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AUG 08 2013

PUBLIC SERVICE
COMMISSION

HAND DELIVERY

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 General Partnership
File No. R0145.01328

Dear Mr. Derouen:

Enclosed are an original and ten copies of a Response to Motion to Take Administrative Notice for filing in the above-referenced matter.

I certify that on this date a copy of this document has been served on all persons on the attached service list by email or overnight delivery.

Sincerely,

Bernard F. Lovely

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COMMONWEALTH OF KENTUCKY
BEFORE THE
KENTUCKY PUBLIC SERVICE COMMISSION

RECEIVED

AUG 08 2013

PUBLIC SERVICE
COMMISSION

In the Matter of:

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

**RESPONSE TO MOTION
TO TAKE ADMINISTRATIVE NOTICE**

Comes now, Century Aluminum of Kentucky General Partnership ("Century") and submits its Response to the Motion of Kentucky Industrial Utility Consumers, Inc. ("KIUC") To Take Administrative Notice ("Motion"), which KIUC filed with the Kentucky Public Service Commission ("PSC" or "Commission") on August 7, 2013. KIUC asks the Commission to take administrative notice of the pre-filed Testimony of Jorge Vazquez, which was filed on August 6, 2013 with the Public Utilities Commission of Ohio ("Ohio Commission") in Case No. 09-119-EL-EAC ("Vazquez Testimony"). KIUC's motion should be denied and the attachment that was included with KIUC's motion should not be considered part of the record in this proceeding.

ANSWER

1. KIUC's Motion Cites An Inapplicable Legal Basis For Its Requested Relief.

KIUC grounds its request for relief in KRS 13B-090(5).¹ Although this section of the Kentucky Rules of Administrative Procedure does permit a hearing officer to take administrative notice of information under certain circumstances, the PSC is exempt from these provisions of the Kentucky statutes with respect to hearings conducted pursuant to KRS Chapter 278.² This plain language reading of the statute was noted by the Commission in its ruling on a motion to

¹ See Motion of Kentucky Industrial Utility Customers, Inc. to Take Administrative Leave, P.S.C. Case No. 2013-00221 (filed Aug. 7, 2013) at pp. 1, 5 ("KIUC Motion").

² KRS 13B.020(d)(3).

take administrative notice, and the Commission declined to rely on that provision as the basis for its ruling.³ The legal grounds cited by KIUC for its Motion do not apply. The Motion should be denied.

2. Even If The Legal Basis Cited By KIUC Were Applicable, It Does Not Support KIUC's Requested Relief.

Even if KRS 13B-090(5) were to apply to this Commission proceeding, the provision does not support KIUC's requested relief. Under that provision of Kentucky law, the ability to take administrative notice is limited to "facts which are not in dispute, or of generally-recognized technical or scientific facts within the agency's specialized knowledge."⁴ KIUC's Motion presents no facts – technical, scientific, or otherwise – of which the Commission could take administrative notice. By KIUC's own account, the Vasquez Testimony that KIUC attempts to include in the record here was presented in Ohio for the purpose of providing Mr. Vasquez' firm's – *i.e.*, HARBOR's - projections of future aluminum prices.⁵ The purely speculative nature of Mr. Vasquez' testimony becomes evident when KIUC attempts to link the Vasquez testimony to certain issues in this proceeding. KIUC contends that "**If** HARBOR's 2014 LME projection is accurate . . . "; and "**If** HARBOR'S 2015 LME is accurate . . . ", and, generally, "**If** HARBOUR'S [sic] aluminum price projections are accurate," then the Hawesville Smelter will earn certain levels of revenue.⁶ KIUC's speculation about potential outcomes is premised upon Mr. Vasquez' speculation about potential prices. Kentucky law does not permit the taking of administrative notice of speculation. The statute cited by KIUC as the exclusive basis for its relief, if it were applicable, is clear that administrative notice may be taken only of facts. Because the Vasquez

³ See *in re Application of Duke Energy Kentucky Inc.*, Order, P.S.C. Case No. 2010-00203 (Nov. 3, 2010), at n.1 ("MISO Order") ("[t]he Commission notes that its hearings are exempt from the procedures set forth in KRS Chapter 13B").

⁴ KRS 13B.090(5).

⁵ See KIUC Motion, p. 2.

⁶ See *id.*, p. 3 (emphasis added).

Testimony is not within the scope of information subject to the taking of administrative notice by an administrative agency, the KIUC motion must be denied.

3. The Commission's Regulations Do Not Support KIUC's Requested Relief.

KIUC's Motion does not find firm footing in the Commission's regulations either. The Commission has adopted specific rules governing all Commission proceedings.⁷ These rules address the admission of testimony. In the context of a formal hearing, the Commission's regulations provide that "[a]ll testimony given before the commission shall be given under oath or affirmation."⁸ Although the Commission is not bound by the formal rules of evidence with respect to formal hearings,⁹ it has consistently cautioned parties against offering "cumulative, repetitive and irrelevant" testimony.¹⁰ Furthermore, the PSC cannot "disregard essential rules by which rights are asserted or defended."¹¹

KIUC's Motion is an *ex post facto* attempt to introduce into the record of this proceeding information that: (1) was presented by a witness with no apparent affiliation with KIUC, (2) was presented in a proceeding being conducted before another state's public utility commission, (3) was apparently filed but not yet admitted into the record in that other state commission's proceeding, and (4) was presented without yet being subject to timely motions to strike, discovery, or cross-examination in that other state commission's proceeding. The information being presented by KIUC does not even represent findings by the Ohio Commission; it is nothing more than one party's self-interested attempt to provide price projections that support that party's particular objectives in the Ohio Commission proceeding. Neither Century nor Big

⁷ *EnviroPower, LLC v. KPSC*, 2007 WL 289328 (Ky. Ct. App. 2007).

⁸ See 807 KAR 5:001 § 9(2)(7) (emphasis added).

⁹ KRS 278.310.

¹⁰ See, e.g., *in re Southeast Telephone, Inc.*, Order, P.S.C. Case No. 2006-00316 (Aug. 30, 2006); *in re Dialog Telecommunications*, Order, P.S.C. Case No. 2006-00099 (June 9, 2006); *in re AT&T Communications of the South Central States, LLC*, Order, P.S.C. Case No. 2004-00234 (July 2, 2004).

¹¹ *Commonwealth ex rel. Armstrong v. KPSC*, 1987 WL 258083 (Nov. 20, 1987).

Rivers nor any other party to this proceeding will have an opportunity to conduct discovery, conduct cross-examination, or provide a response to the Vasquez Testimony. While KIUC concedes that the "Commission should give this information whatever weight it deems appropriate . . .," it becomes clear when viewed in its proper context that the information presented by KIUC should be given no weight in this proceeding. The information should not be accepted into the record.

In support its Motion, KIUC cites a 1996 Commission Order granting admission of documents filed in other jurisdictions; however, KIUC fails to mention in its Motion that these documents were filed prior to hearings and by a party "choosing not to participate in the public hearing."¹² Accordingly, while the Commission admitted the testimony as part of the record, it was not submitted by an active party to the proceeding. By contrast, KIUC has had ample opportunity in this proceeding to submit its own evidence regarding future aluminum prices, to the extent KIUC thinks that such information is relevant to this proceeding. KIUC has filed 18 pages of Direct Testimony in this proceeding, presented its witness during the evidentiary hearing, and conducted cross-examination of several Century witnesses. KIUC took none of these opportunities to present evidence regarding future aluminum prices. Rather, KIUC waits until the post-briefing stage, after all testimony and evidence has been accepted into the record, to present information regarding future aluminum prices. Enough is enough. The KIUC Motion should be denied; the Vasquez Testimony should not become part of the record in this proceeding.

¹² See *in re An Inquiry Into Local Competition, Universal Service, and the Non-Traffic Sensitive Access Rate*, Order, P.S.C. Case No. 355 (Mar. 22, 1996) (emphasis added).

4. KIUC Has Not Demonstrated That The Testimony of Jorge Vazquez is Relevant to the Long-Term Viability of the Hawesville Smelter.

KIUC argues in its Motion that the Testimony of Mr. Vasquez is relevant to the question of whether the Hawesville Smelter is likely to return to profitability and, therefore, whether the Hawesville Smelter may be capable of paying a "market access charge" to mitigate the impact of "stranded fixed costs."¹³ The Century Brief and the Kenergy/Big Rivers Brief presented many reasons why KIUC's "market access charge" concept must be firmly rejected.¹⁴ As Century attempted to make clear in its Post-Hearing Brief, the objective of the Century Transaction is to provide an opportunity for the long-term viability of the Hawesville Smelter.¹⁵ In contrast, KIUC's apparent objective is to siphon any and all positive margins away from the Hawesville Smelter for an indefinite period of time. KIUC's short-sighted logic appears to be that any increases in aluminum prices over the status quo will necessarily provide a source of revenue to Century that should be transferred to other ratepayers. KIUC either misses, or chooses to ignore, the full picture. KIUC misses, or chooses to ignore, the evidence that substantial under-investment has occurred at the Hawesville Smelter in recent years.¹⁶ KIUC misses, or chooses to ignore, the fact that aluminum prices have swung widely from one year to the next.¹⁷ KIUC misses, or chooses to ignore, that the Hawesville Smelter does not have any of its output under contract beyond August 19, 2013.¹⁸ KIUC misses, or chooses to ignore, the fact that electricity market prices are also volatile and that no forecast of electricity market prices exists beyond a 3-4 year period.¹⁹ Consequently, KIUC is in no position to suggest that sheer speculation about

¹³ KIUC Motion, p. 2.

¹⁴ See Century Brief at pp. 14-15; Kenergy/BREC Brief at pp. 15-16.

¹⁵ See Post-Hearing Brief of Century Aluminum of Kentucky General Partnership, P.S.C. Case No. 2013-00221 (filed Aug. 5, 2013) at pp. 3, 6, 8, 14 ("Century Brief").

¹⁶ Testimony of Sean Byrne at July 30, 2013 Hearing, Tr. 16:30:46.

¹⁷ See *id.*, Tr. 16:22:10.

¹⁸ See *id.*, Tr. 16:17:39.

¹⁹ Testimony of Michael Early at July 30, 2013 Hearing, Tr. 17:53:28.

potentially higher aluminum prices in the next year or two should serve as any basis for considering a market access charge for the Hawesville Smelter.

Finally, the Vasquez Testimony is not even relevant to a determination about any market access charge. As outlined above, the Vasquez Testimony is completely irrelevant to the economic viability of Hawesville Smelter. The Vasquez Testimony is simply one analyst's estimate of future aluminum prices – prices that, in reality, are known to vary considerably from one year to the next. The Commission has denied requests for administrative notice of irrelevant data, and it should do so again here.²⁰ KIUC's tactic should be recognized for what it is – an attempt to include in the record here one firm's speculation about future aluminum prices, so that KIUC can extrapolate from that speculation some findings about the future financial viability of the Hawesville Smelter. The Vasquez Testimony is non-probative, wholly irrelevant, and prejudicial. It should not be allowed to enter the record in this proceeding.

²⁰ See, e.g., MISO Order at p. 2 (denying motion to take administrative notice on the grounds that "MISO has not sufficiently shown either a need to take administrative notice . . . or the relevancy of those documents to the decision being made in this case").

CONCLUSION

WHEREFORE, Century hereby respectfully requests that the Kentucky Public Service Commission:

- (1) Deny the Motion of KIUC to Take Administrative Notice; and
- (2) Exclude the Vazquez Testimony from the evidentiary record in this proceeding.

Respectfully submitted,

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