COMMONWEALTH OF KENTUCKY

BEFORE THE 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. 2013-00221

ORDER

On June 12, 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 of Kentucky General Partnership ("Century Kentucky") commencing on and after August 20, 2013. The application included the Applicants' direct testimony, as well as new contracts, as described below, to replace the existing 2009 contracts with Century Kentucky. The 2009 contracts with Century Kentucky 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 nine agreements, referred to herein as the Century Transaction Agreements, for electric service to Century Kentucky of up to 482 MW for operating the Hawesville aluminum smelter. There are also two additional agreements, referred to herein as Alternate Service Agreements, that are to be effective for electric

[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* (PSC Ky. March 6, 2009).

service to Century Kentucky 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 Kentucky on August 20, 2013 in the event that neither the Century 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 Kentucky, the Rate Intervention Division of the Attorney General's Office ("AG"), Jackson Purchase Energy Corporation ("Jackson Purchase"), Meade County RECC ("Meade RECC"), 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 July 30, 2013, and post-hearing briefs. 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 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 RECC. 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 Kentucky is a subsidiary of Century Aluminum Company ("Century Aluminum"). Century Kentucky operates an aluminum smelter in Hawesville, Kentucky.[2] Due to the nature of the smelting process, Century Kentucky requires a significant quantity of firm, reliable power in the amount of 482 MW which it consumes on a round-the-clock basis at a 98 percent load factor. The current annual cost of electricity at Century Kentucky is $206 million, and this accounts for almost 40 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, Green River Electric Corporation, which required Big Rivers to supply the entire electric load of Century Kentucky. 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 Kentucky and one other aluminum smelter.

[2] Century Kentucky's parent, Century Aluminum, recently purchased from Rio Tinto Alcan, Inc. the aluminum smelter located in Sebree, Kentucky, and operates that smelter through a subsidiary known as Century Aluminum Sebree LLC. The power supply contracts for that facility are not at issue in this case.

Between 1998 and July 2009, approximately 70 percent of the power consumed by Century Kentucky 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 Kentucky 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 Kentucky's 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 Kentucky. The Kenergy power contract with LEM for Tier 1 and Tier 2 power for Century Kentucky was to expire at the end of 2010, with 100 percent of Century Kentucky's power requirements purchased by Kenergy at market prices after 2010.

Century Kentucky entered into the 1998 arrangement to purchase a mix of power from LEM and from the market through 2010, followed by all market power purchases, with the expectation that after 2010 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 Kentucky were in the range of $50 to $60 MWh, whereas the LEM supplied power was priced at half or less, in the range of $25 MWh. In an effort to maintain its economic viability, Century Kentucky 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 Kentucky'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 Kentucky. This contractual obligation for Big Rivers to supply Century Kentucky 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 Aluminum 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 Century Kentucky. On August 20, 2012, Century Aluminum did issue such a notice that it would cease smelting operations at Century Kentucky on August 20, 2013.

Following the August 20, 2012 notice that Century Kentucky would close 12 months thereafter, the Applicants and Century Kentucky commenced negotiations in September 2012 to discuss an alternative power supply arrangement. Those discussions continued into June 2013, resulting in the Century Transaction Agreements as filed in this proceeding on June 12, 2013.

CENTURY TRANSACTION AGREEMENTS

The nine Century Transaction Agreements are as follows:

1. Electric Service Agreement - A retail electric service agreement between Kenergy and Century Kentucky for the sale of electricity, electric capacity, and

[3] *Id.*

electricity-related ancillary services, including transmission services, by Kenergy to Century Kentucky for operating its aluminum smelter.

2. Arrangement Agreement - The power arrangement and procurement agreement entered into between Rig 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 Kentucky 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 Kentucky relating to direct, bilateral obligations to each other in connection with the Century Transaction Agreements, such as Century Kentucky's obligations to reimburse Big Rivers' costs relating to must-run conditions at the Coleman Generation Station, if any. 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. Capacitor Agreement - An agreement entered into between and among Big Rivers, Kenergy, and Century Kentucky to protect Big Rivers and Kenergy from risks and obligations relating to the design, development, purchase, installation, operation, and maintenance of the capacitor additions at the Hawesville smelter.

5. Protective Relays Agreement - An agreement entered into between and among Big Rivers, Kenergy, and Century Kentucky to protect Big Rivers and Kenergy from risks and obligations relating to the design, development, purchase, installation, operation and maintenance of the protective relay equipment at the Hawesville smelter.

6. Tax Indemnity Agreement - Agreement between and among Kenergy, Century Kentucky 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 Transaction Agreements.

7. 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 Kentucky under the Electric Service Agreement, the Direct Agreement, the Tax Indemnity Agreement and any other of the Century Transaction Agreements, including the obligations of Century Kentucky relating to the payment of money to Kenergy or Big Rivers.

8. Capacitor Additions and Protective Relays Guarantee - Agreement made by Century Aluminum in favor of Kenergy and Big Rivers whereby Century Aluminum will unconditionally and irrevocably guarantee the prompt payment and performance of the obligations of Century Kentucky under the Capacitor Agreement and the Protective Relays Agreement. A separate guarantee was entered into for the Capacitor Agreement and the Protective Relays Agreement because these two agreements were to be executed in advance of the other Century Transaction Agreements to facilitate the installation of the capacitor and protective relay equipment as soon as possible.

9. Lockbox Agreement - The Lockbox Agreement relates to Century Kentucky's obligation to pay certain amounts due under the Electric Service Agreement to a depository bank. Century Kentucky 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.

The Applicants request approval for three of the Century Transaction Agreements, the Electric Service Agreement, the Arrangement Agreement, and the Direct Agreement, while asserting that the remaining six Century Transaction Agreements do not need Commission approval. In the alternative, the Applicants request approval of the remaining six 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 Kentucky – The Alternate Service Agreement allows Kenergy to provide retail electric service for non-smelting operations at the Hawesville Smelter if Century Kentucky ceases smelting operations at the facility on August 20, 2013 or at the termination of the Electric Service Agreement upon a 60-day notice by Century Kentucky. Pursuant to this agreement, Kenergy is required to provide, and Century Kentucky 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.

COLEMAN STATION MUST-RUN STATUS

Big Rivers owns and operates four generating stations, including the Coleman Station in Hancock County, Kentucky. The Coleman Station consists of three coal fired steam turbines that entered commercial operation between 1969 and 1972. With a combined net capability of 443 MW, the Coleman Station is located next to the Century Kentucky smelter. As a result of the decision by Century Kentucky to terminate its 2009 contracts, Big Rivers will no longer have an immediate market for the 482 MW of power that up to now has been sold to Century Kentucky. Since the cost of generation produced by the Coleman Station is among the highest on the Big Rivers' system, Big Rivers decided to idle the Coleman Station at least through May 2015, or until market power prices equal or exceed the generation costs at Coleman Station.

However, as a member of the regional transmission organization known as the Midcontinent Independent System Operator ("MISO"),[4] Big Rivers was required to submit its plan to idle the Coleman Station to MISO for review and approval to ensure that such plan does not adversely impact the reliability of the regional transmission system that is under MISO's functional control. MISO is a regional reliability coordinator and it performs planning and outage maintenance functions designed to ensure that the transmission system under its control can withstand the impact of the closure of a generating facility. Subsequent to submission of Big Rivers' plan to idle the Coleman Station, MISO determined that its transmission system could reliably supply a firm load

[4] The Commission approved Big Rivers' request to transfer functional control of its transmission system to MISO in Case No. 2010-00043, Application of Big Rivers Electric Corporation For Approval to Transfer Functional Control of Its Transmission System to Midwest Independent Transmission System Operator, Inc. (Ky. PSC Nov. 1, 2010).

at Century Kentucky of only 338 MW, and that load above that level would have to be interruptible.

Due to the nature of Century Kentucky's smelting operations, it is essential to its economic viability that it be able to operate at a firm load of 482 MW. For Century Kentucky to operate at a firm load of 482 MW, MISO has determined that the Coleman Station must be open and available to generate power when needed for reliability purposes. Thus, MISO has designated the Coleman Station as a System Support Resource ("SSR"), placing it in a must-run status. The resulting costs for having to keep the Coleman Station in a must-run status will be assessed by MISO to the transmission users that benefit from the increased reliability, and the amounts collected will be paid to Big Rivers. Under the Century Transaction Agreements, Century Kentucky has agreed to reimburse Big Rivers for the SSR costs it incurs in connection with the Coleman Station's SSR status.

Century Kentucky believes that paying the additional costs associated with the must-run status of the Coleman Station would make the smelting operations uneconomical. In an effort to avoid this situation, Century Kentucky is in the process of adding capacitors and protective relays at its smelter to allow it to safely withstand some level of interruption to its power supply. Due to the length of time necessary to acquire and install this additional equipment, Century Kentucky has agreed that the Coleman Station should be in SSR status and Century Kentucky will pay the resulting costs, but only through May 30, 2014. Because the costs assessed by MISO in connection with a generating facility being in SSR status include budgeted capital expenditures, Century

Kentucky is unwilling to commit to paying capital expenditures beyond May 30, 2014 that will include relatively costly environmental retrofits at the Coleman Station.

As part of the agreements between the Applicants and Century Kentucky, Kenergy will reserve, and Century Kentucky will pay for, all transmission service needed to serve its load. The cost for transmission service is estimated to be $7.7 million annually. However, for the length of time that the Coleman Station is in SSR status and such costs are being paid by Century Kentucky, the cost of transmission service will be credited against the SSR costs. Although it would have been of greater benefit to retail customers if these transmission revenues had not been credited against the Coleman Station SSR costs, we recognize that the crediting will not result in any incremental costs to retail customers. Based on this finding, the Commission will approve the crediting of the transmission revenues against the Coleman Station must-run costs.

PARTIES' POSITIONS ON THE NEW CONTRACT AGREEMENTS

Century Kentucky requests the Commission to approve all of the new contract agreements as filed, with no changes or modifications, but also requests that findings be made that would require Big Rivers to perform planned maintenance on three of its transmission lines while the facilities are energized, rather than first de-energizing the facilities before performing the planned maintenance. Working on energized transmission facilities is referred to herein as "live line maintenance." The AG claims that the Century Transaction Agreements must be rejected as contrary to Kentucky law because they allow for "retail wheeling." KIUC requests the Commission to approve the Century Transaction Agreements, but only if they are modified to require periodic reporting of revenues and expenses associated with the transactions and a provision for the future payment by Century Kentucky of a share of the capital investment in Big Rivers' existing generating facilities. Such payment for existing facilities which are no longer used by a customer is known as "stranded cost payments." Each of these issues is discussed below.

LIVE LINE MAINTENANCE

Century Kentucky claims that if the Coleman Station must run, the additional cost that it would incur causes its power supply to be priced at above-market rates and this would adversely impact its economic viability. While Century Kentucky is willing to accept the SSR costs for Coleman Station through May 30, 2014, it is unwilling to do so beyond that date. The Coleman Station SSR costs include necessary future capital investments at the generating facilities, and Big Rivers has agreed to submit to MISO a reduced capital budget for the Coleman Station through May 2014. Thereafter, there will be greater capital expenditures at the Coleman Station, including the need to fund anticipated environmental equipment required for compliance with the Environmental Protection Agency's Mercury and Air Toxics Standard (commonly known as "MATS"). Absent the operation of the Coleman Station, MISO has indicated that Century Kentucky can operate at a firm power level of 338 MW, with any power consumed over that level being subject to interruption due to a transmission outage, either planned or forced.

In an effort to avoid having to pay the Coleman Station SSR cost, and to reduce the potential risk of an interruption to its power supply, Century Kentucky has requested the Commission to make a finding that it is good and proper utility practice for Big Rivers to perform planned maintenance on three transmission lines while the lines are energized. Although Century Kentucky spent eight months negotiating the Century Transaction Agreements that are proposed for approval in this case, it did not raise the issue of live line maintenance with the Applicants until shortly before the contracts were filed here on June 12, 2013. Century Kentucky raised the live line maintenance issue, arguing that its use will not increase costs to Big Rivers because the new contracts provide that Century Kentucky will pay for any such incremental costs and that no contract provision would need to be changed to accommodate live line maintenance. Big Rivers flatly rejected the proposal, citing a belief that live line maintenance was much more dangerous than performing planned maintenance on de-energized transmission lines, which has been Big Rivers' historic practice. Despite Big Rivers' rejection of live line maintenance, Century Kentucky advised the Applicants that the contracts as then negotiated should nonetheless be filed with the Commission for approval. Century Kentucky has provided expert testimony to show that live line maintenance on transmission lines is performed by other utilities, including some in Kentucky, and that such maintenance is in accord with good utility practice. To further support its proposal, Century Kentucky references the Commission's regulation, 807 KAR 5:041, Section 5(1), which requires electric utilities to "make all reasonable efforts to prevent interruptions of service, and . . . to reestablish service with the shortest possible delay."

Big Rivers defends its rejection of live line maintenance based on its position that live line maintenance is a more dangerous practice which creates greater safety concerns for both its employees and contractors, as well as increased liability to Big Rivers. Big Rivers denies that live line maintenance is needed for reliability purposes, noting that Century Kentucky can operate at its maximum firm load of 482 MW as long as the Coleman Station is operating under an SSR agreement. Big Rivers also states that even if its planned maintenance is performed while the transmission lines are live, a portion of one line extends into Indiana and the utility responsible for that portion has not agreed to perform live line work. In addition, those transmission lines are subject to forced outages which, when they occur, will prevent Century Kentucky from operating at 482 MW without an SSR agreement for the Coleman Station. The voluntary decision by Century Kentucky to refuse to pay the SSR costs for the Coleman Station beyond May 2014 renders the live line maintenance issue one of economics, not reliability, according to Big Rivers.

To the Commission's knowledge, this is the first time that the issue of live line maintenance has been raised in a contested proceeding. While the evidence before us shows that live line transmission maintenance is consistent with good and reasonable utility practice, so too is de-energized transmission line maintenance. Big Rivers has historically performed its maintenance on de-energized transmission lines, and it now expresses safety and liability concerns arising from live line transmission maintenance. While our regulation, 807 KAR 5:041, Section 5(1), is intended to prevent unnecessary interruptions of electric service and to reduce interruptions that do occur to the shortest possible time, that regulation does not expressly require an electric utility to perform live line maintenance.

Century Kentucky has the ability to operate its smelter at a firm load of 482 MW while incurring the SSR cost for the Coleman Station. Thus, Big Rivers is correct in its characterization of this issue as one of economics, not reliability. To the extent that

Century Kentucky believes that live line transmission maintenance is essential to its economic viability, this issue should have been a critical part of its negotiations with the Applicants. Had Century Kentucky raised this issue sooner in those negotiations, it is possible that this issue could have been resolved among those parties. At the request of the Applicants and Century Kentucky, we have processed this very complex case on an expedited schedule to ensure that Century Kentucky has a supply of electric power for its smelter operations on and after August 20, 2013.

We accepted for review the Century Transaction Agreements as filed on June 12, 2013 with the belief and understanding that each of the parties to those agreements – Big Rivers, Kenergy, Century Kentucky, and Century Aluminum – was in agreement with all of the terms and conditions contained therein. It was not until July 19, 2013, over five weeks thereafter, that Century Kentucky's testimony asserted that the agreements did not address what it believes to be a critical issue and that the Commission should effectively revise the agreements, which had been negotiated over an eight-plus month period, to benefit Century Kentucky. Based on the record before us, the Commission declines Century Kentucky's request to require Big Rivers, over its objections, to perform live line maintenance on three of its transmission lines. The issue of live line maintenance is one that the parties to the Century Transaction Agreements must resolve among themselves.

RETAIL WHEELING

The AG argues that the Commission must reject the Century Transaction Agreements because they authorize retail wheeling and will create a deregulated electric supply arrangement for one customer in violation of Kentucky statues. The AG, citing a 2000 Legislative Research Report,[5] defines retail wheeling as the transmission of electricity from a wholesale supplier to a retail customer by a third party and argues that this violates Kentucky law. The Commission finds no merit in the AG's argument.

Pursuant to the Century Transaction Agreements, Big Rivers will no longer have a contractual obligation to use its generating resources to supply power to Kenergy for resale to Century Kentucky. However, Kenergy will continue, as it has always been, to be the retail electric supplier providing retail electric service to Century Kentucky.[6] Kenergy will continue to have the exclusive right to furnish, and will furnish, electric service to Century Kentucky's electric facilities as provided for under the provisions of the Territorial Boundary Act, KRS 278.016 to 278.018. As the retail electric supplier, Kenergy will secure power for Century Kentucky from the wholesale power market or by entering into bilateral contracts for power. Kenergy similarly secures power for all of its other retail customers, except that the source of the power secured for all other customers is determined by Big Rivers rather than by Kenergy. There is nothing in KRS Chapter 278 that prohibits Kenergy from securing power from a source other than Big Rivers.

Kenergy owns no transmission facilities, so all of the power it secures for all of its customers is transmitted (i.e. is "wheeled") over Big Rivers' transmission facilities. Under the Century Transaction Agreements, Century Kentucky will not have a unilateral right to enter into power contracts with wholesale power suppliers. Rather, Kenergy will

[5] 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 (Sept. 2000).

[6] KRS 278.010(4) defines "retail electric supplier" as "any person . . . engaged in the furnishing of retail electric service," while KRS 278.010(7) defines "retail electric service" to be "electric service furnished to a consumer for ultimate consumption."

enter into all power contracts to supply Century Kentucky, just as Kenergy currently enters into all power contracts to supply all of its customers other than Century Kentucky. Between 1998 and July 2009, Kenergy was responsible for purchasing power directly from LEM and the wholesale market for service to Century Kentucky. The Century Transaction Agreements provide for Kenergy to now resume that same responsibility by purchasing power directly from the wholesale market to enable Kenergy to serve Century Kentucky. Under the MISO market rules, only an entity designated as a Market Participant is authorized to purchase power in the MISO market, and Big Rivers will, by contract, perform the duties as the Market Participant for the foreseeable future. Kenergy may at some time in the future assume the role of Market Participant, or some third party may do so under the provisions of the Century Transaction Agreements.

The duties and responsibilities to be performed by Kenergy for Century Kentucky do not violate any provision of KRS Chapter 278 and do not result in any deregulation of electric service in Kentucky. The Century Transaction Agreements merely create an arrangement for a retail electric supplier, Kenergy, to secure a supply of electricity to serve a retail customer, Century Kentucky, as required by the Territorial Boundary Act.

REVENUE AND EXPENSE REPORTING

KIUC recommends that the Century Transaction Agreements be conditionally approved, noting that it is in everyone's best interest for Century Kentucky to continue to operate.[7] However, KIUC suggests that a procedure is needed to ensure that the remaining non-smelter customers do not incur additional costs to subsidize Century

[7] Main Brief of Kentucky Industrial Utility Customers, Inc. ("KIUC Brief") at 1.

Kentucky on and after August 20, 2013.[8] To ensure that Big Rivers' rates remain fair, just, and reasonable and there is no subsidization,[9] KIUC recommends that the Commission review and audit the revenues received and the expenses incurred by Big Rivers and Kenergy relating to the Century Transaction Agreements. KIUC also recommends that Big Rivers and Kenergy be required to file monthly reports with the Commission, with copies to the parties to this proceeding, detailing their respective revenues and expenses for each component of the new agreements.[10]

Big Rivers and Kenergy contend that the proposed Century Transaction Agreements comply with Kentucky's regulatory and statutory framework[11] and that the agreements benefit Big Rivers and Kenergy's members as well as the economy of Western Kentucky.[12] Big Rivers and Kenergy maintain that the Century Transaction Agreements protect their remaining customers from the significant negative economic consequences that would arise if Century Kentucky were to cease smelting operations, pointing out that the remaining customers would experience no more exposure to risks and costs under the Century Transaction Agreements than would be experienced if Century Kentucky ceased smelting operations.[13]

Big Rivers and Kenergy oppose KIUC's reporting requirements, noting that they have already committed to taking the necessary actions before the Commission to

[8] Direct Testimony and Exhibits of Lane Kollen ("Kollen Testimony") at 6.

[9] *Id.*

[10] *Id.*

[11] Joint Post-Hearing Brief of Kenergy Corp. and Big Rivers Electric Corporation ("Big Rivers/Kenergy Brief") at 9.

[12] Big Rivers/Kenergy Brief at 10.

[13] Big Rivers/Kenergy Brief at 11,13.

ensure that any benefits received as a result of the Century Transaction Agreements flow through to their members. Big Rivers and Kenergy contend that, as entities regulated by the Commission, the Commission will be able to address the revenues and costs associated with this transaction in Big Rivers' pending base rate case involving the loss of the Century Kentucky load, Case No. 2012-00535, Application of Big Rivers Electric Corporation, Inc. for an Adjustment of Rates (Ky. PSC filed Jan. 16, 2013), without imposing any of KIUC's conditions on the instant transaction.[14]

Century Kentucky, likewise, claims that the proposed Century Transaction Agreements are fair, just, and reasonable and should be approved unconditionally and without modification.[15]

The Commission finds merit in KIUC's request for the establishment of reporting requirements. The reporting of revenues and expenses is reasonable and will ensure that the Commission and the public are able to see the financial impacts of the Century Transaction Agreements on two regulated utilities. In addition, the reporting will enable the Commission to have continuing oversight of the impacts of these agreements on Big Rivers, its members, and their non-smelter customers. However, we find that quarterly reporting is reasonable and will provide meaningful financial information relating to the agreements. Therefore, we will require Big Rivers and Kenergy to file financial reports on a quarterly basis detailing their respective revenues and expenses for each component of the Century Transaction Agreements.[16]

---

[14] Big Rivers/Kenergy Brief at 15.

[15] Post-Hearing Brief of Century Aluminum of Kentucky General Partnership ("Century Brief") at 1.

[16] *Id.*

STRANDED COST PAYMENTS

KIUC also recommends that the Commission reserve its authority to prospectively establish a just and reasonable market access charge as a way to mitigate the rate impacts on Big Rivers' non-smelter customers. This charge would recover from Century Kentucky the stranded fixed costs that result from its being allowed to obtain market pricing for power.[17] KIUC asserts that Big Rivers sized its system and incurred the investments in power plants to serve Century Kentucky,[18] and Century Aluminum's decision to terminate the 2009 power contracts will leave Big Rivers with significant excess generating capacity that would not be used or useful in providing service to its remaining customers.[19] KIUC contends that the decision to terminate Century Kentucky's 2009 power contracts has already resulted in a request by Big Rivers to significantly increase its electric rates to recover the loss of revenues from Century Kentucky.[20] While the non-smelter customers face significant rate increases, KIUC points out that Century Kentucky will see an annual reduction of 30 percent in its power bill, or approximately $61.2 million,[21] as a direct result of terminating its 2009 power contracts and entering into the proposed Century Transaction Agreements with Big Rivers and Kenergy,

KIUC asserts that the proposed Century Transaction Agreements fail to address any scenario in which Century Kentucky would be obligated to pay a portion of the

[17] KIUC Brief at 11.

[18] Direct Testimony and Exhibits of Lane Kollen ("Kollen Testimony") at 13.

[19] KIUC Brief at 4.

[20] Kollen Testimony at 6-7, and KIUC Brief at 8.

[21] KIUC Brief at 6.

stranded fixed costs related to the generating capacity that was built to serve Century Kentucky should it become profitable in the future.[22] KIUC argues that because Century Kentucky caused the problems, it should be required to pay for the excess capacity in the form of a market access charge if its economic viability and profitability improves in the future.[23] KIUC suggests that Century Kentucky could become profitable in the near future and would then be able to pay a market access charge and share in the burden of paying for the excess generating capacity it caused.[24] KIUC also recommends that the payment of a market access charge by Century Kentucky is just one part of its proposed plan to reduce the adverse rate impacts on non-smelter customers; the other part would require a "workout plan" that includes debt restructuring by Big Rivers' creditors.

Big Rivers and Kenergy argue that the Century Transaction Agreements should be approved as filed and without the imposition of any conditions.[25] Big Rivers specifically contends that KIUC's proposal of a workout plan is substantively flawed because there is not sufficient time, it requires unrealistic creditor concessions, and it violates Big Rivers' philosophy of honoring its commitments.[26]

Century Kentucky states that the Century Transaction Agreements were a product of extensive negotiations in order to provide it an opportunity to continue smelting operations beyond August 19, 2013 and requests the agreements be approved

[22] KIUC Brief at 4.

[23] Kollen Testimony at 14.

[24] KIUC Brief at 7-8.

[25] Big Rivers/Kenergy Brief at 15.

[26] Big Rivers/Kenergy Brief at 16.

as filed without modification. Century Kentucky believes that the proposed agreements strike a fair balance between not imposing any costs on the other Big Rivers' customers and providing Century Kentucky the ability to maintain its viability by accessing competitive, market-based prices for power.[27] Indeed, Century Kentucky points out that the proposed transaction will provide a net benefit to Big Rivers' non-smelter customers as compared to an outcome involving Century Kentucky's closure.[28]

Century Kentucky argues that the conditions recommended by KIUC, particularly the market access charge, would undermine the purpose of the Century Transaction Agreements, which is to provide it an opportunity to be viable over the long term.[29] Century Kentucky indicates that, even with market-priced power, the Hawesville smelter will operate in the short-term at break-even margins.[30] Moreover, Century Kentucky asserts that its smelter has experienced substantial under-investment in recent years and any future profits should be available to allow for reinvestments in the facility to keep the smelter competitive.[31]

Century Kentucky also contends that the market access charge would be a fundamental, retroactive change to the Commission-approved 2009 power contracts. Century Kentucky notes that although those contracts included a 12-month termination notice, there were no provisions imposing an exit fee for termination prior to the 2023

---

[27] Century Brief at 2.

[28] *Id.*

[29] Century Brief at 14.

[30] *Id.*

[31] *Id.*

expiration of the contracts.[32] Century Kentucky argues that any assessment of a market access charge would violate the 2009 power contracts and could not be considered fair, just, and reasonable.[33]

Having reviewed the issue and being otherwise sufficiently advised, the Commission finds that KIUC's recommendation to conditionally approve the Century Transaction Agreements subject to a future market access charge is not reasonable. The proposed contracts were a product of extensive and good faith negotiations among Big Rivers, Kenergy, Century Kentucky and Century Aluminum with the goal of keeping the Hawesville smelter viable while not subjecting the remaining customers to any additional incremental costs after August 19, 2013 due to Kenergy's continuing to serve Century Kentucky or Big Rivers serving as the Market Participant. 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.

DECLARATORY ORDER

The Applicants state that as a result of Century Aluminum's voluntary termination of Century Kentucky's current 2009 power contracts effective at midnight on August 19, 2013, there will be no tariffs or rates on file with the Commission under which the Applicants can legally provide electric service to Century Kentucky and, therefore, electric service must be discontinued. Although Century Kentucky did not address this issue in its filed testimony, its post-hearing brief argues that there is "substantial legal uncertainty" as to the request to discontinue service, and that Kenergy's obligations

---

[32] *Id.*

[33] Century Brief at 15.

under the Territorial Boundary Act creates a statutory obligation for it to continue serving Century Kentucky.[34]

The Commission finds that, as the Applicants correctly note, KRS 278.160(1) requires each utility to file with the Commission "schedules showing all rates and conditions for service established by it and collected or enforced." Electric service to Century Kentucky is now being provided under the terms of the 2009 power contracts which are on file with the Commission. It was Century Aluminum that made a voluntary business decision on August 20, 2012 to terminate Century Kentucky's 2009 power contracts, sending notice that it "had made a business judgment in good faith to terminate and cease all aluminum smelting at the Hawesville smelter and has no current intention of recommending smelting operations at the Hawesville smelter." Thus, Century Aluminum has requested that electric service to the Hawesville smelter be terminated as of midnight on August 19, 2013. Since issuing that request, Century Aluminum has not rescinded its request to terminate service. Based on our decision herein to approve the Century Transaction Agreements, we fully expect those contracts to be executed before August 20, 2013, and for Century Kentucky to continue its smelting operations under the new contracts for electric service. However, if Century Aluminum and Century Kentucky decide to not sign the new contracts, or if for any other reason the new contracts do not become effective on August 20, 2013, Kenergy must honor Century Aluminum's written request to terminate Century Kentucky's 2009 power contracts. Absent the execution of the new contracts, there will be no tariffs or rates to serve Century Kentucky on and after August 20, 2013, and Kenergy will have no choice but to terminate electric service to Century Kentucky.

---

[34] Century Kentucky Post-hearing Brief at 18-19.

KIUC MOTION FOR ADMINISTRATIVE NOTICE

On August 8, 2013, KIUC filed a motion requesting the Commission to take administrative notice of the testimony filed in a case before the Ohio Public Utilities Commission on August 6, 2013. That testimony, a copy of which was attached to the KIUC motion, addresses aluminum prices forecasted for several years in the future. KIUC supports its motion by citing KRS 13B.090(5), and states that the proffered testimony is relevant to the issue of whether Century Kentucky's smelter operations will be profitable in the future so as to enable Century Kentucky to pay for some of the stranded cost of Big Rivers' generating facilities. Objections to KIUC's motion were filed by the Applicants and by Century Kentucky, and KIUC filed a reply asserting that it could not have filed this testimony earlier due to the expedited procedural schedule established for this case.

The Commission finds that KRS 13B.090(5) authorizes administrative agencies that operate under the hearing procedures contained in KRS chapter 13B to "take official notice of facts which are not in dispute, or of generally-recognized technical or scientific facts within the agency's specialized knowledge." At the outset, we note that hearings conducted by the Commission are exempt from the provisions of KRS Chapter 13B.[35] However, we have promulgated a regulation, 807 KAR 5:001, Section 11(4), which allows a document to be received after the close of the testimony with the Commission's express authorization. Here, KIUC seeks administrative notice of the proffered testimony on forecasted aluminum prices for the purpose of demonstrating the truth of that testimony, but KIUC has not shown that those forecasted aluminum prices are accurate and not in dispute. Taking administrative notice as requested by KIUC

[35] See KRS 13B.020(3)(d)3.a.

would violate the procedural due process rights of other parties to this case by denying them an opportunity to cross-examine the forecast set forth in the proffered testimony.

SUMMARY OF FINDINGS

Based on the evidence of record and being otherwise sufficiently advised, the Commission finds that Century Kentucky exercised its right under the existing 2009 contracts to cease business operations at the Hawesville smelter on August 20, 2013. Since that time, in an effort to preserve almost 700 direct jobs at the Hawesville smelter, the Applicants have engaged in extensive negotiations with Century Aluminum and Century Kentucky. Those negotiations resulted in the documents before us today. The Century Transaction Agreements are designed to provide Century Kentucky an opportunity to continue operating the Hawesville 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 Kentucky ceases its smelting operations. The Commission finds that the Century Transaction Agreements and the Alternate Service Agreements are reasonable and all of the agreements should be approved as filed.

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 Aluminum and Century Kentucky, 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.

IT IS THEREFORE ORDERED that:

1. The Century Transaction Agreements are approved for service on and after August 20, 2013.

2. The Alternate Service Agreements are approved for service on and after August 20, 2013 to be effective only in the event that the Century Transaction Agreements are not executed by the parties thereto by August 20, 2013 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 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.

5. Big Rivers and Kenergy shall individually file within 45 days of the end of each calendar quarter a report detailing the revenues and expenses incurred by each in connection with each component of the Century Transaction Agreements.

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

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

By the Commission

ENTERED
AUG 14 2013
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:

Executive Director

Honorable Thomas C Brite
Attorney At Law
Brite & Hopkins, PLLC
83 Ballpark Road
P.O. Box 309
Hardinsburg, KENTUCKY 40143

Bernard F Lovely
Bowles Rice McDavid Graff & Love LLP Attorneys
333 West Vine Street, Suite 1700
Lexington, KENTUCKY 40507-1639

David Brown
Stites & Harbison, PLLC
1800 Providian Center
400 West Market Street
Louisville, KENTUCKY 40202

Honorable James M Miller
Attorney at Law
Sullivan, Mountjoy, Stainback & Miller, PSC
100 St. Ann Street
P.O. Box 727
Owensboro, KENTUCKY 42302-0727

Edward T Depp
Dinsmore & Shohl, LLP
101 South Fifth Street
Suite 2500
Louisville, KENTUCKY 40202

G. Kelly Nuckols
President & Ceo
Jackson Purchase Energy Corporation
2900 Irvin Cobb Drive
P. O. Box 4030
Paducah, KY 42002-4030

Michael Early
Century Aluminum
1300 SW Fifth Avenue, Suite 1750
Portland, OREGON 97201

DeAnna Speed
Director Rates and Budgets
Big Rivers Electric Corporation
201 Third Street
Henderson, KY 42419-0024

Jennifer B Hans
Assistant Attorney General's Office
1024 Capital Center Drive, Ste 200
Frankfort, KENTUCKY 40601-8204

Gregory J Starheim
President and CEO
Kenergy Corp.
6402 Old Carydon Road
P. O. Box 18
Henderson, KY 42419

J. Christopher Hopgood
Dorsey, King, Gray, Norment & Hopgood
318 Second Street
Henderson, KENTUCKY 42420

Robert A. Weishaar, Jr.
McNees Wallace & Nurick LLC
777 N. Capitol Street, NE, Suite 401
Washington, DISTRICT OF COLUMBIA

Honorable Michael L Kurtz
Attorney at Law
Boehm, Kurtz & Lowry
36 East Seventh Street
Suite 1510
Cincinnati, OHIO 45202

Melissa D Yates
Attorney
Denton & Keuler, LLP
555 Jefferson Street
P. O. Box 929
Paducah, KENTUCKY 42002-0929