COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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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

ATTORNEY GENERAL'S POST-HEARING BRIEF

Comes now the intervenor, the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention, and for his post-hearing brief in the above-styled matter states as follows:

I. INTRODUCTION & BACKGROUND

On August 14, 2013, the Public Service Commission of Kentucky ("the Commission") issued an Order[1] approving a series of energy contracts between and among Kenergy Corporation ("Kenergy"), Big Rivers Electric Corporation ("Big Rivers") (collectively "the Joint Applicants") and Century Aluminum Company ("Century") permitting market pricing for Century's aluminum smelting facility ("smelter") at Hawesville, Kentucky. In its Order, the Commission outlined the relevant background and history of the transactions between and among the Joint

[1] *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 (Final Order August 14, 2013).

Applicants and Century Aluminum,[2] which are of equal applicability to this proceeding with the following factual additions:

The "Unwind Transaction" referenced on page 5 of the Commission's Order and approved by the Commission on March 6, 2009, included a 2009 electric service agreement ("2009 Retail Agreement") obligating Big Rivers to become Kenergy's wholesale power supplier for retail service to Alcan Primary Products Corporation's ("Alcan") aluminum smelting operation in Sebree, Kentucky. As detailed by the Joint Application in this proceeding, Century Sebree, a wholly-owned subsidiary of Century Aluminum, acquired the Sebree Smelter assets from Alcan in a transaction that closed on June 1, 2013.[3] Under the terms of the 2009 Retail Agreement between Alcan and the Joint Applicants, which Century Sebree inherited as part of the transaction, Alcan could terminate the 2009 contract only upon providing a 12-month written notice that it had made a business decision to cease smelting operations and shut down the plant at Sebree.

As alleged by Joint Applicants, "Century Sebree's predecessor in interest, Alcan ... provided written notice to Kenergy pursuant to § 7.3.1 of the 2009 Retail Agreement that it was terminating the 2009 Retail Agreement."[4] The letter supplied by Alcan dated January 31, 2013, reveals that the Notice of Termination was a direct result of Big Rivers' application for a rate increase as a result of the stranded costs from Century's

[2] *See* Case No. 2013-00221, Final Order at 2-5.
[3] *See* Case No. 2013-00413, Application at 3 ¶¶ 4-5, n. 2.
[4] *See* Case No. 2013-00413, Application at 3-4 ¶ 5; *see also* Exhibit 1 to Application (Letter from Jack Miller to Gregory Starheim, January 31, 2013.)

Hawesville Smelter departure from Big Rivers' system.[5] Joint Applicants state that "[i]n an attempt to find an alternative to Century ceasing all smelting operations at the Sebree Smelter on January 31, 2014, Kenergy, Big Rivers and Century Sebree have been negotiating, off and on, from approximately September 15, 2013, in an attempt to arrange for the procurement and delivery of a market-priced power supply for Century Sebree following the termination of the 2009 Retail Agreement."[6] Those discussions resulted in the proposed agreements tendered as part of the application filed in this proceeding.

On November 19, 2013, the Joint Applicants filed with the Commission the application in this matter, seeking expedited review and approval for very similar agreements between and among the Joint Applicants and Century regarding a market pricing plan for Century's Sebree smelter facility. The Attorney General and the Kentucky Industrial Utility Customers ("KIUC"), representing the non-smelter, large industrials served by Big Rivers' generation and transmission system, intervened to oppose the application. On November 26, 2013, the Commission entered an expedited procedural order and permitted the record of evidence compiled in Case No. 2013-00221 to be incorporated by reference into the record of this case. The Commission held a public hearing on Monday, January 6, 2014.

[5] *See* Exhibit 1 to Application (Letter from Jack Miller to Gregory Starheim, January 31, 2013.)
[6] *See* Case No. 2013-00413, Application at 4 ¶ 7.

II. THE ATTORNEY GENERAL OPPOSES THE MARKET ACCESS PROPOSED BY THE JOINT APPLICANTS, AS IT WILL NOT RESULT IN FAIR, JUST AND REASONABLE RATES FOR THE REMAINING NON-SMELTER CUSTOMERS.

No party denies the symbiotic relationship between Big Rivers and its largest retail customer, Century Aluminum, which has been ongoing for decades and biotrophic as well as antagonistic in nature. The proposals incorporated into the 2009 Unwind Transaction, which the Attorney General opposed, displayed this dysfunctional arrangement. To alter, let alone separate, such symbiosis requires the precision of a scalpel and not the uncertain hacksaw approach advocated in the agreements pending the Commission's approval .

As in Case No. 2013-00221, when the Commission considered similar agreements between the Joint Applicants and Century regarding the Century Hawesville Smelter, the testimony presented during the course of the Commission's hearing of this matter on January 6, 2014, reveals the continuing discord between Big Rivers and Century. As the Chairman stated on the record in the prior case, the Commission cannot perform magic.[7] However, the Commission does possess the authority to demand precision and certainty before approving any agreement. Moreover, the Commission has the authority and duty to ensure that any agreements it approves result in fair, just and reasonable rates for the remaining retail customers of both Kenergy and its sister cooperatives within the Big Rivers system.

[7] Hon. David L. Armstrong, Chairman, Kentucky Public Service Commission, Case No. 2013-00221, Hearing, July 30, 2013, Video Transcript of Evidence ("VTE") at 18:06:55-18:07:15.

A. The proposal as filed constitutes retail-wheeling, which is impermissible under current Kentucky law.

The Attorney General incorporates by reference his prior comments in lieu of testimony and post-hearing brief filed in Case No. 2013-00221 and references therein to the proposal by the Joint Applicants constituting unlawful retail-wheeling. However, the Attorney General recognizes that his argument from the proceeding in Case No. 2013-00221, which was not appealed by the Attorney General or by any other party to the Franklin Circuit Court, is therefore binding in the context of this proceeding. Nonetheless, the Attorney General must point out that the Kentucky General Assembly's policy analysis and consideration of partial or full restructuring of the electric industry in Kentucky[8] foretold of the negative impacts of increased electric prices that would result from a deregulated approach,[9] and, more particularly, that deregulation would result in stranded costs.[10] As revealed in KIUC's testimony presented in this proceeding and in the testimony and public comments presented during Big Rivers' subsequent rate case,[11] a deregulated, market-based pricing scheme for one customer – Century Aluminum – will result in $71.2 million in stranded costs

[8] *See* Attorney General's Comments in Lieu of Testimony, Case No. 2013-00221 (July 19, 2013), including Exhibit A – *Restructuring Kentucky's Electric Utility Industry: An Assessment of and Recommendation for Future Action in Kentucky*, Final Report of Special Task Force on Electric Restructuring, LRC Research Report No. 299 (September 2000) and Exhibit B – House Bill 211 (RS 2013).

[9] *Id.*, Exhibit A at pp. viii-ix, pp. 29-30.

[10] *Id.*, at pp. ixvii and 24.

[11] *See* In the Matter of: Application of Big Rivers Electric Corporation for a General Adjustment in Rates, Case No. 2013-00199, Public Hearings (January 7-9, 2014).; and the public comment hearing in Henderson, KY on Dec. 16, 2013, at http://www.psc.ky.gov/av_broadcast/2013-00199/2013-00199_16Dec13_Inter.asx .

for the remaining non-smelter customers. To that end, the agreements presented will not result in fair, just and reasonable rates and, therefore, should be denied.

B. Ratepayers should not bear the exclusive burden for the unrecovered, stranded costs incurred to serve the Smelters and should not have to subsidize or otherwise risk the additional cost of transmission to the Smelters.

Even if the Commission concurs with the Joint Applicants and finds that the transactions, in principle, are the same qualitatively and quantifiably as the market agreements approved in 1998, the question of the impact of these agreements on Big Rivers' ratepayers remains and must be considered by the Commission. The Attorney General and Big Rivers' other large industrial customers, represented by KIUC in this matter, agree on a fundamental point: A transaction that permits or otherwise results in one customer – Century Aluminum – reducing its electricity costs while increasing the rates of other large industrials, commercial and residential customers by double or nearly double, is on its face unjust, unfair and unreasonable.

If the Commission finds that agreements are lawful under Kentucky's Territorial Boundary Act, KRS 278.016 to 278.018, as it did in Case No. 2013-00221, the Attorney General **conditionally** supports KIUC Witness Lane Kollen's proposal that the Commission require "the additional revenue from the Sebree Smelter be credited to the remaining non-Smelter customers"[12], subject to a finding by the Commission that the Sebree facility will remain profitable under the market access fee proposed by Witness Kollen. Using data supplied by Big Rivers, Witness Kollen has quantified that the

[12] *See* Case No. 2013-00413, Direct Testimony of Lane Kollen at 17-18.

difference between the market pricing and the price at which Sebree could remain profitable would yield nearly $21 million per year[13] in total rate relief for Big Rivers' non-smelter customers. The Attorney General recognizes that Century disputes the claim that the Sebree plant can remain profitable at a rate of $43/mWh.[14] However, as opposed to the proceeding relating to the Hawesville facility contracts, in which Century supplied a third-party economic analysis,[15] Century provided no economic impact analysis in this proceeding.

The Attorney General understands that the Commission must consider the "delicate balance"[16] of policy prerogatives and economic interests of the stake holders in this proceeding. The Commission stated in its August 14, 2013 Order approving market pricing for the Century Hawesville smelter and rejecting a market access fee:

> The proposed contracts were a product of extensive and good faith negotiations ... with the goal of keeping the Hawesville smelter viable while not subjecting the remaining customers to any additional incremental costs ...The Commission is of the opinion that the proposed Century Transaction Agreements achieves this ***delicate balance*** and that the imposition of a market access fee would jeopardize the balance reached by the proposed agreements.[17]

However, the evidence presented in this proceeding is different. The Commission may address the dispute as to the profitability of the Sebree plant by retaining its lawful jurisdiction over this matter, as it did in Case No. 2013-00221, and investigating further

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[13] Direct Testimony of Lane Kollen at 6:6-7
[14] *See* Century Response to PSC Post-Hearing Data Request (January 9, 2013).
[15] *See* Case No. 2013-00221, Direct Testimony of Sean Byrne, Exhibit "Economic Impact Analysis" prepared by Younger Associates for Century Aluminum (December 2011).
[16] Case No. 2013-00221, Final Order at 23 (August 14, 2013).
[17] *Id.* (emphasis supplied).

the issue of profitability, including whether the goal of keeping the Sebree plant viable and retaining and preserving the jobs at the Sebree facility may still be achieved if a market access fee is imposed.

Further, the Attorney General supports the market access fee as recommended by Witness Kollen, in principle, as it relates to this proceeding and as an innovative way to promote the financial stability of Big Rivers and to minimize the harm to the remaining non-smelter ratepayers. However, the Attorney General notes that the legal model for the market access fee proposed by Witness Kollen references statutory provisions resulting from deregulation or partial deregulation in other states.[18] As such, the Attorney General re-emphasizes that the fundamental transaction proposed constitutes retail-wheeling, which is not and should not be permitted under Kentucky law.

If the Commission elects to implement a market access charge as proposed by KIUC, the remaining question is how those funds should be allocated to ratepayers. Of the two approaches discussed in the testimony of Witness Kollen, the Attorney General favors the alternative presented that would reduce Big Rivers' revenue requirement in Case No. 2013-00199.[19] This method should assure that the market access charge revenues are allocated to benefit retail customer classes by the same methodology that the stranded costs of idling Wilson and Coleman are being allocated to these same customers. As an alternative, the Attorney General would support allocation of the

[18] *See* Direct Testimony of Lane Kollen at 39-40 and n. 2, referencing state statutory provisions from Connecticut, Illinois, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Ohio, Pennsylvania, Rhode Island, and Texas.
[19] Case No. 2013-00413, Direct Testimony of Lane Kollen at 17:19-20.

market access fee revenues through the Economic Reserve, provided these revenues are similarly allocated among customer classes, [20] and subject to the conditions precedent regarding profitability.

As to the total of $71.2 million in stranded costs identified in Big Rivers' pending application for a second rate increase, it is important to note the hypocrisy reflected in the various applications when the disruption of the symbiosis is considered as a whole. First, Big Rivers extols the supposed virtues of its Load Mitigation Plan that has as its aim to reduce excess capacity created by the loss of 850 MW of Smelter sales, then uses the circular logic that it must retain that excess capacity (the Wilson Plant in this instance) as "insurance against any possibility that the smelters"—that same lost customer – could seek to return to Big Rivers' system.[21] Second, while Century Aluminum, like any other ratepayer, is entitled to fair, just and reasonable rates (as long as it remains on Big Rivers' system), it should not be permitted to withdraw from the 2009 Retail Agreement, negotiated at arm's-length over a five year period, and yet benefit from the terms of that agreement to the detriment of other ratepayers.

One such way in which the retail customers on BREC's system will be harmed is if the Commission does not require Century to pay for Wilson's fixed costs – including but not limited to depreciation – in the event MISO should determine that Wilson is a "must-run" facility. Moreover, the Joint Applicants' should not be permitted to exercise the same twisted logic to justify continuing and excessive rates on its captive

[20] Case No. 2013-00413, Direct Testimony of Lane Kollen at 17:17-18.
[21] *See* Case No. 2013-00199, Rebuttal Testimony of Mark Bailey at 8:14-20.

customers, who do not possess the same negotiating power as a multi-national corporation, like Century Aluminum.

C. The Attorney General Concurs with the Commission and Commission Staff Regarding Questions of Jurisdiction Arising During the Hearing.

As to the Commission's existing and continuing jurisdiction over the contractual arrangements among and between the Joint Applicants and Century Aluminum as to both the Hawesville and Sebree Smelters, the Attorney General agrees with the Commission's Order dated August 14, 2013, in Case No. 2013-00221, which states at Ordering Paragraph 4:

> The Commission retains all jurisdiction under KRS 278 relating to the rates and service to be provided by Kenergy to Century Kentucky under the Century Transaction Agreements, including the jurisdiction to resolve all rate and service disputes arising under each of the agreements approved by this Order.[22]

Similarly, if the Commission elects to approve the agreements presented by the Joint Applicants in this matter, the Commission should retain all jurisdiction over those agreements to the full extent permissible under the Commission's statutory authority.

Regarding the other jurisdictional questions raised by the parties over more indirect and remote matters, including live line maintenance and the Load Curtailment Agreement,[23] the Attorney General defers to the Commission and Commission staff. As to live line maintenance, the Commission's prior Order specifically declined to require Big Rivers to perform live line maintenance, holding that "[t]he issue of live line maintenance is one that the parties to the Century Transaction Agreements must

[22] Case No. 2013-00221, Final Order at 27.
[23] *See* Case No. 2013-00413, Application, Exhibit 23.

resolve among themselves."[24] As to the Load Curtailment Agreement, the Attorney General concurs with Commission staff counsel, who pointed out during the hearing on this matter that the Load Curtailment Agreement at Sections 6.5 and 6.6 addresses the issue of governing law and jurisdiction.[25] The Load Curtailment Agreement, specifically Section 6.6 thereof, provides that nothing in the agreement limits or expands the Commission's jurisdiction and that of the respective state and federal authority(ies) over issues relating to load curtailment decisions by Big Rivers and/or its regional transmission organization. Therefore, the face of the agreement made between the parties reflects no apparent dispute. The agreement, if signed by the parties, should resolve the question of jurisdiction by its plain terms.

CONCLUSION

While the Commission cannot perform magic or otherwise disengage Big Rivers from the Smelters by waiving a wand, it does possess the necessary statutory and administrative authority to demand and oversee (with the assistance of a qualified, impartial third-party as deemed necessary) negotiations that will result in fair, just and reasonable rates. The Attorney General, on behalf of Big Rivers' ratepayers, advocates that the Commission adopt the out-of-the-box thinking recommended by the experts for the intervenors in these related matters, rather than accept the flawed and uncertain transaction proposed by the Joint Applicants, which if adopted as a *fait accomplis*, with

[24] Case No. 2013-00221, Final Order at 15.
[25] See Case No. 2013-00413, Testimony of Witness Berry on Cross-Examination by Staff Counsel, Richard Raff, January 6, 2013, Video Transcript of Evidence at approximately 11:30:50-11:36:35.

no provisions for the resulting stranded costs, will result in unfair, unjust and unreasonable rates to Big Rivers remaining retail ratepayers.

Respectfully submitted,

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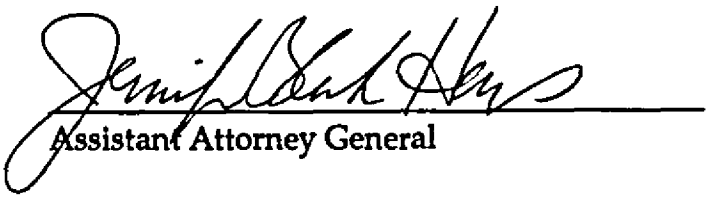

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