

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

JOINT APPLICATION OF KENERGY CORP.)	
AND BIG RIVERS ELECTRIC CORPORATION)	CASE NO.
FOR APPROVAL OF CONTRACTS AND FOR A)	2013-00413
DECLARATORY ORDER)	

ORDER

On November 20, 2013, Kenergy Corp. (“Kenergy”) and Big Rivers Electric Corporation (“Big Rivers”) (collectively “Applicants”) jointly filed an application for approval of certain new contracts for electric service to Century Aluminum Sebree LLC (“Century Sebree”) commencing on and after January 31, 2014. The application included the Applicants’ direct testimony, as well as new contracts, as described below, to replace the existing 2009 contracts with Century Sebree. The 2009 contracts with Century Sebree were entered into upon the July 16, 2009 closing of Big Rivers’ unwind transaction whereby Big Rivers re-acquired operational control of its generating plants.¹

The application includes eight agreements, referred to herein as the Century Sebree Transaction Agreements, for electric service to Century Sebree of up to 378 megawatts (“MW”) for operating the Sebree aluminum smelter. On December 30, 2013, the Applicants filed updated Century Sebree Transaction Agreements to reflect minor revisions, including an increase in the maximum level of electric service to 385 MW.

¹ Case No. 2007-00455, *The Applications of Big Rivers Electric Corporation for: (1) Approval of Wholesale Tariff Additions for Big Rivers Electric Corporation, (2) Approval of Transactions, (3) Approval to Issue Evidences of Indebtedness, and (4) Approval of Amendments to Contracts, and of E.On U.S., LLC, Western Kentucky Energy Corp., and LG&E Energy Marketing, Inc. for Approval of Transactions* (Ky. PSC Mar. 6, 2009).

The application also included two additional agreements, referred to herein as Alternate Service Agreements, that are to be effective for electric service to Century Sebree for up to 10 MW only in the event that it ceases smelting operations. Finally, the application includes a request that the Commission issue a declaratory order confirming the Applicants' authority to terminate electric service to Century Sebree on January 31, 2014, in the event that neither the Century Sebree Transaction Agreements nor the Alternate Service Agreements are in effect as of that date. The Applicants request the Commission to approve all of the new contract agreements as filed, without any changes or modifications, and to issue the declaratory order, as discussed in detail below.

Intervention was requested by and granted to Century Sebree, the Attorney General of Kentucky, by and through his Office of Rate Intervention ("AG"), Jackson Purchase Energy Corporation ("Jackson Purchase"), and Kentucky Industrial Utility Customers, Inc. ("KIUC"). The Commission established a procedural schedule that provided for discovery on the Applicants, intervenor testimony or comments in lieu of testimony, rebuttal testimony by Applicants, an evidentiary hearing on January 6, 2014, and post-hearing briefs, and also incorporated by reference the record of evidence compiled in Case No. 2013-00221.² The case now stands submitted for a decision.

BACKGROUND

Big Rivers is a rural electric cooperative corporation organized pursuant to KRS Chapter 279. Big Rivers owns electric generation and transmission facilities and purchases, transmits, and sells electricity at wholesale, and it is a utility subject to the

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

Commission's jurisdiction under KRS Chapter 278. Big Rivers exists for the principal purpose of providing the wholesale electricity requirements of its three member distribution cooperatives: Kenergy, Jackson Purchase, and Meade County Rural Electric Cooperative Corporation. Big Rivers is owned by these three member cooperatives, and they in turn provide retail electric service to approximately 113,000 customers located in 22 western Kentucky counties.

Century Sebree is a subsidiary of Century Aluminum Company ("Century Aluminum"). On June 1, 2013, Century Sebree acquired the aluminum smelting assets owned by Alcan Primary Products ("Alcan") in Robards, Kentucky. Century Sebree also acquired all of Alcan's rights and obligations under the 2009 contracts. Due to the nature of the smelting process, Century Sebree requires a significant quantity of firm, reliable power in the amount of 385 MW, which it consumes on a round-the-clock basis at a 98 percent load factor. The current annual cost of electricity at Century Sebree is \$180 million, and this accounts for almost 35 percent of its cost to produce aluminum.

From approximately 1970 through 1998, Big Rivers had a full-power-requirements contract with Kenergy and Kenergy's predecessor, Henderson-Union Rural Electric Cooperative Corporation, which required Big Rivers to supply the entire electric load of the aluminum smelter now known as the Century Sebree. In conjunction with a 1998 reorganization plan allowing Big Rivers to emerge from bankruptcy, it leased its generating assets for 25 years to Western Kentucky Energy Corp., an unregulated affiliate of Louisville Gas & Electric Company ("LG&E"). The reorganization plan also included an agreement for Big Rivers to purchase from LG&E Energy Marketing, Inc. ("LEM"), an unregulated power marketing affiliate of LG&E, certain

quantities of power sufficient to supply all of Big Rivers' distribution cooperatives' retail customers, except Century Sebree and one other aluminum smelter.

Between 1998 and July 2009, approximately 70 percent of the power consumed by the Century Sebree smelter was purchased by Kenergy (or its predecessor) directly from LEM, with Kenergy arranging for, and reserving, transmission service on Big Rivers' transmission system. The power Kenergy purchased from LEM for Century Sebree was at fixed-contract prices and was known as Tier 1 and Tier 2 power. Big Rivers had no obligations to supply, and did not supply, the Tier 1 or Tier 2 power. The portion of Century Sebree load not secured through Kenergy's contract with LEM was known as Tier 3 power, and Tier 3 power was secured by Kenergy in the wholesale power market at market-based prices for resale to Century Sebree. The Kenergy power contract with LEM for Tier 1 and Tier 2 power for Century Sebree was to expire at the end of 2010, with 100 percent of Century Sebree's power requirements to be purchased by Kenergy at market prices after 2011.

Century Sebree entered into the 1998 arrangement to purchase a mix of power from LEM and from the market through 2011, followed by all-market power purchases, with the expectation that after 2011 the market-based power prices would be less than the LEM prices, which were substantially tied to Big Rivers' system generation. However, by late 2007, the market-based power prices paid by Century Sebree were in the range of \$50 to \$60 per MWh, whereas the LEM supplied power was priced at half or less, in the range of \$25 per MWh. In an effort to maintain its economic viability, Century Sebree actively supported Big Rivers' efforts to reacquire control of its generating facilities by terminating the 1998 lease agreement and then contracting with

Kenergy to have Big Rivers supply the majority of Century Sebree's power requirements. That transaction, known as the "Unwind Transaction," was approved by the Commission on March 6, 2009.³

The Unwind Transaction included the 2009 contracts obligating Big Rivers to become Kenergy's wholesale power supplier for retail service to Century Sebree. This contractual obligation for Big Rivers to supply Century Sebree was separate and apart from Big Rivers' existing obligation under the full-power-requirements contract with Kenergy to supply all of Kenergy's non-smelter customers. Big Rivers' contractual obligations under the 2009 contracts were for the contract term ending December 31, 2023. However, Century Sebree's predecessor in interest, Alcan, could terminate the 2009 contracts at any time upon providing a 12-month written notice that it had made a business decision to cease smelting operations at the Sebree smelter. On January 31, 2013, Alcan did issue such a notice that it would cease smelting operations at the Sebree smelter on January 31, 2014, and that notice was binding on Century Aluminum for the Century Sebree smelter.

Following the January 31, 2013 notice that the Century Sebree smelter would close 12 months thereafter and Century Sebree's acquisition of the Sebree smelter, the Applicants and Century Sebree commenced negotiations in mid-September 2013 to discuss an alternative power supply arrangement. Those discussions continued into November 2013, resulting in the Century Sebree Transaction Agreements as filed in this proceeding on November 20, 2013.

³ *Id.*

CENTURY SEBREE TRANSACTION AGREEMENTS

The eight Century Sebree Transaction Agreements are as follows:

1. Electric Service Agreement – A retail electric service agreement between Kenergy and Century Sebree for the sale of electricity, electric capacity, and electricity-related ancillary services, including transmission services, by Kenergy to Century Sebree for operating its aluminum smelter.

2. Arrangement Agreement – The power arrangement and procurement agreement entered into between Big Rivers and Kenergy pursuant to which Big Rivers arranges and procures electricity, electric capacity, and electricity-related ancillary services while it serves as the Market Participant. Under the Arrangement Agreement, Big Rivers will procure these services for Kenergy for resale to Century Sebree under the Electric Service Agreement. The Arrangement Agreement terminates if Big Rivers is no longer the Market Participant.

3. Direct Agreement – An agreement between Big Rivers and Century Sebree relating to direct, bilateral obligations to each other in connection with the Century Sebree Transaction Agreements, such as Century Sebree's obligations to reimburse Big Rivers' costs relating to must-run conditions at any owned or leased generation facility required to be operated for reliability purposes as a result of the operation or existence of the Sebree smelter or the Century Sebree Transaction. The Direct Agreement will remain in effect even if Big Rivers is no longer acting as the Market Participant and the Arrangement Agreement is terminated.

4. Protective Relays Agreement – An agreement entered into between and among Big Rivers, Kenergy, and Century Sebree to protect Big Rivers and Kenergy

from risks and obligations relating to the design, development, purchase, installation, operation and maintenance of any protective relay equipment, including any special protective system, that Century Sebree may install in the future relating to the Sebree smelter.

5. Tax Indemnity Agreement – Agreement between and among Kenergy, Century Sebree and Century Aluminum to indemnify Kenergy on an after-tax basis from any tax liability or other tax costs incurred by it as a result of the Century Sebree Transaction Agreements.

6. Guarantee of Century Parent – Agreement of Century Aluminum in favor of Kenergy and Big Rivers. Under this agreement, Century Aluminum will unconditionally and irrevocably guarantee the prompt payment and performance obligations of Century Sebree under the Electric Service Agreement, the Direct Agreement, the Tax Indemnity Agreement and any other of the Century Sebree Transaction Agreements, including the obligations of Century Sebree relating to the payment of money to Kenergy or Big Rivers.

7. Lockbox Agreement – The Lockbox Agreement relates to Century Sebree's obligation to pay certain amounts due under the Electric Service Agreement to a depository bank. Century Sebree will make payments to a lockbox with Old National Bank, which will separate amounts owed to Kenergy and Big Rivers and will disburse all amounts in the lockbox account each month.

8. Load Curtailment Agreement – Agreement between and among Big Rivers, Kenergy, and Century Sebree regarding the right of the Midcontinent Independent System Operator, Inc. ("MISO"), any other governmental authority with

jurisdiction over reliability, or the local balancing authority, Big Rivers, to curtail Century Sebree's load in circumstances where a curtailment is ordered in the service territory of Big Rivers' members, and if such curtailment of Century Sebree would or is anticipated to prevent, counter, or reduce the effects of, the conditions or circumstances giving rise to the curtailment event that has occurred or is reasonably likely to occur. This agreement also indemnifies Big Rivers and Kenergy against any claims by Century Sebree with respect to load curtailment.

The Applicants request approval for three of the Century Sebree Transaction Agreements, the Electric Service Agreement, the Arrangement Agreement, and the Direct Agreement, while asserting that the remaining five Century Sebree Transaction Agreements do not need Commission approval. In the alternative, the Applicants request approval of the remaining five agreements if the Commission determines that approval is needed.

ALTERNATE SERVICE AGREEMENTS

The two Alternate Service Agreements are as follows:

1. Alternate Service Agreement between Kenergy and Century Sebree – The Alternate Service Agreement allows Kenergy to provide retail electric service for non-smelting operations at the Sebree Smelter if Century Sebree ceases smelting operations at the facility on January 31, 2014, or at the termination of the Electric Service Agreement upon a 60-day notice by Century Sebree. Pursuant to this agreement, Kenergy is required to provide, and Century Sebree is allowed to receive, up to 10 MW of load to support non-smelting purposes, such as security, maintenance, and safety activities.

2. The Letter Agreement – The Letter Agreement is a standard form of wholesale power agreement supplement between Big Rivers and Kenergy by which Big Rivers provides the wholesale power supply support for the 10 MW to be supplied in the event that the Alternate Service Agreement becomes effective.

DISCUSSION

A. Applicants' Position and Load Curtailment Agreement

The Applicants contend that the Century Sebree Transaction Agreements are nearly identical substantively to the agreements approved by the Commission less than six months ago in Case No. 2013-00221 involving the Applicants' electric service to another aluminum smelter known as Century Hawesville. The Applicants note that minor differences between the transaction agreements reflect the differences in the load needed to serve each smelter and the way that each smelter is physically connected to Big Rivers' transmission network. Specifically, the Applicants point out that it is not initially contemplated in this transaction that a separate System Support Resources agreement will be necessary, as it was in Case No. 2013-00221. The Applicants also point out the differences in the Protective Relays Agreement in the two transactions reflect that, at the time the documents were drafted, there was uncertainty about whether Century Sebree wanted such relays at the Sebree smelter. Lastly, unlike the Century Hawesville transaction, the instant matter includes a Load Curtailment Agreement in which the parties formally recognize Big Rivers' right to curtail load to the Sebree smelter if such action is required for the reliability of the interstate power system, including Big Rivers' transmission system. The Applicants contend that the proposed transaction agreements should be considered reasonable and should be

approved as filed, as the Commission ultimately determined in Case No. 2013-00221 concerning transaction agreements that are substantially identical to the instant agreements.

The Applicants maintain that the Century Sebree Transaction Agreements were negotiated to avert the anticipated adverse economic impacts for western Kentucky if the smelter were to close and lay off its work force. Furthermore, the Applicants contend the proposed transaction agreements expose their customers to no greater risks and costs than would be experienced if Century Sebree ceased smelting operations. The Applicants note that the Century Sebree transaction is anticipated to produce approximately \$6 million annually in transmission revenues for Big Rivers. Thus, the Applicants argue that the Century Sebree Transaction Agreements are reasonable and approval of these agreements without material changes would serve the best interests of the Applicants' customers and the best interests of the Commonwealth.

With respect to the Load Curtailment Agreement, the Applicants contend that the Commission is without jurisdiction. The Applicants assert that the Load Curtailment Agreement arises out of their duties to comply with mandatory federal requirements to ensure the reliability of the interstate bulk-power system. The Applicants argue that, pursuant to Section 215 of the Federal Power Act,⁴ which provides that only a single, Federal Energy Regulatory Commission ("FERC")-approved entity would be responsible for establishing and enforcing reliability standards, i.e., the North American Electric

⁴ 16 U.S.C. § 824o (2006).

Reliability Corporation (“NERC”), the Commission is preempted from reviewing the Load Curtailment Agreement.

The Applicants contend that even if the Commission had jurisdiction to review the Load Curtailment Agreement itself, the Commission would lack jurisdiction to adjudicate any disputes arising under that agreement. Because the agreement applies when there is a curtailment event as determined by MISO or by Big Rivers, as a NERC-registered balancing authority, any dispute arising under the Load Curtailment Agreement would be directly associated with the enforcement of federal reliability standards and solely within FERC’s jurisdiction. Should the Commission take any action that might be inconsistent with federal reliability standards, the Applicants point out that such Commission action would be reviewable by FERC.

Century Sebree argues that the Commission has jurisdiction to approve the Load Curtailment Agreement as filed and jurisdiction to adjudicate any disputes arising under the agreement. Century Sebree notes that section 6.6 of the Load Curtailment Agreement limits jurisdiction over disputes and claims arising under the agreement to the Commonwealth of Kentucky. Century Sebree contends that this agreement falls within the Commission’s authority over curtailment of retail customers by a generation or transmission cooperative and should be approved by the Commission. Century Sebree argues that the Load Curtailment Agreement formalizes Big Rivers’ obligations with respect to federal reliability standards and addresses the relationship among Big Rivers, Kenergy, and Century Sebree regarding the curtailments that would be necessary to comply with federal reliability standards. Century Sebree relies upon KRS 278.214 for the proposition that the Commission has exclusive jurisdiction to require Big

Rivers to curtail load outside of its service territory before curtailing native load, absent a customer's consent to interruptible service, and that the load curtailment agreement is such an exception, which falls within the Commission's authority under KRS 278.214. Century Sebree argues that FERC regulations and federal reliability standards do not extend to decisions concerning the manner in which retail load is curtailed under KRS 278.214. Given the Commission's exclusive jurisdiction over curtailment of native load, and the Load Curtailment Agreement's satisfaction of Big Rivers' statutory obligation under KRS 278.214, Century Sebree maintains that the Commission should exercise its jurisdiction to determine whether the agreement should be approved as filed. Moreover, because the Load Curtailment Agreement addresses statutory load curtailment obligations under Kentucky law, Century Sebree asserts that any dispute arising under the agreement is properly adjudicated by the Commission.

B. Century Sebree's Position and Live-Line Maintenance

Century Sebree asserts that the Century Sebree Transaction Agreements, as filed, are fair, just, and reasonable; are consistent with Kentucky law; and closely track the agreements that the Commission approved in Case No. 2013-00221. Century Sebree contends that the proposed transaction agreements would not impose any adverse impacts on Kenergy or Big Rivers customers. Significantly, Century Sebree states that the proposed transaction agreements would enable it to remain operational beyond January 31, 2014, by aligning the viability of the smelter facility with competitive, market-based prices for energy and capacity while at the same time providing a net benefit to the Applicants' customers in the form of transmission revenue paid by Century Sebree. As in Case No. 2013-00221, Century Sebree also requests that the

Commission find that live-line maintenance is a necessary component of Big Rivers' statutory and regulatory obligation to engage in good and reasonable utility practice pursuant to its service obligation to Century Sebree arising under the proposed transaction agreements.

The Applicants state that the Commission should reject Century Sebree's request to make findings regarding live-line maintenance. The Applicants point out that the Commission declined such a request in Case No. 2013-00221, determining that the issue of live-line maintenance in the context of this proceeding is one of economics, not reliability and that this issue should have been discussed while the transaction agreements were being negotiated.

C. KIUC's Position and Market Access Charge

KIUC argues that the proposed Century Sebree Transaction Agreements are not fair, just, and reasonable and would result in unreasonable economic prejudice to Big Rivers' non-smelter customers. KIUC contends that the circumstances surrounding Century Sebree smelter are fundamentally different than those surrounding the Hawesville smelter as presented in Case No. 2013-00221. KIUC noted that the Hawesville smelter's dire financial status indicated that market-based rates were necessary in order to avoid a shutdown of that facility. In contrast, KIUC argues that the Sebree smelter is currently operating at a profit and the proposed transaction agreements would only make its operations more profitable at the expense of Big Rivers' non-smelter customers, due to Big Rivers' pending request for a \$71.2 million rate increase to recover from its remaining customers the stranded fixed costs that no longer would be paid by Century Sebree. In light of the purported financial strength of

Century Sebree, KIUC argues that the proposed transaction agreements should be modified to include a reasonable market access charge. KIUC recommends that Century Sebree should be required to pay the market access charge to result in a \$43/MWh rate, reflecting the monthly difference between the market-based rate and \$43/MWh. KIUC states that the market access charge would be paid by Century Sebree to Kenergy as a component of the distribution rate and then remitted to Big Rivers. The revenues from the market access charge could be credited to Big Rivers' remaining non-smelter customers either through the Economic Reserve or used to reduce the revenue requirement in Case No. 2013-00199.⁵ KIUC argues that the establishment of a market access charge to mitigate the imposition of stranded costs on non-smelter customers is necessary because Century Sebree's decision to terminate the 2009 contracts caused Big Rivers to incur stranded fixed costs and because the Century Sebree 2009 contract termination exacerbated Big Rivers' excess capacity issues and caused the fixed costs related to that excess capacity to be stranded.

Alternatively, KIUC recommends that the proposed transaction agreements be approved on an interim basis and an investigation be opened to determine the appropriate level of a market access charge for Century Sebree.

The Applicants state that the Commission should approve the Century Sebree Transaction Agreements without material changes and that the Commission should reject KIUC's recommendation of a market access charge, as the Commission did in Case No. 2013-00221, as being not reasonable. The Applicants argue that KIUC is estopped from relitigating the same issue in this case pursuant to the principles of *res*

⁵ Case No. 2013-00199, *Application of Big Rivers Electric Corporation for a General Adjustment in Rates* (filed June 28, 2013).

judicata, noting that the market access charge issue was litigated, decided, and necessary to the judgment in the prior proceeding of Case No. 2013-00221.

Century Sebree likewise argues that KIUC's market access charge should be rejected as unjust and unreasonable. Century Sebree asserts that the Commission, in Case No. 2013-00221 involving transaction agreements that are nearly identical to the ones proposed in the instant proceeding, has already determined that a market access charge is not reasonable and that such a determination is now settled law. Century Sebree also warns that the imposition of a market access charge would trigger the irrevocable closure of Century Sebree, as it would place additional risks beyond the risks associated with market pricing in order to keep the smelter facility financially viable. Lastly, Century Sebree contends that the market access charge is based upon a flawed premise that the smelter is highly profitable. Century Sebree notes that KIUC based its determination on the smelter's Earnings Before Interest, Tax, Depreciation, and Amortization ("EBITDA"). Century Sebree asserts that it utilizes Generally Accepted Accounting Principles ("GAAP") and that under GAAP, Century Sebree's 2012 financial results reflect a \$12.5 million loss, rather than a \$29 million profit as determined under EBITDA. Century Sebree also argues that the market access charge would apply even if the smelter were marginally profitable, which would cause it to become highly unprofitable. Century Sebree contends that the market access charge ignores the risks assumed by Century Sebree under the transaction agreements – market-based pricing risks that are not borne by any other Kenergy customer – and by the assumption of Century Sebree of any net incremental costs incurred by the Applicants to provide service to Century Sebree. Lastly, Century Sebree asserts that

the market access charge would violate the terms of the Commission-approved 2009 contracts, which included a 12-month termination notice, no exit fee in connection with an early termination of the 2009 contracts, and provided Century Sebree with no right to future electric service from Big Rivers' generating facilities upon termination of those contracts. Century Sebree avers that the imposition of a market access charge would be a fundamental, retroactive change to the 2009 contracts and thus unreasonable.

D. AG's Position

The AG argues that the proposed transaction agreements would not result in fair, just, and reasonable rates for Big Rivers' remaining non-smelter customers because the proposal would, in effect, allow one customer to reduce its electricity costs which, in turn, would cause the rates of other large industrials, commercial, and residential customers to increase significantly. Although the AG contends that the agreements as filed constitute unlawful retail wheeling, he recognizes that this argument was unsuccessfully raised in Case No. 2013-00221, and the Commission's ruling to the contrary thereon is controlling in the context of this proceeding. In the event the Commission finds that the proposed transaction agreements do not constitute retail wheeling, the AG states that he conditionally supports KIUC's recommendation that the Commission require any additional revenue from Century Sebree to be credited to the remaining Big Rivers' non-smelter customers, subject to a finding by the Commission that Century Sebree would remain profitable under the market access charge proposed by KIUC. The AG also agrees, in principle, with KIUC's recommended market access charge. Specifically, the AG states that, if accepted by the Commission, the market access charge should be applied to reduce Big Rivers' revenue requirement in Case

No. 2013-00199. Alternatively, the AG would support allocation of the market access charge revenues through the Economic Reserve.

FINDINGS

Having reviewed the record and being otherwise sufficiently advised, the Commission finds that, with the exception of the Load Curtailment Agreement, the Century Sebree Transaction Agreements are substantially identical to the set of agreements we approved last year relating to the Century Hawesville smelter in Case No. 2013-00221. The Commission also finds that Century Sebree's predecessor, Alcan, exercised its right under the existing 2009 contracts to cease business operations at the Sebree smelter on January 31, 2014. Since that time, in an effort to preserve almost 500 direct jobs at the Sebree smelter, the Applicants have engaged in extensive negotiations with Century Aluminum and Century Sebree. Those negotiations resulted in the documents before us today. The Century Sebree Transaction Agreements are designed to provide Century Sebree an opportunity to continue operating the Sebree smelter, which will provide significant benefits to the western Kentucky economy, while the Alternate Service Agreements are designed to provide a minimum supply of power in the event that Century Sebree ceases its smelting operations. The Commission finds that the Century Sebree Transaction Agreements and the Alternate Service Agreements are reasonable and all of the agreements should be approved as filed. The agreements will result in rates that are fair, just, and reasonable for electric service to Century Sebree and to the approximately 113,000 retail customers whose electricity is supplied by Big Rivers.

The Commission further finds that the issues concerning live-line maintenance and market access charge raised in the instant proceeding were also raised and addressed in Case No. 2013-00221. Therefore, our determination of these two issues in Case No. 2013-00221 governs the disposition of the same issues as presented in the instant matter.

With respect to the live-line maintenance issue, we adopt our findings in Case No. 2013-00221 that found both live-line and de-energized transmission line maintenance protocols to be consistent with good and reasonable utility practice and decline Century Sebree's request to require Big Rivers, over its objections, to perform live-line maintenance on Big Rivers' transmission lines. As we stated in Case No. 2013-00221, the issue of live-line maintenance is one that the parties to the Century Sebree Transaction Agreements must resolve among themselves and that Big Rivers has discretion as to whether to conduct live-line maintenance on its transmission system.

With respect to the market access charge, we adopt our findings in Case No. 2013-00221 and find that KIUC's recommendation to conditionally approve the proposed transaction agreements subject to a future market access charge not reasonable. Like the transaction agreements relating to the Century Hawesville smelter, the Century Sebree Transaction Agreements "were a product of extensive and good faith negotiations among Big Rivers, Kenergy, Century [Sebree], and Century Aluminum with the goal of keeping the [Sebree] smelter viable while not subjecting the remaining customers to any additional incremental costs after [January 31, 2014] due to Kenergy's continuing to serve Century [Sebree] or Big Rivers serving as the Market

Participant.”⁶ The imposition of a market access charge would unreasonably jeopardize the delicate balance achieved by the proposed transaction agreements.

Concerning the Load Curtailment Agreement jurisdictional issue, the Commission notes that Article 6.6 of the agreement, titled “Jurisdiction,” states that disputes arising thereunder are to be brought in the courts of the Commonwealth of Kentucky, unless reserved to the United States District Court for the Western District of Kentucky, while the parties thereto are not prohibited from referring to the FERC or any other governmental authority “any matter properly within its jurisdiction.”⁷ The Commission finds that because there is no actual dispute presented to us for resolution under the agreement, the issue of whether or not we will have jurisdiction to resolve such a dispute is not ripe for a decision. We may be presented in the future with a controversy that requires our determination as to whether or not we have jurisdiction to resolve that particular dispute under the Load Curtailment Agreement. Now, however, in the absence of an actual controversy involving the Load Curtailment Agreement, the Commission is unable to render what would amount to an advisory opinion as to whether our jurisdiction under KRS Chapter 278 will exist to enable us to review such a dispute or whether such a dispute rightly belongs before the FERC or any other appropriate forum.

Moreover, as a general matter, the Commission notes that some of the agreements that we approve by this Order include provisions for arbitration or court actions to resolve certain disputes that may arise among the parties to those agreements. We take this opportunity to remind the Applicants, as well as Century

⁶ Case No. 2013-00221, Final Order at p. 23.

⁷ Application, Exhibit 23 at 9.

Aluminum and Century Sebree, that under KRS 278.040(2), the Commission has “exclusive jurisdiction over the regulation of rates and service of utilities,” and under KRS 278.160(1), the Commission has “original jurisdiction over complaints as to the rates or service of any utility.” Thus, any dispute relating to rates or service that may arise under the agreements approved in this Order should be filed here for our review and resolution.

Based on our decision herein to approve the Century Sebree Transaction Agreements, we fully expect those contracts to be executed on or before January 31, 2014, and for Century Sebree to continue its smelting operations under the new contracts for electric service. However, if Century Aluminum and Century Sebree decide to not sign the new contracts, or if for any other reason the new contracts do not become effective on January 31, 2014, Kenergy must honor Century Aluminum’s written request to terminate Century Sebree’s 2009 power contracts. Absent the execution of the new contracts, there will be no tariffs or rates to serve Century Sebree on and after January 31, 2014, and Kenergy will have no choice but to terminate electric service to Century Sebree.

IT IS THEREFORE ORDERED that:

1. The Century Sebree Transaction Agreements are approved for service on and after January 31, 2014.
2. The Alternate Service Agreements are approved for service on and after January 31, 2014, to be effective only in the event that the Century Sebree Transaction Agreements are not executed by the parties thereto by January 31, 2014, or, if they are executed, they are terminated earlier than December 31, 2023.

3. The Applicants' request for a declaratory order is granted as discussed in the findings above.

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

5. Big Rivers and Kenergy shall individually file within 45 days of the end of each calendar quarter, with copies served to the parties to this case, a report detailing the revenues and expenses incurred by each in connection with each component of the Century Sebree Transaction Agreements, including the energy usage consumed by Century Sebree expressed in either MWh or kWh.

6. Big Rivers and Kenergy shall file, within 15 days of the date of this Order, executed copies of the Century Sebree Transaction Agreements and the Alternate Service Agreements.

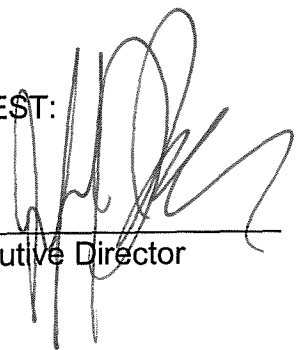
7. Any documents filed pursuant to ordering paragraphs 5 and 6 of this Order shall reference the number of this case and shall be retained in the utility's general correspondence file.

8. The Executive Director is delegated authority to grant reasonable extensions of time for the filing of any documents required by this Order upon a showing of good cause for such extension.

By the Commission

ENTERED
JAN 30 2014
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:



Executive Director

Case No. 2013-00413

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