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February 27, 2014

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PUBLIC SERVICE COMMISSION

VIA FEDERAL EXPRESS
Hon. Jeff Derouen
Executive Director
Kentucky Public Service Commission
211 Sower Blvd.
P. O. Box 615
Frankfort, KY 40601

Re: ***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***

Dear Mr. Derouen:

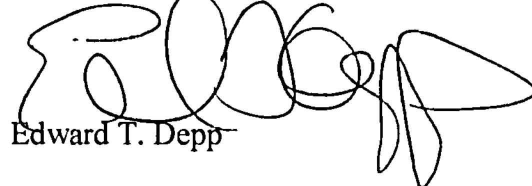
With this letter I am enclosing one (1) original and ten (10) copies of Big Rivers Electric Corporation's Response to the Petition for Rehearing of Kentucky Industrial Utility Customers, Inc. in regard to the above matter.

Please return a file stamped copy in the self addressed, postage paid envelope provided.

Thank you, and if you have any questions, please call me.

Sincerely,

DINSMORE & SHOHL LLP



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ETD/kwi

Enclosure
cc: Attached Service List

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY

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FEB 28 2014
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

RESPONSE OF BIG RIVERS ELECTRIC CORPORATION TO THE PETITION FOR REHEARING OF KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC.

Big Rivers Electric Corporation ("Big Rivers"), by counsel, submits this response to the Petition for Rehearing ("Petition") filed by Kentucky Industrial Utility Customers, Inc. ("KIUC").

INTRODUCTION

The Petition seeks rehearing of four issues that KIUC contends were erroneously decided by the Commission in its January 30, 2014 order approving the proposed Sebree Transaction documents (the "January 30 Order"). Although styled as separate arguments, each of these assignments of error rests on a common complaint: that the Commission erred when it refused to amend the carefully negotiated Sebree Transaction documents to include a "market access" charge loosely proposed by KIUC. These arguments present no basis for rehearing because they do nothing more than rehash the same contentions that KIUC unsuccessfully advanced in its pre-filed testimony, at the January 6, 2014 hearing, and in its post-hearing brief. Moreover, these are recycled arguments that KIUC lost in the prior

Century Hawesville Transaction case (No. 2013-00221) and later conceded by dismissing with prejudice its appeal of the Hawesville Transaction case order.

KIUC's arguments also suffer from an additional flaw: they conflate the issues in this case with issues pending before the Commission in connection with Big Rivers' request for an adjustment of rates as a result of the Sebree Smelter's notice terminating its prior electric service agreement (No. 2013-00199). Those rate case arguments have no bearing on the validity of the Sebree Transaction documents at issue in the January 30 Order. Any financial impact of the Sebree Transaction may be addressed by the Commission in that separate, ongoing proceeding.

ARGUMENT

I. A Petition for Rehearing Must Do More Than Rehash Arguments Already Made and Rejected.

The KIUC petition should be denied because the issues raised have already been argued and adjudicated adversely to KIUC. A petition for rehearing under KRS 278.400 is not an opportunity to rehash arguments already made to, and rejected by, the Commission. The Commission has repeatedly held that a party cannot obtain rehearing through mere "recitation of the arguments that it presented in its complaint, in filed testimony, at oral argument and in its post-hearing briefs." *In the Matter of DPI Teleconnect, LLC v. BellSouth Telecomm., Inc.*, P.S.C. Case No. 2009-00127 (March 2, 2012).[1]

[1] See also *In the Matter of Complaint of Sprint Comms. Co. LP Against Brandenburg Tele. Co. and Request for Expedited Relief*, P.S.C. Case No. 2008-00135 (Dec. 15, 2009) (denying motion for rehearing after finding that the moving party's arguments for rehearing were "merely a rehash of its

Each of KIUC's assignments of error violates this fundamental principle by renewing KIUC's unsuccessful arguments advocating a market access charge. The first assignment of error alleges that the Commission's rejection of the KIUC market access charge was erroneous because there was insufficient evidence in the record to support the conclusion that the Sebree Smelter would likely close if forced to pay that charge. The second assignment of error similarly argues that the Commission failed to address whether the profitability of the Sebree Smelter was relevant to its review of the Sebree Transaction documents. The third assignment of error once again claims that the Commission erred by failing to require Century Sebree to show that it was unable to pay a market access charge. Finally, the fourth assignment of error yet again argues that the Commission erred in rejecting KIUC's request to "balance the interests" of all parties by imposing a market access charge on the Sebree Smelter before deciding separate issues in the pending rate case (No. 2013-00199).

Though couched in slightly different terms, each of these arguments boils down to an assertion that the Commission should have imposed the market access charge KIUC requested. That issue was fully addressed by the parties in the pre-

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old arguments"); *In the Matter of: Petition of Bellsouth Telecommunications, Inc. to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, P.S.C. Case No. 2004-00427 (Jan. 18, 2008) (denying motion for rehearing because it presented no "new evidence or arguments which were not previously considered by the Commission"); *In the Matter of Joint Application for Approval of the Indirect Transfer of Control Relating to the Merger of AT&T Inc. and Bellsouth Corp.*, P.S.C. Case No. 2006-00136 (Aug. 21, 2006) ("Intervenors have raised no evidence or arguments not previously considered by the Commission. Thus, the Commission will not grant rehearing"); *In the Matter of An Adjustment of The Rates of Delta Natural Gas Company, Inc.*, P.S.C. Case No. 99-176 (Feb. 7, 2000) ("As the AG merely reargues this point in his motion and has not presented any new evidence or argument on this point, we find no basis for rehearing and deny his motion on this issue.").

filed testimony, at the January 6, 2014 hearing, in the post-hearing data request responses, and in the post-hearing briefs. Indeed, the Commission recited the parties' positions on the proposed market access charge at length in the January 30 Order. *See* Jan. 30 Order, at pp. 13-16. It then left no doubt about its resolution of this dispute:

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

Jan. 30 Order, at pp. 17-18. KIUC wishes to reargue this point yet again, but that desire is insufficient to warrant reopening the case.

Moreover, KIUC's attempt to reargue the market access charge issue is barred by principles of *res judicata*. As this Commission noted in the portion of its January 30 Order just quoted, the market access charge question in this case was the very same question at issue in the Century Hawesville Transaction case (No. 2013-00221). *See* Jan. 30 Order, at pp. 17-18. Indeed, the Commission's January 30 Order expressly quotes from its resolution of that issue in Case No. 2013-00221, substituting only the names of the smelter and the relevant dates. *See id.* KIUC had a full and fair opportunity to pursue an appeal of the Commission's order

concluding that imposition of a market access charge for the other member of the historical smelter class (Century Hawesville) would be unreasonable, and although it initially did so, it later abandoned the appeal by voluntarily dismissing it with prejudice. KIUC therefore is estopped from relitigating that issue in this proceeding or in any appeal of the Commission's order in this case.[2]

II. KIUC's Assignments of Error Lack Merit in Any Event.

In addition to being duplicative of KIUC's previous arguments, each of the Petition's assignments of error lacks merit. Thus, rehearing should be denied even if these arguments had not been previously raised and rejected.

A. The Evidence in the Record Supports the Commission's Conclusion That Imposing a Market Access Fee Would Jeopardize the Sebree Transaction.

KIUC first argues that "[n]o party to this case provided sufficient evidence to demonstrate that levying additional fees on the Sebree smelter would likely result in the termination of the Transaction Agreements by Century." Petition, at p. 2. This assertion is belied by the record itself. Century's witness, Michael Early, could hardly have been clearer about Century's position on the market access charge during cross-examination by KIUC's counsel:

[2] *See Ky. Bar Ass'n v. Harris*, 269 S.W.3d 414, 418 (Ky. 2008) ("Decisions of administrative agencies acting in a judicial capacity are entitled to the same *res judicata* effect as judgments of a court."); *Godbey v. University Hosp. of the Albert B. Chandler Med. Ctr.*, 975 S.W.2d 104, 105 (Ky. App. 1998). Because the market access charge "was actually litigated, actually decided, and necessary to the judgment in a prior proceeding," *Herrera v. Churchill McGee*, 680 F.3d 539, 550 (6th Cir. 2012), KIUC is bound by the Commission's prior ruling on that question. *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).

Q: . . . . If the Commission said we'll give you everything you want except one dollar, would you close it?

A: Well, Mike, you know, we're not going to engage in this discussion because then it becomes, well, if it's $1, is it $2, is it $3, is it $4, and the answer is no, we're not going to engage in that. The point is we have to have a clean market-based rate. Otherwise, you start pushing us and adding more risk on there. We're not going there.

Q: Well, it's – that's why we're here. It's not your choice, is it?

A: No, but our – ultimately it is our choice. Ultimately we have the decision as to whether to close or not. And if we close, your customers are going to pay the full freight. I mean, part of the message here is the proposal you're asking for is not going to happen, whether it's approved or not. It's not going to happen because we won't accept it. So you're going to bear this cost. It's inevitable. It's not a choice, it's inevitable, and the question is solely do you want the $6 million of additional transmission revenue or not, do you want the additional employment and jobs that will keep rates lower for Kenergy in general?

Jan 6, 2014 Hearing Tr., at pp. 182:9-183:8 (emphasis added).

This Commission "serves as fact-finder and possesses sole discretion to judge the credibility of evidence," including the credibility of the witnesses that testify before it. *Citizens for Alternative Water Solutions v. Ky.*, PSC, 358 S.W.3d 488, 490 (Ky. App. 2011) (citing *Energy Regulatory Comm'n v. Ky. Power Co.*, 605 S.W.2d 46 (Ky. App. 1980). Thus, the Commission was entitled to credit the assertion by Century's witness and conclude that the imposition of a market access charge would jeopardize the Sebree Transaction.[3]

[3] As part of this first assignment of error, KIUC also complains it "did not have the right to conduct discovery on Century." Petition, p. 3. This is not true, as KIUC issued post-hearing data requests to Century Sebree that were answered before briefs were filed. In addition, KIUC's after-

B. The Commission Did Not Err By Failing to Impose a Market Access Charge on Century Based on the Sebree Smelter's Alleged Profitability.

KIUC's second contention is that the Commission erred by failing to consider the Sebree Smelter's alleged profitability when rejecting KIUC's request for a market access charge. This is simply another variation on KIUC's central theme: that the Commission erred in refusing a proposed market access charge.

KIUC's argument about the Smelter's alleged profitability ignores the important context surrounding the Sebree Transaction negotiations. Long before Big Rivers, Kenergy, and Century Sebree began negotiating the Sebree Transaction agreements, and more than four months before the Century Hawesville transaction document negotiations concluded,[4] Rio Tinto Alcan ("Alcan," Century's predecessor-in-interest) made the irrevocable election to terminate the power supply agreement for the Sebree Smelter and to cease smelting operations there on January 31, 2014. That decision was made notwithstanding KIUC's claims that the Sebree Smelter was profitable at the time. Therefore, the alternative to these agreements was not a hypothetical continuation or modification of the then-existing service arrangements and rates, but rather a shuttering of the smelter and the loss of all the jobs and economic activity it supported. Mr. Early's unequivocal testimony confirmed that Century's position was no different than Alcan's position.

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the-fact complaint rings hollow, as its post-hearing brief never argued that additional discovery was needed; it simply argued that the evidence Century produced in response to KIUC's on-the-record data request was "flawed and unreliable." KIUC Post-Hearing Br., p. 12, P.S.C. Case No. 2013-00413.

[4] *See* August 14, 2013 order in P.S.C. Case No. 2013-00221, p. 5.

Thus, and as the Applicants explained in their post-hearing brief, the profitability (or lack thereof) of the Sebree Smelter was not relevant to negotiating the Century Sebree Transaction, or the contractual right of Century Sebree to terminate its retail power contract and cease smelting operations. Rather, the Applicants negotiated in good faith with Century to structure an arrangement for the Sebree Smelter that mirrored the Century Transaction this Commission had already approved at the time these negotiations began.

C. The Commission Was Not Required to Order Century to Produce More Evidence Regarding the Smelter's Alleged Profitability.

KIUC next argues that the Commission erred by failing to require Century to offer proof that it was financially unable to pay the market access charge KIUC proposed. Once again, this argument is nothing more than an attempt to argue that the Commission erred in accepting Century Sebree's testimony that imposition of the market access charge would cause it to reject the Sebree Transaction arrangements and carry out its stated plan of shutting down the Sebree Smelter. That argument is flawed for all the reasons just discussed in Parts II.A and II.B of this Response.

KIUC's third argument suffers from an additional flaw as well: it inappropriately conflates the issues in this case with those in the pending rate case (2013-00199). KIUC argues that the reasonableness of the Sebree Transaction documents cannot be judged standing alone, but only after the Commission decides the pending rate case, including the question of whether the Coleman and Wilson generating units are "used and useful." As explained in Big Rivers' brief in the rate

case, those units are "used and useful" for many reasons, including: their importance to the reliability of Big Rivers' and MISO's transmission systems; the opportunity they offer Big Rivers for future growth and expansion by acquiring replacement load and increasing off-system sales; the flexibility they offer Big Rivers—and the entire state of Kentucky—to comply with proposed CO_2 regulations; and the insurance they offer Big Rivers and its other customers against unforeseen major outages.

But, that issue has no relevance to this case. Whether the imposition of a market access charge would threaten the viability of the Sebree Transaction is an entirely separate question from whether Big Rivers' application for an adjustment of rates should be granted in full. Indeed, this Commission approved the Century Hawesville Transaction documents, which were virtually identical substantively to the Sebree Transaction Documents, without first resolving similar questions presented in both rate cases arising out of the Smelter retail contract terminations. Moreover, in denying the Sierra Club's motion to intervene in that Hawesville Transaction case, the Commission noted: "To the extent that Movants desire to address the impacts of the Century Kentucky contract on the rates of all other ratepayers and on generating resources, the proper venue for those issues is Big Rivers' pending rate case where those issues were raised." P.S.C. Case No. 2013-00221, Order Denying Intervention at *6 (July 19, 2013) (emphasis added).

In fact, KIUC's attempt to tie the issues in this case to the distinct issues in the rate case suggests that its real motivation in filing this petition was not to

obtain rehearing on an issue that it lost—twice—but instead to make additional arguments to the Commission about issues in the pending rate case after the record in that case has closed.

D. The Commission Did Not Err By Deciding the Sebree Transaction Case Prior to the Sebree Rate Case.

KIUC's fourth assignment of error is yet another argument that is nominally based on the Sebree Smelter's profitability, but in reality is once again aimed at the rate case. KIUC argues that the Commission's order in this case might not strike the appropriate balance of ratepayers' interests if its arguments in the rate case (No. 2013-00199) are rejected. Specifically, KIUC argues that if the Commission rejects its suggestion in the rate case that the Sebree and Hawesville Smelters should be required to pay a portion of the fixed costs associated with the Wilson and Coleman generating units, then its refusal to consider the Smelter's alleged profitability here would have violated the Commission's policy of attempting to balance the interests of all ratepayers.

Simply put, there was no obligation that the Commission decide the rate case first, or that it make its decision in this case contingent on the outcome of that rate case. As in the Hawesville Transaction case (No. 2013-00221), the question of whether the Sebree Transaction documents are reasonable can and should be decided on its own terms.

Finally, although it is not relevant to the Sebree Transaction documents, it must be noted that KIUC's reliance on the Commission's Order in Case No. 9613 is badly misplaced. In Case No. 9613, the Commission was asked to approve a debt

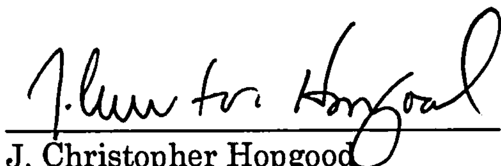
restructuring plan reached after the United States had filed a foreclosure action against Big Rivers in federal court, and the Commission had denied Big Rivers' request for an increase in rates, instead directing the parties to negotiate new terms in the debt restructuring plan and a new rate structure for the smelters. The Commission's comments in Case No. 9613 about the parties' shared responsibility for Big Rivers' debts must be understood against that unique backdrop, and they cannot be applied to the very different facts of this case or Case No. 2013-00199 (for the reasons explained at pages 160-163 of Big Rivers' post-hearing brief in that case). Here, Century Sebree had already given its irrevocable notice terminating the power supply source to its facility. Big Rivers and Kenergy merely sought to negotiate an alternative electric service agreement similar to the one approved by this Commission for the other member of the historical smelter rate class, thereby preserving the economic benefits that flow to the entire region from the continued operation of that smelter.

CONCLUSION

For the foregoing reasons, Big Rivers requests that the Commission deny KIUC's Petition for Rehearing.

On this the 28th day of February, 2014.

Respectfully submitted,



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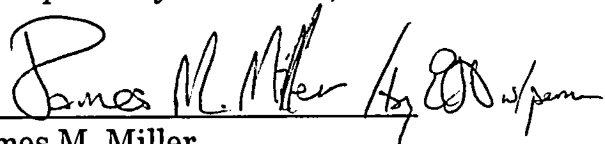

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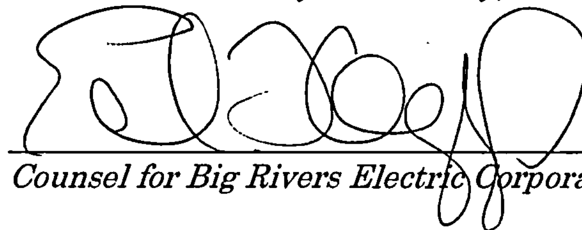
<u>CERTIFICATE OF SERVICE</u>

I certify that a true and accurate courtesy copy of the foregoing Response of Big Rivers Electric Corporation to the Petition for Rehearing of Kentucky Industrial Utility Customers, Inc. has been provided by Federal Express 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 27th day of February, 2014,



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