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August 8, 2013

**Via Federal Express**

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Executive Director  
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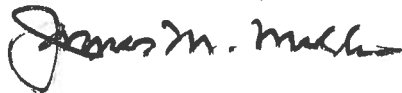
PUBLIC SERVICE  
COMMISSION

*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. 2013-00221*

Dear Mr. Derouen:

Enclosed are an original and ten copies of the joint response of Kenergy Corp. and Big Rivers Electric Corporation to Kentucky Industrial Utility Customers, Inc.'s Motion to Take Administrative Notice. I certify that copies of this letter and response have been served on each of the persons identified on the attached service list by first class mail, postage prepaid.

Sincerely yours,



James M. Miller

JMM/ej  
Enclosures

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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     )     Case No. 2013-00221  
A Declaratory Order                    )

**JOINT RESPONSE OF KENERGY CORP. AND BIG RIVERS ELECTRIC  
CORPORATION TO THE MOTION OF KENTUCKY INDUSTRIAL UTILITY  
CUSTOMERS, INC. TO TAKE ADMINISTRATIVE NOTICE**

Come Kenergy Corp. (“Kenergy”) and Big Rivers Electric Corporation (“Big Rivers”), by counsel, and for their joint response to the motion of Kentucky Industrial Utility Customers, Inc. (“KIUC”) asking the Public Service Commission (“Commission”) to take administrative notice of certain testimony filed in a case before the Public Utilities Commission of Ohio (the “Motion”), state as follows:

KIUC’s motion is unsupportable, and inappropriate. KIUC files its motion “[p]ursuant to KRS 13B-090(5).”<sup>1</sup> But utility hearings conducted under KRS Chapter 278, like the hearing in this proceeding, are expressly exempt from that chapter. KRS 13B.020(3)(d)3.a.

Even if KRS 13B.090(5) were applicable to this proceeding, KIUC’s motion does not satisfy the requirements of the statute for the types of facts that are appropriate for administrative notice, or the timing and procedural requirements for seeking administrative notice. That statute provides:

*The hearing officer may take official notice of facts which are not in dispute, or of generally-recognized technical or scientific facts within the agency's specialized knowledge. The hearing officer shall notify all*

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<sup>1</sup> Motion, page 1.

*parties, either before or during the hearing, or in preliminary reports or otherwise, of any facts so noticed and their source. All parties shall be given an opportunity to contest facts officially noticed.*<sup>2</sup> [Emphasis added]

First, the testimony KIUC seeks to introduce into evidence in this case after the hearing and after the briefs are filed includes the witness' opinion about what the price of aluminum will be in 2014 and 2015. Opinion evidence from an Ohio administrative proceeding on a subject that was raised during the hearing in this case, and which clearly does not fall within the category of "generally recognized technical or scientific facts within the [Commission's] specialized knowledge" fails the statute's threshold test.

Moreover, the tendered testimony is not the type of evidence of which any agency should take administrative notice. "[A]ssertions made by an individual, even under oath, are not the type of facts that are capable of' being introduced into evidence through administrative notice.<sup>3</sup> That is especially true when the testimony of the individual is an opinion or prediction.<sup>4</sup> As one court explained:

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<sup>2</sup> KRS 13B.090(5) (emphasis added).

<sup>3</sup> See *Garza v. State*, 996 S.W.2d 276, 279-80 (Tex. App. 1999).

<sup>4</sup> See 21B Fed. Prac. & Proc. Evid. § 5104 (2d ed.) (footnotes omitted):

One feature that emerges from the cases on "indisputability" that some writers find a useful rule of thumb is that a "fact" will more likely be found "disputable" if it falls on the opinion end of the traditional "fact-opinion" spectrum. Since the drawing of inferences is a quintessential jury function, it would be the rare case where inferences drawn by others would be appropriate for judicial notice; e.g. a person's state of mind. Other examples of such "opinion-facts" include:

- causation.
- the future.
- legal conclusions.
- customary behavior of officials.
- socio-political trends.
- findings or testimony in prior litigation.

Other "opinion-facts" that cannot so easily be categorized have also been found to be reasonably disputable.

In order to be judicially noticed, a fact must be a matter of common knowledge, verifiable without the necessity of an assessment of the truth and veracity of an interested witness in a particular case. Testimony given during a trial is necessarily subject to an assessment as to the truth of the testimony and the honesty or bias of an interested witness...Assertions made by an individual, even under oath, are generally not the type of facts capable of accurate and ready determination by a source whose accuracy cannot reasonably be questioned.”<sup>5</sup>

Second, under KRS 13B.090(5), even if the facts are appropriate for administrative notice, the “hearing officer” is required to notify the parties of the facts before or during the hearing, and allow the parties to contest the facts. Since the hearing has concluded, this procedural requirement is impossible for KIUC to satisfy. KIUC filed its motion more than a week after the hearing, after briefs were filed, and less than a week before a decision is requested, ensuring that the other parties have no opportunity to inquire into, investigate, or contest the testimony it is trying to introduce into evidence. Parties appearing before the Commission are entitled to procedural due process.<sup>6</sup>

KIUC’s motion is irreconcilable with the policy of the Commission on this subject as reflected in the Commission’s own regulations. Those regulations

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<sup>5</sup> *Davis v. State*, 293 S.W.3d 794, 797 (Tex. App. 2009) (citations omitted).

<sup>6</sup> *See Am. Beauty Homes Corp. v. Louisville and Jefferson Co. Planning and Zoning Comm.*, 379 S.W.2d 450, 456 (Ky. 1964). This requires that a party be granted “sufficient notice and opportunity to make his defense.” *See In the Matter of Application of Kentucky Utils. Co. for Certificates of Public Convenience and Necessity and Approval of Its 2009 Compliance Plan for Recovery by Environmental Surcharge, and Application of Louisville Gas and Elec. Co. for a Certificate of Public Convenience and Necessity and Approval of Its 2009 Compliance Plan for Recovery by Environmental Surcharge*, P.S.C. Case Nos. 2009-00 197 and 2009-00198, 2009 Ky. PUC LEXIS 1338 (Dec. 23, 2009), “materials were not presented by individuals who were under oath, were not subject to discovery, and were not subject to cross-examination at the evidentiary hearing.” *See also, Auxier Water Co. v. City of Prestonsburg and Prestonburg City’s Utilities Commission*, P.S.C. Case No. 96-362, 1998 Ky. PSC PUC LEXIS 329 (Feb. 9, 1998).

provide, “Except as expressly permitted in particular instances, the commission shall not receive in evidence or consider as a part of the record a book, paper, or other document for consideration in connection with the proceeding after the close of the testimony.”<sup>7</sup> The Commission’s regulation represents sound policy that prohibits introduction of evidence and gratuitous additional briefing after the close of the testimony in a case. KIUC’s motion conflicts squarely with this policy, and should be denied.

KIUC had sufficient time to present evidence on future aluminum prices if it considered that information relevant to its ratemaking issue.<sup>8</sup> Big Rivers filed this proceeding on June 12, 2013, KIUC filed its direct testimony on July 19, 2013, and the hearing occurred on July 30, 2013. KIUC received the term sheet for the Century Transaction on May 29, 2013. The fact that KIUC did not think about retaining an aluminum industry expert until after the briefs were filed is no reason to grant KIUC’s motion. Moreover, KIUC did include future aluminum price projections in its brief that were not in the record in this case;<sup>9</sup> it now seeks to add information to the record that was not even available when its brief was filed.

KIUC provides no legal authority that supports granting the relief it requests, and no justification for the Commission to depart from its policy on accepting evidence after the close of testimony. For the foregoing reasons, KIUC’s Motion should be denied, and the tendered testimony stricken from the record.

On this the 8<sup>th</sup> day of August, 2013.

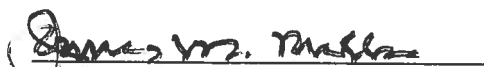
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<sup>7</sup> 807 KAR 5:001 Section 11(4).

<sup>8</sup> The Commission has already ruled that this case is not “the proper venue” for such issues. See order dated July 19, 2013, at page 7.

<sup>9</sup> See KIUC Brief at p. 8.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I certify that a true and accurate copy of the foregoing has been served on the persons listed on the accompanying service list, by first class mail, Federal Express, or hand delivery, on or before the date this response is filed with the Kentucky Public Service Commission.

On this the 8th day of August, 2013,



\_\_\_\_\_  
Counsel for Big Rivers Electric Corporation