may be incurred as a result of the changes in operation at Wilson, Coleman, and other BREC plants. While Century is taking on these significant risks, BREC's remaining customers will benefit from millions of dollars in firm

³⁷ *See id.*

³⁸ *See id.* at 2-3.

³⁹ *See* Kollen Direct Testimony at pp. 6-16.

⁴⁰ *See* Testimony of Jason Young at January 6, 2014 Hearing, Tr. 15:28-15:29 ("Young Hearing Testimony"); Early Hearing Testimony, Tr.

⁴¹ Early Direct Testimony, p. 4: 1-6.

transmission revenues for continued service to Sebree.⁴² Moreover, any positive margins need to be available to reinvest in smelting operations in order to keep Sebree competitive.⁴³ The imposition of a "market access charge" would unreasonably interfere with the reinvestments necessary for sustained operation of the Sebree Smelter. The proposed market access charge is unreasonable.

4. The Proposed Market Access Charge Violates the Terms of the Commission-Approved 2009 Agreements.

Any assessment of a "market access charge" would violate the 2009 Agreements approved by the Commission. The 2009 Agreements included a 12-month termination notice and no "exit fee" for termination prior to the otherwise scheduled end-date of the Agreement.⁴⁴ The 2009 Agreements also provided Century with no right to return to BREC's generation system supply upon termination of the 2009 Agreements.⁴⁵ Any potential "market access charge" would be a fundamental, retroactive change to the 2009 Agreements. The retroactive imposition of a market access charge on a transaction that was approved by the Commission and has since been terminated in strict accordance with its terms is not "fair, just, and reasonable."⁴⁶ KIUC's proposal to impose a market access charge should therefore be rejected.

5. KIUC's Request For Profitability Reporting Is Unduly Burdensome, Unnecessarily Intrusive, and Should Be Rejected.

KIUC requests that the Commission further condition approval of the Century Transaction on compliance with certain reporting requirements. KIUC essentially requests that the Commission monitor the profitability of Sebree, to require it to pay a higher rate when it can

⁴² *Id.*

⁴³ Young Hearing Testimony, Tr. 15:31.

⁴⁴ See Berry Rebuttal Testimony, Exh. 5, Art. 7.

⁴⁵ See *id.*

⁴⁶ KRS 278.030(1); see also *Nat'l-Southwire Alum. Co. v. Big Rivers Elec. Corp.*, 785 S.W.2d 503 (Ky. Ct. App. 1990).

"afford" to do so, but to assure that the rate would not force the Sebrec Smelter out of business.⁴⁷ Century acknowledges and does not object to reporting requirements that are identical to those imposed as a condition of approval of the Hawesville Smelter agreements. However, Century strenuously objects to any additional reporting requirements, especially those that seek information about Century's actual market price or about Century's profitability. As noted above, the Commission has carefully avoided delving into information about smelter profitability.⁴⁸ Century urges the Commission to reject KIUC's expanded reporting proposal as unreasonable.

C. THE COMMISSION SHOULD FIND THAT LIVE-LINE MAINTENANCE IS NECESSARY FOR RELIABLE SERVICE AND TO OPERATE CONSISTENT WITH GOOD AND REASONABLE UTILITY PRACTICE.

The Commission has determined that live-line maintenance is consistent with good and reasonable utility practice.⁴⁹ The only remaining question is whether live-line maintenance is a necessary component of BREC's statutory and regulatory obligation to engage in good and reasonable utility practice vis à vis its service obligation to Century. The Commission has stated that the parties should negotiate this issue among themselves.⁵⁰ BREC cites to health and safety concerns as the basis for its continuing refusal to perform live-line maintenance to ensure reliable service to Century, and argues that Century's insistence on live-line maintenance reflects economic interests rather than an interest in service reliability.⁵¹ BREC also agrees that, given its position, any further negotiations on live-line maintenance would have been fruitless.⁵² BREC's steadfast refusal to undertake live-line maintenance to ensure reliable service to Century is undermined by uncertainty whether BREC is currently performing some live-line maintenance. BREC has not presented evidence clearly accounting for all instances of "hot line

⁴⁷ Kollen Hearing Testimony, Tr. 14:38-39.

⁴⁸ *Big Rivers Electric Corporation's Notice of Changes in Rates and Tariffs for Wholesale Electric Service and of a Financial Workout Plan*, Order at 15, Case No. 9613 (Ky. P.S.C. Mar. 17, 1987).

⁴⁹ Hawesville Order at 14.

⁵⁰ *See id.* at 15.

⁵¹ *See* Rebuttal Testimony of Robert W. Berry, p. 18: 18-21 (Dec. 30, 2013) ("Berry Rebuttal Testimony").

⁵² Berry Hearing Testimony, Tr. 10:32.

work" performed on BREC's transmission system, as recorded on MISO's outage system.⁵³ Moreover, BREC's refusal to perform live-line maintenance as necessary to maintain reliable transmission service to Sebree is inconsistent with its hiring requirements for transmission linemen.⁵⁴ In these circumstances, Century requests that the Commission find now that live-line maintenance is a necessary component of BREC's service obligations.

1. The Requested Commission Findings On Live-Line Maintenance Do Not Require Changes To the Century Transaction Agreements.

No changes to the Century Transaction agreements are necessary to enable the use of live-line maintenance. Section 13.1 of the Electric Services Agreement requires Century to indemnify BREC for all losses resulting from litigation arising under the contract.⁵⁵ This would include indemnification for losses incurred in the unlikely event that injuries are sustained during performance of live-line maintenance. Section 4 of the Direct Agreement describes the Wilson-related SSR costs for which Century will be responsible.⁵⁶ These provisions are purposefully broad to accommodate costs related to the suspension of Wilson operations, including any additional cost of performing live-line maintenance on the affected transmission lines. As with the agreement for the Hawesville Smelter, Century will reimburse BREC for all incremental costs associated with live-line maintenance for service continuity to Sebree.⁵⁷ Consequently, no contractual bar exists to requiring live-line maintenance on the affected transmission lines.

⁵³ Berry Hearing Testimony, Tr. 10:33-10:36 (citing Berry Rebuttal Testimony, Exh. 6). Although Mr. Berry testified to such a distinction, the evidence set forth in Mr. Berry's Rebuttal Testimony, Exhibit 6 fails to account for all instances of "hot line work" recorded on MISO's transmission outage system.

⁵⁴ See Century Exh. 1, January 6, 2014 Hearing (setting forth qualifications for lineman including certification in "glove and hotstick work on energized lines").

⁵⁵ See Application, Exh. No. 5 (Electric Services Agreement) § 13.1.

⁵⁶ See *id.*, Exh. No. 9 § 4.

⁵⁷ See Direct Testimony of Michael Early, p. 25: 19-20, Case No. 2013-00221 (July 19, 2013).

2. Live-Line Maintenance Is A Necessary Component Of Good and Reasonable Utility Practice.

The tariff arrangements that will be in place if the Century Transaction is approved, and the regulatory obligations that exist for BREC, compel the use of live-line maintenance. Century will be a firm transmission service customer, paying the full MISO Tariff rate for its monthly peak loads.⁵⁸ Century should be treated no differently than any other firm transmission service customer and, in that respect, should not have its load severely reduced whenever BREC must perform scheduled maintenance on the lines that affect power delivery to Sebree. Moreover, under Kentucky law, BREC remains under the following obligation:

Each utility shall make all reasonable efforts to prevent interruptions of service, and when such interruptions occur shall endeavor to reestablish service with the shortest possible delay. Whenever service is necessarily interrupted or curtailed for the purpose of working on equipment, it shall be done at a time if practicable, that will cause least inconvenience to customers, and those customers which may be seriously affected shall be notified in advance, except in cases of emergency.⁵⁹

This obligation is important in two respects. First, BREC must undertake "all reasonable efforts" to prevent interruptions of service. In the context of this case, that means BREC must undertake the type of live-line maintenance necessary to prevent interruptions of service to the Sebree Smelter, which can sustain outages no longer than three hours.⁶⁰ Second, by use of the word "necessarily," the provision makes clear that the Commission anticipates that lines may not need to be taken out of service when maintenance is performed, and, if they must be taken out of service, such outages should occur only when and to the extent necessary. In light of BREC's obligation to employ all reasonable efforts to prevent service interruptions and to limit interruptions to the extent necessary, the Commission should find that live-line maintenance is necessary to provide good and reasonable utility practice to Century.

⁵⁸ See, e.g., Application, Exh. No. 9 (Direct Agreement) § 3.10.

⁵⁹ 807 KAR 5.041, Section 5(1) (emphasis added).

⁶⁰ See Young Direct Testimony, p. 5: 19-21.

3. Live-Line Maintenance Is Necessary To Ensure The Service Reliability That Is Necessary To Sustain The Sebree Smelter.

Live-line maintenance is essential for the Century Transaction to achieve its objective of sustaining the viability of the Sebree Smelter.⁶¹ Although the Commission did not reach the issue of whether live-line maintenance was a requirement for continued service to the Hawesville Smelter, a subsequent load curtailment event impacting service to the Hawesville Smelter demonstrates the critical need for a live-line maintenance requirement. As discussed in the hearing testimony of Michael Early and Robert Berry, the Hawesville Smelter was forced to curtail approximately 30 MW of load on October 10, 2013. The curtailment resulted from the simultaneous planned maintenance outage of a 345 kV BREC transmission line serving the Hawesville Smelter and a generation outage of one of BREC's Coleman units.⁶² The resulting load curtailment lasted approximately 6-8 hours.⁶³ The Smelter was also put on notice that the smelter might have to curtail an additional 120 MW of load. Had that additional curtailment occurred for more than 3 hours, one-fifth of the smelter would have been shut down and layoffs would have immediately followed.⁶⁴ As Mr. Early's testimony makes clear, had BREC conducted live-line maintenance on this 345 kV transmission line, instead of taking the line out of service, the load curtailment would not have occurred and the viability of the Hawesville Smelter would not have been jeopardized.⁶⁵

As evident from this preventable load curtailment experience, the use of live-line maintenance is necessary to reduce the risk of load reduction at Sebree and maintain the long-term viability of the smelter. Given that the Commission has already determined that live-line

⁶¹ Early Direct Testimony, p. 5: 20-22 and 6: 1-4. Live-line maintenance includes hot stick and barehand techniques, and using equipment to keep conductors energized to expand the work zone for maintenance practices. See Direct Testimony of Donald J. Morrow, p. 4: 6-12, Case No. 2013-00221 (July 19, 2013).

⁶² Early Hearing Testimony, Tr. 16:02-16:04; Berry Hearing Testimony, Tr. 10:44.

⁶³ See Response of Big Rivers Electric Corp. to On-the-Record Data Request (Jan. 7, 2014).

⁶⁴ See Direct Testimony of Sean Byrne, Case No. 2013-00221, p. 2: 1-5, p. 6: 14-20.

⁶⁵ Early Hearing Testimony, Tr. 16:02-16:04.

maintenance is consistent with good and reasonable utility practice, given that the Century Transaction agreements can accommodate live-line maintenance as-filed, and given the preventable load curtailment that recently occurred at Hawesville as a direct result of de-energized maintenance, the use of live-line maintenance on transmission lines necessary to serve Sebree should be required.

D. THE COMMISSION HAS JURISDICTION TO APPROVE THE LOAD CURTAILMENT AGREEMENT AS FILED

Pursuant to the LCA, BREC may curtail load at the Sebree Smelter when required by MISO or upon determination by BREC, consistent with applicable law and rules, that such curtailment will prevent or reduce a curtailment that would otherwise occur on BREC's system. The LCA also indemnifies BREC and Kenergy against any claims by Century with respect to load curtailment.⁶⁶ Section 6.6 of the LCA limits jurisdiction over disputes and claims arising under the agreement to the Commonwealth of Kentucky; however, the parties maintain the right to refer "to FERC or any other Governmental Authority any matter properly within its jurisdiction."⁶⁷ While BREC, Kenergy, and Century agree that the LCA is an essential component of the Century Transaction, the parties differ with respect to whether the agreement is subject to the jurisdiction of, and therefore requires approval by, the Commission. Century's position is that the LCA falls squarely within the Commission's jurisdiction over curtailment of retail customers by a generation or transmission cooperative, and should be approved by the Commission. Any disputes arising under the LCA must be adjudicated before the Commission.

⁶⁶ Application, Exh. 23.

⁶⁷ See *id.* § 6.6.

1. The LCA Falls Squarely Within the Commission's Exclusive Jurisdiction Over Curtailment of a Retail Customer By A Generation or Transmission Cooperative.

BREC argues in its testimony that the LCA does not fall within the Commission's jurisdiction because the agreement is "necessary for [BREC] to comply with several mandatory reliability standards developed and enforced by NERC and SERC, subject to FERC approval."⁶⁸ BREC cites to Section 215 of the Federal Power Act in support of its position that the Commission is not permitted to take actions "inconsistent" with federal reliability standards, and concludes that any Commission action on the LCA would likely result in a violation of such a reliability standard.⁶⁹

Century disagrees. Although BREC may be required to curtail its transmission load at MISO's direction in compliance with federal reliability standards, or may decide on its own that curtailment is necessary, the LCA governs BREC's curtailment of retail load. The LCA does not determine whether BREC should or should not comply with federal obligations; rather the LCA takes those obligations as a given, and then addresses the relationship between Century and BREC (and Kenergy) relative to the curtailments that are necessary for such compliance.

The LCA is an exception to the general standards that exist under Kentucky law regarding interruptions of retail customers. The Commission's statutory obligations include regulation of utilities and enforcement of the provisions of Chapter 278.⁷⁰ In accordance with these obligations, the Commission retains exclusive jurisdiction over utility "services."⁷¹ Section 278.214, which governs curtailment of service by a utility or generation and transmission cooperative, provides the following:

⁶⁸ Berry Rebuttal Testimony, p. 15: 21-23.

⁶⁹ See *id.* at 15: 21-23 and 16: 1-8.

⁷⁰ KRS 278.040(1).

⁷¹ KRS 278.040(2).

When a utility or generation and transmission cooperative engaged in the transmission of electricity experiences on its transmission facilities an emergency or other event that necessitates a curtailment or interruption of service, the utility or generation and transmission cooperative shall not curtail or interrupt retail electric service within its certified territory, or curtail or interrupt wholesale electric energy furnished to a member distribution cooperative for retail electric service within the cooperative's certified territory, except for customers who have agreed to receive interruptable [sic] service, until after service has been interrupted to all other customers whose interruption may relieve the emergency or other event.⁷²

As set forth in the Application, BREC is a "member-owned, not-for-profit generation and transmission cooperative."⁷³ Accordingly, the Commission has exclusive jurisdiction to require BREC to curtail load outside of its certified territory before curtailing native load, absent a customer's consent to interruptible service. The LCA is such an exception and, thus, falls squarely under the Commission's authority under the statute. The Commission has also clarified its jurisdiction over load curtailment as a condition to approving BREC's transfer of operational control of transmission facilities to MISO.⁷⁴ Filing the LCA for Commission approval satisfies these obligations.

Moreover, BREC has sought and received Commission approval of tariff revisions specifically to comply with Section 278.214.⁷⁵ In addition, BREC's current tariff includes a voluntary curtailable service rider to accommodate the exception to Section 278.214.⁷⁶ As discussed throughout the Application, Century is a native load customer within BREC's service territory.⁷⁷ The LCA between Century and BREC therefore satisfies BREC's obligations under Section 278.214, by documenting Century's agreement to receive "interruptible service." Given

⁷² KRS 278.214 (emphasis added).

⁷³ Application at 1.

⁷⁴ *Application of Big Rivers Electric Corporation for Approval to Transfer Functional Control of Its Transmission System to Midwest Independent Transmission System Operator, Inc.*, Case No. 2010-00043, Order at 10 (Ky. P.S.C. Nov. 1, 2010).

⁷⁵ *In re Big Rivers Electric Corp.*, Case No. 2002-00347, Order (Ky. P.S.C. Feb. 6, 2003).

⁷⁶ *See Big Rivers Electric Corp., Rates, Terms and Conditions for Furnishing Electric Service*, P.S.C. Ky. No. 25, Rider CSR.

⁷⁷ *See, e.g.*, Application, Exh. 4 at 19; Exh. 23.

the Commission's exclusive jurisdiction over curtailment of native load, and the LCA's satisfaction of BREC's statutory obligation under state law, the Commission should exercise its jurisdiction to determine whether the LCA should be approved as filed.

BREC's assertion that Commission approval of the LCA is preempted by federal law is misplaced. While FERC regulations and federal reliability standards do impose certain performance obligations on BREC, they do not extend to decisions about how, or in what order, to curtail retail load under KRS 278.214. The distinction between state and federal load curtailment obligations is settled law. In *Kentucky Power Co. v. Huelsmann*, several Kentucky utilities challenged the obligations of KRS 278.214 on federal preemption grounds. The U.S. District for the Eastern District of Kentucky found no conflict between KRS 278.214 and the load curtailment obligations set forth in FERC Order No. 888. In adopting MISO's explanation of the distinction between the state and federal curtailment obligations, the court stated:

FERC Order 888 and the applicable [Open Access Transmission Tariffs ("OATTs")] merely regulate how a [Regional Transmission Organization] is to allocate curtailments of transmission service among its transmission customers, such as [plaintiff utilities]; nothing in the OATTs direct how Plaintiffs must allocate a reduction of their transmission service among the retail customers they serve. . . . Thus, the curtailment provisions of the OATTs and those found in the Kentucky statute are complementary and sequential; KRS 278.214 picks up where the OATT provisions end.⁷⁸

There is no conflict between KRS 278.214 and BREC's load curtailment obligations as a MISO transmission provider. BREC remains obligated to satisfy Kentucky's statutory load curtailment obligations. As discussed above, Century is a retail customer within BREC's certified service territory. The LCA picks up where directives under federal law end, and the LCA satisfies BREC's (and Kenergy's) statutory obligation under state law to re-prioritize retail load curtailments only upon voluntary consent to receive "interruptible service." Nothing in the LCA undermines, subverts, or any way interferes with BREC's obligations to MISO with respect to

⁷⁸ *Kentucky Power Co. v. Huelsmann*, 352 F. Supp. 2d 777, 784 (E.D. Ky. 2005).

load curtailment. The LCA addresses a matter of state law subject to the exclusive jurisdiction and approval of the Commission.

2. Disputes Arising Under The LCA Are Appropriately Adjudicated Before the Commission

Having established the Commission's jurisdiction over the LCA, it follows that the Commission is the appropriate venue to resolve disputes arising under the agreement. The Commission has exclusive jurisdiction over the regulation of "service of utilities."⁷⁹ The Commission also has original jurisdiction "over complaints as to rates or service of any utilit[y]."⁸⁰ Only "where a matter complained of is one of purely private concern between the utility and one of its patrons [do] courts have jurisdiction to hear and determine the controversy."⁸¹ A customer alleging a violation of the load curtailment requirements set forth in KRS 278.214 is required to seek relief before the Commission as the adjudicative body with original jurisdiction. Because the LCA squarely addresses statutory load curtailment obligations under Kentucky law, any dispute arising under the LCA is properly adjudicated by the Commission. Century's voluntary agreement to load curtailment is not a "purely private right;" it is a term of utility service subject to the Commission's review and enforcement. Absent the LCA, Century would be within its statutory right to file a complaint against BREC or Kenergy at the Commission for unreasonable service if load curtailments to Sebree were to occur prior to curtailments outside of BREC's certified service territory. For all of these reasons, the Commission is the appropriate body to adjudicate any disputes arising out of the LCA.

⁷⁹ KRS 278.040(2).

⁸⁰ KRS 278.260(1).

⁸¹ *Bulldog's Enterprises, Inc. v. Duke Energy*, 412 S.W.3d 210, 211-12 (Ky. Ct. App. 2013), citing *Bee's Old Reliable Shows, Inc. v. Kentucky Power Co.*, 334 S.W.2d 765, 766 (Ky. 1960).

III. CONCLUSION

WHEREFORE, Century respectfully requests that the Commission:

- (1) Approve the Century Transaction agreements as filed;
- (2) Reject all proposed modifications to the Century Transaction agreements, including KIUC's proposed market access charge and reporting obligations regarding smelter profitability;
- (3) Find that live-line maintenance is a necessary component of good and reasonable utility practice;
- (4) Find that the Load Curtailment Agreement is subject to Commission jurisdiction; and
- (5) Issue its order on or about January 24, 2014.

Respectfully submitted,

STITES & HARBISON

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Dated: January 14, 2014

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served via United States Postal Service, First Class Mail, postage prepaid, upon:

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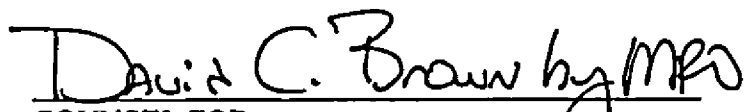
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on this the 14th day of January, 2014.


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