COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

JOINT APPLICATION OF KENERGY CORP. AND BIG RIVERS ELECTRIC CORPORATION FOR APPROVAL OF CONTRACTS AND FOR A DECLARATORY ORDER	))))	Case No. 2013-00221

ATTORNEY GENERAL'S POST-HEARING BRIEF

Comes now the intervenor, the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention, and for his post-hearing brief in the above-styled matter states as follows:

A. "It appears to me that [Century Aluminum and Big Rivers] are at loggerheads. ... Sometimes people think we create magic here, but we don't."[1]

As the Chairman stated succinctly at the hearing relating to this matter, the Public Service Commission cannot create something out of nothing. Fundamentally, the agreements proposed and requested for approval by Big Rivers Electric Corporation ("Big Rivers" or "BREC") and Kenergy Corporation ("Kenergy") (collectively "the Joint-Applicants") in the application pending before the Commission reflect no agreement at all. The following is a representative list of substantive disputes between the parties:

- Century Aluminum is seeking in the eleventh hour a material change to the agreements to require Big Rivers to perform "live-line transmission maintenance," which Big Rivers' does not currently perform and to which it will not agree to perform.

[1] Hon. David L. Armstrong, Chairman, Kentucky Public Service Commission, Case No. 2013-00221, Hearing, July 30, 2013, Video Transcript of Evidence ("VTE") at 18:06:55-18:07:15.

- Big Rivers and Century Aluminum have substantive differences of opinion regarding key defined terms, including "incremental costs", "Base Load", and "Curtailable Load,"within the context of the agreements.[2]
- Big Rivers learned from Century Aluminum during the course of this proceeding and in the eleventh hour that "the 'package of mitigation measures' that Century will employ to protect its electric service from transmission contingencies" will likely require "dynamic reactive equipment."[3]
- Big Rivers and Century Aluminum dispute the extent to which Century Aluminum possesses a substantive, stakeholder role in the System Support Resource ("SSR") negotiations and agreement between Big Rivers and the Midwest Independent System Operator ("MISO").[4]
- Big Rivers and Century Aluminum express skepticism and distrust regarding their respective negotiating positions as to an ongoing SSR.[5]
- Big Rivers and Century Aluminum have different preferences as to arbitration and resolution of disputes, including the role of the Commission.
- Uncertainty as to the SSR, which is the first time such an arrangement will be used in Kentucky, is inherent to the transaction.[6]

No party denies the symbiotic relationship between Big Rivers and its largest retail customer, Century Aluminum, which has been ongoing for decades and biotrophic as well as antagonistic in nature. To alter, let alone separate, such symbiosis requires the precision of a scalpel and not the uncertain hacksaw approach advocated in the agreements. While the Commission may not be able to perform magic, it does possess the authority to demand precision and certainty before approving any agreement.

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[2] *See* Berry Rebuttal TE at p. 18:13-15, 16-21 and p. 19: 1-9, including references internal thereto to Early Direct TE; *see also* Berry TE on Cross-Examination, VTE 11:14:30 – 11:18:20

[3] *Id.* at p. 19:10-22, *see also* Berry TE on Cross-Examination, July 30, 2013, Video Transcript of Evidence "VTE" at 11:18:20 – 11:19:05

[4] *See* Berry TE on Cross-Examination, VTE at 11:12:30 – 11:12:55 (negotiations limited to BREC and MISO).

[5] *See e.g.* Early TE on questioning by Commissioner Breathitt, VTE at 17:59:20 – 18:00:00 (Advising Commission the Century believes Big Rivers' preferred outcome is to remain on the SSR as it is "to their benefit.")

[6] *See e.g.* Berry TE on Cross-Examination, VTE at 10:42:40-10:42:50 ("first in Kentucky") and 13:23:50 – 13:23:55 ("Only MISO knows … for certain.")

B. The proposal as filed constitutes retail-wheeling, which is impermissible under current Kentucky law.

In requiring a surgical approach to the crisis confronting these entities, it is essential that the Commission pursue the legal equivalent of the Hippocratic oath – "First, do no harm." The Attorney General adopts herein his preliminary comments filed in this matter, as well as the exhibits thereto evidencing the Kentucky General Assembly's policy analysis and consideration of partial or full restructuring of the electric industry in Kentucky.[7] The results of that analysis and consideration concluded that deregulation of the electric industry would have negative effects on electricity prices in Kentucky[8] and, more particularly, would result in stranded costs.[9]

In response to the legislative intent and legal authority, the Joint Applicants via the testimony of Kenergy's Chief Operating Officer[10] advised that the agreements proposed in this matter are "almost exactly" like the "Tier 3 Energy" market access transactions involving LG&E Energy Marketing, Inc., ("LEM") and the Smelters in 1998. However, no evidence was provided regarding how much, if any, actual electricity Century and Alcan received under Tier 3 of the 1998 Smelter Agreement came from outside of Big Rivers' generation fleet. Rather, under the Commission's defined approval, Tier 3 rates constituted a pricing distinction only, not a deregulated carve-

[7] *See* Attorney General's Comments in Lieu of Testimony, Case No. 2013-00221 (July 19, 2013), including Exhibit A – *Restructuring Kentucky's Electric Utility Industry: An Assessment of and Recommendation for Future Action in Kentucky*, Final Report of Special Task Force on Electric Restructuring, LRC Research Report No. 299 (September 2000) and Exhibit B – House Bill 211 (RS 2013).

[8] *Id.*, Exhibit A at pp. viii-ix, pp. 29-30.

[9] *Id.*, at pp. ixvii and 24.

[10] *See* Starheim Rebuttal and TE on Cross-Examination, VTE 14:43:00 – 14:43-:25; Respectfully, Mr. Starheim conceded on cross-examination by counsel for the Attorney General that he was not an attorney nor otherwise qualified to testify to matters of law or legislative policy.

out.[11] Under the agreements proposed, at some point in the near future, 100% of the electric service to the Hawesville smelter would be procured from outside of Big Rivers' generation fleet.[12]

Further, the actual transaction proposed, as explained by Kenergy,[13] falls squarely within the definition of retail wheeling, as expressed by the Kentucky General Assembly.[14] The transaction involves the transmission of electricity from a wholesale supplier[15] to a retail customer [Century is a retail industrial customer of Kenergy] by a third party [the Market Participant], which does not have to be Big Rivers and may be selected at any time by Century under Section 3.1.3 of the proposed Electric Service Agreement. In 1998, it was LEM – an entity subject to the ongoing jurisdiction of the Commission -- that arranged for and reserved transmission service exclusively with Big Rivers for service to the Smelters.[16] Finally, the Commission's ongoing jurisdiction of the 1997-1998 transaction proved essential to ensure an equitable resolution to unforeseeable cost increases and to ensure that no unintended consequences resulted to the overall financial condition of Big Rivers and ultimately, to the rate impact on its

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[11] *See* Case No. 97-204, Order dated June 11, 1998 at p. 7. "The record clearly demonstrates that while this power is ***priced*** at energy only rates, those rates exceed variable cost and ***provide a contribution to fixed costs***." (Emphasis supplied.) Note that as to the Commission's finding in Case No. 97-204, *id.* at p. 8, that "after the year 2000, the Co-ops [now Kenergy] should be responsible for securing [wholesale power] sources" for the Smelters. The Attorney General objected in 1998 and continues to believe that shifting the burden of negotiating complicated power deals with a multi-national corporation from an industry-owned entity (LEM) to a local, member-owned, distribution-only Rural Electric Co-operative Company like Kenergy, is both untenable and impractical.

[12] *See* Starheim TE on Cross-Exam, July 30, 2013, VTE at 14:49:50 – 14:50:30.

[13] *Id.* VTE at 14:54:35 – 14:55:35.

[14] *See* Attorney General's Comments in Lieu of Testimony, Exhibit A at p. xvii ("Retail Wheeling – The transmission of electricity from a wholesale supplier to a retail customer by a third party.")

[15] Any entity meeting the necessary MISO qualifications and signing relevant MISO agreements would qualify.

[16] *See* Case No. 98-267 at pp. 4, 7.

remaining customers.[17] Therefore, the transactions are fundamentally different in nature and scope, qualitatively and quantifiably, from the Tier 3 transaction.

It should be noted that the Commission's review and final approval of the various power contracts between and among the Smelters, Big Rivers and LEM in the late nineties developed over the course of two (2) proceedings, three (3) orders[18]and one (1) full year. In this matter, the Joint Applicants are seeking resolution of this very complicated matter in less than six (6) weeks. Once again, the Commission should exercise its authority and expertise to approach this problem with exacting scrutiny and precision, and not merely accept the agreements as *fait accomplis*.

C. Ratepayers should not bear the exclusive burden for the unrecovered, stranded costs incurred to serve the Smelters and should not have to subsidize or otherwise risk the additional cost of transmission to the Smelters.

Even if the Commission concurs with the Joint Applicants and finds that the transactions, in principle, are the same qualitatively and quantifiably as the market agreements approved in 1998, the question of the impact of these agreements on Big Rivers' ratepayers remains. The Attorney General and Big Rivers' other large industrial customers, represented by KIUC in this matter, agree on a fundamental point. A transaction that permits or otherwise results in one customer – Century Aluminum -- reducing its electricity costs by thirty percent (30%), while the rates of other large industrials, commercial and residential customers double or nearly double, is unjust,

[17] *Id.* at p. 7.
[18] Cite – Case No. 97-204, initiated with Application filed on June 30, 1997, resolved by Orders dated April 30, 1998, and June 11, 1998, respectively, and Case No. 98-267, resolved by Order dated July 14, 1998.

unfair and unreasonable. The Joint Applicants present a solution that is as inequitable as it is incomplete.

Using data supplied by Big Rivers in its pending rate cases,[19] KIUC's expert quantified that the total rate impact to residential and commercial ratepayers would be an increase of 72% or $881 per year and total impact to industrial ratepayers would be an increase of 110%.[20] Further, experts for the Attorney General specifically identified in Big Rivers' most recent rate case[21] stranded costs resulting from Century Aluminum's continuing to operate and receive transmission from Big Rivers:

(1) The allocation of Big Rivers' total annual revenue requirement for transmission costs among the Rural Class, Non-Smelter Industrial Class and Alcan resulted in remaining ratepayers bearing **$10,760,729 in stranded cost in transmission service** – i.e. the fair share that Century Aluminum would pay for transmission alone if it continued as a retail customer.[22]

(2) The adjustment of all or a significant share of the fixed costs associated with the Coleman Station as a result of the idled asset no longer being 'used or useful.' More specifically, as the Attorney General's expert advised in Case No. 2012-00535:

> "The Commission should not allow BREC to now transfer lost margins from the smelters to remaining rural and large industrial consumers. These lost margins from the Century departure cover costs which are not appropriately assigned to other rural and large industrial consumers and which stem at least in part from plant which is no longer 'used or useful' in providing public utility service. The rates proposed to be charged to remaining large

[19] Case Nos. 2012-00535 and 2013-00199.

[20] *See* Direct TE Kollen, p. 7, citing KIUC Hearing Exh. 6 to Case No. 2012-00535 and referencing data supplied by Case No. 2013-00199, Exh. Wolfram 7 & 8 (KIUC Hearing Exh. 1 herein) and Case No. 2012-00535, Big Rivers Application Tab 59 Exh. Richert at pp. 3-4 (KIUC Hearing Exh. 2 herein).

[21] *See generally* Attorney General's Pre-filed Direct TE, Case No. 2012-00535.

[22] *See supra* Direct TE Holloway at p.28-29 and Exh. Holloway-6 (AG Hearing Exh. 1 herein); the Commission may take administrative notice of this previously filed exhibit, which adopts data supplied by Big Rivers in Case No. 2012-00535 Exh. Wolfram 4.2 at pp. 13, 16 and forecasts supplied in Big Rivers' Response to AG 1-234.

> industrial and rural consumer are not fair, just and reasonable since they include BREC's proposal to make these consumer responsible for paying costs of another customer—lost margins due to Century's departure. The Commission should not require remaining large industrial and rural consumers to be responsible for all costs on a residual basis, including the costs of excess capacity that result from the consequences of a bargained –for agreement…."[23]

As to the stranded costs identified by the Attorney General above, it is important to note the hypocrisy reflected in the various applications when the disruption of the symbiosis is considered as a whole. First, Big Rivers' extolls the supposed virtues of a Load Mitigation Plan that has as its aim to reduce excess capacity created by the loss of 850 MW of Smelter sales, then uses the circular logic that it must retain that excess capacity to benefit from transmission revenue from the same lost customer.[24] Further, the Century Agreement does not even compensate Big Rivers for transmission service until it is no longer required to operate this excess capacity to provide that very same transmission service to Century. Second, while Century Aluminum, like any other ratepayer, is entitled to fair, just and reasonable rates, it should not be permitted to withdraw from the 2009 agreements, negotiated at arms-length over a five year period, and yet benefit from the terms of that agreement to the detriment of other ratepayers. Moreover, the Joint Applicants' should not be permitted to exercise the same twisted logic to justify continuing and excessive rates on its captive customers, who do not possess the same negotiating power as a multi-national corporation.

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[23] *See* Attorney General's Pre-filed Direct TE, Case No. 2012-00535, Brevitz Direct TE at p. 34:2-14; *see also id.*, Kollen Direct TE at pp. 24:8-10 and pp. 31:15-32:11 ("just and reasonable rates should not include the costs of facilities that are not 'used and useful' in providing electric service")

[24] *See e.g.* Berry Rebuttal TE at p. 9:7-9.

CONCLUSION

While the Commission cannot perform magic or otherwise disengage Big Rivers from the Smelters by waiving a wand, it does possess the necessary statutory and administrative authority to demand and oversee with the assistance of a qualified, impartial third-party as deemed necessary, negotiations that will result in fair, just and reasonable rates. The Attorney General, on behalf of Big Rivers ratepayers, advocates that the Commission adopt the out-of-the-box thinking recommended by the experts for the intervenors in these related matters, rather than accept the flawed and uncertain transaction proposed by the Joint Applicants, where there is clearly no true, definitive agreement between the parties and which would result in unjust, unfair and unreasonable rates.

Respectfully submitted,

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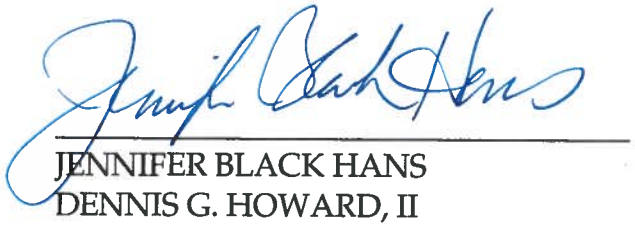

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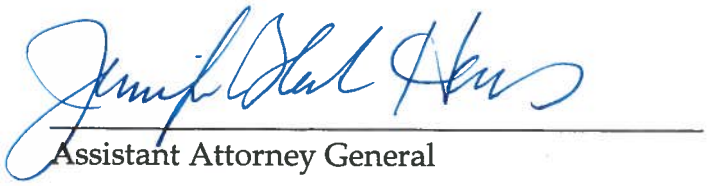

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