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January 14, 2014

Via Federal Express

Jeff Derouen
Executive Director
Public Service Commission
211 Sower Boulevard, P.O. Box 615
Frankfort, Kentucky 40602-0615

Re: *In the Matter of: Joint Application of Kenergy Corp. and Big Rivers Electric Corporation for Approval of Contracts and for a Declaratory Order,*
PSC Case No. 2013-00413

Dear Mr. Derouen:

Enclosed are an original and ten copies of the Post-Hearing Brief on behalf of the joint applicants, Kenergy Corp. and Big Rivers Electric Corporation, in the above-referenced matter. I certify that on this date, a copy of this letter and a copy of the post-hearing brief were served on each of the persons shown on the attached service list by first class mail, postage prepaid.

Sincerely yours,

James M. Miller

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY

In the Matter of:

Joint Application of Kenergy Corp.	**)**	
and Big Rivers Electric Corporation	**)**	
for Approval of Contracts and for	**)**	**Case No. 2013-00413**
A Declaratory Order	**)**	

JOINT POST-HEARING BRIEF OF

KENERGY CORP. AND BIG RIVERS ELECTRIC CORPORATION

January 14, 2014

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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. 2013-00413

POST-HEARING BRIEF OF JOINT APPLICANTS KENERGY CORP. AND BIG RIVERS ELECTRIC CORPORATION

I. INTRODUCTION

Kenergy Corp. ("Kenergy") and Big Rivers Electric Corporation ("Big Rivers") jointly submitted the application (the "Application") in this proceeding seeking an order of the Kentucky Public Service Commission (the "Commission") granting:

(i) approval of certain agreements establishing electric service arrangements ("Century Sebree Transaction") between and among Kenergy, Big Rivers, and Century Aluminum Company ("Century Parent") and Century Aluminum Sebree LLC ("Century Sebree" and, together with Century Parent, "Century"), including the revised versions of three of those agreements that were filed December 30, 2013;

(ii) approval of alternate electric service arrangements for non-smelting purposes to the Century Sebree smelter facility (the "Sebree Smelter"); and

(iii) a declaratory order confirming the right of Kenergy and Big Rivers to disconnect service to the Sebree Smelter in the absence of appropriate, approved, and effective contractual arrangements for electric service to the Sebree Smelter for the period beginning immediately after 11:00 p.m. CT on January 31, 2014.

The agreements for which the Joint Applicants seek approval in this case are nearly identical substantively to the agreements that were before the Commission in the Century Hawesville transaction case (P.S.C. Case No. 2013-00221). In that case, the Commission noted that the "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."[1] The Commission found "that the Century Transaction Agreements and the Alternate Service Agreements are reasonable and all of the agreements should be approved as filed."[2]

The Commission should approve the Century Sebree Transaction agreements for the same reasons and grant the Applicants' request for a declaratory order, as it did in the prior case. The Applicants join in Century's request that the Commission issue such an order by January 24, 2014. A decision by that date would allow the parties the necessary time required to exchange and execute the final transaction documents, and to make market power arrangements for the January 31, 2014 transition of the Century Sebree load off Big Rivers' system.

II. LEGAL STANDARD

Pursuant to the contracts in the Century Sebree Transaction described in the application, Kenergy will furnish retail electric service to the Sebree Smelter. The Commission has the authority to approve these special contracts under KRS 278.160 and 807 KAR 5:011(13).[3] When considering whether to approve special arrangements, the Commission determines whether the rates and conditions of service contained in those agreements are "reasonable"; if so, it will approve the agreements.[4]

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[1] *In the Matter of Kenergy Corp. and Big Rivers Electric Corp. for Approval of Contracts and for a Declaratory Order*, P.S.C. Case No. 2013-00221 ("2013-00221 Order"), at *26 (Aug. 14, 2013).
[2] *Id.*
[3] *See generally* 2013-00221 Order (approving virtually identical agreements).
[4] *See, e.g.*, 2013-00221 Order, p. 26 (finding that the agreements "are reasonable" and "should be approved" as filed); *In the Matter of the Applications of Big Rivers Elec. Corp. for: (1) Approval of Wholesale Tariff Additions for Big Rivers Elec. Corp., (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 Ky. Energy Corp., and LG&E Marketing, Inc. for Approval of Transactions*, Order, P.S.C. Case No. 2007-00455 *67 (Mar 6, 2009) (same).

III. FACTUAL BACKGROUND

Alcan Primary Products Corporation ("Alcan"), Century Sebree's predecessor in interest, notified Kenergy on January 31, 2013, that it was terminating its retail electric service agreement, dated as of July 1, 2009 (the "2009 Retail Agreement"), effective January 31, 2014.[5]

On June 1, 2013, Century acquired the Sebree assets, including the 2009 Retail Agreement, from Alcan.[6] After the Century Hawesville transaction closed on August 19, 2013, Century "asked Kenergy and Big Rivers to propose a similar arrangement for Century Sebree."[7] In an effort to establish an altemative to Century Sebree terminating smelter operations, Century, Kenergy and Big Rivers then started negotiating a series of new power supply arrangements that are "nearly identical substantively to the Century Hawesville Transaction approved by the Commission."[8]

The minor differences between the transaction agreements reflect the differences in the loads needed to serve each smelter and the way that each smelter is physically connected to Big Rivers' transmission network.[9] For example, it is not initially contemplated in this transaction that a separate System Support Resource ("SSR") agreement will be necessary, as it was in the Hawesville transaction.[10] Likewise, the differences in the Protective Relays Agreement in the two transactions reflect that, at the time the documents were drafted, there was uncertainty about whether Century wanted such relays at the Sebree Smelter. Also, this transaction includes a Load Curtailment Agreement, in which the parties formally recognize Big Rivers' right to curtail load to the Sebree Smelter if such action is required for the reliability of the interstate power

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[5] *See* Letter from J. Miller to G. Starheim, Jan. 31, 2013, Application Exhibit 1.
[6] Direct Testimony of Robert W. Berry ("Berry Direct Testimony"), p. 8:12-14 (Nov. 20, 2013).
[7] *Id.* at p. 8:22-23.
[8] *Id.* at p. 9:9-10.
[9] *See* Berry Direct Testimony, at pp. 37:13-39:3; Big Rivers' Response to Attorney General's Initial Data Request 1-5; Berry Hearing Testimony, 1/6/14 Tr., at p. 93:1-4.
[10] Berry Direct Testimony, at p. 37:17-19.

system, including Big Rivers' transmission system. At the time the Hawesville transaction closed, the parties did not yet know that this agreement would be necessary because discussions with MISO relating to reliability matters occurred following that closing.[11] Finally, Kenergy determined that no additional modifications to an existing tariff on file with the Commission were necessary because the tariff expressly related solely to the 2009 agreements.[12]

Following the closing of the Hawesville transaction, the parties finalized the SSR Agreement and other reliability matters with MISO. Promptly thereafter, the parties finalized the Century Sebree Transaction documents and filed them with the Commission on November 20, 2013. Kenergy, Big Rivers, and Century have committed to sign the agreements as filed, if approved.[13]

The Application in this proceeding details all agreements submitted, but only three agreements directly related to electric service for Century's smelting operations require Commission approval:

(i) the Electric Service Agreement, which is described in detail in paragraph 10(a) of the Application, and attached to the Application as Exhibit 5;

(ii) the Arrangement and Procurement Agreement, which is described in detail in paragraph 10(b) of the Application, and attached to the Application as Exhibit 7; and

(iii) the Direct Agreement, which is described in detail in paragraph 10(c) of the Application, and attached to the Application as Exhibit 9.

These three agreements set forth the parties' principal service and payment obligations in the Sebree Transaction. Additional financial and operational protections for Kenergy's and Big

[11] *Id.* at p. 37:23-38:6; Berry Hearing Testimony, 1/6/14 Tr., at p. 64:1-3. For reasons explained below, the Commission lacks jurisdiction over this Agreement.
[12] Applicants' Response to AG 1-5, at pp. 3:26-4:2.
[13] Berry Direct Testimony, at p. 43:15-16 (Sebree Transaction was approved by Big Rivers' Board of Directors); Direct Testimony of Gregory J. Starheim ("Starheim Direct Testimony"), p. 20:1-2 (Sebree Transaction was approved by Kenergy's Board of Directors) (Nov. 20, 2013); Hearing Testimony of Michael Early ("Early Hearing Testimony"), 1/6/14 Tr., at p. 180:2-17.

Rivers' customers are set forth in the supporting agreements submitted with the Application, including revised drafts of those agreements submitted on December 30, 2103.[14]

In addition, Kenergy and Big Rivers seek the Commission's approval of the Alternate Service Agreement and the Wholesale Letter Agreement (the "Alternate Service Agreements"), which are described in paragraphs 12 and 13 of the Application, and attached to the Application as Exhibits 19 and 20, respectively.

IV. LEGAL ANALYSIS

A. The Century Sebree Transaction Is Reasonable and Should Be Approved.

1. The Century Sebree Transaction Is Nearly Identieal Substantively to the Hawesville Transaction the Commission Approved in Case No. 2013-00221.

Just four months ago, this Commission approved an arrangement in the Century Hawesville transaction case (No. 2013-00221) that was nearly identical substantively to the Century Sebree Transaction. There, as here, the Applicants sought approval of transaction documents negotiated after the aluminum smelter gave notice that it was terminating an existing electric service agreement and planned to cease smelting operations at the relevant facility.[15] In both instances, the Applicants negotiated to avert the anticipated adverse economic impacts for Western Kentucky if the smelter closed and laid off its work force.[16] As the Commission recognized in the prior case, the negotiated arrangement "achieves the delicate balance" of "keeping the . . . smelter viable while not subjecting the remaining customers to any additional incremental costs . . .."[17]

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[14] *See* Application, Exhibits 11, 13, 15, 17, 19-20. These agreements are described in more detail in Berry Direct Testimony pp. 17:1-20:19 and Starheim Direct Testimony p. 13:22-14:19.
[15] *Compare* 2013-00221 Order, at *26, *with* Starheim Direct Testimony, at pp. 4:26-5:6.
[16] *Compare* 2013-00221 Order, at *26, *with* Starheim Direct Testimony, at pp. 4:26-5:6.
[17] 2013-00221 Order, at *23.

Here, as in the Century Hawesville transaction, the proposed transaction documents and Alternate Service Agreements "are reasonable and : . . should be approved as filed."[18] No party in this case has objected to any term contained in any of the proposed transaction documents.

Like the Century Hawesville transaction, the Century Sebree Transaction is fully consistent with the Kentucky regulatory framework for provision of retail electric service and with the parties' prior approved retail electric service arrangements. Kenergy remains the retail electric supplier to the Sebree Smelter[19] and will continue to have an obligation to provide "adequate service," including "not only the distribution of electric energy to [Kenergy's] customers, but also the selection and acquisition of an adequate source of supply to meet the foreseeable needs of [Kenergy's] customers."[20] Accordingly, Kenergy must enter into an arrangement that enables it to provide adequate service to the Sebree Smelter but also ensures that Kenergy is properly compensated, protected from risks associated with service to this load, and is not forced to extend services over and above those required by law. The Century Sebree Transaction accomplishes these goals.

As the Commission noted in the Hawesville transaction case, the transaction documents establish familiar electric service arrangements that are based on past contracts among the

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[18] *Id.* at *26.

[19] *See* KRS 278.010(4) (defining "retail electric supplier"); KRS 278.010(5) (defining "certified territory"); KRS 278.010(8) (defining "electric-consuming facility"); KRS 278.016-.018.

[20] *In the Matter of the Application of Big Rivers Elec. Corp., LG&E, Western Ky. Energy Corp., Western Ky. Leasing Corp., and LG&E Station Two, Inc. for Approval of Wholesale Rate Adjustment for Big Rivers Elec. Corp. and for Approval of Transaction*, Order, P.S.C. Case No. 97-204, p. 20 (April 30, 1998) (the "97-204 Order") (specifically discussing the service obligations of "Big Rivers' distribution cooperatives") (attached to the Rebuttal Testimony of Gregory J. Starheim as Exhibit GJS Rebuttal 1 in Case No. 2013-00221). Kenergy has a similar obligation to the United States Department of Agriculture's Rural Utilities Service ("RUS"), its principal creditor. *See* 7 C.F.R. § 1710.103(a) ("[b]orrowers shall make a diligent effort to extend electric service to all unserved persons within their service area who: (1) Desire electric service; and (2) Meet all reasonable requirements established by the borrower as a condition of service.").

parties.[21] Century contracts with Kenergy for retail electric service, including transmission, pursuant to the Electric Service Agreement. Kenergy, in turn, contracts with Big Rivers, as the initial Market Participant under the Arrangement Agreement, for the wholesale power supply service, again including transmission, that is necessary to support Kenergy's retail service obligations under the Arrangement Agreement.[22] The Direct Agreement between Big Rivers and Century essentially serves as an indemnification agreement to protect Big Rivers and its members from costs and risk exposures created by the Electric Service Agreement between Kenergy and Century. The payments among the parties follow the structure of the contractual arrangements and are consistent with the mechanics for payment in the prior 1998 and 2009 agreements among the parties.

Kenergy's right to wholesale service from Big Rivers to support retail service to the Sebree Smelter, and Big Rivers' obligation to provide that service, were carved out of the existing all-requirements contract with Big Rivers in 1998.[23] Thereafter, Kenergy was free to obtain wholesale power for the Sebree smelter from the wholesale market, and it did so as reflected in subsequent contracts with the successive owners of the Sebree Smelter.[24] As the Commission previously held, these longstanding arrangements do not constitute "retail wheeling" and are not inconsistent with KRS Chapter 278.[25] Thus, if the Attorney General renews his argument that the Sebree Transaction constitutes improper "retail wheeling," it should be rejected again for the reasons stated in the 2013-00221 Order and the Applicants' brief in that case.

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[21] *See* 2013-00221 Order, at *17.
[22] Starheim Direct Testimony at p. 9:1-22; Berry Direct Testimony at pp. 9:22-10:7.
[23] *See* Exhibit RWB Rebuttal – 2 to the Rebuttal Testimony of Robert W. Berry ("Berry Rebuttal Testimony" (Dec. 30, 2013)).
[24] *See* Exhibits RWB Rebuttal – 3, 4 and 5 to Berry Rebuttal Testimony.
[25] 2013-00221 Order, at *17.

2. Kenergy and Big Rivers Reasonably Determined They Should Continue to Treat the Smelters as a Unique Customer Class.

Prior agreements approved by this Commission have long treated the Sebree and Hawesville smelters as a unique class of two customers. Because of their size, "[t]hese two retail customers are not and cannot be treated like any other customer or customer class."[26] Between them, the smelters constitute "approximately 60% of Big Rivers' Member load," or approximately [850] MW.[27] "The next largest load on the system is only 38 MW."[28] "[T]he impact that the large smelter load has had on Big Rivers, its Members, and the Commonwealth of Kentucky is enormous and constant."[29]

In recognition of their unique size and impact on Big Rivers' system, this Commission has long acknowledged that the smelters should be treated as a unique customer class. It has therefore approved a series of arrangements that provide electric service to the smelters under similar conditions, including the 1998 retail agreements and the 2009 retail agreements.[30] In light of the Commission's prior approval of the Century Hawesville transaction, the Century Sebree Transaction documents represent a reasonable way for Kenergy, Big Rivers and the Commission to continue the longstanding practice of treating these unique customers alike.

3. The Century Sebree Transaction benefits the members of Kenergy and Big Rivers, as well as Western Kentucky.

As the Commission recognized in the Hawesville transaction, by allowing Century an opportunity to continue operating the Sebree Smelter, the proposed transaction "will provide significant benefits to the western Kentucky economy."[31] Without a new electric service

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[26] *Id.* at p. 9:17-18.
[27] Berry Rebuttal Testimony, at p. 9:10-11.
[28] *Id.* at p.9:11-12.
[29] *Id.* at p.9:15-17.
[30] *Id.* at pp. 9:22-11:20.
[31] 2013-00221 Order, at *26.

arrangement in place, the Sebree Smelter will shut down upon the effective termination of the 2009 Retail Agreement, causing significant economic harm to Kenergy's and Big Rivers' members.[32] Thus, Kenergy and Big Rivers concluded that the economic benefits of pursuing the Century Sebree Transaction are superior to simply standing by and allowing Century to terminate its smelting operations.

Nevertheless, throughout the negotiations of the Century Sebree Transaction, both Kenergy and Big Rivers recognized that the economic benefits of the Sebree Smelter's operations could not come at the expense of their members. Both were adamant that their members have no more exposure to risks and costs with the Century Transaction than would be experienced if Century ceased smelting operations.[33] The Century Transaction achieves that goal[34] and is anticipated to produce approximately $6,000,000 annually in transmission revenues for Big Rivers.[35] Consequently, its approval serves the best interests of Kenergy's and Big Rivers' members and the best interests of the Commonwealth.

B. The Transaction Documents Should be Approved Without Material Changes.

Kenergy and Big Rivers ask the Commission to approve the Transaction Documents without material change, as it did in the case Century Hawesville transaction case. There, the Commission recognized that "[t]he 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 . . . smelter viable while not subjecting the remaining customers to any additional incremental costs . . ."[36] The Commission thus rejected any changes to the documents, including Kentucky Industrial Utility Customers, Inc.'s ("KIUC") "recommendation

[32] Berry Direct Testimony at p. 44:16-20; Starheim Direct Testimony at pp. 15:8-16.
[33] Berry Direct Testimony at p. 46:21-23; Starheim Direct Testimony at p. 11:1-4.
[34] Berry Direct Testimony at pp. 43:11-13.
[35] 1/6/14 Tr., at p. 17:18-21.
[36] 2013-00221 Order, at *23.

to conditionally approve the Century Transaction Agreements subject to a future market access charge" for Century, finding that recommendation "not reasonable."[37]

Principles of *res judicata* prevent KIUC from relitigating that same issue in this case, as it attempts to do.[38] Kentucky courts have long recognized that "[d]ecisions of administrative agencies acting in a judicial capacity are entitled to the same *res judicata* effect as judgments of a court."[39] Here, there is little question that this Commission was acting in a "judicial capacity" when it approved the Century Hawesville transaction; it "hear[d] evidence, [gave] the parties an opportunity to brief and argue their versions of the facts, and the parties [were] given an opportunity to seek court review of any adverse findings."[40] Nor is there any serious question about whether the elements of issue preclusion are met. The market access charge issue "was actually litigated, actually decided, and necessary to the judgment in a prior proceeding."[41] KIUC is therefore estopped from attempting to relitigate the issue of whether a market access fee is necessary for the Century Sebree Transaction to comply with KRS 278.030 and KRS 278.170.

Kenergy and Big Rivers did not consider the profitability of either Century Sebree or Alcan as a precondition to negotiating the Century Sebree Transaction, or as a factor distinguishing between the Century Sebree Transaction and the Century Hawesville transaction, because in either case, it would not have made a difference. Alcan terminated the 2009 Retail Service Agreement based upon its intent to cease smelting operations at Sebree. Century Sebree assumed the 2009 Retail Service Agreement when it acquired the Alcan Sebree smelter assets.

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[37] *Id.*
[38] *See* Direct Testimony of Lane Kollen ("Kollen Direct Testimony"), pp. 16:15-17, 34:6-10.
[39] *Ky. Bar Ass'n v. Harris*, 269 S.W.3d 414, 418 (Ky. 2008); *see also*, *Godbey v. University Hosp. of the Albert B. Chandler Med. Ctr.*, 975 S.W.2d 104, 105 (Ky. App. 1998).
[40] *Herrera v. Churchill McGee*, 680 F.3d 539, 547 (6th Cir. 2012). KIUC did appeal the Commission's ruling, but voluntarily dismissed its appeal with prejudice.
[41] *Herrera*, 680 F.3d at 550; *see also Moore v. Cabinet for Human Resources*, 954 S.W.2d 317, 320 (Ky. 1997) (applying issue preclusion to bar relitigation of previously adjudicated claims).

Alcan made the irrevocable election to terminate the power supply to its Sebree smelter and cease smelting operations, notwithstanding KIUC's position about the profitability of the Sebree Smelter.

At the hearing, Vice Chairman Gardner asked whether the Applicants would object if the Commission imposed the same quarterly reporting requirements as in the Century Hawesville transaction case. Kenergy and Big Rivers do not object to providing those same periodic reports,[42] which were intended to allow the "Commission and the public to see the financial impacts of the Century Transaction Agreements on" Kenergy, Big Rivers, their respective non-smelter members."[43] KIUC now seeks to add to the report information on both smelters' future profitability[44] and information from which the Century Hawesville effective rate for electric service can be calculated.[45] First, neither Kenergy nor Big Rivers have access to information on the smelter's future profitability. Second, neither the smelters' future profitability nor Century Hawesville's effective power rate is related to the reasons for which the reporting was originally directed by the Commission, and it should not be required to satisfy the commercial curiosity and future litigation strategies of KIUC's members.

C. The Commission Should Approve the Alternate Service Agreement and Enter a Declaratory Order Authorizing the Disconnection of Service to the Hawesville Smelter.

As in the Hawesville transaction, the Altemate Service Agreement and the related Wholesale Letter Agreement are intended to be available for security, lighting, maintenance, safety, and other non-smelting purposes[46] during any periods in which the Sebree Smelter is not

[42] *See* Berry Hearing Testimony, 1/6/14 Tr., at p. 80:13.
[43] *See* 2013-00221 Order, at *19.
[44] 1/6/14 Tr., at p. 143:11-144:2.
[45] 1/6/14 Tr., at p. 153:9-25.
[46] *See* 2013-00221 Order, at * 26; Starheim Direct Testimony at p. 21:17-22:15.

operating.[47] Because there can be no assurance that the Electric Service Agreement will be in effect on January 31, 2014—and even if it is in effect, it can be terminated thereafter on only 60-days' notice—approval of the Alternate Service Agreement and the Wholesale Letter Agreement are necessary to cover these contingencies.[48]

If the Commission does not approve the Century Sebree Transaction to be in effect by January 31, 2014, if the U.S.D.A. Rural Utilities Service ("RUS") disapproves or delays review of the contracts as filed, if Century Sebree refuses to execute the contracts as filed, or if Century Sebree terminates the new Electric Service Agreement in the future without Alternate Service Agreements in place, Kenergy will have no service arrangement in place and thus no legal authority to continue providing retail electric service to the Sebree Smelter.[49] That service must be physically disconnected and terminated pursuant to the terms of the 2009 Retail Agreement and 2009 Wholesale Agreement, as well as 807 KAR 5:006 Section 15.[50]

Although Kenergy and Big Rivers expect to enter into the Transaction Documents if they are approved by the Commission, they seek the declaratory order to prudently address all possible scenarios with which they may have to contend. The Commission should enter the requested declaratory order, as it did in the Hawesville transaction case.[51]

D. The Commission Should Not Require Withdrawal or Modification of the Smelter Tariff at this Time.

Commission Staff questioned Mr. Starheim during the hearing about what Kenergy tariff changes may be required as a result of the termination of both smelter contracts.[52] Kenergy's smelter tariff (Rate Schedule 33, Second Revised Sheet No. 33) refers only to the 2009 smelter

[47] Starheim Direct Testimony at p. 23:1-19.
[48] *See* 2013-00221 Order, at * 26 (approving the Alternate Service Agreements).
[49] Berry Direct Testimony at p. 36:20-23.
[50] *See* Application p. 12.
[51] *See* 2013-00221 Order, at *23-24, 27.
[52] Tr. at 110-113.

agreements. However, certain rights and obligations of the parties under the 2009 smelter agreements, such as settlement of payment obligations, expressly survive the contract terminations. As a result, withdrawal of, or revision to, the smelter tariff at this time could result in abrogation of any recourse against Century for noncompliance with those portions of the parties' obligations that survive termination of the smelter agreements. Consequently, the Commission should not require withdrawal or modification of the smelter tariff at this time.

E. The Commission Should Reject Century's Request to Make Findings Regarding Live Line Maintenance.

As the Commission noted in the Hawesville transaction case, Century's request that Big Rivers be required to perform "live line maintenance" on its electric service lines is an issue "of economics, not reliability."[53] Thus, "[t]o 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."[54] That observation is even more appropriate in this case because when these agreements were negotiated the Commission already had "decline[d] Century Kentucky's request to require Big Rivers, over its objections, to perform live line maintenance on three of its transmission lines."[55] Yet, Century did not raise that issue even once in these negotiations.[56]

Nevertheless, Century asks the Commission to find, as it supposedly "did in Case No. 2013-00221, that 'live line' transmission maintenance is consistent with good and reasonable utility practice."[57] That is an incomplete, and thus inaccurate, characterization of the

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[53] 2013-00221 Order, at *14.
[54] *Id.* at *14-15.
[55] *Id.* at *15.
[56] *See* Berry Rebuttal Testimony, at p. 17:22-25 ("Not one time during the negotiations of the Century Sebree agreements did Century Sebree ever request or suggest the need for 'live line' maintenance as a condition to execution of the Century Sebree Transaction documents . . .").
[57] Direct Testimony of Michael Early ("Early Direct Testimony"), at p. 6:2-4.

Commission's holding; the 2013-00221 Order found that *both* "live line" and de-energized maintenance are consistent with good utility practice, and that this issue is one the parties "must resolve among themselves."[58]

The only logical explanation for Century raising the issue again is that Century intends to use such a finding by the Commission in another forum—such as the Federal Energy Regulatory Commission ("FERC"), or the state legislature—to argue that Big Rivers should be required to perform live line maintenance over its objections based on a mischaracterization of the Commission's order.[59] This Commission should decline Century's request and prevent the potential for mischaracterization. And if the Commission does address the live line maintenance issue, it should reaffirm that Big Rivers cannot be ordered, over its objections, to perform live line maintenance on its transmission lines.[60]

F. The Commission Lacks Jurisdiction Over the Load Curtailment Agreement or Any Dispute Arising Under It.

Like the other transaction documents, the Load Curtailment Agreement was premised, in part, on the concept that Kenergy's and Big Rivers' members should be no worse off under the Sebree Transaction than if the smelter had closed. The agreement "protect[s] Big Rivers' Members from any load curtailment required as a result of the Century Sebree smelter continuing to operate" in two key ways.[61] First, it formally acknowledges Big Rivers' right to curtail

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[58] *Id.* at 15.

[59] Indeed, Century recently filed a document with FERC protesting MISO's request for approval of the System Support Resources Agreement for Coleman Station. *See* Berry Rebuttal Testimony, at p. 19:3-12. In that document, Century inaccurately alleged that Big Rivers had performed live line maintenance for other customers but refused to do so for Century. In fact, the "hot line" work Century cited to FERC was far different than the "live line" maintenance Century demands; it involved only routine tasks such as such as "repairing woodpecker holes, treating poles for insects or performing vegetation management." *Id.*, at p. 20:7-10.

[60] 2013-00221 Order, at *15.

[61] Berry Direct Testimony, at p.38:2-3. Under its tariff, which is subject to FERC not Commission review, MISO will direct its members – including Big Rivers - to curtail the transactions that effectively

Century Sebree in order to maintain the reliability of the bulk power system (a right that Century concedes exists even in the absence of this agreement[62]). Second, it indemnifies Kenergy and Big Rivers for any resulting costs of a curtailment.[63]

There was no equivalent agreement in the Hawesville transaction. When that transaction was finalized, the parties did not yet know that MISO would require a Load Curtailment Agreement if the Hawesville SSR agreement were to terminate.[64] Once the Applicants learned that MISO would require such an agreement, Kenergy and Big Rivers insisted that the parties enter into a Load Curtailment Agreement for the Sebree Smelter. This additional agreement should not alter the Commission's acceptance of the overall transaction, however.

The Load Curtailment Agreement arises out of Kenergy's and Big Rivers' duties to comply with federal requirements to ensure the reliability of the interstate bulk power system. In Section 202(a) of the Federal Power Act, Congress directed FERC "to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy."[65] These regional transmission organizations ("RTOs") are responsible for the reliable operation and planning of the transmission systems owned by their members. Big Rivers is a member of MISO, its RTO. Under federal law, Big Rivers is obligated to comply with directives from MISO, notwithstanding any state law to the contrary.

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relieve a transmission constraint. *See* MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff, Section 13.6

[62] Early Hearing Testimony, 1/6/14 Tr., at p. 194:3-6.

[63] Berry Rebuttal Testimony, at p. 13:10-12.

[64] Berry Direct Testimony, at p. 37:23-38:6; Berry Hearing Testimony, 1/6/14 Tr., at p. 64:1-3.

[65] 16 U.S.C. § 824a(a) (2006). The division into regional districts was intended to "assur[e] an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources." *Id.*

Moreover, under Section 215 of the Federal Power Act, Congress authorized FERC to certify an electric reliability organization ("ERO") to establish and enforce reliability standards for the bulk power system in the continental United States.[66] FERC, in turn, designated the North American Electric Reliability Corporation ("NERC") as the electric reliability organization responsible for developing and enforcing mandatory reliability standards that are approved by FERC.[67] NERC has delegated to SERC Reliability Corporation ("SERC") the authority to develop regional reliability standards and to enforce existing NERC reliability standards within most of Kentucky, including the service territory of Big Rivers' members.[68] The rules and regulations developed under Section 215 apply to *all* users, owners, and operators of the bulk power system, including cooperatives receiving funding through the U.S.D.A. Rural Utilities Service programs, such as Big Rivers.[69]

Big Rivers has registered with NERC as a balancing authority, distribution provider, generator owner, generator operator, load-serving entity, purchasing-selling entity, transmission owner, transmission operator, and transmission planner.[70] Thus, Big Rivers must comply with all mandatory reliability standards that apply to each of these registered entity designations.

As a NERC-registered balancing authority, Big Rivers has an obligation to control load and generation within its balancing authority area.[71] Big Rivers also must "have the

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[66] *See* 16 U.S.C. § 824o (2006).
[67] *See N. Am. Elec. Reliability Corp.*, 116 FERC ¶ 61,062, *order on reh'g and compliance*, 117 FERC ¶ 61,126 (2006), *aff'd sub nom. Alcoa Inc. v. FERC*, 564 F.3d 1342 (D.C. Cir. 2009).
[68] *See N. Am. Elec. Reliability Council, et al.*, 119 FERC ¶ 61,060 (2007) (accepting regional entity delegation agreements).
[69] *See* 18 C.F.R. § 39.2(a) (2013) (stating that all users, owners, and operators of the bulk power system, including but not limited to entities described in Section 201(f) of the FPA, which includes Big Rivers, are subject to FERC jurisdiction for the purposes of approving reliability standards under Section 215 of the FPA and enforcing compliance with Section 215 of the FPA).
[70] *See* NERC, Active Compliance Registry (last updated Nov. 27, 2013) *available at* http://www.nerc.com/pa/comp/Pages/Registration-and-Certification.aspx.
[71] *See* NERC, Reliability Functional Model, Version 5, at 32 (May 2010) ("NERC Functional Model") (describing balancing functions) *available at*

responsibility and clear decision-making authority to take whatever actions are needed to ensure the reliability of its respective area and shall exercise specific authority to alleviate capacity and energy emergencies."[72] In addition, Big Rivers must comply with any directive from MISO, as the NERC-registered reliability coordinator, to curtail firm load.[73] The NERC reliability standards also require Big Rivers to develop, maintain, and implement a set of plans to mitigate operating emergencies, including a set of plans for load shedding (*i.e.*, a load curtailment plan).[74]

The Load Curtailment Agreement is therefore necessary to comply with mandatory federal reliability standards.[75] Consequently, the Commission lacks jurisdiction to review the Agreement at all. Congress enacted Section 215 of the Federal Power Act to ensure that only a single, FERC-approved entity would be responsible for "establishing and enforcing [reliability] standards."[76] Based, in part, on MISO's recommendation that a Load Curtailment Agreement would be necessary for the Hawesville transaction in the absence of a System Support Resource agreement, Big Rivers (in its capacity as a NERC-registered balancing authority) determined that this agreement is necessary. The Commission cannot contradict that judgment; under Section 215, any state action "inconsistent with any reliability standard" is *expressly* preempted.[77]

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http://www.nerc.com/pa/Stand/Functional%20Model%20Archive%201/Functional_Model_V5_Final_2009Dec1.pdf.

[72] NERC Reliability Standard EOP-002-3.1, Requirement R1; NERC Reliability Standard TOP-001-1a, Requirement R1.

[73] *See* NERC Reliability Standard TOP-001-1a, Requirement R3

[74] NERC Reliability Standard EOP-001-2.1b, Requirement R2.3; NERC Reliability Standard TOP-004-2, Requirement R6.

[75] *See* Application Exhibit 23, § 3.2.

[76] *Alcoa Inc. v. FERC*, 564 F.3d 1342, 1344 (D.C. Cir. 2009) (describing history of § 215).

[77] 16 U.S.C. § 824o(i)(3) (2006). This preemption provision appears within Section 215 as an exception to a savings clause that generally preserves state power to regulate the safety, adequacy, and reliability of electric service within a state. FERC has repeatedly held that this savings clause "is not a grant of new authority to the states, but merely preserves any authority states may have under state law 'to take action to ensure the safety, adequacy, and reliability of electric service within that State, so long as such action is not inconsistent with any reliability standard . . . .'" *Planning Resource Adequacy Assessment Reliability Standard*, 76 Fed. Reg. 16250, 16254 (Mar. 23, 2011) (citing FERC precedent); *cf. New England Power Co. v. New Hampshire*, 455 U.S. 331, 341 (1982) (savings clause of § 201 of the FPA "did more than

Moreover, even if the Commission had jurisdiction to review the Load Curtailment Agreement itself, it plainly would lack jurisdiction to adjudicate any disputes arising under that agreement. The Agreement only applies when there is a "Curtailment Event," which requires a determination by MISO (or another RTO or ISO), or by Big Rivers itself "in accordance with all Applicable Laws of a FERC-approved ERO, SERC or any applicable RTO, ISO or other Governmental Authority," that a curtailment is necessary.[78] Hence, any dispute that Century could conceivably raise under that Load Curtailment Agreement would be inextricably intertwined with the enforcement of federal reliability standards and therefore solely within FERC's jurisdiction.

In the event the Commission did take any action that may be inconsistent with federal reliability standards—such as modifying or rejecting the Load Curtailment Agreement, or making findings with respect to whether Big Rivers' or Kenergy's conduct comported with those reliability standards in any dispute arising under that agreement—that Commission action, in turn, would be reviewable in an administrative process created by FERC.[79] FERC also has the authority to stay the effectiveness of a state's action, pending issuance of a FERC order on the merits.[80]

As the foregoing makes clear, the setting of reliability standards is an exclusively federal prerogative. Thus, the Commission is forbidden from taking *any* action that causes a user, owner, or operator of the bulk power system, including MISO or Big Rivers, to act in a manner

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leave standing whatever valid state laws then existed relating to the exportation of hydroelectric energy"). Thus, Section 215's savings clause does not give the Commission new authority to adjudicate disputes arising under federal reliability standards.

[78] Application Exhibit 23, § 3.2.

[79] *See* Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 808; *see also* 18 C.F.R. § 39.12(b) (stating that "[w]here a state takes action to ensure the safety, adequacy, or reliability of electricity service, the [ERO], a Regional Entity, or other affected person may apply to [FERC] for a determination of consistency of the state action with a Reliability Standard.").

[80] *Id.* § 39.13.

that is inconsistent with a mandatory NERC or SERC reliability standard. Congress has expressly forbidden state actions inconsistent with any reliability standard and, as a result, the Commission lacks jurisdiction to consider the Load Curtailment Agreement or any dispute between the parties that arises under it. However, in the event the Commission does conclude it has jurisdiction to review the Load Curtailment Agreement, it should approve it as reasonable. As described above, that agreement protects Kenergy, Big Rivers, and their members by specifying that if a curtailment is needed, the Sebree Smelter will be curtailed first and Kenergy and Big Rivers will be held harmless. Given the sheer size of the Sebree load, curtailing it first will often be the fastest and most effective way to address the problem, and will involve the least disruption to Kenergy's and Big Rivers' members.[81]

V. CONCLUSION

For all of the foregoing reasons, the Commission should approve the Electric Service Agreement, Direct Agreement, Arrangement Agreement, Alternate Service Agreement, and Wholesale Letter Agreement as filed, and it should issue the requested declaratory order.

[81] Berry Hearing Testimony, 1/6/14 Tr., at p. 29:1-7.

On this the 14th day of January, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and accurate courtesy copy of the foregoing Post-Hearing Brief has been provided by electronic mail and first class mail, postage prepaid, to the persons listed on the attached service list, on the date this Post-Hearing Brief is filed with the Kentucky Public Service Commission.

On this the 14th day of January, 2014,

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