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Re: PSC Case No. 2013-00221  
Joint Application of Kenergy Corp. and Big Rivers Electric Corporation for  
Approval of Contracts and For A Declaratory Order  
Our Client: Century Aluminum of Kentucky, a Kentucky General Partnership  
File No. R0145.01328

Dear Mr. Derouen:

Enclosed are an original and ten copies of the Post Hearing Brief of Century Aluminum of Kentucky General Partnership.

I certify that on this date these documents have been served on the persons on the attached service list by email or overnight delivery.

Very truly yours,



Bernard F. Lovely

Enclosures



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COMMONWEALTH OF KENTUCKY  
BEFORE THE  
KENTUCKY PUBLIC SERVICE COMMISSION

In the Matter of:

Joint Application of Kenergy Corp.            )  
and Big Rivers Electric Corporation        )  
for Approval of Contracts and for        )  
A Declaratory Order                            )     Case No. 2013-00221

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**POST-HEARING BRIEF OF  
CENTURY ALUMINUM OF KENTUCKY GENERAL PARTNERSHIP**

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Dated: August 5, 2013

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

### **I. EXECUTIVE SUMMARY**

Century respectfully requests that the Commission issue an order granting approval of certain electric service arrangements between and among Kenergy Corp. ("Kenergy"), Big Rivers Electric Corporation ("BREC"), and Century (together, the "Century Transaction") for which Commission approval may be necessary.<sup>1</sup> The Century Transaction agreements are fair, just, and reasonable, and should be approved without modification. The Commission should also find that the use of live-line maintenance on certain BREC transmission facilities is consistent with good and prudent utility practice and is necessary and appropriate for continued operation of the Hawesville Smelter.

The Commission should reject efforts to impose actual or potential surcharges on the Century Transaction. Such surcharges are inconsistent with previously approved agreements, will upset the carefully balanced Century Transaction agreements, and will force the closure of the Hawesville Smelter. The Commission should also find that the Century Transaction agreements are consistent with Kentucky law, conform with previously approved wholesale market agreements, and, as such, do not constitute retail wheeling.

Finally, Century notes that approval of the Century Transaction would render moot the declaratory order request that Kenergy and BREC included in their application. Substantial legal uncertainty surrounds the requested declaratory order. Consequently, if the Commission reaches

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<sup>1</sup> See *Joint Application of Kenergy Corp. and Big Rivers Electric Corporation For Approval of Contracts and for a Declaratory Order*, P.S.C. Case No. 2013-0221, p. 6 (June 12, 2013) ("Application"). BREC and Kenergy note that Commission approval may be necessary for: Electric Service Agreement; Arrangement Agreement; and Direct Agreement. Other agreements were filed with the Commission, but do not appear to require Commission approval: Capacitor Agreement; Protective Relays Agreement; Tax Indemnity Agreement; Guarantee of Century Parent; Capacitor Additions and Protective Relays Guarantee; and Lockbox Agreement. See *id.* at 6-10.

the merits of the declaratory order request, it should deny the request because BREC and Kenergy have not demonstrated a sufficiently clear legal basis for its issuance.

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

## **II. ARGUMENT**

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

Century fully supports the Century Transaction agreements that were filed with the Commission on June 13, 2013, and is prepared to consummate the Century Transaction if the agreements are approved as filed and if the Commission makes the requested findings regarding live-line maintenance.<sup>2</sup> The Century Transaction is a product of extensive negotiations among BREC, Kenergy, and Century, and represents an opportunity for the Hawesville Smelter to remain operational beyond August 19, 2013.

The Century Transaction ensures that the Hawesville Smelter will not be subsidized by, and will not impose any costs on, other Kenergy or BREC customers. The Transaction will provide a net benefit to those customers, as compared to an outcome involving closure of the Hawesville Smelter.<sup>3</sup> The Transaction aligns the Hawesville Smelter's viability with competitive, market-based prices for energy and capacity. Given the substantial public interest and benefit in continued operation of the Hawesville Smelter, and the direct benefit to Kenergy, BREC and its ratepayers, the Commission should approve the Century Transaction as fair, just, and reasonable.

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<sup>2</sup> See Direct Testimony of Michael Early, pp. 3: 21-22 and 4: 1-10 (July 19, 2013) ("Early Direct Testimony"); see also Direct Testimony of Sean Byrne, p. 5: 7-11 (July 19, 2013) ("Byrne Direct Testimony").

<sup>3</sup> Early Direct Testimony at p. 9: 10-15.

The objective of the Century Transaction is to facilitate the continued operation of the Hawesville Smelter. The continued operation of the Hawesville Smelter will provide significant regional economic benefits, including the retention of more than 600 well-paying positions at the Smelter that are essential to the economic vitality of Western Kentucky.<sup>4</sup> Century makes substantial contributions to Hancock County in the form of property and other local taxes.<sup>5</sup> In addition, the Hawesville Smelter is vital to the continued viability of the Southwire Cable plant, which employs nearly 400 and is highly dependent on the output of the Hawesville Smelter.<sup>6</sup>

If the Commission does not approve the Century Transaction agreements as filed, the Hawesville Smelter will close. As evident from Century's August 20, 2012 Notice of Termination, the Hawesville Smelter cannot survive under rates that are well above market-based rates. Century's current average electric rate is approximately \$49/MWh, and it was projected to reach approximately \$60/MWh even without Century's termination, nearly 62% higher than the average power rate for U.S.-based aluminum smelters.<sup>7</sup> Commission approval of the Century Transaction agreements, combined with the requested findings on live-line maintenance, will allow the Hawesville Smelter to continue to operate; without Commission approval, Century will be forced to close the Smelter upon termination of the current contract.<sup>8</sup>

The ongoing analysis by the Midcontinent Independent Transmission System Operator, Inc. ("MISO") of the potential need to operate the Kenneth C. Coleman Station ("Coleman") does not in any way preclude Commission approval of the Century Transaction agreements. MISO issued an Attachment Y Report on July 18, 2013 that was appropriately labeled as

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<sup>4</sup> Byrne Direct Testimony at p. 2: 21-22.

<sup>5</sup> See *id.* at p. 3: 4-6. Mr. Byrne provided a December 2011 study that estimated that the Hawesville Smelter had a combined positive impact on Hancock County of more than \$800 million per year. See *id.*, Exhibit 1, at p. 3.

<sup>6</sup> See *id.* at p. 3: 12-15.

<sup>7</sup> See *id.*, p. 4: 16-21; see also Century Response to On-The-Record Data Request (Aug. 1, 2013) (average power rate for U.S.-based smelters that are currently operating is \$37/MWh).

<sup>8</sup> See Byrne Direct Testimony at p. 5: 19-21 (only options are approval or closure).



"Draft".<sup>9</sup> MISO, Century, BREC, and other stakeholders are considering MISO's preliminary determinations, and those determinations may change in the coming weeks. The Century Transaction agreements are structured to accommodate the present lack of finality over Coleman's System Support Resource ("SSR") status. Specifically, the Direct Agreement and Electric Service Agreement include provisions to ensure that Century pays all costs to keep Coleman running for reliability purposes, if necessary, to accommodate the Hawesville Smelter operating above the Base Load plus any Curtailable Load, as ultimately determined by MISO.<sup>10</sup>

The Century Transaction provides tangible benefits to BREC's customers that would not be realized if the Hawesville Smelter were to close. BREC will receive approximately \$7.7 million in annual transmission revenue from Century, because Century will pay for firm transmission service, at the rates set forth in the MISO Tariff, for the entirety of its load.<sup>11</sup> In addition to providing these affirmative benefits, the Century Transaction ensures that Kenergy and BREC ratepayers will experience no adverse impacts as a result of the Century Transaction.

Century respectfully requests that the Commission issue an order approving the Century Transaction, as filed, on or about August 13, 2013, which would provide the parties with sufficient time to consummate the transaction and ensure that operations at the Hawesville Smelter are not irreversibly disrupted.

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<sup>9</sup> See BREC Hearing Exh. No. 1, p. 1 (July 18, 2013).

<sup>10</sup> See Testimony of Robert E. Berry at July 30, 2013 Hearing, Tr. 11:14:05 ("Berry Hearing Testimony").

<sup>11</sup> Berry Direct Testimony, p. 43: 7 – 44: 15; see also Berry Hearing Testimony, July 30, 2013, Tr. 13.55:54.

**B. THE LIVE-LINE MAINTENANCE OPPORTUNITY PRESENTED BY CENTURY IS CONSISTENT WITH GOOD AND PRUDENT UTILITY PRACTICE, AND IS NECESSARY AND APPROPRIATE TO ALLOW CENTURY TO CONTINUE OPERATION OF THE HAWESVILLE SMELTER.**

Century and BREC anticipate that MISO may require BREC to enter into an SSR Agreement to allow the Hawesville Smelter to operate at 482 MW.<sup>12</sup> MISO's analysis of the need for such an arrangement is ongoing.<sup>13</sup> In the long-term, SSR costs assigned to Century will result in the Hawesville Smelter not being financially viable, and the Smelter will be shut down.<sup>14</sup> Consequently, even if Coleman is designated as an SSR, and an SSR Agreement becomes necessary in the near-term, the SSR Agreement must be short-lived to allow the Hawesville Smelter to remain viable. In order to minimize the duration of (and, thus, the level of costs associated with) an SSR Agreement, Century has pursued and will continue to pursue all available options for allowing MISO to terminate Coleman's SSR status.<sup>15</sup> These mitigation measures will allow Century to operate the Hawesville Smelter at full load without the need for MISO to operate Coleman as an SSR.<sup>16</sup> The mitigation measures currently being considered include the installation of capacitors, a protective relay scheme, and, as necessary, dynamic reactive equipment.<sup>17</sup> To be effective in limiting the SSR designation period for Coleman, the package must also include live-line maintenance for the three transmission lines that are most directly affected by suspension of Coleman operations. This mitigation package will allow the

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<sup>12</sup> Early Direct Testimony, p. 5: 9-12.

<sup>13</sup> BREC Hearing Exh. No. 1, p. 4 (potential reliability issues exist that would require Coleman to enter into an SSR Agreement if a mitigation plan is not developed prior to change in unit status).

<sup>14</sup> Testimony of Michael Early at July 30, 2013 Hearing, Tr. 17:42:45 ("Early Hearing Testimony").

<sup>15</sup> *See id.*, Tr. 16:57:40.

<sup>16</sup> Early Direct Testimony, p. 7: 9-13.

<sup>17</sup> Dynamic reactive equipment, most likely consisting of static VAR compensators ("SVCs"), may be required as part of the capacitor additions installed to serve Century's full load. While BREC's rebuttal testimony raises questions about dynamic reactive equipment, no changes to the agreements and no additional agreements are required for dynamic reactive equipment. The language in the Capacitor Agreement is sufficiently broadly worded to accommodate the use of SVCs. *Cf.* Rebuttal Testimony of Robert W. Berry, p. 19: 10-22 (July 25, 2013) ("Berry Rebuttal Testimony"). Dynamic reactive equipment could be among the "Capacitor Additions" that help "provide the necessary voltage support for the Hawesville Smelter to operate at up to 492 MW with all units of the Coleman Generation Station idled." *See* Application, Exh. 7 ("Capacitor Agreement") at Exh. A.

Hawesville Smelter to operate at full load, without Coleman as an SSR.<sup>18</sup> However, because these options take some time to implement, an SSR Agreement may be necessary for a limited period of time.

Although the initial SSR arrangement will permit the Hawesville Smelter to continue operating until May 30, 2014, implementation of a mitigation plan that includes the use of live-line maintenance is necessary to ensure the continued operation of the Hawesville Smelter beyond May 30, 2014. In order for the Century Transaction to achieve its objective, the package of mitigation measures, including the use of live-line maintenance on certain transmission lines, must be adopted and implemented prior to May 30, 2014.

The Century Transaction agreements include and anticipate three components of the package – protective relays, dynamic reactive equipment, and other types of capacitors. The fourth element of the package – live-line maintenance – can be accommodated by the Direct Agreement in its as-filed form, but, as the record makes clear, this element has been met with resistance by BREC. Therefore, it became necessary for Century to request that the Commission address this issue directly by finding that: (1) the use of live-line maintenance is consistent with good and prudent utility practice, and (2) the use of live-line maintenance is necessary and appropriate for the continued operation of the Hawesville Smelter.<sup>19</sup> The evidence provided in this proceeding provides an unassailable basis for making these findings.

**1. SSR Arrangements Are Disfavored By FERC And MISO, And, If They Are Necessary, Should Be As Short-Lived As Possible.**

SSR arrangements are disfavored by both the Federal Energy Regulatory Commission ("FERC") and MISO; they are intended to be a "last resort" for ensuring transmission reliability

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<sup>18</sup> Early Direct Testimony, p. 6: 12-17.

<sup>19</sup> See *id.*, p. 12: 15-22 (describing the Commission findings that Century requests). Century is not necessarily requesting that the Commission order BREC to perform live-line maintenance.

when a generation owner provides notification of unit suspension or retirement. FERC found, in first approving MISO's SSR tariff provisions, that "The SSR program is a backstop measure."<sup>20</sup>

In more recent orders, FERC has continued to view SSR Agreements only as last-resort measures that should be limited in duration and scope:

We continue to expect that MISO will use SSR Agreements only as a last resort to meet short-term reliability needs precipitated by the retirement of a resource and will ensure that SSR Agreements have a limited and short duration.<sup>21</sup>

FERC has reached nearly identical conclusions with respect to generation must-run arrangements in other regions:

The Commission believes that RMR [*i.e.*, must-run] agreements should be a last resort and that the proliferation of these agreements is not in the best interest of the competitive market.<sup>22</sup>

MISO also disfavors SSR agreements, as evident from MISO Tariff provisions that require MISO to evaluate all feasible alternatives prior to entering into an SSR agreement.<sup>23</sup> It is against this backdrop of FERC precedent strongly disfavoring SSR and other must-run arrangements, and MISO tariff language suggesting the same, that Century presents live-line maintenance as an option to help avoid the need to operate Coleman, on an out-of-market basis, as an SSR.<sup>24</sup>

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<sup>20</sup> *Midwest Indep. Sys. Operator, Inc.*, 109 FERC ¶ 61,157 P 290 (2004) (emphasis added); *see also id.* at P 291 ("SSR designation is a limited last-resort measure").

<sup>21</sup> *Midwest Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,237 (2012) (emphasis added); *see also Midwest Indep. Sys. Operator, Inc.*, 142 FERC ¶ 61,170 P 45 (2013).

<sup>22</sup> *Devon Power LLC, et al.*, 103 FERC ¶ 61,082 P 31 (2003)(emphasis added); *see also PJM Interconnection, LLC*, 117 FERC ¶ 61,331 P 77 (2006)("The Commission disfavours 'out-of-market' RMR contracts.").

<sup>23</sup> *See* Joint Applicants' Response to Item 1 of KIUC's First Request for Information (July 11, 2013), Attachment, § 38.2.7.(c).

<sup>24</sup> Contrary to BREC's assertions, the use of live-line maintenance to minimize the duration of any SSR agreement delivers a pro-competitive benefit to the market. *Cf.* Berry Rebuttal Testimony, p. 22: 13-15 (suggesting, incorrectly, that Century proposes live-line maintenance to address price volatility or transmission congestion costs).

## **2. Live-Line Maintenance Is Essential For Limiting the Term of Any SSR Agreement And Sustaining The Viability of the Hawesville Smelter.**

Live-line maintenance is essential for the Century Transaction to achieve its objective of sustaining the viability of the Hawesville Smelter.<sup>25</sup> Accordingly, Century has requested that BREC commit to live-line maintenance for three transmission lines in the vicinity of the Hawesville Smelter, to minimize scheduled outages and shorten the duration of any SSR Agreement for Coleman.<sup>26</sup> To date, BREC has been unwilling to agree to live-line maintenance.

It is very likely that an SSR Agreement will be necessary for Coleman initially. While the SSR Agreement is in effect, Century and BREC will work to implement a package of mitigation options that will enable the termination of the SSR Agreement and allow the Hawesville Smelter to avoid monthly out-of-market SSR availability payments. Termination of the SSR Agreement on or about May 30, 2014 would also avoid the need for expensive Mercury and Air Toxics Standard ("MATS")-compliance investments that would otherwise become necessary if Coleman must run beyond April 2015.<sup>27</sup> Century will not make these investments, which alleviates any concern that these investments may become stranded if Century were to later terminate the Century Transaction after the investments were made.<sup>28</sup>

To mitigate the need for SSR status at Coleman, live-line maintenance would entail performing scheduled maintenance on three BREC transmission lines while those lines remain energized. Live-line maintenance keeps those lines in service and keeps the transmission system in a more robust state. Without live-line maintenance, the transmission system would be

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<sup>25</sup> Early Direct Testimony, p. 10: 11–20; Direct Testimony of Donald J. Morrow, p. 10: 4-8 (July 19, 2013) ("Morrow Direct Testimony). Live-line maintenance includes hot stick and barehand techniques, and using equipment to keep conductors energized to expand the work zone for maintenance practices. *Id.*, p. 4: 6-12.

<sup>26</sup> *Id.*, p. 21: 3-8.

<sup>27</sup> Early Hearing Testimony, July 30, 2013, Tr. 17:42:50. The exact date for a decision to avoid MATS-compliance investments depends on whether BREC seeks, and the Environmental Protection Agency approves, an extension of the compliance deadline. *See* BREC Response to On-The-Record Data Request, August 1, 2013.

<sup>28</sup> *Id.*, Tr. 17:42:55.

operating without key transmission elements. While BREC may have a different view of whether this creates a "modified N condition" or an "N-1 condition", it is clear that reliability is greater when all transmission elements are in service (energized), than when one or more key transmission elements is out of service (de-energized), even for short periods.

Using traditional, de-energized maintenance techniques on the three affected transmission lines would require that Century substantially reduce load levels at the Hawesville Smelter while scheduled transmission maintenance is being performed. This reduction of load "pre-positions" the system to withstand the impacts of the next contingency.<sup>29</sup> Using live-line maintenance on these lines would eliminate the need to "pre-position" the system and, thus, would allow the Hawesville Smelter to operate at sustainable load levels while Coleman operation is suspended. Thus, live-line maintenance would help enable termination of any Coleman SSR Agreement and enable the Hawesville Smelter to avoid costly SSR payments beyond May 30, 2014. The use of live-line maintenance (combined with other elements of the mitigation package), is critical to the continued viability of the Hawesville Smelter.

### **3. Live-Line Maintenance Is Consistent With Good and Prudent Utility Practice.**

In addition to being necessary for the continued viability of the Hawesville Smelter, live-line maintenance is consistent with good and prudent utility practice. The record demonstrates that live-line maintenance is widely performed in the electric industry, is conducted with highly trained and experienced crews, and is actually safer than maintenance performed on de-energized facilities. Mr. Morrow testified directly that "the use of energized maintenance techniques, when the incremental cost is justified [as it is here] and when they are implemented by qualified, properly trained staff using well designed work practices and tools, can be considered both good

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<sup>29</sup> Morrow Direct Testimony, p. 21: 17 - 22: 1.

utility practice and prudent utility practice provided the utility can recover its costs."<sup>30</sup>

Additional evidence bolsters Mr. Morrow's conclusion. Live-line maintenance does not present additional safety concerns. The safety record for Quanta Energy Services ("QES"), one of the industry-leading providers of live-line maintenance, is superior to the industry average for all transmission maintenance. For example, since 1998, QES logged over 4.6 million person-hours performing live-line maintenance.<sup>31</sup> During that 15-year period, QES had only two incidents reportable to the Occupational Safety and Health Administration ("OSHA"), only one of which resulted in a loss time injury and neither of which resulted in a fatality.<sup>32</sup> QES' average Loss Time Incident Rate ("LTIR") of 0.0435 for live-line maintenance is a small fraction of the industry average LTIR for all forms of transmission maintenance, which was 1.1 in 2012.<sup>33</sup> Live-line maintenance clearances and work practices are addressed in OSHA 1910.269 (Electric Power Transmission and Distribution Work Practices), which have been adopted by the International Brotherhood of Electrical Workers.<sup>34</sup> Qualified live-line maintenance workers are highly trained and, at QES, journeyman status, preferably with in-depth experience in hot-stick maintenance, is required before being accepted into the bare-hand training program.<sup>35</sup> Since 2010, QES has performed live-line maintenance on transmission facilities owned by Kentucky-based electric utilities.<sup>36</sup> Industry experience demonstrates that, with appropriate planning and execution, virtually any type of transmission maintenance activity can be safely performed using one or more energized techniques.<sup>37</sup>

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<sup>30</sup> *Id.*, p. 10: 4-8.

<sup>31</sup> *Id.*, p. 11: 11-12.

<sup>32</sup> *Id.*, p. 11: 12 – 12:4.

<sup>33</sup> *Id.*, p. 12:1-4. QES' safety record for live-line maintenance is even more impressive when one considers that the average transmission maintenance LTIR of 1.1 in 2012 is the lowest such LTIR reported for the last 12 years.

<sup>34</sup> *Id.*, p. 12: 15-19.

<sup>35</sup> *Id.*, p. 12: 19 – 13:13.

<sup>36</sup> *Id.*, p. 10: 12-15 (noting that QES has performed live-line maintenance for AEP and Kentucky Utilities).

<sup>37</sup> *See id.* at p. 8: 9-11.

In response, BREC offers only generalized safety-based concerns about live-line maintenance. As became evident during cross-examination, however, these concerns are not well-founded in experience, analysis, or data. BREC's rebuttal testimony states that live-line maintenance is unsafe and may jeopardize worker safety.<sup>38</sup> However, BREC provides no details regarding this generalized concern and, in particular, provides no reports, studies, analysis, or data to support its generalized assertion. On cross-examination, Mr. Berry acknowledges that BREC's safety concerns were not based on a review of safety records or safety data that are required to be submitted to OSHA.<sup>39</sup> Mr. Berry acknowledges that he did not review the Institute of Electrical and Electronics Engineers ("IEEE") standards that apply to live-line maintenance.<sup>40</sup> Mr. Berry acknowledges that he is not familiar with the specialized training that is provided to live-line maintenance technicians.<sup>41</sup> Mr. Berry also acknowledges that one of BREC's current contractors has live-line maintenance qualifications.<sup>42</sup> While Century appreciates that a utility is concerned about the safety of crews working on its system, all evidence provided in this proceeding demonstrates that these concerns are not well-founded when it comes to live-line maintenance performed by a qualified contractor. The evidence demonstrates that live-line maintenance has a safety record that is superior to the overall safety record for transmission maintenance, including de-energized maintenance.<sup>43</sup> Importantly, at no point in this proceeding has BREC or any other party testified or provided any other evidence that live-line maintenance is not consistent with good and prudent utility practice. Consequently,

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<sup>38</sup> Berry Rebuttal Testimony, p. 22: 18-22.

<sup>39</sup> Berry Hearing Testimony, July 30, 2013, Tr. 11:31:50.

<sup>40</sup> *Id.*, Tr. 11:31:46.

<sup>41</sup> *Id.*, Tr. 11:31:36.

<sup>42</sup> *Id.*, Tr. 11:30:30.

<sup>43</sup> Morrow Direct Testimony, p. 11: 19-22; p. 12: 1-4.



the record fully supports a finding that live-line maintenance is consistent with good and prudent utility practice.

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

No changes to the Century Transaction agreements are necessary to enable the use of live-line maintenance on the three affected transmission lines. Section 13.1 of the Electric Services Agreement requires Century to indemnify BREC for all losses resulting from litigation arising under the contract.<sup>44</sup> This would include indemnification for losses incurred in the unlikely event that injuries are sustained during performance of live-line maintenance. Section 4 of the Direct Agreement describes the Coleman-related SSR costs for which Century will be responsible.<sup>45</sup> These provisions are purposefully broad to accommodate costs related to the suspension of Coleman operations, including any additional cost of performing live-line maintenance on the affected transmission lines. To be sure, Century's testimony confirms that Century will reimburse BREC for all incremental costs associated with live-line maintenance.<sup>46</sup> BREC currently has contractual arrangements in place with an outside vendor that would allow that outside vendor to perform live-line maintenance.<sup>47</sup> Consequently, no contractual impediment exists to BREC's use of live-line maintenance on the affected transmission lines.

The tariff arrangements that will be in place if the Century Transaction is approved, and the regulatory obligations that exist for BREC, compel the use of live-line maintenance. Century will be a firm transmission service customer, paying the full MISO Tariff rate for its monthly peak loads.<sup>48</sup> Century should be treated no differently than any other firm transmission service

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<sup>44</sup> See Application, Exh. No. 4 (Electric Services Agreement) § 13.1.

<sup>45</sup> See *id.*, Exh. No. 6 § 4.

<sup>46</sup> Early Direct Testimony, p. 25: 19-20.

<sup>47</sup> Berry Hearing Testimony, July 30, 2013, Tr. 11:30:45.

<sup>48</sup> See, e.g., Application, Exh. No. 6 (Direct Agreement) § 3.13.

customer and, in that respect, should not have its load severely reduced whenever BREC must perform scheduled maintenance on any of the three affected lines.<sup>49</sup> Moreover, under Kentucky law, BREC remains under the following obligation:

Each utility shall make all reasonable efforts to prevent interruptions of service, and when such interruptions occur shall endeavor to reestablish service with the shortest possible delay. Whenever service is necessarily interrupted or curtailed for the purpose of working on equipment, it shall be done at a time if practicable, that will cause least inconvenience to customers, and those customers which may be seriously affected shall be notified in advance, except in cases of emergency.<sup>50</sup>

This obligation is important in two respects. First, BREC must undertake "all reasonable efforts" to prevent interruptions of service. In the context of this case, that means BREC must undertake reasonable efforts to deploy live-line maintenance to prevent interruptions of service to the Hawesville Smelter, which can sustain outages no longer than three hours.<sup>51</sup> Second, by use of the word "necessarily", the provision makes clear that the Commission anticipates that lines may not need to be taken out of service when maintenance is performed, and, if they must be taken out of service, such outages should occur only when and to the extent necessary.

Given that Century would be paying all incremental costs associated with live-line maintenance, given that Century would be indemnifying BREC for live-line maintenance, given the record evidence showing that live-maintenance is safer than de-energized maintenance, and given that BREC already has in place a live-line maintenance contract with an outside vendor, the use of live-line maintenance on the three affected transmission lines is a very reasonable option for preventing interruption of service to the Hawesville Smelter.

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<sup>49</sup> As Mr. Early explained during the hearing, BREC would certainly undertake efforts to avoid interruption or diminution of transmission service to hospitals, schools, and other facilities that are firm transmission service customers. Early Hearing Testimony, July 30, 2013, Tr. 16:48:22.

<sup>50</sup> 807 KAR 5:041, Section 5(1) (emphasis added).

<sup>51</sup> See Byrne Direct Testimony, p. 6: 14-16.

**C. NO MODIFICATIONS TO, OR CONDITIONS ON APPROVAL OF, THE CENTURY TRANSACTION ARE JUSTIFIED OR NECESSARY.**

**1. The Proposed "Market Access Charge" Would Perpetuate the Ongoing Cycle of Unsustainable Electric Service Costs for Century.**

The Kentucky Industrial Utility Customers, Inc. ("KIUC") argues that approval of the Century Transaction should be conditioned on several reporting and auditing requirements. More significantly, KIUC argues for a condition that would potentially allow the imposition of a "market access charge" on the Hawesville Smelter, purportedly to mitigate the rate impact of "stranded fixed costs."<sup>52</sup> These conditions, and particularly the "market access charge," fundamentally defeat the purpose of the Century Transaction. The objective of the Century Transaction is to provide an opportunity for the long-term viability of the Hawesville Smelter. Even with the Century Transaction, the Hawesville Smelter will operate in the short-term at "break-even" margins; additionally, substantial under-investment in the Hawesville Smelter has occurred in recent years.<sup>53</sup> Any positive margins going forward should be available to reinvest in smelting operations in order to keep the Hawesville Smelter competitive.<sup>54</sup> The assessment or even potential assessment of a "market access charge" would interfere with the reinvestment opportunities necessary for sustained operation of the Hawesville Smelter.

Moreover, any assessment of a "market access charge" would violate the 2009 Agreements approved by the Commission. As part of the 2009 Agreement, Century paid rates that were substantially above BREC's and Kenergy's cost of serving the Hawesville Smelter.<sup>55</sup> The 2009 Agreements included a 12-month termination notice and no "exit fee" for termination prior to the otherwise scheduled end-date of the Agreement.<sup>56</sup> The 2009 Agreements also

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<sup>52</sup> Direct Testimony of Lane Kollen, p. 3: 18-23 (July 19, 2013) ("Kollen Direct Testimony").

<sup>53</sup> Testimony of Sean Byrne at July 30, 2013 Hearing, Tr. 16:30:46 ("Byrne Hearing Testimony").

<sup>54</sup> *Id.*, Tr. 16:31:10.

<sup>55</sup> Early Hearing Testimony, July 30, 2013, Tr. 17:12:26.

<sup>56</sup> *See id.*, Tr. 17:10:51.

provided Century with no right to return to BREC's generation system supply during, or upon termination of, the 2009 Agreements.<sup>57</sup> Any potential "market access charge" would be a fundamental, retroactive change to the 2009 Agreements. Even if the "market access charge" would not force the closure of the Hawesville Smelter, and even if there are "stranded costs" incurred by BREC (a point that is strongly disputed by BREC),<sup>58</sup> the retroactive imposition of a market access charge on a transaction that was approved by the Commission and has since been terminated in strict accordance with its terms could not be considered "fair, just, and reasonable."<sup>59</sup> KIUC's proposal to explore a market access charge should be rejected.

## **2. Offsetting SSR Costs To Reflect Century's Transmission Revenue Contribution Is Fair, Just, and Reasonable.**

Pursuant to the SSR arrangement contemplated by the Direct Agreement, Century will pay the SSR costs incurred by BREC, which will be offset by the transmission revenues paid by Century to BREC.<sup>60</sup> This offset is reasonable because SSR costs are incurred only when Century is operating and paying transmission revenues to BREC.<sup>61</sup> Certain parties dispute the offset, suggesting that Century should be responsible to BREC for 100 percent of the transmission revenues and all SSR costs incurred under the Century Transaction.<sup>62</sup> Requiring Century to compensate BREC for both transmission and SSR costs, however, ignores the benefits realized by BREC's other customers as a result of the Hawesville Smelter's continued operation. Transmission revenue from Century is a benefit to BREC's remaining customers relative to closure of the Hawesville Smelter. The SSR arrangement proposed in the Century Transaction

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<sup>57</sup> See, e.g., Rebuttal Testimony of Gregory J. Starheim, Exhibit GJS Rebuttal 6, at p. 48, July 25, 2013 ("Starheim Rebuttal Testimony").

<sup>58</sup> See, e.g., Berry Rebuttal Testimony, p. 8: 17-22 ("[t]he . . . discussion of stranded costs is simply an attempt to argue that the Coleman station will not be used and useful following termination of Century's existing retail electric service agreement").

<sup>59</sup> KRS 278.030(1); see *Nat'l-Southwire Alum. Co. v. Big Rivers Elec. Corp.*, 785 S.W.2d 503 (Ky. Ct. App. 1990) .

<sup>60</sup> Early Direct Testimony, p. 9: 5-8.

<sup>61</sup> See *id.*

<sup>62</sup> See, e.g., Attorney General's Comments in Lieu of Testimony, p. 10, July 19, 2013 ("AG Comments").

allows Century to pay the net cost to BREC without subjecting BREC's remaining customers to any additional costs.<sup>63</sup> The Commission should approve the Century Transaction agreements, as proposed, inclusive of the offset to SSR costs.

### **3. Allowing Century To Coordinate With Kenergy To Arrange Competitively Priced Wholesale Power Is Not "Retail Wheeling."**

The Attorney General ("AG") contends that the Century Transaction constitutes "retail wheeling" and that the Commission does not have authority to enable retail wheeling arrangements.<sup>64</sup> The AG's position is without merit, for several reasons, and should be rejected.

First, pursuant to the Century Transaction, Century will direct BREC, as an authorized Market Participant, to purchase electric generation in wholesale power markets. BREC will provide transmission service for delivery of the purchased generation to Kenergy. Kenergy, in turn, will remain as the exclusive retail provider to Century.<sup>65</sup> While retail wheeling is not a statutorily defined term, the AG's definition of retail wheeling does not comport with the Century Transaction. According to the AG, retail wheeling is "the transmission of electricity from a wholesale supplier to a retail customer by a third party."<sup>66</sup> The Century Transaction does not align with this definition. Upon consummation of the Century Transaction, Kenergy will continue to be the exclusive retail service provider, as required by statute.<sup>67</sup> Electricity will not be provided "by a third party."<sup>68</sup> The only change from previous market energy agreements approved by the Commission is that BREC, rather than Kenergy, will make energy purchases for sale to Century; however, all sales will be to Kenergy and, in turn, to Century.<sup>69</sup>

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<sup>63</sup> Berry Hearing Testimony, July 30, 2013, Tr. 11:44:23; Early Direct Testimony p. 9: 13-15.

<sup>64</sup> AG Comments, p. 7.

<sup>65</sup> Application, pp. 5-6.

<sup>66</sup> AG Comments, p. 5 (emphasis added).

<sup>67</sup> KRS 278.018

<sup>68</sup> *Cf. id.*

<sup>69</sup> Starheim Rebuttal Testimony, p. 11: 13-22.

Second, the Century Transaction does not permit Century to select a provider of its choice. Kenergy is involved with, and retains authority to approve, Century's nomination of a wholesale supplier. Mr. Starheim explains at length in his Rebuttal Testimony the various restrictions on Century's ability to enter into future Market Agreements, select future Market Participants, and direct Market Participants' entry into bilateral contracts.<sup>70</sup>

Third, the Century Transaction requires Century to pay to Kenergy the actual market charges for energy, capacity, and ancillary services. This arrangement is identical to the Tier 3 service provisions of the July 15, 1998 Agreement For Electric Service between Green Rivers Electric Corporation (Kenergy's predecessor) and Southwire Company (Century's predecessor), which was approved by the Commission.<sup>71</sup> This same arrangement was carried over, in substantially identical form, into the July 1, 2009 Retail Electric Service Agreement by and between Kenergy and Century.<sup>72</sup> The AG cursorily acknowledges the Commission's approval of these agreements, yet maintains its assertion that the arrangement contemplated in the Century Transaction is in conflict with Commission precedent.<sup>73</sup> The AG's analysis of the 1998 arrangement as "retail wheeling" fails to fully explain the arrangement, citing only to the April 30 order but not including the Commission's Orders of June 11, 1998 and July 14, 1998, which clarified the wholesale power arrangement.<sup>74</sup> The AG's understanding of the "Market Energy"

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<sup>70</sup> See *id.*, pp. 12-14.

<sup>71</sup> See, e.g., Starheim Rebuttal Testimony, Exhibit GJS Rebuttal 5, at p. 77 of 84 ("Southwire shall be obligated to pay to GREC all amounts that GREC is obligated to pay to Third-Party Suppliers for sales of Tier 3 power to GREC for resale to Southwire"); see also *Application of Big Rivers Electric Corporation, et al., for Approval of Wholesale Rate Adjustment for Big Rivers Electric Corporation and for Approval of Transaction*, Order, P.S.C. Case No. 97-204, (Apr. 30, 1998) (approving Tier 3 wholesale market purchases for aluminum smelters).

<sup>72</sup> See, e.g., Starheim Rebuttal Testimony, p. 5: 11 – 11: 2; see also Exhibit GJS Rebuttal 6, at pp. 19-20 (describing Kenergy's obligations to enter into third-party transactions to arrange for the purchase of "Market Energy" for resale, at pass-through prices, to Century).

<sup>73</sup> See AG Comments at n. 23.

<sup>74</sup> See Starheim Rebuttal Testimony, p. 10: 1-11.

provisions of the 2009 agreement is simply incorrect.<sup>75</sup> Fundamentally, no difference exists between the structure of the Century Transaction and the market-based pricing provisions of the 1998 and 2009 agreements applicable to Century and its predecessors.

Given that the Commission has previously approved wholesale market energy purchases for Century, it should approve the Century Transaction as filed consistent with prior orders.

**D. NO CLEAR LEGAL BASIS EXISTS FOR GRANTING THE REQUEST FOR A DECLARATORY ORDER.**

Kenergy and BREC request that the Commission issue a Declaratory Order pursuant to 807 KAR 5:001, Section 18, providing authority to Kenergy and BREC to physically disconnect electric service to the Hawesville Smelter upon termination of the 2009 Agreements on August 19, 2013. Commission approval of the Century Transaction as filed, and granting the requested findings on live-line maintenance, would render moot Kenergy's and BREC's request for a declaratory order. Century hopes that the Commission need not consider the request for a declaratory order.

If the Commission must reach the merits of the declaratory order request, the Commission should decline the request because substantial legal uncertainty surrounds the request, and Kenergy and BREC have not demonstrated that the Commission is on firm ground in granting the request. Kenergy, as the franchised exclusive provider of service of electric service to Century, has an ongoing statutory duty to provide service to Century.<sup>76</sup> Pursuant to the Commission's authority governing a utility's obligation to serve, Kenergy is obligated to provide uninterrupted service to Century.<sup>77</sup> Moreover, should Kenergy wish to terminate service to Century, the burden is on Kenergy to demonstrate that such a shutdown would be reasonable,

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<sup>75</sup> See n.71, *supra*.

<sup>76</sup> KRS 278.018(1).

<sup>77</sup> 807 KAR 5:041(5).

and the request for declaratory order fails to meet the reasonableness standard.<sup>78</sup> Moreover, a Declaratory Order authorizing Kenergy to cease electric service to Century upon expiration of the 2009 Agreements would cause immediate shut-down of the Hawesville Smelter on August 20, 2013, resulting in irreparable harm and damage to the smelter and substantial product loss. Plant restart is likely cost-prohibitive, and more than 600 employees of the Hawesville Smelter would lose their jobs.<sup>79</sup> In order to ensure that these consequences do not come to pass if, for whatever reason, the Century Transaction is not in place by midnight August 19, 2013, Century requests that the Commission decline the request for a Declaratory Order.<sup>80</sup>

Kenergy itself appears to be uncertain regarding the legal basis for terminating service to Century if the Century Transaction is not in place as of August 20, 2013. On one hand, Kenergy acknowledges that it will remain the exclusive retail electric supplier for Kenergy pursuant to KRS 278.018(1) upon expiration of the 2009 Agreements, and will therefore have the "right and the reasonable obligation" to serve Kenergy's load after August 20, 2013.<sup>81</sup> On the other hand, Kenergy argues that KRS 278.160(2) prohibits a utility from providing electric service except pursuant to approved rate schedules, and that expiration of the 2009 Agreements, without an approved rate schedule in place, prevents Kenergy from legally providing electric service after August 20, 2013.<sup>82</sup> Kenergy's own statements detract from the strength of its position that it be permitted immediately and irreparably terminate service to the Hawesville Smelter on August 20, 2013, if the Century Transaction is not in place at that time.

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<sup>78</sup> KRS 278.030(2). "Reasonable" restrictions are those that are "[f]air, proper, just, moderate, suitable under the circumstances." *Pub. Serv. Comm'n of Kentucky v. Commonwealth*, 320 S.W.3d 660 (Ky. 2010).

<sup>79</sup> Bryne Direct Testimony, pp. 5: 14 – 7: 2.

<sup>80</sup> For example, BREC witnesses have testified that approval by the Rural Utilities Service ("RUS") is necessary, but is still pending. *See, e.g.*, Joint Applicants' Response to Item 1 of Staff's First Request for Information (July 11, 2013). BREC and Kenergy have also indicated that they "would be willing to agree to a temporary extension of the existing contractual arrangements," assuming Century would agree and assuming the necessary approvals. *See* Joint Applicants' Response to Item 15 of KIUC's First Request for Information (July 11, 2013).

<sup>81</sup> Joint Applicants' Response to Item 12 of KIUC's First Request for Information (July 11, 2013).

<sup>82</sup> Joint Applicants' Response to Item 13 of KIUC's First Request for Information (July 11, 2013).



**III. CONCLUSION**

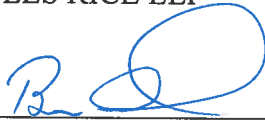
WHEREFORE, Century respectfully requests that the Commission:

- (1) Approve the Century Transaction agreements as filed;
- (2) Find that live-line maintenance on certain BREC transmission facilities is consistent with good and prudent utility practice, and is necessary and appropriate for the ongoing operation of the Hawesville Smelter;
- (3) Reject all proposed modifications to the Century Transaction agreements;
- (4) Decline to issue a Declaratory Order as requested by Kenergy and BREC; and
- (5) Issue its order on or about August 13, 2013.

Respectfully submitted,

BOWLES RICE LLP

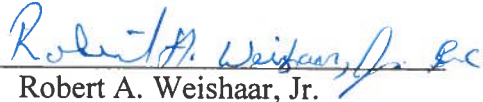
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Dated: August 5, 2013