PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

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Service Commission

CASE NO. 12-0613-E-PC

CENTURY ALUMINUM OF WEST VIRGINIA, INC.
Petition for consent and approval of a special rate for purchase of electricity.

COMMISSION ORDER

October 4, 2012

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Date 6-17-14 Reporter KF
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At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA in the City of Charleston on the 4th day of October 2012.

CASE NO. 12-0613-E-PC

CENTURY ALUMINUM OF WEST VIRGINIA, INC.
Petition for consent and approval of a special rate for purchase of electricity.

COMMISSION ORDER

This Order rejects, in part, the Century Aluminum of West Virginia, Inc. (Century) proposal for a special rate but establishes a special rate that the Commission believes satisfies the policy goals of the Legislature and incorporates mechanisms that address the concerns of Century regarding the reopening of its Ravenswood smelter and balance the interests of present and future utility service customers of Appalachian Power Company (APCo), the general interest of the State's economy and the interests of APCo. This Order (i) establishes Century current cash payments for power that provide for a positive cash flow and a sufficient level of working capital for Century to operate long-term, even in the face of volatile market prices for aluminum, (ii) contemplates $19.4 million in annual coal severance tax credits flowing to APCo to offset a portion of the Century bill as provided by the West Virginia Legislature, (iii) provides Century the benefit of not sharing in certain fixed costs, presently estimated at $20 million per year, that are already embedded in the rates of other customers, unless Century experiences the level of aluminum prices it has projected, (iv) rejects Century's proposal to place the risk of revenue shortfalls on other customers, (v) places the risk of revenue shortfalls on Century, and (vi) requires Century and its parent to enter into a corporate guarantee and undertaking with APCo to assure payment of potential revenue shortfalls. This Order establishes a Special Rate Mechanism, as described herein, to be incorporated into a long-term contract between APCo and Century.

In addition to the benefits of the severance tax credit and the fixed cost credit for Century, the Order also provides Century with a deferral and tracking mechanism to facilitate the "smoothing" of rates needed to restart production at the Ravenswood Plant in a timely fashion and to permit the plant to remain open and profitable for years to come. The Special Rate Mechanism established by the Commission will not increase current rates to APCo customers and is likely to result in net excess revenue over the life of the contract based on the projections of Century's expert witness.

I. INTRODUCTION

This is the first case to come before the Public Service Commission (Commission) under the statutory provisions of the Energy Intensive Industrial Consumer Revitalization Tax Credit Act (W.Va. Code §11-13CC-1; (Tax Credit Act)) and a recent amendment to W.Va. Code §24-2-1j (H.B. 101; passed March 16, 2012; in effect from passage). W.Va. Code §24-2-1j authorizes and empowers the Commission to consider and, if appropriate, to approve special rates for energy intensive industrial consumers of electric power and will be referred to hereinafter as "the Act." When referring jointly to the Tax Credit Act and the changes to W.Va. Code §24-2-1j, the legislation will be referred to as "H.B. 101."

This case is both difficult and troublesome. The various parties, Century, APCo, the Consumer Advocate Division (CAD), the West Virginia Energy Users Group (WVEUG) and the Commission's Staff (Staff), as aggressive and skilled advocates for their respective clients and constituents, have left little doubt about their positions on the legal efficacy and reasonableness of the special rate. Those positions, if not polar opposites, at least run a broad spectrum of concerns and reservations.[1] Although not part of the record and not part of our deliberative considerations, the Fourth Estate sees little that is "difficult or troublesome" about the decision the Commission faces on the special rate and their pronouncements are clear and generally opposed to the Century Petition and the special rate.[2] Many of the public comments received by the Commission are also opposed to the Century Petition.

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[1] For instance, Century contends that "[o]ver the proposed nine-year time period of the special rate the undisputed evidence in the case shows it is forecast that the rate will impose no incremental costs on other ratepayers or the utility." Century Initial Br. at 1. CAD argues that it "does not dispute that the aluminum business is cyclical and presents operating and financial problems for Century . . . [but] the answer to these problems is additional equity funding or a revolving line of credit. APCo ratepayers should not be required [to] act as Century's shareholders and bank." CAD Initial Br. at 8. WVEUG asserts that while the "WVEUG opposes the Special Rate as proposed by Century . . . . [and states that] [w]hile WVEUG is certainly supportive of reasonable and lawful measures that would return to operation Century's Ravenswood smelter, Century's Petition is simply unacceptable." WVEUG Initial Br. at 2. Staff argues that "the Commission should reject Century's revised proposal . . . on the basis that Century failed to demonstrate that the operation of the industrial facility or facilities for an extended period of time appears economically viable, as required by [the Act]. . . ." Staff Initial Br. at 3.

[2] In a website article posted August 1, 2012, the *West Virginia State Journal* stated "[t]his is a simple case, and it [the Commission's Order] should be a simple decision. No for-profit company has any right to ask us to foot the bill for its operating costs." *The West Virginia State Journal*. The *Charleston Daily Mail*, in an editorial August 1, 2012, after conceding that "everybody in the state would like to see those people [the former Century employees] go back to work" also said that "[i]f other power customers risk their money first [and Century might risk its money later] . . . [t]he PSC must reject this astounding proposition." The *Daily Mail* on May 16, 2012, suggested that the deal should be approached "very carefully" if it ultimately could affect the utility's entire rate base – business and residential users" and also suggested in an editorial of June 6, 2012, that "[t]he PSC should kill this monstrosity – and consumers should examine any fallback proposals with great attention, lest they be by comparison only smaller monsters." Similar articles and sentiments abound in other State newspapers.

If we were "unencumbered" by legislative and judicial guidance, we might conclude that as well. The Commission, however, historically under the provisions of Chapter 24 of the West Virginia Code, and specifically under the provisions of W.Va. Code §24-2-1j, fulfills a legislative role and regardless of the popular thought about the ease and appropriateness of rejecting this proposal, it is neither an easy decision nor an undertaking that lends itself to a quick and clean "balancing of interests" analysis.

We are required by statute to "appraise and balance" an array of interests in our deliberations, including specifically "the interests of current and future utility service customers, the general interests of the state's economy and the interests of the utilities subject to the Commission's deliberations and decisions." W.Va. Code §24-1-1(a). This statutorily required balancing of interests puts the Commission squarely between (i) on the one hand, the tremendous tension and pressures to consider the jobs, the livelihood and the futures of 460 employees and their families at Century and the financial impact on Ravenswood, Jackson County and the State and (ii) on the other hand, the extreme regulatory angst of considering the actual and potential impact on APCo and its other residential, commercial and industrial customers in this State.

Although the rates of APCo on a national basis continue to be reasonable, the residential customers of APCo have over recent years faced significant rate increases that have imposed a burden on a state and its citizens that struggle financially, particularly during the hard economic times experienced since 2008 and that continue to exist. By the same token, WVEUG argued at hearing that APCo's industrial customers have also incurred significant rate increases since 2009 and struggle to remain financially viable and operate in an increasingly active, global and competitive economy. Tr. I at 47.[3]

The Commission has been asked in the Century Petition to consider and (because the parties themselves were unable to agree on a rate or rate approach) to set in this case a special rate for Century, an energy intensive industrial customer of APCo. As discussed later, we believe that the Commission is authorized by the specific provisions of W.Va. Code §24-2-1j to consider and set rates for large energy intensive industrial customers using a variety of methods and tests to assure that the rates carry out the intent of the Act, but at the same time do not "impose an unreasonable burden" upon electric utilities or their other customers.

As discussed in this Order[4], historically the method of setting rates for utility customers in West Virginia is based primarily on the cost to serve the customer. This traditional form of cost-based rate making requires the Commission to group customers

[3] References to the prefiled testimony of the witnesses will be by witness initials and letter to indicate whether the testimony was direct (D) or rebuttal (R) and by page number, for example, "Century Ex. HF-R at 5" for the rebuttal testimony of Henry Fayne. References to the transcript of the hearings will be volume and page number, such as "Tr. I at 6," and where necessary for clarity by witness name.

[4] Discussion infra at Section II.

into reasonably homogenous groups, or "classes," in which the customers demonstrate similar patterns and conditions of service.

Nearly all residential customers, for example, are served by all levels of electric utility delivery systems, including high voltage transmission, subtransmission, primary distribution and secondary distribution. Residential customers also demonstrate similar patterns of usage during similar time periods within a day and during different seasons of the year. These similar conditions and patterns of service make it relatively easy to group residential customers, assign costs to the residential group, and then derive rates that reasonably cover the costs to serve the residential group.

Other types of customers can often be grouped into reasonably homogenous groups and a single set of rates can reasonably be designed to recover the costs of those groups in a fair and consistent manner. These groups can include small commercial customers, medium commercial customers, large commercial customers, and even small industrial customers.

Setting rates for large industrial customers, however, is often more problematic. Large industrial customers often cannot be neatly pigeonholed into a single group. Even if that were possible, while a single average set of rates might recover the overall costs of the group, it would be unlikely that any one customer would have the same characteristics and conditions of service as the average for the group. Industrial rate schedules can contain many different rate components and are typically much more complex than the rate schedules for more homogenous groups such as residential and commercial customers.

The Century Aluminum Plant, by all accounts, was the economic engine for Ravenswood, Jackson County and the surrounding area until it curtailed operations in February 2009. Century is a huge customer for APCo, and the addition of a customer of the magnitude of Century brings new and complex problems when it comes to attempting to mold the unique aspects and conditions of service of Century into a tariff designed for smaller, more homogenous and similarly situated industrial customers.

For instance, Century takes service directly from the high voltage transmission lines of APCo, not using the subtransmission system or any of the distribution system of APCo. Century has an annual energy usage that is many times larger than the next largest industrial customer served by APCo. Century takes power at approximately the same load level twenty four hours a day, seven days a week. This is an unusually high load factor, even when compared to most other industrial customers. The Century load factor will be 97 to 98 percent, compared to industrial load factors in the range of 65 to 80 percent for most other large industrial customers. High load factors mean high energy usage over which to spread allocated demand-related costs. Higher load factor customers will likely have a lower average energy rate per kilowatt-hour. Average energy rates designed for customers with lower load factors and different load characteristics may not be reasonable when applied to a customer like Century. Given the unique Century load level, characteristics and pattern, a unique set of rates is the most efficient way to recover the cost of serving Century.

Under W.Va. Code §24-2-1j, the Legislature has given the Commission specific authority to consider business-related factors when deciding on a special rate for qualified large energy intensive industrial customers. These factors include the need for flexibility in the rate that will allow the customer to survive in times of low commodity prices for the products that the customer produces by paying a lower rate for electricity. By the same token, the statute contemplates that the energy intensive customer under a special rate can be required to pay higher rates in times of high commodity prices for the products that the customer produces.

II. LEGISLATIVE HISTORY

It is necessary to review the legislative history of the utility ratemaking authority in the State and the ratemaking process in the State in order to appreciate fully the scope of the authority and responsibility of the Commission in this case under the West Virginia legislative framework for regulating public utilities.

A. The 2012 Legislation and the Cessation of the Ravenswood Plant Production Operations

The statutory provisions of H.B. 101 passed by the Legislature (W.Va. Code §§24-2-1j and 11-13CC-1 et seq.) do not relate specifically or solely to the aluminum industry or to the efforts to reopen the Century aluminum production facility at Ravenswood. Nevertheless, there can be no serious doubt that this legislation was designed, introduced, discussed and passed with the full support of the Legislature to authorize the Commission to consider a special rate to help address the energy needs of Century and, if possible, to facilitate the restart of aluminum production at the Ravenswood Plant.

The Act contains the following legislative findings:

(1) The State has relatively low cost electric power rates that constitute a competitive economic advantage for West Virginia;

(2) West Virginia has many energy intensive industrial consumers of electric power and the ability to retain existing energy intensive industrial consumers and attract additional energy intensive industrial consumers in the future through policies and rates that enhance and preserve the attractiveness of the State as a place for energy intensive industrial consumers to do business;

(3) Energy intensive industrial consumers create jobs, provide tax base and enhance the productive capacity, competitiveness and economic opportunities of the State and its citizens;

(4) Energy intensive industrial consumers help keep power rates low for all consumers of electric power, including residential customers, by providing a larger consumption base over which the cost of producing electric power may be spread from time to time;

(5) It is in the best interests of the State, its citizens, its electric public utilities, and all consumers of electric power in the State, including residential customers, to encourage the continued development, construction, operation, maintenance and expansion in the State of industrial plants and facilities which are energy intensive consumers of electric power, thereby increasing the creation, preservation and retention of jobs, expanding the tax base, helping keep power rates low for all consumers of electric power, and enhancing the productive capacity, competitiveness and economic opportunities of all citizens of the State;

(6) To encourage the continued development, construction, operation, maintenance and expansion in West Virginia of industrial plants and facilities which are energy intensive consumers of electric power, the Commission may establish special rates under the Act that in its judgment are necessary or appropriate for the continued, new or expanded operation of energy intensive industrial consumers and that can reasonably be expected to support the long-term operation of energy intensive industrial consumers, and that do not impose an unreasonable burden on electric public utilities or their customers; and

(7) To assist the Commission in the exercise of its authority to establish special rates under the Act, the Legislature created a tax credit mechanism (Tax Credit Act) to provide a source of funding to support special rates of which the Commission may avail itself in exercising that authority in certain circumstances.

W.Va. Code §24-2-1j(a)(1-7)

H.B. 101 also contains further legislative findings and purposes that it is in the public interest to assist energy intensive consumers of electricity determined to be in need of a special rate "by employing a portion of the coal severance tax revenues to reduce such industrial consumers' electric power costs without imposing an undue burden on electric utilities or their other customers." W.Va. Code §11-13CC-2(e).

By its terms, the Act sets forth the specific showings necessary for an energy intensive industrial consumer to qualify for a special rate. The energy intensive industrial consumer must:

(1) Have a contract demand of at least fifty thousand kilowatts of electric power at its State facilities under normal operating conditions;

(2) Create or retain at least twenty-five full-time jobs in the State;

(3) Have not less than $500,000 invested in the State in fixed assets, including machinery and equipment;

(4) Provide reasonable evidence that, without the special rate, market conditions in the industry in which the energy intensive industrial consumer operates, or other factors bearing on investment in and operation of the industrial facility or facilities, the continued operation of the industrial facility is threatened or not economically viable under reasonable assumptions and projections regarding the market and the operation of the industrial facility or facilities;

(5) Provide reasonable evidence that, with the special rate, the energy intensive industrial consumer intends to operate the industrial facility or facilities in the State for an extended period of time, and that the operation or continued operation of the industrial facility or facilities for an extended period of time appears economically viable, under reasonable assumptions and projections regarding the market in which the energy intensive industrial consumer operates and regarding the operation of the industrial facility or facilities; and

(6) Provide information and data setting forth how the energy intensive industrial consumer meets the qualifications of the Act, and how the special rate advances the policy goals set forth in the Act.

W.Va. Code §24-2-1j(e)(1-6)

When H.B. 101 was proposed, it stirred little adverse public comment or opposition. In fact, the legislation passed the 2012 Legislature with a unanimous vote in the West Virginia Senate (32-0) and a near unanimous vote (93-1) in the West Virginia House of Delegates. Although consulted from time to time about H.B. 101, the Commission neither advanced nor opposed the passage of the legislation. As is discussed more fully in this order, however, the Commission, as the duly designated legislative utility regulatory body of the State, is the agency authorized under the legislation to consider and pass upon the implementation of a special rate for energy intensive industrial customers in this State under appropriate circumstances.

The particular assignment delegated to the Commission under H.B. 101 with regard to ratemaking and utility regulation is not unusual. For nearly one hundred years the Commission has been assigned an array of legislative duties related to the regulation of public utilities and common carriers in the State. As long as those duties are carried out in a manner consistent with the Constitution of the United States (United States Constitution), the Constitution of West Virginia (West Virginia Constitution) and the laws of the State, the duties authorized for the Commission by the Legislature under H.B. 101 are merely a further proper assignment of legislative duties to the Commission. None of the Commission's prior duties, however, has generated the strong reaction engendered by the request for approval of a special rate by Century in this proceeding.

When Century curtailed operations at its Ravenswood Plant in 2009, it greatly reduced its electrical load and was no longer a unique, energy intensive industrial customer. Although Century had been paying for a portion of the fixed costs of the APCo system that would have otherwise been the responsibility of other customers, when it ceased its Ravenswood aluminum production it also greatly reduced its payment of fixed costs of APCo. The fixed costs that had been paid by Century did not go away when Century curtailed its Ravenswood operations. Those costs have been picked up by the remaining APCo customers and current rates of APCo now reflect the loss of the Century contribution to fixed costs. As a consequence, the loss of Century smelter operations had a negative impact on APCo customers and a devastating impact on the economy within the Ravenswood and Jackson County area. Tr. I at 17-20, 22, Ex. LH-1.

At the time of the curtailment of the Ravenswood smelter operations, Century had a contract capacity with APCo for 325,000 kW of electricity, and the Ravenswood Plant was by far the largest single customer of APCo, accounting for approximately thirteen percent of APCo's West Virginia power sales.

This Order discusses the statutory and constitutional framework authorizing the Commission to consider and act on the request for a special rate, reviews the evidence from the hearing and explores and discusses (i) the efforts of the parties to reach agreement on an energy intensive special rate for Century's Ravenswood Plant, (ii) the unilateral proposal contained in the Petition filed in this case by Century when it was unable to reach an agreement with APCo on that special rate, (iii) the counterproposals advanced prior to, at, or following the hearing by APCo, the CAD, Century, Staff and WVEUG, and (iv) the Commission ruling on the proposed special rate sought by Century.

B. The Constitutional and Statutory Underpinnings for Commission Regulation of the Rates and Charges of Public Utilities

Much has been made, by all sides, in the ongoing and public debate about the form (and the wisdom) of the special rate and about the statutory propriety of the special rate for Century. In that regard, it is helpful as background and for a fair reading of this Order (i) to discuss, to some extent, the genesis and evolution of the Commission and its designated and delegated legislative role in regulating and setting rates for public utilities and to discern the public interest in that regulatory activity and (ii) to describe the role that due process, equal protection and concepts of undue discrimination and unreasonable rate burden play in the Commission decision making process, particularly under the special rate legislation at issue in this case.

Article XI, Section 9 of the West Virginia Constitution provides

> Railroads heretofore constructed, or that may hereafter be constructed in this state, are hereby declared public highways and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as shall be prescribed by law; and the legislature shall, from time to time, pass laws, applicable to all railroad corporations in the state, establishing reasonable maximum rates of charges for the transportation of passengers and freights, and providing for the correction of abuses, the prevention of unjust discriminations between through and local or weight freight and passenger tariffs, and for the protection of the just rights of the public, and shall enforce such laws by adequate penalties.

Article XI, Section 9 of the West Virginia Constitution is the same as originally adopted in the Constitution of 1872. At the time of the adoption of the Constitution of 1872, railroads had evolved into virtual monopolies in the transportation of passengers and freights in this country. Because of the importance of the railroads and their impact upon the public, the railroads became the first natural monopolies[5] to have their rates and practices regulated by the State.

By Acts of the Legislature (Chapter 227, Acts 1872-73) the Legislature, in the exercise of this constitutional power, classified all railroads as impressed with a public service obligation and undertook to establish reasonable maximum rates and charges for the transportation of both passengers and freights. The law enacted in 1872 remained undisturbed until the passage of Chapter 41, Acts of 1907. The Acts of 1907 limited all railroads to 2¢ per mile for both passengers and freights, excepting railroads fewer than fifty miles in length. This statutory rate limitation was known as the "Two Cent Law."

C. Due Process and Equal Protection in Utility Ratemaking

In an early decision addressing the "Two Cent Law," the Supreme Court of Appeals of West Virginia (the Court) reviewed the constitutionality of the legislative enactment that established maximum rates for railroads. The Court found that legislation unconstitutional, as applied to the railroad's specific financial condition, and held that the Two Cent Law denied the railroad company due process because it deprived the railroad of property by reducing its earnings below the point of reasonable remuneration as to

[5] "A market is said to be a natural monopoly when the characteristics of the industry are such that it is economical for a single firm to supply services in the relevant market...." The Regulation of Public Utilities, Charles F. Phillips, Jr. (1993).

passenger fares. Coal and Coke Ry. Co. v. Conley and Avis, 67 W.Va. 129, 67 S.E. 613 (1910).

The Court, however, found that the issue of adequate financial compensation to the railroad was a legitimate issue to be pursued by the Legislature as long as it was mindful of Article III, Section 10 of the West Virginia Constitution and the Fourteenth Amendment to the Constitution of the United States. The Court observed that these Constitutional provisions prevented deprivation of any person of his property without due process of law and also guaranteed equal protection of the laws for those persons. Id. at 188, 67 S.E. at 638-639.

As a result of that decision, the Legislature faced a dilemma. Although the Court recognized that the Legislature had the right to regulate railroad rates (in a constitutional manner), the Legislature understood that it was ill equipped as a body to examine the financials of a particular railroad and other public service corporations in an evidentiary proceeding and to determine whether the maximum rates would work a constitutional hardship on a particular railroad. Faced with this difficult administrative and legal conundrum, the Legislature grappled with how to perform its legislative function of setting rates while, at the same time, considering the financial particulars of numerous public service corporations, consistent with due process and equal protection considerations.

D. Creation of the Commission

By 1913, other businesses, besides railroads, had acquired monopoly powers and were providing essential public services to the citizens of the State. In that year, the Legislature created the Public Service Commission to address the problems of regulation of certain essential public service industries consistent with due process required by the United States and the West Virginia Constitutions. Chapter 9, Acts 1913. The Legislature empowered the Commission, through the enactment of the predecessor to current Chapter 24 of the West Virginia Code, to regulate the rates and practices of not only railroads, but also other common carriers; telegraph and telephone companies; pipeline companies transporting oil, natural gas or water; gas companies; electric lighting companies; municipalities furnishing gas or electricity for lighting, heating or power purposes; hydroelectric companies for the generation and transmission of light, heat or power; and water companies.

Through that enactment, the Legislature intended to create a strong and independent Commission. The legislation provided for members of the Commission to serve for a fixed term of years and to be appointed by the Governor, with the advice and consent of the Senate. The Commissioners could be removed only by the Governor for incompetency, neglect of duty, gross immorality, malfeasance in office, or certain other specified acts. No more than two of the Commissioners could belong to the same political party, and one member of the Commission had to be a lawyer with not less than ten years of actual legal experience. The legislation also provided for a special license fee to be collected from the public service corporations regulated by the Commission for the exclusive purpose of paying the salaries, compensation, costs and expenses of the Commission. Section 650, Chapter 9, Acts 1913.

The Legislature included in this initial legislation concepts of due process and equal protection. The legislation, for instance, required the Commission to establish just and reasonable rates for each utility service, prohibited "undue" discrimination and prohibited rates, tolls and charges that are more than the service "is reasonably worth, considering the cost of the service." Many of these 1913 statutory provisions continue nearly a hundred years later as the bulwark of Commission regulation. See, e.g., W.Va. Code §24-2-2.

E. Early Legal Challenge to the Commission's Authority

After enactment of the 1913 legislation, various cases were brought before the Court challenging the authority of the Commission to fix rates. Among other things, the Court held that the Legislature's delegation of authority to the Commission was constitutional; that the rate orders of the Commission were akin to an act of the Legislature; that the Legislature intended the Commission to be the body in State government that would determine the public interest from the perspective of the regulated utilities, current and future ratepayers and the State; and that, because of the legislative nature of the Commission orders, the Court's review (which was not reviewed upon appeal, but rather reviewed by original process under W.Va. Code §24-5-1) was limited so as not to give the Court the power to substitute its judgment for that of the Commission. United Fuel Gas Co. v. Public Serv. Comm'n, 73 W.Va. 571, 80 S.E. 931 (1914). The Court, in United Fuel, recognized that the Legislature was directing the Commission to assume duties that were important, technical and complex. The Court observed

> [T]he salaries which the statute attaches to the office of commissioners, and the nature of the subjects to be dealt with by them, all imply that only persons of the requisite qualifications should be appointed, and that after appointment they should by investigation and study become further qualified by learning and experience, indeed should become experts upon all subjects and businesses coming within their jurisdiction.

Id. at 581-582

In holding that the delegation of authority to the Commission was constitutional, the Court also held that the functions that the Commission fulfills are quasi-judicial and quasi-legislative. Public Serv. Comm'n v. Baltimore & Ohio Railroad Co., 76 W.Va. 399, 403, 85 S.E. 714 (1915). The Court recognized that the legislative function of establishing railroad rates could be constitutionally delegated to the Commission and that this concept was recognized and established as law throughout the country by both state and federal decisions. Id. at 407, 85 S.E. at 717-718.

F. The Commission Has Been Delegated Legislative Authority

Much of the legislative scheme developed by the Legislature in 1913, as amended in 1915, has remained intact to this present day.[6]

The Legislature has taken significant steps to structure the Commission to safeguard the "public interest" for the ratepayers, the regulated utilities, and the general interests of the State's economy, recognizing that those public interests are entitled to the safeguards of due process and equal protection and the protection from undue or unreasonable discrimination.

The West Virginia Supreme Court quoted with approval a statement of the United States Supreme Court holding that:

> [T]he rate-making power necessarily implies a range of legislative discretion; and, so long as the legislative action is within its proper sphere, the courts are not entitled to interpose and upon their own investigation of traffic conditions and transportation problems to substitute their judgment with respect to the reasonableness of rates for that of the legislature or of the railroad commission exercising its delegated power.

United Fuel Gas Co. v. Public Serv. Comm'n, 73 W.Va. at 582, 80 S. E. at 936, quoting Louisville & N.R. Co. v. Garrett, 231 U.S. 298, 58 L.Ed. 229 (1913).

Soon after the 1914 Court decision in United Fuel Gas Co., v. Public Serv. Comm'n, the Court considered the argument that the delegation of authority by the Legislature to the Commission was unconstitutional. The Court rejected that argument and found that the legislative enactment was a reasonable exercise by the Legislature under the West Virginia Constitution of its authority to regulate tariffs and rates, correct abuses, prevent unjust discrimination, and provide for the "protection of the just rights of the public." Public Serv. Comm'n v. Baltimore & Ohio R. R. Co., 76 W. Va. 399, 404, Syllabus Pt. 1, 85 S.E. 714 (1915).

The Court observed that the powers conferred on the Commission were similar to those conferred by Congress on the Interstate Commerce Commission and by many other states on state utility regulatory commissions like the Commission. Id. at 405; 85 S.E. at 717.

[6] The legislation concerning the organization of the Commission is largely contained in West Virginia Code, Chapter 24, Article 1.

The Court held:

> While it is now established law by state and federal decisions, that the making of reasonable maximum rates for general application is primarily a legislative function, it is equally settled that legislative control over railways and other public service corporations may, within constitutional limitations, be delegated to Public Service Commissions, the reasons for such regulative laws being the distinction between prescribing rates generally, without complaint, controversy or investigation, and directing the observance of a particular rate or schedule after judicial or quasi-judicial investigation of its propriety.

Id. at 407 (Syllabus Pt. 3).

For the first time, but certainly not the last, the Court referred to the legislation as conferring upon the Commission powers of a quasi-legislative and quasi-judicial nature. Id. (Syllabus Pt. 2).

In a 1916 decision, resulting from a challenge by a natural gas company to the Commission's rate-making process, the Court noted that it was beyond denial that power existed in the Legislature to regulate rates of public service corporations directly by its own act through statutes, or indirectly by a commission or other tribunal created by it with authority to regulate those rates. Randall Gas Co. v. Star Glass Co., 78 W.Va. 252, 253-254, 88 S.E. 840 (1916).

In upholding the Commission's authority to establish the gas company's rates, the Court stated that

> The power of the Commission to alter rates, charges and tolls for public service, is delegated legislative power, and the procedure in the exercise thereof is also legislative in character.

Id. at 252 (Syllabus Pt. 2).

Thus, within the first three years of the creation of the Commission, the Court had firmly recognized and established that the rate-making power of the Commission is a legislative function. The Court has had opportunity to revisit these principles.

By statute, the Legislature lawfully delegated responsibility to the Commission to regulate rates, practices, and services of railroads and other utilities. The Legislature clearly intended that the Commission have the responsibility to determine the public interest in utility regulation. That public interest is not limited to the utilities and the ratepayers. As stated by the Legislature,

> The public service commission is charged with the responsibility for appraising and balancing the interests of current and future utility service customers, the general interests of the state's economy and the interests of the utilities subject to its jurisdiction in its deliberations and decision.

W.Va. Code §24-1-1(b); See, also, §24-1-1(a).

Likewise the Court has consistently and emphatically held that the Commission is the sole authority to determine the public interest in utility regulatory matters. In 1914, the Court stated "it is not for a reviewing court to substitute its judgment for that of the Commission, on questions of expediency, or as to what would be best in the interest of the petitioner, or of the public served. On all such questions we think the Legislature intended that the judgment of the Commission should prevail." United Fuel Gas Co. v. Public Serv. Comm'n, 73 W.Va. at 591, 80 S.E. at 939.

Over the years, the Court has restated and emphasized this same point. Mountain State Water Co. v. Kingwood, 122 W.Va. 374, 9 S.E.2d 532 (1940) (the Public Service Commission is the only public authority vested with the power to regulate water companies and other public utilities operating in the state and their rates and charges); C&P Telephone Co. v. City of Morgantown, 144 W.Va. 149, 107 S.E.2d 489 (1959) (the paramount design of pertinent statutes is to place regulation and control of public utilities exclusively with the Public Service Commission); and more recently in State ex rel WDA v. Northern Wayne County PSD, 195 W.Va. 135, 464 S.E.2d 777 (1995) (any authority the Water Development Authority has to affect utility rates is subject to the regulatory review and approval of the Commission in its public interest determinations); South Charleston v. Public Serv. Comm'n, 204 W.Va. 566, 514 S.E.2d 622 (1999) (the Commission "was created by the Legislature for the purpose of exercising regulatory authority over public utilities. Its function is to require such entities to perform in a manner designed to serve the interests of the public and the utilities. Its primary purpose is to serve the interests of the public"), citing, Syllabus Pt. 1, in part, West Virginia Citizens Action Group v. Public Serv. Comm'n, 175 W.Va. 39, 330 S.E.2d 849 (1985).

Although the power and authority of the Commission is conferred on the Commission by statute, the Commission has no inherent power or authority except from the necessary implications of the statute. Wilhite v. Public Service Commission, 150 W. Va. 747, 759, 149 S.E.2d 273, 281 (1966). The jurisdiction to decide the instant case involving the special rate for energy intensive industrial consumers is a specific subject matter that the Legislature has granted to the Commission, with the specific direction to consider the utilities, the ratepayers and, as set forth in W.Va. Code §24-2-1j(a)(1-7), supra at 2, the jobs, development, economic benefits, industrial expansion and the continuation of low rates for the benefit of all customers that could flow from a special rate for energy intensive industrial consumers.

Considering the clear intent of the Legislature and the Court decisions concerning that intent, the Commission (subject, of course, to Constitutional constraints and the

Court's review) determines the public interest in utility regulation pursuant to delegation of legislative authority by the West Virginia Legislature.

G. Not All Discrimination or Any Rate Burden is *Per Se* Unconstitutional or Contrary to Chapter 24

The Commission takes the role of determining the public interest in rate making seriously, and never more so than in this case. Given the strong opposition voiced to the special rate for Century in this case, the path of least resistance might have been for the Commission to rule that the special rate proposed by Century has not met the statutory requirements of W.Va. Code §24-2-1j and that it is statutorily deficient because it "discriminates" against or places a burden on one class of ratepayers (i.e., residential customers) in favor of Century, as a special rate customer of APCo.

The issue before the Commission, however, is not whether there is any discrimination or any burden imposed on some customers or classes of customers. Chapters 24 and 24A of the West Virginia Code do not bar or prohibit any "discrimination." Rather, the statutory provisions of Chapters 24 and 24A contemplate some allowable level of deviation from basing rates strictly on cost of service and impose burdens and responsibilities on the Commission to evaluate that level of discrimination and consider an array of factors in doing so.

For instance, the Commission is variously charged with monitoring or ensuring rate levels.

> W.Va. Code §24-1-1(a)(4) speaks of rates and charges applied without unjust discrimination or preferences.
>
> W.Va. Code §24-2-2 authorizes the Commission to prescribe a rate charge or toll to prevent undue discrimination.
>
> W.Va. Code §24-2-3 authorizes the Commission to fix reasonable rates to be followed in the future in lieu of those unjustly discriminatory.
>
> W.Va. Code §24-2-7 authorizes the Commission to determine and declare, and by order fix measurements, regulations, acts, practices or services in lieu of those found unjustly discriminatory.
>
> W.Va. Code §24A-5-1 allows for rates for motor carriers to replace rates that are unjustly discriminatory.

This Commission and the West Virginia Court have each held that not all discrimination is illegal and that only unjust or undue discrimination is prohibited. Elk Hotel Co. v. United Fuel Gas Co., 75 W.Va. 200, 83 S.E. 922, 923 (1914).

The contemplation and consideration of factors other than pure cost of service based calculations in arriving at rates for customers is not new to the West Virginia Code provisions governing the legislative authority granted to the Commission to determine rates for customers. For instance, the Commission has been allowed (and even urged) by the Legislature to consider various factors to enforce and regulate the practices, services and rates of public utilities in order to effect various policies of the Legislature.

> W.Va. Code §24-1-1(a)(5) authorizes the Commission to encourage energy conservation and the effective and efficient management of regulated utility enterprises.
>
> W.Va. Code §24-2-1d(c) provides that utilities should acquire, if reasonable, required capacity from West Virginia generation that burns West Virginia coal or gas in the interest of keeping utility rates of residential customers as low as possible and keeping utility rates for commercial and industrial customers competitive with those of other states and attracting new industry for which electric power costs are a major factor in location determinations.
>
> W.Va. Code §24-2-1g authorizes the Commission, incident to the use of clean coal technology, to determine, at the time and in the proceeding, form and manner as is considered appropriate by the Commission, the extent to which any electric utility investment or purchases of power qualify for incentive rate making in clean coal technology.

Various statutes permit ratepayers to pay less than the rate that would otherwise be applicable to them if those utility customers participate in certain public assistance programs. See, i.e., W.Va. Code §24-2A-1 (gas and electric); W.Va. Code §24-2C-1 (telephone service); W.Va. Code §24-2A-5 (private water service). W.Va. Code §24-2-2 directs the Commission to establish the lowest available rate for utility service to emergency shelter providers.

In the statute relating to the determination of a special rate for energy intensive industrial consumers, the Legislature specifically approved the concept of a level and structure of rates based not solely on cost and not absolutely without some level of differentiation from traditionally set rates.

For instance, W.Va. Code §24-2-1j(a)(6) permits the imposition of a special rate that in the judgment of the Commission is required for continued, new or expanded operation of energy intensive industrial consumers and can reasonably be expected to support the long-term operation of energy intensive industrial customers. In developing a special rate, however, the Commission should not impose an unreasonable burden on the electric utility or other customers of the utility.

W.Va. Code §24-2-1j(c) authorizes the Commission to consider, in addition to all factors which the Commission may consider in setting rates for consumers of electric power, a rate that may take into consideration fluctuations in the market prices for goods and products produced or other variables or factors which may be relevant to or affect the continuing vitality of the energy intensive industrial customers.

W.Va. Code §24-2-1j(e) provides that in order to qualify for the special rate, the energy intensive industrial customer must provide information and data demonstrating how the special rate advances the legislative policy goals and findings set forth in the legislation. Regarding the impact of an energy intensive industrial customer upon the rates of other customers, legislative findings include findings that energy intensive industrial customers help keep power rates low for all customers by sharing in fixed costs from time to time and that energy intensive industrial customers help keep power rates low for all consumers of electric power. W.Va. Code §24-2-1j(a)(4) and (6).

Last, but not least, W.Va. Code §24-2-1j(f) authorizes the Commission to determine whether any excess revenue or revenue shortfall created by a special rate should be allocated among any other customers of the utility and whether the determination of how that revenue shortfall or excess revenue should be allocated is just, reasonable and fairly balances the interest of other customers, the utility and the customers receiving the special rate.

This Commission typically uses class cost of service allocation studies to spread costs across customer classes in an equitable manner, but even fully allocated class cost of service studies frequently leave some customer class alleging that it has been treated unfairly. Those studies rely to some extent on judgment and the (varying) application of (varying) approaches. It is rare that one or more customer classes or groups is not alleging undue discrimination in allocation between and among customer classes, and the Commission deals with this repeatedly in rate cases.

Given the specific nature of W.Va. Code §24-2-1j, the Legislature clearly contemplated that the formulation of a special rate under this enactment may lead to rates that are not based (wholly or solely) on utility cost and that may entail some level of discriminatory treatment and reallocation of resulting revenue shortfalls or excesses among other customers, albeit for legitimate purposes and findings that the Legislature believed worthwhile, to wit: the retention and attraction of current or additional energy intensive industrial consumers; the encouragement of the development, construction, operation, maintenance and expansion of industrial plants; and the preservation and retention of jobs, expansion of tax base, helping keep power rates low for all consumers of electric power, including residential customers, by providing a larger consumption base over which the cost of producing electric power may be spread from time to time, enhancement of productive capacity, competitiveness and economic opportunities of all citizens.

H. The Commission Must Determine Whether the Special Rate is "Reasonable"

What then is the test this Commission must or should apply in assessing the special rate proposed in this proceeding? The Commission is charged with balancing a myriad of factors in determining a reasonable special rate. "Reasonable" is not easily reduced to an objective test -- there is no "five feet" or "fifteen pounds" of reasonable. Nevertheless, while "reasonable" is a subjective standard, it is a standard that this Commission is called upon frequently to apply and is the touchstone of utility ratemaking.

For instance, in VEPCO and UtiliCorp United, Inc., Case No. 85-553-E-PC, the Commission, in discussing whether the merger transaction in that case should be approved under W.Va. Code §24-2-12, made the following holding:

> The Commission believes that the Legislature under W.Va. Code §24-2-12 requires the Commission to apply a "reasonableness" standard to these transactions. "Reasonableness" is the common yardstick by which utilities are measured under the various provisions of Chapter 24,[1] and the Commission finds that the same standard applies under W.Va. Code §24-2-12.
>
> Thus, in requiring that a transaction "not adversely affect the public," the Commission finds that the utility must make a showing that the acquiring entity has, or as part of the transaction will acquire the knowledge, experience and resources sufficient to conduct the utility operation in a manner designed to provide adequate and reliable service at reasonable rates. That is the test the Commission will apply in this proceeding in order to determine whether the public is "not adversely affected."

The following text is the Commission's footnote 1 from VEPCO and UtiliCorp United at 8.

> [1] See, for instance: Rates should be reasonable (W.Va. Code §24-1-1(a)(4)); Commission may change any rate which is unreasonable, and rates must not exceed what the service is reasonably worth (W.Va. Code §24-2-2); Commission may fix reasonable rates for the future for utilities and reasonable rates for railroads (W.Va. Code §24-2-3); Change of rates requires reasonable notice, and utility has burden to demonstrate requested rate is reasonable (W.Va. Code §24-2-4a); Commission may fix reasonable terms for joint use of equipment (W.Va. Code §24-2-6); Commission may require reasonable regulations, measurements, practices, acts or services (W.Va. Code §24-2-7); The terms and conditions of certain transactions must be reasonable (W.Va. Code §24-2-12); Utilities prohibited from giving any unreasonable preference to any person (W.Va. Code §24-3-2).

The "final test" by which the Commission must evaluate the special rate is not the bright line and easily applied "test" of whether there is "any discrimination." On the contrary, the provisions of W.Va. Code §24-2-1j (and various other provisions of W.Va. Code §§24-1-1 and 24A-1-1 et seq.) clearly tolerate some level of "reasonable" or "due discrimination" as opposed to unreasonable or undue discrimination.

By the same token, the Commission does not believe that the Legislature, in adopting the Act, suggested, mandated or required that the Commission set aside more than a hundred years of rate regulation and ratemaking principles. Century appears to argue (incorrectly we believe) to the contrary:

> Even assuming the proposed special rate is discriminatory the "notwithstanding" language in the statute precludes reliance on ratemaking principles. Tax policy, for example, deliberately discriminates against some in favor of others.

Century Reply Br. at 4 (fn 1) (Commission's emphasis).

In a recent decision, our Court considered and determined the proper interpretation of a "notwithstanding clause" within a newly enacted act that was part of other related legislative provisions. Miller v. Wood, 2012 W.Va. LEXIS 318 (2012). The Court held that the new legislation with the "notwithstanding clause" and the existing, related legislation should be read in *pari material* to determine the Legislature's intention. In construing the "notwithstanding clause" in H.B. 101, the Commission concludes that the Legislature did not intend the Commission to disregard other relevant provisions of Chapter 24 of the West Virginia Code.

With regard to impact on other customers, the bottom line for the Commission in our examination of the Act is whether, when considered in its totality, and given the findings and directives of the Legislature and the evidence presented in this record, the special rate imposes an unreasonable burden on APCo or its "other customers." We will apply that test in the context of the record.

I. How Should the Commission Apply the Test

In applying that test, the Commission will consider the ability of the energy intensive industrial customer to continue and expand its operations, particularly when it is facing low prices for its product. Given the provisions of the Act, the Commission is authorized to consider differentiated energy prices based on the market for the energy intensive industrial customers' products. We also believe that these differentiated energy prices can include business cycle differentiated prices that allow, over time, a mix of lower than average rates and higher than average rates.

These business cycle differentiated rates could allow, in a proper case, for a deferral, or "banking," of a portion of the energy bills at low points in the industrial business cycle, to be offset by future payments of rates that are higher than the average rate set for the customer. Setting rates that differ from the average rate set based on traditional cost of service principles or incremental cost of service principles can result in either revenue shortfalls or excess revenue to a utility.

This form of rate setting requires some new techniques to be applied by the Commission, including an understanding of the industrial business cycle of the customer seeking the special industrial rate, and deferral, matching or smoothing mechanisms designed by the Commission to balance out over time.

While the Commission may implement these new techniques, it must take reasonable steps to assure that any special industrial rate mechanism that takes industrial business cycles into consideration fairly balances the interests of the energy intensive industrial customer, other customers and the utility company.

An important aspect of this balancing is that the Commission should not use business-cycle considerations to set rates to accommodate an energy intensive industrial customer only at the low end of an industrial cycle. We believe that allowing energy intensive industrial customers to pay below average rates during low points in the industrial business cycle carries with it a concomitant obligation of the customer to accept and pay above average rates during high points in the industrial business cycle.

The Legislature recognized that in the Act and authorized the Commission to consider allocation of both revenue shortfalls and excess revenue to other customers. This allocation of revenue shortfalls to other customers may result in higher rates or deferred revenue owed to the utility by those other customers. The allocation of excess revenue to other customers may result in lower rates or deferred credits owed to the customer by the utility.

The Special Rate Mechanism that we approve for Century does not, as did other plans presented to the Commission in this case, allocate revenue shortfalls to other customers. There are, however, fixed cost credits given to Century, and the casual observer may contemplate "subsidy" or "undue discrimination" regardless of the impact on other customers because Century is being billed a lower amount than would be required at a traditional fully allocated tariff rate. Part of the plan approved by the Commission provides that excess revenue that APCo will receive from Century at higher aluminum prices can and should be allocated to other customers in a balanced and fair manner.

The Commission would not deliberately set out to condemn other customers to increased rates in the name of a special industrial rate that considers the business cycle of the industrial customer, and we have not done so in this case. The Legislature has given the Commission another factor to consider regarding sharing of fixed costs when it authorized the formulation of a special rate for energy intensive industrial customers. Not requiring a customer like Century immediately to share fully in existing fixed costs is consistent with the Commission's responsibility when designing rates to foster and encourage the resumption, expansion or continuation of an energy intensive industrial customer in West Virginia. In lieu of the fixed cost rate component that would be the responsibility of the industrial customer under traditional ratemaking, the Commission goal, and responsibility to the extent it is reasonable under the Act, is to devise a plan that has a reasonable possibility of excess revenue from an energy intensive industrial customer during that customer's business cycle, and the Commission will then require the allocation of some or all of that excess revenue to benefit other customers.

III. PROCEDURAL BACKGROUND AND POSITIONS OF THE PARTIES

A. Parties and Filings

On May 11, 2012, Century filed a Petition (Petition) with the Commission to establish a special rate to apply to purchases of electricity by Century from APCo pursuant to W.Va. Code §24-2-1j. Century asserted that it meets the statutory criteria for the special rate but also asserted that its efforts to negotiate a special rate with APCo had been unsuccessful. Century requested that the Commission name APCo a respondent in this matter and expedite the case. With the Petition, Century filed direct testimony from five witnesses and an exhibit under seal and requested that the Commission issue a protective Order for the sealed exhibit.

On May 16, 2012, the CAD requested leave to intervene in this proceeding to advocate for the interests of residential ratepayers. Separately, SWVA, Inc., formerly known as Steel of West Virginia, Inc. (SWVA), and WVEUG also petitioned to intervene.

On May 16, 2012, Commission Staff requested that the Commission name APCo as a respondent in this proceeding and requested that the Commission direct Century to amend its Petition to set forth a maximum estimated rate contribution from other customers. Staff also recommended certain changes to a procedural schedule Century proposed.

The Commission established a procedural schedule in this matter, named APCo a respondent and required notice of the filing of the Petition by publication. May 16, 2012 Commission Order. In a subsequent order, the Commission granted the pending intervention requests and rejected the Staff motion to require an amended petition from Century. May 24, 2012 Commission Order.

After a series of discovery requests, objections and motions to compel, the Commission granted the CAD request to compel discovery, but declined to adjust its procedural schedule. June 1, 2012 Commission Order.

The parties issued additional discovery requests. Century filed several discovery responses under seal. It also filed a second request for a protective order for documents not covered by its initial request. June 29, 2012 Motion for Protective Order.

On July 9, 2012, parties other than Century filed direct testimony. Staff, CAD, WVEUG and APCo each filed testimony from one witness. Staff recommended that the Commission deny the Petition and direct Century to create a new proposal. Other parties recommended rejecting the initial Century proposal, but suggested various alternatives.

The Commission subsequently issued an Order urging the parties to discuss the proposals presented in the pre-filed testimony and directing the parties to address those alternatives in their rebuttal. July 10, 2012 Commission Order.

On July 20, 2012, the parties filed rebuttal testimony. Century substantially revised its initial rate proposal and modified its proposed net operating income, after allowance for capital expenditures (Operating Margin). Century also included a price floor, altered other aspects of its proposal and stressed to the Commission that its revised rate plan constituted the minimum support that will permit Century to restart the plant.

On July 26, 2012, the Commission issued an Order allowing surrebuttal to the rebuttal testimony Century filed.

On July 30, 2012, the Commission called this matter for hearing. At hearing, the parties presented the direct and rebuttal testimony of their witnesses, offered associated exhibits, and presented the witnesses for examination. The witnesses who appeared at the hearing were identified on the record and their prefiled testimonies were identified by initials and exhibit identification:

<u>Century Aluminum</u>	
Gordon Hopper	Plant manager of Ravenswood Aluminum Smelter
John Hoerner	Vice President, North American Operations, Century Aluminum
Henry Fayne	Century consultant on the Special Rate
Robin Adams	Aluminum pricing consultant, CRU International Limited
Lacy J. Harbert	Mayor, Ravenswood
<u>APCo</u>	
Steven Ferguson	Director, Regulatory Services for West Virginia
<u>CAD</u>	
Byron Harris	Director, Consumer Advocate Division of the Commission
<u>WVEUG</u>	
Richard Baudino	Baudino Regulatory Consulting, Inc.
<u>Staff</u>	
Marion A. Russell	Utilities Analyst, Public Service Commission

During the hearing, in an effort to complete the record and to give a better sense of the special rate, the Commission requested the filing of a series of exhibits on various aspects of this matter. All of those requests were completed and filed during the hearings. Among those exhibits, Century filed Commission Request Exhibit 3 (CR Ex. 3) detailing its proposed capital commitments. Also, at the specific request of the Commission, APCo prepared Commission Request Exhibit 6 (CR Ex. 6), a revised rate proposal designed to review offers and counteroffers that had occurred to that point in the hearing and also to see if there might be a bridge in the gap between the Century proposal and that of APCo.

On August 8, 2012, CAD, APCo, Staff and WVEUG jointly requested that the Commission modify the briefing schedule in this matter. They requested that the Commission extend the due date for initial briefs to August 21, 2012, and the due date for reply briefs to August 28, 2012. Neither Century nor SWVA opposed that motion. The Commission granted the motion. August 9, 2012 Commission Order.

On August 10, 2012, the reporter filed a transcript of the evidentiary hearing.

On August 20, 2012, CAD requested leave to supplement the record with a response to CR Ex. 6. It suggested modifying CR Ex. 6 to protect other ratepayers. The Commission believes that the parties had ample opportunity to address CR Ex. 6 at the hearing, and inasmuch as no one opposed the request of the CAD, the Commission will receive the supplemental response of the CAD to CR Ex. 6.

On August 21, 2012, the parties filed briefs in support of their positions, and on August 28, 2012, the parties filed reply briefs.

On September 24, 2012, the Commission issued an Order that requested clarification from the CAD regarding the coal severance tax payments that APCo could receive to cover a portion of the Century power bill. The CAD filed a response to the Commission Order on September 25, 2012.

B. Special Rate Proposals

All parties except SWVA filed testimony in this proceeding. Century filed direct testimony along with its Petition. Other parties filed their testimony in accordance with the procedural schedule in the May 16, 2012 Commission Order. There is an extensive record in this proceeding consisting of nearly 1,200 pages of prefiled testimony, exhibits and transcripts. A summary of the positions of the parties is:

1. Century Positions

In the Petition, Century asserted that it met the statutory criteria under W.Va. Code §24-2-1j for establishing a special rate and proposed a rate mechanism based on its estimated costs and the market price for aluminum. Century presented Gordon Hopper, its Ravenswood plant manager, to testify that Century is eligible for the special rate and to provide estimated costs that would be used in its proposed rate mechanism. Ex. GH-D. He stated that, if restarted, the plant would likely use 222,000 MWH per month with a contract demand of 310 MW. Id. at 3. Century made $18 million of capital investments in West Virginia in the three years before ceasing production at the Ravenswood plant in 2009 and expects to employ approximately 421 employees during the restart. Id. He also sponsored a confidential exhibit with detailed projected production costs for both the restart period and steady state operation. Id. at GH-1. On rebuttal, Mr. Hopper submitted a revision to the estimated production costs. Ex. GH-R.

Century also filed testimony from John Hoerner, its Vice President of North American Operations, in support of the proposed special rate. Ex. JH-1. Mr. Hoerner stated that the Ravenswood plant meets the statutory requirements for the special rate and discussed the variable rate formula Century initially proposed and its $200 per metric ton of production Operating Margin. Mr. Hoerner characterized the proposed rate structure as routine in the aluminum industry. Id. at 3. Mr. Hoerner asserted (based on the forecasts from the testimony of Robin Adams, discussed below) that Century will obtain an average aluminum price that will establish rates over the life of the contract sufficient to result in no net incremental cost to other ratepayers. Ex. JH-1 at 4. Mr. Hoerner characterized Mr. Adams and his firm, CRU International Limited (CRU), as the premier forecaster of future prices for aluminum and reaffirmed his faith in those estimates at hearing. Tr. I at 249. Mr. Hoerner asserted that approval of the special rate proposed by Century would allow the creation of hundreds of jobs, could create rate benefits for other customers, would assist retirees on health benefits and would stimulate coal demand. Ex. JH-1 at 6.

In his rebuttal testimony, Mr. Hoerner described a modified version of the original Century proposal that (i) introduced a variable Operating Margin, (ii) included a five-year recovery period for start-up costs instead of three years, (iii) utilized revised cost estimates provided by Mr. Hopper, and (iv) increased the product premium over London Metal Exchange (LME) prices that Century was likely to obtain. Ex. JH-2. The witness disputed the criticism of other parties from the direct testimony and asserted that the new proposal for a special rate is the minimum acceptable power rate for Century to restart the plant. Id. at 2.

At hearing, Mr. Hoerner also presented CR Ex. 3 to detail the capital commitments Century would invest in its Ravenswood plant. Tr. II at 25. CR Ex. 3 lists three tiers of capital investments. The first tier includes $90 million of start-up investments necessary to reopen the plant. The second tier, which would occur after the initial restart, included annual modernization in years two through nine totaling $44 million. The third tier included a series of potential future investments dependent on future market conditions. CR Ex. 3.

Century presented Henry Fayne to assist in describing the special rate proposed by Century. Mr. Fayne testified that he has contributed to the design of several power contracts similar to the one proposed in this proceeding and that he had assisted in producing the current special contract between Century and APCo. Ex. HF-D at 1, 2. Mr. Fayne described both the 2006 rate mechanism and the special rate proposal contained in the Petition. According to Mr. Fayne, the Century special rate proposal includes rate support from (i) annual tax credits from the State of West Virginia totaling $19.4 million,[7] (ii) fixed costs currently being paid by other customers that would not be added to the Century rate, along with what he described as an APCo contribution, bringing the total credit to $20 million annually, and (iii) additional direct rate support from other ratepayers to cover any further shortfall, if needed. Id. at 2-7.

Under the Century proposal, Mr. Fayne indicated that APCo will track the surplus and deficit over time between the amounts Century can afford to pay for electricity based on its costs and the market price for aluminum against the APCo transmission level Industrial Power Tariff (IP Tariff) rate. APCo will fill the gap between the variable rate paid by Century and its tariff rate sequentially from each type of support. If market prices for aluminum reach and maintain a point where there is no outstanding accumulated shortfall, Century will receive 75 percent of the surplus and other customers will receive 25 percent of the surplus as a rate credit. Id. at 11. Century recommended

[7] The annual $20 million tax credit is paid directly to APCo by coal producers who may deduct three percent from the total. W.Va. Code §11-13CC-4(a).

that a net deficit balance, however, would be addressed in a subsequent proceeding, such as an ENEC case.[8] Id. at 15.

In rebuttal testimony, Mr. Fayne described changes in the new Century rate proposal and stated that a rate based on an aluminum market price of $1,800 per metric ton would cover APCo fuel and variable production costs. Ex. HF-R at 2. The new proposal establishes a rate floor of $1,500 per metric ton. Id. at 3. Mr. Fayne stated that Century objected to picking up the arrearages from the existing rate mechanism and stated that it would be appropriate to leave that amount as a general prior period under recovery of APCo to be spread among all ratepayers. Id. at 4.

Century provided testimony regarding forecasts of future aluminum prices from Robin Adams of CRU. Mr. Adams predicted that market prices for aluminum on the LME would rebound over time and would reach a level such that there would be no net negative impact on other ratepayers from the proposed special rate. Ex. RA-1 at 7. Mr. Adams stated, however, that future prices may vary from his estimated average of approximately $2,450 per metric ton, with a fifty percent chance of being higher and a fifty percent chance of being lower than his estimate. Id. In his rebuttal testimony, he criticized the historical data provided by other witnesses for their failure to account for inflation to present value and disputed the reliance of other parties on LME aluminum futures to predict market prices. Ex. RA-2 at 1, 3, 4.

2. APCo Response and Positions

APCo presented the testimony of Steven H. Ferguson, Director-Regulatory Services for APCo West Virginia. Subsequent to the filing of the Century Petition, and in response to a Commission Order of May 16, 2012, APCo filed a response to the Century Petition on June 1, 2012. Ex. SHF-3. In its response, APCo expressed strong concerns regarding several aspects of the special rate Century proposed in its Petition. Mr. Ferguson noted the potential for rate increases on its other customers and asserted its unwillingness to consent on behalf of ratepayers to the potential risks in accepting the terms Century proposed. He also noted the potential benefits to the Ravenswood area of restarting the smelter. Finally, APCo highlighted the need for modernization at the Ravenswood plant and pointed to a recent plan for $110 million of upgrades as a means of assuring the long-term viability of the Ravenswood plant. Ex. SHF-3.

In his direct testimony, Mr. Ferguson recounted the history of electric service to Century and described the current rate mechanism approved in Appalachian Power Company and Wheeling Power Company, both dba American Electric Power, Case No. 05-1278-E-PC-PW-42T. Ex. SHF-1. He characterized the initial Century

[8] Expanded Net Energy Cost or ENEC proceedings are accelerated annual requests by electric utilities before this Commission to adjust rates for changes in costs of obtaining fuel, fuel-related expenses and purchased power. Appalachian Power Company and Wheeling Power Company, dba American Electric Power, Case No. 12-0399-E-P (Interim Commission Order, July 26, 2012) (APCo ENEC Order).

proposal as conferring "extraordinary and unprecedented benefits upon Century...." Id. at 6. He argued that Century's proposed special rate would concentrate risk on other customers and remove incentives from Century to contain costs. APCo also noted Century had accelerated the recovery of start-up costs. Id. at 7. Mr. Ferguson recommended that the Commission condition any special rate on capital investment by Century of $110 million. Id. at 8, 9. As an alternative, APCo proposed that the Commission establish a rate tied to LME aluminum prices that include the $20 million annual tax credit and the $20 million credit included by Century in its calculations representing the contribution to fixed costs currently being paid by other ratepayers that Century would make under traditional ratemaking. Mr. Ferguson noted that Century could receive an additional $10 million annual rate credit if it agrees to be an interruptible customer for one-half of its load. Mr. Ferguson also recommended a floor for the variable rate at an LME aluminum price of $2,200 per metric ton. Id. at 9-11. On rebuttal, he addressed certain aspects of testimony from other respondents. Ex. SHF-1 Rebuttal.

At hearing, Mr. Ferguson noted what he characterized as positive movement by Century in modifying the initial proposal contained in the Century Petition, but indicated that the revised Century proposal continued to incorporate substantial potential payments from other ratepayers to support reductions for Century that could equal potential annual payments of $74 million. Mr. Ferguson continued to express concern about the possibility that the sharing of surpluses Century proposed would not offset potential deficits resulting from low aluminum prices. Finally, Mr. Ferguson noted the expense to APCo of financing those potential shortfalls that would result from adopting the special rate Century requested. Tr. II at 166-171.

Near the conclusion of his testimony, the Commission requested that Mr. Ferguson prepare an exhibit that would review the status of current proposals and invited APCo to submit any new proposal that would represent a compromise and a balance between the concerns of APCo, Century and other parties. Tr. II at 190-192. Mr. Ferguson presented the new schedule, designated CR Ex. 6, on the final day of hearing. Mr. Ferguson said, and the Commission acknowledged, that APCo did not endorse the proposal contained in CR Ex. 6, but merely had fashioned that proposal at the request of the Commission. Tr. III at 9. The proposal in CR Ex. 6 modified the mechanism that APCo advanced in its direct testimony.

CR Ex. 6 incorporated the available tax credits offered by the State and continued to allow Century relief from paying $20 million in fixed costs currently being paid by other ratepayers. It also provided up to a maximum of approximately $20 million in contributions provided by other ratepayers at a floor LME aluminum price of $1,900 per metric ton, but capped the aggregate amount of the contributions that could accumulate to $60 million. Under CR Ex. 6, Century would not enjoy an Operating Margin when a deficit exists in the proposed banking mechanism. The proposal summarized in CR Ex. 6, as explained by Mr. Ferguson, also recovers the arrearage from the prior rate mechanism and the first $20 million of any potential shortfall from a new contract through the pending securitization process filed by APCo.[9] Under the proposal, the Commission would address any necessary modifications to the initial plan in a future ENEC proceeding after three years. CR Ex. 6.

3. CAD Position and Revision

CAD submitted direct testimony of Byron Harris, Director of the CAD. Mr. Harris recommended that the Commission reject the initial Century proposal and stated that CAD believed that the initial Century proposal is flawed economically and on a policy basis. CAD Ex. 1 at 2. Mr. Harris reviewed the original rate mechanism Century proposed, offered a number of criticisms, and argued that the initial Century proposal would require vast subsidies from other ratepayers while offering guaranteed profits to Century. Id. at 3, 9. He also noted the inherent difficulties in this Commission attempting to audit costs that Century includes in future rate calculations. Id. at 20.

The CAD recommended that the Commission establish a revised mechanism that includes recovery of the revenue shortfalls previously attributed to Century spread prorata over the expected nine-year contract period and require Century to provide security for both current and any future revenue shortfalls with a letter of credit. CAD also recommended that the Commission tie any special rate for Century to future increases in the price of aluminum without future modification based on new operating cost data filed by Century. Id. The CAD recommended that Century not be allowed to receive a special rate unless the one-year forward futures price for aluminum was above $2,450 per metric ton and the three-year forward futures contract price for aluminum was above $2,620 per metric ton. Id. at 16.

On rebuttal, CAD reiterated its argument against basing rates on Century costs. CAD Ex. 2. At hearing, Mr. Harris noted that the revised Century proposal continued to suffer from several flaws described in his direct testimony. Tr. II at 211-213.

On August 20, 2012, CAD submitted a response to CR Ex. 6, the proposal APCo submitted at the request of the Commission on August 1, 2012. CAD revised its earlier recommendation. CAD dropped its recommended requirement that the availability of a special rate require certain minimum aluminum futures prices. It also dropped its recommendation that the minimum rate for Century should include certain increased Capacity Equalization Charges that APCo would incur to serve the Century load. CAD continued to recommend that the Commission incorporate a minimum amount for APCo to receive for providing service to Century. This minimum should, according to the CAD, cover the ENEC rate, the Commission authorized construction surcharge rate and a prorata share of the previously deferred revenue shortfalls related to the 2006 Century Special Contract.

[9] Appalachian Power Company and Wheeling Power Company, both dba American Electric Power, Case No. 12-1188-E-PC.

CAD also advocated for the adoption of other protections it had previously recommended including requiring a letter of credit large enough to cover a shortfall and adjusting the special rate based on increases in the market price of aluminum but without consideration of periodic production cost updates from Century. August 20, 2012 CAD filing.

On September 24, 2012 the Commission issued an Order that requested clarification from the CAD regarding the coal severance tax payments that APCo could receive to cover a portion of the Century power bill. The CAD filed a response to the Commission Order on September 25, 2012. In the response, CAD clarified that its revised recommendation for a minimum rate that should be established for Century did not take into consideration the coal severance tax credit. It further explained that the tax credit "would cause the effective electricity rate paid by Century to be lower than the minimum rate by the amount of the tax credit."

4. WVEUG Position

WVEUG presented the testimony of Richard Baudino of Baudino Regulatory Consulting, Inc. Mr. Baudino recommended rejecting the proposed special rate and characterized the special rate Century initially proposed as "completely unprincipled from a regulatory standpoint." WVEUG Ex. 1 at 3. Mr. Baudino argued that below a certain aluminum price level the original Century proposal would allow the purchase of electricity below the cost that APCo incurs for fuel to generate the power. Id. at 3, 4. He also noted that customers could incur substantial costs if market prices for aluminum remain low, but Century would retain most of the benefit from higher market prices under its plan. Id. at 9, 10. Higher costs than estimated by Century would also expand the additional costs that other customers may incur. Id. at 12, 15.

Instead of the Century special rate proposal, Mr. Baudino recommended a special contract that leaves ratepayers no worse off while fairly allocating both risk and reward among Century, the ratepayers and APCo. Id. at 21. On rebuttal, the witness also offered criticism of the APCo rate proposal based on the principles set forth in his testimony. WVEUG Ex. 1-R. At hearing, Mr. Baudino concluded that although the revisions made by Century to its proposal will ameliorate somewhat the potential risks to other customers, he continues to believe that the revised special rate proposal is still unduly burdensome and continues to include the potential for substantial subsidies from West Virginia ratepayers. Tr. II at 203, 204.

5. Staff Position

Staff presented its position in this matter through the testimony of Staff analyst Marian Russell. Staff recommended that the Commission reject the Century proposal and argued that Century should formulate a new proposal and refile the Petition. Ex. MAR-D at 11. Staff argued that the initial Century plan improperly shifts business risk onto ratepayers while it enjoys a guaranteed profit. Id. at 2. Staff also argued that

Century is unable to show that its current business model is viable without the unlimited support of ratepayers, thereby failing the statutory criteria for a special rate. Id. at 8.

In their briefs, both the WVEUG and Staff stated their support for the CAD alternative proposal filed on August 20, 2012. Neither WVEUG nor Staff filed a response to the CAD September 24, 2012 filing clarifying the August 20, 2012 alternative proposal.

IV. SUMMARY DESCRIPTION OF APPROVED SPECIAL RATE MECHANISM

The more technical description of the Commission decision in this proceeding is set forth in Section V. of this Order, infra at 34-62. In an effort, however, to provide a more easily understood description of the Special Rate Mechanism approved by the Commission is in this Order, we offer this summary.

A. A Special Rate Mechanism is Appropriate

While the Commission does not find the Century special rate proposal to be acceptable, the Commission has determined that Century has demonstrated that it (i) qualifies for a special rate under the requirements of W.Va. Code §24-2-1j(e)(1-6) and (ii) there should be a Special Rate Mechanism offered to Century for an initial contract period ending December 31, 2021, or, at Century's option, for a ten-year period from the starting date.

B. LME Rate and Minimum Rate

The Special Rate Mechanism approved by the Commission will require Century to pay a monthly bill at a variable rate that is a function of the market price of aluminum (LME-Indexed special rate or LME Rate).

It is reasonable to allow the Century cash payments for electricity to fluctuate with the price of aluminum. We understand this is a novel approach in this jurisdiction to setting a utility rate, but we establish this Special Rate Mechanism after considerable thought and analyses and with the guidance of W.Va. Code §24-2-1j. We have fully considered the record and established a variable LME Rate that, over time, is likely to be beneficial for Century and for other ratepayers. Century has the tool, in the form of a lower cash payment for electricity designed to increase its available cash flow even at low aluminum prices, to manage its business and weather the lows in the aluminum market cycle. We have, however, placed the risk that the more recent low prices in the aluminum market cycle will become the new norm on Century, not on other ratepayers.

The Commission has further determined that Century will be liable for a total bill that is no lower than a bill calculated at a rate that is based on a more traditional cost of service ratemaking approach (Minimum Cost-based special rate or Minimum Rate). The

LME Rate may be lower than the Minimum Rate when aluminum prices are low, thereby creating "revenue shortfalls," and it may be higher than the Minimum Rate when aluminum prices are high, thereby creating "excess revenue."

The Minimum Rate, which includes a $39.4 million discount as described below, could allow, at an average level of aluminum prices, Century to pay its power bill and still generate cash flow to make capital expenditures to modernize and maintain its production equipment. During periods of high aluminum prices, Century may be able to pay even more than the Minimum Rate and even more than the full tariff rate and still generate cash flow for capital expenditures. Whatever the aluminum prices are over the next ten years, however, it is certain they will fluctuate both up and down. That fluctuation will cause changes in Century's operating income and cash flow that, according to Century, make a decision to reopen the Ravenswood facility more problematic.

C. Minimum Rate is Net of Coal Severance Tax and Fixed Cost Credits

The Commission has determined that a credit of $19.4 million per year of coal severance taxes as authorized by the Legislature is necessary to support a special rate for Century that will not impose an unreasonable burden on APCo or its customers and that will provide for the restart of the Ravenswood production operations and support a long-term operation of the plant.

The Commission has also determined that, in addition to the severance tax credit the Minimum Rate we set will provide Century with an additional financial benefit of a $20 million per year credit (fixed cost credit). This credit represents fixed costs currently paid by other customers that, under a traditional ratemaking approach, would be spread over a larger consumption base so that a portion would be paid by Century. This fixed cost credit will reduce the amount that Century pays under the Special Rate Mechanism as compared to the amount that Century would have paid under a traditional ratemaking approach.

These two credits will give Century a Minimum Rate that is $39.4 million per year lower than the rate based on the IP Tariff of APCo. With these two credits, Century will have a significantly reduced power bill. The reduced Minimum Rate, by itself however, would not take into consideration the cash payments that Century could afford to make at low aluminum price levels or at high aluminum price levels, although the legislation allows the Commission to consider this factor when establishing a special rate. It is for this reason that we have established the LME Rate (cash payments by Century), the Minimum Rate (accrued payables from Century) and a Tracking Account.

D. Tracking Account

The difference between the cash payments at the LME Rate and the amount due at the Minimum Rate (revenue shortfalls or excess revenue) will be recorded in a Tracking

Account. This Tracking Account will be closed and settled at the end of the contract, or sooner if the Commission determines that an earlier settlement or modification to Century payments is reasonable because of a high level of excess revenue (regulatory liability) accumulated in the Tracking Account. When the Tracking Account is closed, net cumulative revenue shortfalls, if any, will be the responsibility of Century. When the Tracking Account is closed, net cumulative excess revenue, if any, will go first to other customers to offset the fixed costs that would have been paid by Century under a traditional ratemaking approach and then, if there is a remaining net cumulative excess revenue balance, will be shared at a rate of 75 percent to Century and 25 percent to other customers.

Based on the current Minimum Rate, if aluminum prices rise above approximately $2,450 per metric ton, the LME Rate will exceed the Minimum Rate set by the Commission, and there will be excess revenue from the payments made by Century to APCo. This excess revenue will be used to offset the accumulated Century payable to APCo. When the payable is reduced to zero, the excess revenue will continue to be accumulated in the Tracking Account.

E. Century's Assessment of Risk Based on Forecasted Aluminum Prices

Century's expert witness on the aluminum market, Mr. Adams (whom Century referred to as the "gold standard") forecasted a base case that aluminum prices will begin to climb, and reach a level of just under $3,000 per metric ton within ten years. If the aluminum prices rebound as predicted in the Century base case presented by Mr. Adams, there will be no accumulated revenue shortfall in the next ten years under the Special Rate Mechanism approved by the Commission. Instead, excess revenue paid to APCo by Century under the LME Rate, before the consideration of carrying charges as approved by the Commission, will accumulate in excess of $350 million.

The Commission decision is not dependent on the accumulation of excess revenue, but we present this number to quantify the results of our decision based on the forecast made by Mr. Adams. While this number may appear to be optimistic, it is based on the aluminum price forecast made by Mr. Adams, the expert witness presented by Century. We derive this number based on the Report attached as Exhibit A to Mr. Adams' testimony (as revised at the hearing) and the revenue shortfalls or excess revenue at various LME aluminum prices presented with the rebuttal testimony of Mr. Fayne as Exhibit HF-6.

We have interpolated the excess or shortfall between the even $100 LME aluminum prices shown in Mr. Fayne's Exhibits. For example, Mr. Adams revised projection for average LME aluminum prices in 2013 is $2,365 per metric ton. Exhibit HF-6 (without severance tax carryforwards) shows start-up period revenue shortfalls of $18.0 million at an LME aluminum price of $2,300 and $8.1 million at an LME aluminum price of $2,400. Using these data, we calculate a shortfall of

$11.57 million at the projected price of $2,365.[10] For the steady-state operations, we make similar calculations using the steady-state data in HF-6.

F. Assignment of Risk

Under the Special Rate Mechanism approved by the Commission, Century will be able to pay a rate that its own cost models show it can afford to pay when aluminum prices are low and make up any revenue shortfall by paying a higher rate when aluminum prices are higher. This will allow Century to maintain close to the level of cash flow that it requested in its alternate proposal when aluminum prices are low.

Contrary to the Century proposal, however, the Commission has not placed the risk of ultimately compensating APCo for the revenue shortfalls caused by those low payments by Century on the other customers, but instead has placed that risk on Century. Century will be responsible for the revenue shortfall that occurs at low aluminum rates and that shortfall will be monitored and recorded in a Tracking Account.

Century will pay a higher electric rate when aluminum prices are high. Above a certain aluminum market price, this rate will be above the Commission set Minimum Rate and possibly even above the full tariff rate, and will generate excess revenue. The higher rate will be an affordable rate for Century because it will be synchronized with the higher revenue Century receives when aluminum prices are higher. Excess revenues will be recorded in the Tracking Account and will be used first to offset shortfalls in cash payments made in years when aluminum prices were low.

If there are net excess revenue in the Tracking Account when it is settled up (at the end of the contract or as otherwise directed by the Commission), the excess will be used to reduce rates to other customers up to the full extent of the accumulated $20 million per year fixed cost sharing credit that other customers would have received to reduce their rates under traditional ratemaking. Any additional amounts of excess revenue will be split with 75 percent going to Century and 25 percent credited to other customers. As discussed above, based on the base case forecast of Century's expert witness, this excess, before consideration of carrying charges, would total in excess of $350 million over the next ten years.

If the Century projections regarding aluminum prices over the next ten years prove to be significantly high, there may be an accumulated shortfall in the Tracking Account that will be the responsibility of Century. The Commission will require that Century Aluminum of West Virginia and Century Aluminum Company, the parent company of Century, file an executed Corporate Guarantee and Undertaking that they will be jointly and severally responsible for any liability of the Century Ravenswood facility payable to APCo pursuant to the Special Rate Mechanism Tracking Account.

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V. DISCUSSION

A. The Legislative Findings and Instructions to the Commission

As we stated earlier, under W.Va. Code §24-2-1j, the Legislature finds that West Virginia can retain and attract energy intensive industrial customers through the adoption of policies and the establishment of rates that enhance and preserve the attractiveness of West Virginia as a place for energy intensive industrial consumers to do business. The Legislature specifies that energy intensive industrial consumers of electric power create jobs, provide a substantial tax base and enhance the productive capacity, competitiveness and economic opportunities of West Virginia and all of its citizens.

In addition to these economic benefits to the State, the Legislature further finds that, under the Act, energy intensive industrial consumers of electric power help keep power rates low for all consumers of electric power, including residential customers, by providing a large consumption base over which the cost of producing electric power may be spread from time to time. We do not believe the Legislature intended that all fixed costs will be spread across the larger consumption base attributable to energy intensive customers at all times; nor do we believe that the Legislature intends that the availability of a larger consumption base over which to spread costs is a guarantee for lower electric rates for all consumers. The desire to keep power rates low for other customers by shifting a portion of existing fixed costs to a large energy intensive industrial customer must be tempered by other factors that the Commission must consider in order to satisfy the Legislative findings and authority that we can use special rates to attract and preserve large energy intensive industrial customers.

Under W.Va. Code §24-2-1j, the Commission is authorized to establish special rates that are necessary for the continued, new or expanded operation of energy intensive industrial consumers in the state. The Commission is further encouraged to establish a special rate that can reasonably be expected to support the long-term operation of energy intensive industrial consumers. The Legislature was well aware of and acknowledged that supporting the operations of energy intensive industrial customers may not always result in lower rates to other customers. The Legislature clearly contemplated that the sharing of fixed costs over a larger consumption base may not always be consistent with the policy of enhancing West Virginia as a place for energy intensive customers to do business. When there is a conflict, the benefit to other customers may be reduced or even eliminated from time to time. The Legislature specifically provided that the Commission may consider timing differences in rate payments directly tied to market prices for the product(s) produced by the customer regarding cost recovery and the viability of the energy intensive industrial customer. As specified in the statute, and as discussed earlier, the rates that we establish to support energy intensive industrial customers cannot impose an "unreasonable burden" upon the electric utility or other customers of the utility.

The Legislature does not instruct us to provide a special rate solely to support the financial integrity of an energy intensive industrial customer or solely to help to keep rates low for other customers. We must instead consider and balance all of the interests involved to derive a special rate that can encourage the continued development, construction, operation, maintenance and expansion in West Virginia of energy intensive industrial plants, and thereby increase the creation, preservation and retention of jobs, expand the tax base, help keep power rates low for all consumers of electric power, and enhance the productive capacity, competitiveness and economic opportunities of all citizens of West Virginia. All of this we must do without imposing an unreasonable burden on other customers.

Under the provisions of W.Va. Code §24-2-1j, we believe we are permitted, consistent with the strictures of the United States Constitution, the West Virginia Constitution, and the other statutes and case law that prescribe and proscribe the power and authority of the Commission, to consider alternatives to traditional ratemaking during our deliberations of a special rate for an energy intensive industrial customer.

We further believe that the statute contemplates that there may be, from time to time, some burden placed on an electric utility or its other customers when that is necessary for the continued, new or expanded operation of energy intensive industrial consumers and to support the long-term operation of energy intensive industrial consumers. The Legislature requires that the "burden" on the utility or other customers not be an unreasonable burden. In order to satisfy the legislative intent, the establishment of special rates under W.Va. Code §24-2-1j must be balanced, and potential negative impacts on other customers must be offset by potential benefits that would not have been available under traditional ratemaking. The Legislature recognizes that the special industrial rates that we authorize may, from time to time, result in a revenue shortfall that can be allocated to other customers or result in excess revenue that likewise may be allocated to other customers.

> The Commission shall determine whether any excess revenue or revenue shortfall created by a special rate authorized pursuant to this section should be allocated among any other customers of the utility. In making that determination, the Commission shall consider all relevant factors, including whether such allocation is just, reasonable, and fairly balances the interests of other customers, the utility, and the customer receiving the special rate.

W.Va. Code §24-2-1j(f).

B. Century's Qualification for a Special Rate

As an initial matter, the Commission must consider the requirements of H.B. 101 and determine if Century qualifies for a special rate pursuant to W.Va. Code §24-2-1j(e) and, if so, whether APCo would qualify for coal severance tax credits to reduce or eliminate revenue shortfalls related to the special rate.

First, to qualify for a special rate Century must have a contract demand of at least fifty thousand kilowatts of electric power (50 MW) at its West Virginia facilities under normal operating conditions. W.Va. Code §24-2-1j(e)(1). In addition, to allow APCo to qualify for the coal severance tax credits, Century must have a contract demand of at least two hundred fifty thousand kilowatts of electric power (250 MW) at its West Virginia facilities under normal operating conditions. W.Va. Code §24-2-1j(g)(4). Century expects to operate at a demand level that is lower than it had operated under in the past because it does not expect to operate its carbon plant. Under normal operating conditions, after restart and without the carbon plant operating, Century still expects to have a demand of 310 MW. Ex. GH-D at 3. There is no question that Century meets, and significantly exceeds, the demand level requirement of the Act to qualify for a special rate as well as meeting the requirement that would allow APCo to receive coal severance tax credits to reduce or eliminate revenue shortfalls.

Second, to qualify for a special rate Century must create or retain at least twenty-five full-time jobs in the State. W.Va. Code §24-2-1j(e)(2). To allow APCo to qualify for the coal severance tax credits, Century must employ no less than three hundred persons. W.Va. Code §24-2-1j(g)(3). Century expects to employ approximately 421 employees even before it starts up the first potline and will eventually increase that number to approximately 472 employees during the sequenced restart and stabilization period. Century expects to maintain that level of employees during its steady state operations after startup. Ex. GH-D at 3. This level of employment meets the level of employment necessary to qualify for a special rate and the requirement that would allow APCo to receive coal severance tax credits.

Third, Century must have not less than $500,000 invested in the State in fixed assets, including machinery and equipment. W.Va. Code §24-2-1j(e)(3). Century's investment in the Ravenswood facility is significant. After it acquired the facility in 1995, it added $22.0 million for pot tending cranes, $8.4 million for an anode cleaning facility, and $6.3 million for a sow casting facility. In the three years prior to curtailment of smelting operations in 2009, Century invested $18 million in capital projects at the plant. Ex. GH-D at 2, 3. Century projects that it will have capital expenditures of $16.2 million in the start-up period and will spend an additional $4.0 million per year on capital expenditures during its steady state operations. Id. at 4. At hearing, Century put forward an exhibit listing its financial commitments. Therein, Century committed to invest $90 million at the startup of the Ravenswood plant, including $40.5 million for operational readiness, $39.5 million for raw materials, and $9.1 million for initial modernization. CR Ex. 3. Thereafter, Century plans to invest $44 million in years two through nine of operation. Id. These investments are clearly sufficient to meet the threshold for considering a special rate.

Fourth, Century must also provide reasonable evidence that, without the special rate, market conditions in the industry in which the energy intensive industrial consumer operates, or other factors bearing on investment in and operation of the industrial facility or facilities, the continued operation of the industrial facility is threatened or not economically viable under reasonable assumptions and projections regarding the market and the operation of the industrial facility or facilities. W.Va. Code §24-2-1j(e)(4). Mr. Hoerner testified that Century had curtailed its operations in 2009 due in part to low aluminum prices and in part due to the inadequacy of the special rate in effect at that time. Ex. JH-1 at 2. Mr. Adams testified that based on his analysis and his projections regarding market conditions in the aluminum industry there was less than a five percent probability that a power price at the APCo industrial tariff rate was affordable. He concluded that "[the Ravenswood facility] cannot be reopened on the basis of the standard [APCo] industrial tariff." Ex. RA-1 at 6. The Commission finds that Century demonstrated that the operations of the Ravenswood facility are not economically viable without a special rate.

Fifth, Century must also provide reasonable evidence that, with a special rate, it intends to operate the Ravenswood facility for an extended period of time and that the operation or continued operation of the industrial facility or facilities for an extended period of time appears economically viable, under reasonable assumptions and projections regarding the market in which the energy intensive industrial consumer operates and regarding the operation of the industrial facility or facilities. W.Va. Code §24-2-1j(e)(5). This element of the statutory test has provided a substantial amount of contention in this proceeding, second only to the proposal for the allocation of revenue shortfalls to other ratepayers. Some parties other then Century argue that its business model is not viable without the unlimited subsidies from other ratepayers. See, Staff Initial Brief at 3.

The Commission believes that the economic viability of Century and the variable rates are inseparably linked. If Century can obtain a price for electricity based on aluminum prices, it is viable over time, presuming that it efficiently operates the other aspects of its business. As discussed below, the Commission rejects the allocation of revenue shortfalls to other customers, but instead will direct APCo to establish a Tracking Account to defer differences between bills calculated at the Minimum Rate established by the Commission and bills calculated at the LME Rates which are discussed and shown in Tables 1 and 2 below. Century has stated that it is able to pay amounts that are based on the price of aluminum. Ex. HF-D at 11. The Commission accepts that representation and based thereon concludes that Century is economically viable with the Special Rate Mechanism approved in this Order.

Sixth, and finally, Century must provide information and data setting forth how the energy intensive industrial consumer meets the qualifications of the Act, and how the special rate advances the policy goals set forth in the Act. W.Va. Code §24-2-1j(e)(6). Century bears the burden to show it meets these requirements. The benefits that Century noted, including increased economic activity, hundreds of jobs in the Ravenswood area and a substantial boost to the coal industry, are consistent with the intent of the Legislature in passing the Act. See, Ex. LH-1, JH-1 at 6. In addition, the Commission approved Special Rate Mechanism helps keep rates low for other customers by requiring Century to bear the risk of any revenue shortfall.

Based on the foregoing, the Commission finds that Century qualifies as an energy intensive industrial customer and is eligible for a special rate pursuant to the provisions of W.Va. Code §24-2-1j(e).

C. Eligibility for Energy Intensive Industrial Customers Tax Credit

In addition to meeting the statutory qualification for a special rate, the Commission believes that the expected revenue shortfall discussed below requires that we consider the availability of energy intensive industrial customers tax credits. The Commission has determined that Century is eligible for a special rate and that the rate is necessary to reopen the plant. The testimony of Mr. Hopper shows that Century meets the employment and electric demand criteria for consideration of the tax credit. Ex. GH-D at 2-4. Therefore, the Commission will consider the available tax credits and will incorporate them into the Special Rate Mechanism it fashions below. W.Va. Code §24-2-1j(g).

D. Commission Analysis of Proposals Submitted by the Parties

There are problems that exist with the proposals presented by parties in this case.

1. Century Proposal

In this case, Century has submitted an initial proposal and a subsequent revised proposal. The revised proposal added some limits to the potential revenue shortfall that would be allocated to other customers and addressed some of the other concerns with the Century proposal expressed by other parties. Inasmuch as Century is proposing the alternative LME Rate levels, we believe that those rates provide cash flow benefits to Century at lower aluminum prices and are affordable for Century at higher aluminum prices. As such, they should meet the legislative goal to encourage the construction, operation, maintenance and expansion of the Century facility. We must consider, however, the totality of the Century plan, including the exposure of other customers to allocations of revenue shortfalls at lower aluminum prices. Century did revise its plan to limit that exposure as compared to its original plan, but the revised Century proposal did not go far enough to protect other customers against an unreasonable allocation of revenue shortfalls. As a consequence, we believe that the Century plan, as it currently exists under the revised proposal, presents the potential for an unreasonable burden on other customers, does not fairly balance the interests of other customers, APCo, and Century, and violates the safeguards of W.Va. Code §24-2-1j.

Century argues in its testimony and exhibits that the large revenue shortfalls that would be allocated to other customers at low aluminum prices should not accumulate to a large amount over time. Century's basis for this argument is that as aluminum prices increase above certain levels, there will be excess revenues under the Century Plan. These excess revenues, according to Century, will offset accumulated revenue shortfalls, and over the life of the contract it is possible that there will be a net benefit to other customers.

Century witness Adams presented a report at the hearing and in his testimony in which he projected that the aluminum price from 2013 through 2021 would likely be within a range of $2,304 to $2,583 per metric ton. He also forecasted that the mean price of aluminum would be $2,447 and that his models showed that there was a ninety percent confidence level that the aluminum price would exceed $2,331 per metric ton and an eighty percent confidence level that the price would exceed $2,374 per metric ton. Ex. RA-1, Exhibit A at 9.

Mr. Adams testified that there would be a zero net impact on other ratepayers at an aluminum price of $2,457. He also testified that he believed that there was a fifty percent chance that there would be a net positive impact on other ratepayers under the Century Plan. Ex. RA-1 at 7.

As a utility regulatory body, we are steeped in the use of historical, cost-based financial information and concepts of "known and measurable" adjustments to historical data when fixing rates for the future. We use forecasts and projections sparingly and generally those forecasts and projections are "trued up" frequently, such as in annual Commission 30-C (gas utility purchased gas cost) proceedings or ENEC (electric utility net capacity and energy cost) proceedings. We are admittedly uneasy with the use of forecasts and projections as means for setting rates. Nevertheless, given the legislative aims of W.Va. Code §24-2-1j and the guidance provided by the Legislature under that statute, we find that the type of evidence and projections of aluminum prices presented by Century can be a reasonable basis for evaluating a Special Rate Mechanism for Century.

We do not agree that the risks and burden of lower than estimated aluminum prices should fall on other ratepayers. Notwithstanding the Century estimates and Century's asserted confidence of a neutral or even favorable outcome for other customers, we find that the potential revenue shortfall that is allocated to other customers under the Century proposal is too large to sustain a finding that the proposal is "not unreasonable."

2. APCO Proposal and Commission Request Exhibit 6

APCo originally submitted an alternative to the Century special rate (APCo plan). APCo also, at the request of the Commission, presented CR Ex. 6, an alternative special rate plan for Commission consideration. This was not APCo's original plan nor for that matter did APCo endorse the plan, but it presented it in response to a Commission hearing request. The CR Ex. 6 plan provides more protection to other customers and comes closer to not imposing an unreasonable burden on other customers than does the revised Century Plan. The CR Ex. 6 plan, however, limits Century's cash flow and results in significant negative cash flows for Century at the lower end of reasonably expected aluminum prices.

Even if we determined that the CR Ex. 6 plan represented a reasonable allocation of potential revenue shortfalls to other customers, the record does not support a finding that the plan results in power costs for Century that support the new, expanded, and continued operation of the Century plant. We, therefore, find that the cash flow available to Century during periods of low LME aluminum prices are not sufficient to provide a reasonable expectation that the rates presented in either the APCo plan or the CR Ex. 6 plan can support the long-term operation of the Century West Virginia operations.

The protection to other customers produced by the limits built into either the APCo Plan or the CR Ex. 6 plan come at the severe cost of reduced or even negative net cash flow to Century at lower aluminum prices. Thus, even if we determined that either plan resulted in potential revenue shortfalls allocated to other customers that were likely to be reasonable and not unduly burdensome, we would not find the plans to be reasonable. In protecting other customers, both the APCo plan and the CR Ex. 6 plan make it unlikely that Century will have sufficient cash flow during the down years of the aluminum business and price cycle to sustain continued operations. There is, thus, the possibility that the electric bills that Century would have to pay would result in cash outlays for power during periods of low aluminum prices that would be damaging to the continued operations of Century and would not support the long-term operation or viability of the Century West Virginia operations.

3. CAD Proposals

The CAD presented an alternative to the Century proposed pricing mechanism that was designed, according to the CAD, to minimize the potential for "undue subsidies" that would be paid by other customers (Initial CAD Plan). After the hearing and receipt of CR Ex. 6, the CAD filed an alternative plan which it described as a "do no harm" approach (Alternative CAD Plan).

a. Initial CAD Plan

In the Initial CAD Plan, the CAD recommended that there be no special rate for Century until the one-year forward futures price of aluminum, as reported on the London Metals Exchange, was above $2,450 per metric ton, and the three year forward price was above $2,620 per metric ton. The Initial CAD Plan also required the minimum special rate for Century to include an amortization of the accrued under recoveries from the 2006 Century Special Contract. In addition to the under recoveries, the minimum rate in the Initial CAD Plan required Century to cover the ENEC rate incorporated in the APCo IP Tariff, including the impact of additional capacity charges and the Construction Surcharge. The CAD suggested that the special rate could fluctuate with the price of aluminum, but should not include consideration of Century's revised or updated costs of production, including profits.

Because the CAD recommended a minimum rate level in its proposal, we believe that the Initial CAD Plan must have contemplated that the minimum rate could increase if aluminum prices increased above the threshold level for starting the special rate, but could not fluctuate downward below the minimum rate level, even if aluminum prices dropped. The CAD did not address whether the minimum rate could be further reduced by the available severance tax credit.

The Initial CAD Plan did not describe a banking or deferral mechanism. The CAD did not explain how a deficit would be calculated. The Initial CAD Plan included a requirement for an irrevocable letter of credit from Century in the amount of \$32.7 million to provide assurance that the under recoveries from the 2006 Special Contract are paid by Century and to provide protection against additional under recoveries under a new Special Rate Mechanism.

In Exhibit BLH-5, attached to the CAD direct testimony, the CAD quantified a minimum rate of \$38.89 per MWH based on the ENEC rates and Construction Surcharge in effect at the time of the submission of the direct testimony. CAD intended to add an increment for the amortization of the under recovery from the 2006 Century Special Contract in the proposed minimum rate, but Exhibit BLH-5 contained an error and failed to include that increment in the \$38.89 per MWH minimum rate. Correcting the error appears to the Commission to result in an additional \$0.95 per MWH to be added to the minimum rate, bringing that rate to \$39.84.[11]

b. Alternative CAD Plan

In the Alternative CAD Plan, the CAD removed the requirement that Century could not receive the special rate until aluminum futures prices reached certain levels. The Alternative CAD Plan continued to recommend that there be a minimum price paid by Century equal to the ENEC component of APCo's IP Tariff, the Construction Surcharge and amortization of the accrued under recoveries from the 2006 Century Special Contract. The Alternative CAD Plan modified the earlier CAD proposal regarding additional capacity equalization charges. The CAD indicated that the minimum special rate for Century would be \$36.97, or \$1.92 per MWH lower than the rate included in the CAD direct testimony. We believe that this rate included the same error regarding the amortization of the under recovery from the 2006 Century Special Contract and that including that amortization would change the minimum rate for the Alternative CAD Plan to \$37.92. The Alternative CAD Plan did not specifically address how the severance tax credit factored into the calculations of either a minimum rate or calculation of excess revenue or revenue shortfalls.

[11] The CAD used 2,661,288 MWH for its calculations on Exhibit BLH-5. The CAD intended to require Century to pay \$2,522,222 per year for the under recovery balance related to the 2006 Century Special Contract. On a per MWH basis, this would require a minimum rate increment of \$0.95 per MWH (\$2,522,222 ÷ 2,661,288). The CAD failed to add that amount to its recommended minimum rate.

On September 24, 2012, the Commission issued an Order asking the CAD to clarify how the available tax credits were to be used under the Alternative CAD Plan. The CAD responded on September 25, 2012 and clarified that the $36.97 per MWH minimum rate contained in the Alternative CAD Plan "does not take into consideration the coal severance tax credit...." The CAD further explained that accounting for the severance tax credit would cause the effective electricity rate paid by Century to be lower than the minimum rate calculated by the CAD by the amount of the tax credit. The CAD concluded:

> The concept of the "do no additional harm" to ratepayers is that the revenues received by APCo must recover; 1) an amortization of the current arrearage; 2) the applicable construction surcharge costs; and 3) the applicable ENEC costs. As long as APCo receives sufficient revenue from a combination of payments by Century and use of tax credits, ratepayers would not be required to provide any additional subsidies....

September 25, 2012 CAD Clarification at 2.

The CAD also provided a recalculation of its proposed minimum rate under the provisions of its Alternative CAD Plan using the most current ENEC rates and construction surcharge applicable to the APCo IP Tariff and correcting the mathematical error in the calculation of the increment for the under recovery under the 2006 Century Special Contract. The recalculated minimum rate in the CAD response, before reduction for the available severance tax credit, is $37.55.

The Commission believes that the CAD plans, both the Initial CAD Plan and the Alternative CAD Plan, are intended to provide maximum protection against revenue shortfalls being allocated to other customers. The plans, however, result in low, or even negative, cash flow to Century at low aluminum prices and do not provide for the smoothing and tracking of revenue shortfalls that the Act permits us to consider. We do not find sufficient flexibility in the CAD plans to provide a reasonable expectation that Century could reopen the Ravenswood facility or could operate for an extended period of time. We do not believe that the CAD plans comply with the intent of the Act.

4. <u>WVEUG Proposal</u>

The WVEUG opposed the Century plan for a variety of reasons. The WVEUG witness testified that customers could incur substantial costs if market prices for aluminum remain low, while Century would retain most of the benefit from higher aluminum prices. WVEUG argued that the Commission should not approve a plan in which revenue shortfalls could be allocated to, and paid by, other customers. WVEUG did not suggest a specific alternative plan that would satisfy its concerns about potential revenue shortfalls but still provide Century with a special rate that would be based on aluminum prices and would provide Century with the flexibility it needed to reopen its plant.

5. Staff Proposal

The Staff did not recommend a special rate plan, but commented on the Century Proposal. Staff recommended that if the Commission adopted a special rate plan, the plan should be considered a modification of the 2006 Special Rate Contract. The Staff does not recommend that the Commission end the 2006 special rate, presumably because that would allow APCo to recover the under recovery attributable to the 2006 Century contract in its ENEC rates.

Staff opposed the severance tax credit for Century based on the Staff's evaluation of the qualifications for the severance tax credit and its direct or indirect assumptions that Century did not meet the qualifications. Staff listed six qualifications that it believed Century must meet to receive the severance tax credit. The Staff witness testified that she believed that Century met the first three factors. By implication, the Staff witness appears to be taking the position that Century does not meet the remaining qualifying factors, to wit: Century must provide reasonable evidence that without the special rate the operation of the industrial facility is threatened or not economically viable; Century must provide reasonable evidence that with the special rate it is economically viable under reasonable assumptions and projections regarding the aluminum market; and Century must provide information and data setting forth how it qualifies for a special rate.

We believe that most of the factors listed by Staff are required for an energy intensive industrial customer to be qualified for a special rate, not the tax credit. Nevertheless, qualification for a special rate is the focus of the Staff objection to the Century proposal. Staff appears to believe that Century is not economically viable based on the fact that Century filed a special rate plan that, in Staff's opinion, shifted all risk to other customers. We do not fully understand the Staff analysis as presented. Staff seems to be stating that the special rate plan proposed by Century is so tilted in Century's direction that the Commission must find that Century does not qualify for a special rate. It would have been more persuasive if the Staff had said that Century's ability to start the plant is tenuous and perhaps not economically viable and that problem led Century to ask for a plan that, in Staff's view, is unfair to other customers and unreasonable. Staff did not analyze whether Century could be viable with a special rate that did not place an unreasonable burden on other customers.

E. Commission Proposed Alternative Special Rate Mechanism

We see problems with the proposals and plans submitted by all of the parties. We believe that a better plan would provide a rate mechanism that allowed Century to maintain cash flow, even at relatively low aluminum prices. Having said that, however, it is not reasonable to place the potential burden of revenue shortfalls while maintaining cash flow for Century on the backs of other ratepayers.

As discussed earlier, the Commission will set a Minimum Rate that is equal to the APCo Tariff rate applicable to Century, currently the IP Tariff rate, less the coal severance tax credit and the $20 million per year contribution to fixed costs that Century would have paid under traditional ratemaking (fixed cost credit) and an LME Rate which will be the required cash payments to be made to APCo by Century. Century's description of a Tracking Account used arithmetic that resulted in revenue shortfalls being positive numbers and excess revenue being negative numbers. It is confusing if accumulated excess revenue is referenced as a negative number. The Commission prefers the opposite result and will direct that APCo calculate and report monthly revenue shortfalls and accumulated revenue shortfalls as negative numbers and report monthly excess revenue and accumulated excess revenue as positive numbers. To accomplish this, for purposes of calculating current excess revenue or revenue shortfalls the Century bill calculated at the Minimum Rate will be subtracted from the bill calculated at the LME Rate each month and the differences will be recorded in a Tracking Account. Positive differences will represent excess revenue and negative differences will represent revenue shortfalls. For accounting purposes, APCo will record revenue shortfalls as debit balances in accounts receivable from Century (a regulatory asset). If the Century accounts payable balance becomes a credit balance because of payments by Century at high LME Rates, the balance will be a regulatory liability, subject to disposition as directed by the Commission.

1. Cash Payment Rate Based on Aluminum Prices (LME Rates)

Under the Commission Special Rate Mechanism, Century will pay a lower LME Rate during periods of low aluminum prices. These lower payments will help Century to maintain a positive cash flow, but, as discussed above, the difference between the LME Rate and the Minimum Rate will be tracked in a separate Tracking Account. For accounting purposes, revenue shortfalls created when a bill at the LME rate is lower than the bill at the Minimum rate will be recorded as a receivable by APCo from Century and may be offset by excess revenue received by APCo from Century during periods of higher aluminum prices.

If there is a net negative cumulative amount in the Tracking Account owed to APCo after excess revenue offsets, the net balance must be paid by Century at the conclusion of the contract or, if there is a request and the Commission agrees, rolled over into a new or extended contract. If there is net positive cumulative excess revenue reflected in the Tracking Account at the conclusion of the contract, or sooner if ordered by the Commission, the net balance will be used to reduce rates for other customers or be refunded to Century as described later in this Order.

a. Century Operating Margin Considerations in Developing LME Rates

Because we are not requiring an allocation of any revenue shortfall below the Minimum Rate to other customers, we will provide the maximum cash flow benefit reasonable to Century by adopting LME Rates consistent with the revised proposal made by Century. The calculation of LME Rates is based on projected plant operations data supplied by Century. A major component of the projected cash requirements is an Operating Margin for Century. The original Century proposal requested an Operating Margin of $200 per metric ton of aluminum production at any level of aluminum prices. Ex. JH-1 at 3, 4. This proposal was severely criticized by other parties, and it became a hotly-contested issue with regard to the LME Rates proposed by Century. The Commission was concerned about the fixed Operating Margin proposed by Century because, under the Century plan, the Operating Margin added to the revenue shortfalls that were allocated to other customers while Century was receiving the full proposed Operating Margin.

In the original proposal, Century presented illustrative examples of LME Rates at aluminum prices beginning at $2,100 per metric ton. At a $2,100 per metric ton aluminum price in the start-up period, the proposed LME Rate was $16.63 per MWH, and at that LME Rate there would have been a $45.7 million revenue shortfall allocated to other customers. Ex. HF-D at HF-5. At the same time, the operating cash requirements proposed by Century included an Operating Margin that gave Century operating cash flow of $29.3 million. The cost models used by Century to produce its illustrative examples could be extended to derive LME Rates at even lower aluminum market prices. For example, we calculate that at an aluminum price of $1,800 per metric ton, the LME Rate, as determined under Century's original proposal, would have been $3.70 per MWH and the revenue shortfall allocated to other customers would have been $75.6 million. In addition to a relatively low aluminum price, one of the reasons for the low LME Rate and huge revenue shortfall allocated to other customers was that the Operating Margin was fixed at $200 per metric ton and Century would still receive the $29.3 million Operating Margin when it was paying only $3.70 per MWH for its power and allocating a revenue shortfall of $75.6 million to other customers.

In its modified proposal, Century changed the amount of the Operating Margin that it targeted as aluminum prices fell. Century proposed that the Operating Margin be fixed at $200 per metric ton when aluminum prices were at and above $2,200 per metric ton. As aluminum prices fell, Century proposed that the Operating Margin be stepped down in increments of $50 for each $100 drop in aluminum prices. Thus, at an aluminum price of $2,100 per metric ton, Century proposed a revised Operating Margin of $150 per metric ton of production. At an aluminum price of $1,900 per metric ton, Century dropped its requested Operating Margin to $50 per metric ton of production. At aluminum prices of $1,800 per metric ton, and below, Century proposed that the Operating Margin be set at zero. Ex. HF-R at 2, HF-6. Century made a number of other revisions to its model for calculating LME Rates and showed that under its revised proposal, at an $1,800 per metric ton aluminum market price, Century would have an LME Rate of $20.03 per MWH and the revenue shortfall allocated to other customers would be $29.1 million. Id. The reduced Operating Margin was just one reason for the higher LME Rate and lower revenue shortfall in the revised Century proposal, but by itself, setting the Operating Margin at zero reduced the revenue requirements calculated for the Ravenswood facility by $29.3 million.

In CR Ex. 6, APCo addressed the Operating Margin issue and suggested an alternative for stepping down the Century Operating Margin. The CR Ex. 6 plan would have set the $200 Operating Margin at an aluminum market price of $2,900 per metric ton or above and stepped down the Operating Margin in increments of $25 for each $100 drop in aluminum prices down to $2,200 per metric ton. Under the CR Ex. 6 plan, the Operating Margin would then be levelized at $25 per metric ton of aluminum production until the market price of aluminum dropped below $2,000 per metric ton. Then, the Operating Margin would drop again, reaching zero at an aluminum market price of $1,900 per metric ton. Thus, under the CR Ex. 6 plan, Century would have a lower Operating Margin than under even the Century revised plan, beginning when the market price of aluminum dropped below $2,900 per metric ton. For example, whereas Century's revised proposal would have included an Operating Margin of $200 per ton of aluminum production at an aluminum price of $2,200 per metric ton, the Operating Margin under CR Ex. 6 would have been $25 per metric ton of production. Ex. HF-R at HF-6, CR Ex. 6.

The Commission understands the concerns of the parties and shares in the concern about the fixed $200 per metric ton of production Operating Margin for Century, or even the step down of that Operating Margin proposed in the revised Century plan. It is difficult to rationalize a relatively high level of Operating Margin to Century at the expense of other ratepayers. We understand, however, that the sources of operating cash flow for Century are the Operating Margin, amortization, and allowance for capital additions built into the LME model. Under an extremely restrictive Operating Margin scenario, in a declining aluminum price market, Century is hit with a double impact of the drop in aluminum prices and the lower Operating Margin built into the LME Rate. While cash flow will continue to be derived from the amortization and allowance for capital additions built into the LME Rates, the Operating Margin represented more cash flow to Century than the amortization and capital addition allowance, combined.

The Commission will not set the Operating Margin at a fixed level across all aluminum prices. Neither will we adopt the step down of Operating Margin as reflected in CR Ex. 6. The Commission, instead, will adopt the step down of Operating Margin as proposed by Century in its revised proposal. This will result in zero Operating Margin when aluminum prices drop to $1,800 per metric ton. This may build a higher level of Operating Margin into the LME Rate than other parties find acceptable. The significant condition in this Commission ruling, however, is that under the Special Rate Mechanism approved by the Commission, the lower LME Rate resulting, in part, from the Operating Margins built into the rate calculations, does <u>not</u> result in revenue shortfalls allocated to other customers.

We have explained that any revenue shortfall created by the difference between the LME Rate established by the Commission and the Minimum Rate established by the Commission will be allocated to Century. Thus, the Operating Margin built into the LME Rate gives Century the benefit of cash flow at lower aluminum prices, but that

Operating Margin also contributes to a higher payable that Century owes APCo. As aluminum prices increase to the level that the LME Rate exceeds the Minimum Rate, the additional payable will be reduced by payments by Century at the LME Rate.

Given the fact that under the Commission plan the Century revised proposed Operating Margins are not resulting in a revenue shortfall that is allocated to and paid by other customers as was originally proposed by Century, and considering our concern that positive cash flow to Century is a necessary component of continuing plant operations for an extended period of time, it is reasonable to use the less severe step down of Operating Margins as proposed by Century in its revised proposal.

b. Other Cash Flow Considerations in Developing LME Rates

We will further modify the Century cash flow by leaving the amortization of start-up costs at the levels reflecting a three-year amortization as contained in the original Century proposal. Century will also have internally generated cash flow from operations equaling approximately $5.5 million per year during startup and approximately $5 million per year thereafter, based on capital expenditures reflected in the non-power cost models filed by Century and used for purposes of our calculation of LME Rates. Our decision to use the Operating Margin levels proposed by Century, a shorter amortization period of start-up costs, and the capital expenditure projections made by Century in the development of an initial LME Rate will produce the maximum reasonable level of internal cash flow from operations. We believe that providing for the maximum amount of internally generated cash flow from operations is reasonable based on the record before us and is an important step in developing a Special Rate Mechanism that provides appropriate flexibility and predictability over time in order to give Century the ability to make the capital investments and other commitments necessary to support the continued operation of the Ravenswood facility.

c. Capital Expenditures Commitment

Century provided for the record an exhibit that detailed its Capital Plan for the plant. CR Ex. 3. That plan shows that at or before startup Century will spend $40.5 million for operational readiness and $9.1 million for initial modernization in the form of IT hardware and plant equipment. The Capital Plan also reflects expenditures over an eight-year period of $44 million, or approximately $5.5 million per year. In discussing this plan on the record, Century's witness, Mr. Hoerner, indicated a commitment to spend the $44 million over years two through nine to sustain the plant and to keep the plant in condition where it can run year after year. Tr. II at 33. When asked by the Commission if the word "commitment" was "too strong," Mr. Hoerner responded: "No, sir, you can use that [term]. We're going to spend that money." The Commission takes that commitment seriously as we know Century does.

We have attempted to provide cash flow that will make it easier for Century to keep its commitment. We will condition the approval of the Special Rate Mechanism on this commitment from Century that it will follow through on the annual modernization component of its Capital Plan and spend a minimum of $44 million on required capital expenditures over the eight-year period shown in that plan. As indicated above, the capital expenditure levels of approximately $5.5 million per year during startup, $5.0 million per year during steady state operations and the more substantial cash flow from Operating Margins and amortization of start-up costs, were all included in our calculation of LME Rates to help Century with the cash flow necessary to enable it to keep its commitment to modernization of the Ravenswood plant from internally generated cash flow. In fact, the levels of cash flow included in our calculation of LME Rates exceed the $44 million modernization commitment over an eight-year period. We believe that this additional internal cash flow can help Century make positive decisions with regard to the long-term modernization opportunities discussed in its Capital Plan and that those decisions will help to support the continued operations of the plant as contemplated under W.Va. Code §24-2-1j(a)(6), (c) and (e)(4) and (5).

d. Start-up and Steady State LME-Indexed Special Rates

The Commission determines that it is necessary to establish an initial period LME Rate and a separate LME Rate to become effective after Century has concluded initial start-up sequencing of its facilities and is likely to be at full production on a "24/7" basis. We will establish an initial startup LME Rate for the first thirty-six months after Century begins operations under a new contract.

We establish this rate based on the models presented by Century for the first 36 months of operations but adjusting product premiums and Operating Margins as presented by Century in its revised proposal. The resulting LME start-up rates are:

Table 1 LME Rates During First 36 Months

Average LME Price Per Metric Ton	LME Rate Per MWH	Average LME Price Per Metric Ton	LME Rate Per MWH
$ 1,700	$ 15.89	$ 2,600	$ 41,34
$ 1,800	$ 20.20	$ 2,700	$ 45.54
$ 1,900	$ 21.41	$ 2,800	$ 49.75
$ 2,000	$ 22.62	$ 2,900	$ 53.95
$ 2,100	$ 23.83	$ 3,000	$ 58.15
$ 2,200	$ 25.04	$ 3,100	$ 62.35
$ 2,300	$ 29.34	$ 3,200	$ 66.56
$ 2,400	$ 33.64	$ 3,300	$ 70.76
$ 2,500	$ 37.14	$ 3,400	$ 74.96

We also establish a second LME Rate equivalent to what Century referred to as its "steady state" proposal. In determining these rates, we used the production cost models used by Century in its original proposal, but adjusted product premiums and Operating

Margins as presented by Century in its revised proposal. The resulting LME Rates that will be effective for the fourth through the tenth year of the special rate are:

Table 2 LME Rates After First 36 Months

Average LME Price Per Metric Ton	LME Rate Per MWH		Average LME Price Per Metric Ton	LME Rate Per MWH
$ 1,700	$ 19.33		$ 2,600	$ 45.48
$ 1,800	$ 23.74		$ 2,700	$ 49.89
$ 1,900	$ 25.00		$ 2,800	$ 54.31
$ 2,000	$ 26.25		$ 2,900	$ 58.72
$ 2,100	$ 27.50		$ 3,000	$ 63.13
$ 2,200	$ 28.75		$ 3,100	$ 67.55
$ 2,300	$ 33.17		$ 3,200	$ 71.97
$ 2,400	$ 37.21		$ 3,300	$ 76.39
$ 2,500	$ 41.25		$ 3,400	$ 80.81

The LME Rate at a $1,700 per metric ton aluminum price is the minimum LME Rate approved by the Commission. LME Rates billed are to be calculated to the nearest dollar LME aluminum price based on the $100 price steps in the LME price tables above. We do not adopt a cap on the LME Rate. At aluminum prices above $3,400, the LME Rate can be calculated using the linear change in prices between $3,100 and $3,400 in the LME price tables, which is $4.20 per $100 in the Table 1 LME Rates and $4.42 per $100 in the Table 2 LME Rates.[12]

The monthly bill for Century at the Minimum Rate and the monthly bill at the applicable LME Rate will be calculated by APCo and will become the factors for determining, with a simple mathematical subtraction calculation, the amounts that are recorded as future payables or credits in the Tracking Account. The bill under the Minimum Rate will be subtracted from the bill at the LME Rate and a negative difference will represent a revenue shortfall recorded in the Tracking Account. A positive difference will represent excess revenue recorded in the Tracking Account. Negative differences represent amounts owed to APCo by Century. Positive differences represent excess revenue paid by Century to APCo. The LME Rates shown in Tables 1 and 2 above will remain in effect during the contract period under the Commission approved Special Rate Mechanism.

[12] Century will timely provide APCo with the average aluminum market price needed for billing purposes. The aluminum price applicable to each month's usage billed by APCo will be the simple average daily cash settlement price for high grade aluminum for the month as quoted by the London Metals Exchange and as published by Reuters. APCo and Century may, by mutual agreement, use a different publication for purposes of obtaining the aluminum market price data.

2. Minimum Cost-Based Special Rate (Minimum Rate)

The appropriate starting point for setting the Minimum Rate is the average rate per MWH derived by applying Century billing determinants to the transmission level APCo IP Tariff in effect each month the Special Rate Mechanism is in effect. The average IP Tariff rate that was described in the record as the rate that Century would pay in the absence of a special contract rate was represented to be $52.45 per MWH. For purposes of discussion and comparison in this Order, we use the $52.45 per MWH reflected in the record. This amount will be adjusted by the available net coal severance tax credit and the $20 million fixed cost credit. We describe below the expected annual credits per MWH that will be deducted from the average IP Tariff rate to provide clarity in this order. The actual credit may vary slightly from month to month because the credit will be calculated monthly by APCo based on billing units applicable to Century.

a. Severance Tax Credit

The gross severance tax credit is presumed to be $20 million on an annual basis, unless there is a carryover credit that increases that amount. The maximum credit plus carryover in any year is $35 million. After deducting the 3 percent fee available to coal companies that participate in the severance tax credit program, the annual amount available for collection by APCo is $19.4 million before any carryover amount, and the maximum annual credit with carryover is $33.95 million. The actual monthly severance tax credit available for APCo will be subtracted from the monthly Century bill calculated at the IP Tariff rates. For example, if a monthly Century bill at the tariff rate is $10 million, that amount will be reduced by one-twelfth of the annual severance tax credit, or $1.6 million. The credit per MWH is not needed to calculate the monthly bill, but the credit increment could be calculated by dividing the monthly severance tax credit by the energy usage on the monthly bill. For example, if the monthly energy usage was 200,000 MWH, the severance tax credit would be $8 per MWH. If there is a maximum carryover to bring the severance tax credit to $33.95 million for a year, the monthly bill credit would be approximately $2.8 million for that year. If the monthly energy usage for Century was 200,000 MWH, the credit per MWH would be $14.

During the start-up period, the estimate of annual usage for Century is approximately 2,373,000 MWH. At that usage level, an annual severance tax credit of $19.4 million will equal $8.18 per MWH. After the start-up period, the estimate of annual usage for Century is 2,688,040 MWH. At that usage level, an annual severance tax credit of $19.4 million will equal $7.22 per MWH.

The severance tax credit is necessary to reduce the potential impact on other customers and to provide the opportunity for other customers to receive the benefit of fixed cost sharing that would occur under traditional ratemaking. This benefit is dependent on a variety of factors, including the LME rates that Century pays, and the extent to which those LME rates produce cash payments to APCo in excess of the

Minimum Rate. The LME rates, in turn, are determined by the aluminum markets and the price for aluminum on the London Metals Exchange.

Because aluminum prices vary monthly and have demonstrated considerable volatility in the past, it is not reasonable to assume that a period of high aluminum prices that result in relatively high LME Rates will continue indefinitely. Even if there is a surplus in the Tracking Account and additional excess revenues are accruing under the Special Rate Mechanism, there is no assurance that there may not be a turnaround in the future that would require accumulated credits to offset future revenue shortfalls. Prematurely reducing or eliminating the severance tax credit because aluminum prices are high would not be reasonable or consistent with the intent of the Legislature for facilitating the development of special electric rates that would encourage new or expanded operations of energy intensive industrial customers while protecting other ratepayers from an unreasonable allocation of revenue shortfalls as set forth in H.B. 101.

Aluminum prices can fluctuate, and history has shown that they can fluctuate significantly and rapidly. A sudden downturn in aluminum prices could negatively impact the availability of excess revenue which is first available, under the Commission Special Rate Mechanism, to reduce the impact on other customers of the fixed cost credit we are providing for Century. In addition, this is a long-term Special Rate Mechanism that will be incorporated in a long-term contract for power purchases by Century. Century must make a decision whether to go forward with significant investment to reopen the Ravenswood facility, and it is entitled to know how the Minimum Rate will be calculated over the term of the contract so that it can project and evaluate long-term expectations.

We conclude that a current decision to use the severance tax credit to set the Minimum Rate over the life of the contract is important to provide a Special Rate Mechanism that will allow Century to reopen the plant and that will provide the statutorily required reasonable expectation that continuing operations will be viable over an extended period of time. We find that providing for the maximum severance tax credit annually to set the Minimum Rate is a necessary and reasonable component of the long-term Special Rate Mechanism.

b. <u>Fixed Cost Credit</u>

In addition to calculating a Minimum Rate by applying the severance tax credit to bills calculated at the APCo IP Tariff rates, the Commission will also reduce the monthly bill at the tariff rate by the amount of the fixed cost credit. The determination of this credit has been a troubling and difficult task. There have been different views and different assumptions to derive this credit presented to the Commission by various parties. We refer to the calculations presented by Mr. Fayne on behalf of Century and those presented by Mr. Harris on behalf of the CAD.

Because the fixed cost credit reduces bills that Century will receive for power, we are surprised that a full analysis of the evidence presented by Century indicates a lower fixed cost credit, which would result in a higher Minimum Rate, as compared to the evidence presented by the CAD.

In the Century evidence, the fixed cost credit was represented to be $17.3 million in a snapshot, single point in time, exhibit presented by Mr. Fayne. Ex. HF-D, Exhibit HF-4. Exhibit HF-4 shows a calculation of the difference between the fuel and additional capacity costs incurred in a single month to provide service to Century and the average rate that Century would pay at the IP Tariff rate. In fact, Century could have more clearly described Exhibit HF-4 as a calculation of an incremental $46.61 per MWH for the cost of fuel and additional capacity to serve Century, rather than using that exhibit to calculate a $17.3 million "estimated net annual contribution to fixed costs."[13]

The CAD calculated a minimum rate, before consideration of the coal severance tax credit. The CAD minimum rate can be compared to the Century fuel cost and additional capacity payment related to the Century load. The CAD calculation was first presented in Exhibit BLH-5 in Mr. Harris' testimony and was updated and corrected in the Exhibit A, attached to the CAD response to the Commission September 24, 2012 Order asking for clarification (CAD Exhibit A). The CAD calculated that, based on current rates in effect for the APCo IP Tariff, the minimum rate that Century should pay, before consideration of the coal severance tax or the amortization of a prior period under recovery, is $36.60 per MWH. Although the CAD does not further calculate the implicit fixed cost credit, at this point we need only compare the $36.60 "minimum rate" recommended by the CAD to the $46.61 fuel cost and additional capacity cost to serve Century as presented in Exhibit HF-4. Both numbers can be used to do what Mr. Fayne did, which was to estimate a fixed cost credit and the results are very different.

We recognize that the calculations are based on different load levels and the CAD calculation looks at current ENEC rates that are based on average fuel, capacity equalization and other costs, to calculate a minimum rate that Century should pay. Mr. Fayne takes a more incremental approach and looks only at fuel and additional capacity equalization costs. We have determined that the different load levels do not create a significant portion of the differential that we perceive between the CAD calculations of a minimum rate and the Century calculations of the fuel and additional capacity cost to serve Century. If we use the cost numbers in Exhibit HF-4 and apply those numbers to the same demand and energy levels used by the CAD, we arrive at an

[13] Exhibit HF-4 calculates the fuel cost to serve Century in a typical month as $6,232,200 and the capacity cost as $4,721,517, or a total of $10,953,717. Based on energy usage of 235,000 MWH as used in Exhibit HF-4, this is equal to $46.61 per MWH. In the exhibit, Century deducts the $10,953,717 from a typical monthly bill calculated at the APCo Industrial Power Tariff rates of $12,395,740 to arrive at a residual amount $1,442,023. Century refers to this difference between a monthly bill at the tariff rate and its calculated monthly fuel and additional capacity cost as the "net monthly contribution to fixed costs." Multiplying this monthly amount by twelve, Century arrives at its "estimated net annual contribution to fixed costs" of $17.3 million.

average cost of fuel and additional capacity to serve Century of $46.73. This is not drastically different from the $46.61 derived from Exhibit HF-4. This relatively minor difference does not change our conclusion that the CAD is calculating a minimum rate for Century, before severance tax credits or amortization of prior period under recoveries, of $36.60 as compared to the Century calculation of $46.61 (or $46.73 using CAD load numbers) as the fuel cost and additional capacity cost of serving Century.

The CAD did not go any further than recommending a minimum rate, before severance tax credit and amortization of a prior period under recovery, of $36.60. We can use the data in the CAD exhibit, however, to calculate a total bill for Century at the current APCo IP Tariff. The annual bill based on the data in the CAD Exhibit A is $139,962,492. Deducting the $97,402,501 ENEC and Construction Surcharge calculated by the CAD results in a difference of $42,559,991 to compare to the $17,304,282 "estimated net annual contribution to fixed costs" contained in Exhibit HF-4.

Boiling this down to its simplest terms, if we use CAD Exhibit A to calculate an "estimated net annual contribution to fixed costs," we arrive at an annual credit of $42.6 million. Century calculates an "estimated net annual contribution to fixed costs" of $17.3 million, which is then rounded up to $20 million in the Century proposal. Adopting the Century proposed $20 million "estimated net annual contribution to fixed costs" results in a higher Minimum Rate under the Commission Special Rate Mechanism as compared to using a $42.6 million "estimated net annual contribution to fixed costs" which can be derived from CAD Exhibit A.

The determination of the actual fixed cost amount that was paid by Century and used to lower rates for the other customers is a more complex calculation than the one-month snapshot differential between fuel and additional capacity costs and a monthly bill at IP Tariff rates depicted in Mr. Fayne's Exhibit HF-4. A party could have made a calculation of the level of fixed costs shifted to other customers based on the test year from the last APCo base rate case, or a current going level test year, but none did. We must consider the record made in this case. The other parties did not object to Mr. Fayne's proxy methodology for estimating a fixed cost credit or his adjustment of that estimate to a fixed amount of $20 million per year.

Exhibit HF-4 used an estimated partial incremental cost approach related to the Century load to derive a difference that could represent the expected fixed costs that would be paid by Century if it returned to APCo and paid for power at the IP Tariff Rate. Exhibit HF-4 was, therefore, intended to estimate "net annual contributions to fixed costs" which would be the most reasonable discount off of bills at the APCo IP Tariff rates to reflect an estimate of the fixed costs that were shifted to other customers when Century ceased its Ravenswood production operations.

The CAD calculation viewed the issue from the other direction and attempted to derive a minimum amount that, if received by APCo, would cover costs to serve the Century load and would "do no additional harm" to other customers. The CAD calculation and recommendation was never represented to be a way to estimate the fixed cost credit. Thus, although we believe that the actual fixed cost credit requires a different calculation approach that looks at revenue requirements with and without Century, the most reasonable resolution based on the record before us is to adopt the $20 million fixed cost credit proposed by Century.

We do not, however, view the $20 million as representing a total of $17.3 million in fixed costs that were shifted to other customers because of the curtailment at the Ravenswood Plant and a $2.7 million additional APCo annual contribution from shareholders as described by Mr. Fayne. We consider the $20 million to be an attempt to simplify the Century special rate proposal by establishing a reasonable estimated value to be used for the fixed cost credit.

For purposes of setting the Minimum Rate for Century, the Commission will adopt the $20 million annual fixed cost credit and will deduct that amount from the annual bill that Century would receive at the applicable tariff rate of APCo for purposes of calculating a Minimum Rate.

c. Calculation of Minimum Rate

The actual Minimum Rate will be calculated monthly based on the effective IP Tariff of APCo over the life of the contract and the monthly load of Century. If the effective IP rate applied to the Century billing units produces a starting point that is different, either higher or lower, from $52.45 per MWH that has been included in various exhibits, discussed in the record and discussed in this Order, the net Minimum Rate will be adjusted accordingly. To calculate the net monthly Minimum Rate, the Commission will require that the per unit (MWH) fixed cost credit and the per unit severance tax credit be calculated based on one-twelfth of the annual credit divided by the Century energy load for each billing month.

We have discussed above that the severance tax credit is estimated to be $8.18 per MWH based on estimated loads during the three-year start-up period and $7.22 per MWH based on estimated loads after the start-up period. Likewise, the $20 million annual fixed cost credit will be approximately $8.43 per MWH based on estimated loads during the start-up period and $7.44 per MWH after the start-up period. While the actual average benefits to Century could vary somewhat from these calculations depending on actual demand and energy usage, we estimate that because of the fixed cost credit and severance tax credit the average power rate to Century will be reduced by $16.61 per MWH during the start-up period and $14.66 per MWH after the start-up period. Assuming an average rate under the APCo IP tariff of approximately $52.45 per MWH, these benefits to Century represent monthly bills calculated at the Minimum Rate that will be 28 to 32 percent lower than bills calculated at the APCo IP Tariff rate.

3. Tracking Account

We currently anticipate a settlement and appropriate billing or refunds for the amounts accumulated in the Tracking Account at the end of the contract term, or sooner if the Commission determines that conditions and a high Tracking Account balance that represents a regulatory liability for APCo support an earlier settlement or modification to the LME Rate payments from Century. The Commission may, in its discretion, with or without petition, address large regulatory liability balances in the Tracking Account before the end of the contract period, but initially, as discussed above, it is not reasonably possible to set a point at which the severance tax credit or the $20 million fixed cost credit will be modified or no longer used to set the Minimum Rate.

We will authorize and require APCo to calculate a carrying charge or credit on the monthly Tracking Account balances at a rate equal to the average APCo monthly cost of short-term debt. If Century believes that it can more economically fund a payable in the Tracking Account, Century may choose to deposit cash to cover any accrued negative amounts in the Tracking Account. This deposit would be subject to refund to Century to the extent that there are future credits to the Tracking Account that would reduce the need for the deposit. Carrying charges on the Tracking Account will be calculated net of any deposits made by Century.

If, at the end of the contract period, there is a net negative amount (APCo receivable) reflected in the Tracking Account, that amount must be paid by Century. If there is a net positive balance, representing a regulatory liability of APCo, the Commission will authorize that the accumulated excess revenue be used to reduce rates of other customers, up to a total of $20 million per year for each year the contract was in effect. If the credit balance exceeds the amount needed to provide other customers with a credit equal to $20 million per year of the contract period, the balance will be split with 25 percent going for further rate credits for other customers and 75 percent to be refunded to Century. This additional benefit to other ratepayers was proposed by Century, but that is not the reason we adopt such a sharing of positive balances in the Tracking Account that occur only if Century has had the benefit of relatively high aluminum prices.

The Special Rate Mechanism is favorable for Century. Century receives a guaranteed discount from the APCo IP Tariff rates due to the coal severance tax credits authorized by the Legislature and the fixed costs credits that we have determined should be initially used to support the resumption and continuation of operations at the Ravenswood facility. Century also receives the benefit of a cash payment obligation that is significantly below the Minimum Rate when aluminum prices are low. Although Century is eventually responsible to make up the difference between the Minimum Rate and the LME Rate, it will do that by making payments that are above the Minimum Rate when aluminum prices support higher LME Rates. Thus, Century's cash flow is preserved, and its ability to budget cash payments for electricity based on its expected revenue, to maximize cash flow and to budget capital improvements is enhanced.

Current and future customers of APCo, on the other hand, while not paying any higher rates to support Century, are required to forego rate reductions that they might have received if Century paid a tariff rate which included the benefit of allocation of fixed costs to Century. We believe this is fair because there is a reasonable chance, based on Century's predictions for the aluminum market, that LME rates will exceed the Minimum Rate and perhaps even the IP Tariff rate. It is reasonable to encourage Century to reopen even if there is no resulting rate reduction for current customers as long as we hold current customers harmless and not require additional rates from those customers to support Century. That approach is easier to support when part of our plan is to offer customers in the future some additional benefits, if Century is successful.

We see those future benefits as the opportunity, but not a certainty, for customers to receive credits that are not only equal to the credits that may have been received currently from Century contributions to fixed costs, but actually provide some amount of additional credits that are over and above the benefits of having a large energy intensive customer helping to keep rates low under a traditional rate making approach. The tax credits, the fixed cost credits and the benefits of low LME rates when aluminum prices are low are consistent with legislative intent and provide incentives that should encourage Century to reopen the Ravenswood smelter.

4. Corporate Guarantee and Undertaking

The Tracking Account and accrued liability for Century to be responsible for the bills calculated at the Minimum Rate provide a reasonable balance that protects other customers and provides Century with a variable rate and a current power bill that tracks fluctuations in the market price of its product. There may not be a significant liability accrued for Century under the rate mechanism that we describe. If Century's predictions and the forecast of Mr. Adams are correct, aluminum prices will rebound and potentially result in a net excess revenue balance. There must, however, be some provisions in place to protect APCo and its customers and to provide some assurance that Century will pay accrued revenue shortfalls (APCo receivable from Century) if they are not offset fully by excess payments made by Century when LME Rates are higher. The Commission will require that Century Aluminum of West Virginia and Century Aluminum Company, the parent company of Century, execute a Corporate Guarantee and Undertaking that they will be jointly and severally responsible for any liability of the Century Ravenswood facility payable to APCo pursuant to the Special Rate Mechanism Tracking Account as described herein. This guarantee must make clear that the Century and Century Aluminum Company Guarantee applies regardless of the ownership of Century or the Ravenswood facility. APCo, Century and Century Aluminum Company will prepare and agree on the language of the Corporate Guarantee and Undertaking and file a copy along with a copy of the special rate contract if Century proceeds under the terms and provisions of this Order.

The Commission approval of this Special Rate Mechanism will expire at the end of this year, December 31, 2012. APCo or Century may request that the Commission extend the expiration date for good cause shown.

5. Conclusions Regarding Special Rate Mechanism

The Special Rate Mechanism described herein is consistent with the intent of W.Va. Code §24-2-1j. It provides a mechanism that allows Century to make cash payments for electricity that vary on a per MWH basis with the price of aluminum. This protects Century's cash flow and should provide it with the incentive and ability to restart its Ravenswood aluminum operations. We also find that based on the record, particularly the projections of Century's own witnesses regarding the aluminum market and future prices, the Special Rate Mechanism authorized herein, if viewed rationally and objectively, can reasonably be expected to support the long-term operation of the facility. Although we place the risk of lower than projected aluminum prices on Century, we allow for timing differences and accrual of revenue shortfalls so that Century will not have to pay additional amounts to bring its cash payments up to the level of the Minimum Rates until aluminum prices reach levels to support a more robust profit level for Century.

The aluminum price forecasts are made by Century, and Century has repeatedly claimed that they do not anticipate continuing low aluminum prices. The expert presented by Century presented a downside case, base case, and upside case forecast for aluminum prices. He testified at length about his expertise in the field and his confidence in the reasonableness of his forecasts. The risk that we place on Century is that it will be liable for net accumulated revenue shortfalls that might occur if LME Rates trend below the Minimum Rates over the life of the Special Rate Mechanism. The forecasts of Mr. Adams do not indicate that there is much of a chance that will be the case. The potential benefits to other customers occur when LME Rates exceed the Minimum Rate sufficiently to generate accumulated excess revenue. The forecasts of Mr. Adams indicate that there is a good chance for such benefits to the other customers of APCo.

At the base case forecast level for aluminum prices made by Mr. Adams, Century will have no additional liability above the LME Rates that it has already paid. In fact, at the base case level as presented by Century's expert witness, Century will have paid a sufficient level of LME Rate payments to accumulate excess revenue for APCo of $350 million, before consideration of carrying charges. Section IV. E. above. Under the Commission plan, $200 million of this amount will be credited to other ratepayers of APCo in recognition of the cumulative fixed cost credit over the life of the contract, giving them the benefit of lower rates in the future.[14] From the remaining approximate $150 million, there will be an additional $37.5 million contribution to benefit other customers, and the balance of approximately $112.5 million will be refunded to Century. This refund to Century will result in an average rate paid by Century over the life of the contract that is less than the LME Rate set by the Commission.

The Commission Special Rate Mechanism will place the risk of lower aluminum prices on Century, not on other customers as Century had requested. If there is a revenue shortfall over the life of the contract, Century will be responsible for 100 percent of that shortfall. The Commission establishes a potential refund to Century of a portion of excess revenue in recognition of that risk and to provide Century with an incentive to reopen the Ravenswood facility. Century will not be first in line for a share of excess revenue.

Under the Special Rate Mechanism as described in this Order, Century will not receive any refund if other customers have not received an allocation of excess revenue equal to $20 million per year for the life of the contract. We believe that this combination of risk of revenue shortfalls being placed on Century and allocation of excess revenue between other customers and Century provides potential benefit for both Century and other customers which are just and reasonable and represent a fair balance of the interests of other customers, APCo, and Century as required by W.Va. Code §24-2-1j(f).

We determine that the total Special Rate Mechanism approved by the Commission, including an allocation of the first $200 million in excess revenue to other customers and sharing of additional excess revenue between other customers and Century, is reasonable and necessary to give Century the incentive and ability to reopen the Ravenswood facility, to make capital investment and other commitments necessary to support the continued and long-term operations of the facility.

When Mr. Adams provided his downside case and upside case for aluminum prices, he did not provide the Commission with the annual aluminum prices of these cases nor did he provide a chart that clearly showed the data points representing the annual aluminum prices. The chart that he provided was at a very low scale and quality. Based on our estimation of the data points in Mr. Adams' Report, adjusted for a lower starting point in 2013, at the downside case level for aluminum prices, Century will still have no accrued liability above the LME Rates that it has already paid. At the downside case level, Century will have paid a sufficient level of LME Rate payments to result in accumulated excess revenue for APCo, before consideration of carrying charges, of

[14] If aluminum prices increase as fast and move as high as projected by Century's witness, particularly in the upside case and the base case, the Commission will consider an adjustment that will begin the sharing of excess revenue before the end of the contract period. If the Commission makes such an adjustment, Century will continue to receive credit for LME payments in excess of the target rate even if the cash associated with a portion of those payments has been taken from the Tracking Account and used to reduce rates for other customers or to reduce the LME rates payable by Century.

approximately $124 million. Under the Commission plan, because the $124 million in excess revenue would not equal the full accumulated fixed cost credits, the entire amount will be credited to other ratepayers. Although Century does not share in any excess revenue distribution under this scenario, its total payments to APCo are limited to the LME Rates that it has indicated it can afford to pay based on the expected aluminum prices in effect during the term of the contract.

At the upside case for aluminum prices presented by Mr. Adams, Century will have paid a sufficient level of LME Rate payments to accumulate excess revenue for APCo, before consideration of carrying charges, of approximately $620 million. We realize that this is an optimistic scenario, but it is not our scenario, it is the upside case presented by Mr. Adams. If this scenario occurred, before consideration of carrying charges, other APCo ratepayers would receive a credit of approximately $305 million, and Century would receive a refund of approximately $315 million. This refund to Century will result in an average rate paid by Century over the life of the contract that is less than the LME Rate set by the Commission.

Overall, we have determined the entire Special Rate Mechanism, with its LME Rate, consideration of Century cash flow, protection against an increase in rates to other customers, potential for credits to reduce rates for other customers, and potential for Century to receive some refunds of amounts that it has paid under the LME Rates is fair, balanced, is not unreasonable and does not impose an undue hardship on Century, APCo or APCo's ratepayers.

F. Market Options for Century

During the hearings, the question of Century obtaining power supply for the Ravenswood facility from the open market operated by PJM was raised. The issue was not advanced by Century, but arose through cross examination of Century witness Hoerner by the CAD. Mr. Hoerner was asked if the CEO of Century Aluminum, Mr. Bless, had given press interviews in which he touted the potential benefits to Century if it was able to go to the market for power supply. Mr. Hoerner was not aware of the statements by Mr. Bless, but he indicated that acquiring power supply from the open market was always an option to consider.

Century is an unusual West Virginia customer and was served for approximately fifty years as an Ohio customer of Ohio Power Company. It received service in Ohio because it owned the transmission line from the sub-station in West Virginia to a connection in Ohio, where the Century line connected to a transmission line owned by Ohio Power Company. It was only in 2005 that Century requested and received service from APCo.

After the market option was addressed by CAD, Century stated in its reply Brief that the CAD suggestion that Century should leave APCo had no basis in law or the record. Century stated that nowhere in its testimony did it propose such an alternative.

Century argued that the CAD suggestion is a diversion to prevent the Commission from considering the facts before it on the law that is in effect. Century argued that a West Virginia deregulation plan was required before it could leave APCo for another provider, and described the prospect of a deregulation plan as daunting,

The option for Century to obtain power supply from the PJM market is not before us in this proceeding. We agree with Century that this proceeding involves a request for a special rate from APCo, and we were not asked to consider nor is the record developed sufficiently for us to consider a power supply open market option for Century. We note, however, that we do not necessarily agree with the Century argument regarding the legal and regulatory barriers to that option. The Century argument on that basis looks only at deliveries in West Virginia, and does not consider the options that are available to it in Ohio, where it had a service connection for over fifty years, and apparently still maintains that connection today.

G. Current Century Special Contract and Related Under Recoveries

In the 2012 APCo ENEC proceeding, the issue of the regulatory assets booked by APCo pursuant to the terms and conditions of the 2006 Century Contract was held in abeyance pending a Commission decision in this case. Staff and CAD have argued in this case that the 2006 Century Special Contract not be terminated. They argue that a Special Rate Mechanism approved in this case be considered to be a modification and extension to the 2006 Century special rate. That position is influenced, we believe, by the under recovery under the 2006 Contract that is currently on APCo's books. The terms of the Stipulation of Parties asking the Commission to approve the 2006 Century Contract provides that when that contract ends, any related regulatory asset on APCo's books would be recovered as part of an APCo ENEC proceeding. Case No. 05-1278-E-PC-PW-42T (Commission Order July 26, 2006), Appendix A at 16.

Upon review of the status of the Century facility in Appalachian Power Company and Wheeling Power Company, both dba American Electric Power, Case No. 09-0177-E-GI, the Commission allowed the 2006 Special Contract to continue after Century curtailed its Ravenswood operations. We did so, partly because Century asked that the contract continue even though Century was taking a tiny fraction of the power that the contract called for. Century requested this continuation based on the hope that if conditions improved in the aluminum market the plant could be reopened and could reemploy hundreds of people in the future. Case No. 09-0177-E-GI, Memorandum of Law Submitted by Century Aluminum of West Virginia, Inc, at 2. Mr. Fayne testified in that proceeding:

> A significant part of that opportunity [restarting the plant] would be to have some sort of power arrangement that, on a prospective basis, will allow the company [Century] to work through cycles. So having the special contract in place allows the company to retain hope and expectation that it could be restarted in the future. Absent that, I think it would be a much bigger hurdle to restart the plant.

Case No. 09-0177-E-GI, Transcript of June 18, 2009 hearing at 23, 24.

The Commission agreed that giving Century and APCo the tools to respond quickly to a resurgence of the aluminum market was in the best interest of Century, APCo, APCo's other customers and the economy of the Jackson County area and the State:

> There is also evidence that the continuation of the AEP/Century Special Rate Mechanism will make it easier to restart the plant if aluminum prices justify such a restart. The Commission will, therefore, order that the Special Rate Mechanism be extended for one year, unless before the end of that period an alternative contract that considers the interests of Century, AEP and other AEP customers is proposed and approved by the Commission.

Case No. 09-0177-E-GI (Commission Order, September 30, 2009) at 23.

The 2006 LME-based Century Special Contract is no longer a power supply contract that might be quickly used if there is a decision to reactivate the Ravenswood Plant. Century has indicated that a different Special Rate Mechanism is needed before it will consider reopening the plant. The Special Rate Mechanism approved herein is a completely separate proposal and requires a new contract between Century and APCo. Accordingly, if Century moves forward with a new contract pursuant to the terms, conditions and mechanisms described and approved in this Order, the 2006 Special Contract will be terminated. The related under recovery that APCo has recorded as a regulatory asset and which is determined by the Commission to be reasonable[15] is part of APCo's unrecovered Expanded Net Energy Costs and will be subject to recovery pursuant to Commission ENEC procedures.

The Commission directs this result for the 2006 Special Contract whether Century goes forward with the Special Rate Mechanism described and approved herein or not. If Century does not choose to go forward with the approved Special Rate Mechanism, it may negotiate with APCo for another special rate plan, negotiate for a special contract for power supply, or select an appropriate tariff schedule for service. Under any of those circumstances, we still consider the regulatory assets related to the 2006 Century Special

[15] The record indicates the under recovery is approximately $22.7 million. CAD Testimony Exhibit BLH-5. The Commission has not reviewed the calculations of the under recovery and has not determined the final amount of the under recover that is appropriate to be included in the ENEC.

Contract recorded by APCo as an ENEC cost element, subject to review and a determination of reasonableness by the Commission.

H. Protective Treatment

Century filed two requests for the Commission to seal data that it asserted to be exempt from disclosure under the West Virginia Freedom of Information Act, codified as W.Va. Code §29B-1-1 to 7 (WV FOIA). Century provided the data currently under seal in three separate contexts including (i) production cost estimates filed under seal with its testimony, (ii) responses to various discovery requests including requests for financial information and (iii) data from its consultant underlying the commodity projections including modeling information. In addition to the data Century filed under seal, CAD filed a confidential version of the direct testimony of Byron Harris that discussed a portion of the materials Century argued is exempt from WV FOIA.

The Commission concludes that there is no need at present to make a final ruling on the protective treatment requests. It will instead direct the Executive Secretary to hold the unredacted versions of the data Century filed under seal and the confidential versions of exhibits and testimony admitted at the evidentiary hearing separate and apart from the remnant of this case file until the Commission receives a request for that information. By deferring consideration of the matter, the Commission is not taking any final position on the application of the WV FOIA to the sealed data.

I. Motion to Supplement

On August 20, 2012, CAD requested leave to supplement the hearing record in this case by submitting a plan in response to CR Ex. 6. No party objected to the request. Therefore, the Commission will grant the motion and add its August 20, 2012 filing to the record in this case.

FINDINGS OF FACT

1. Pursuant to W.Va. Code §24-2-1j(d), Century entered into negotiations for a mutually agreeable special rate with APCo.

2. Following unsuccessful negotiations, Century petitioned the Commission to establish a special rate for it to purchase electricity from APCo.

3. Century initially proposed a special rate that varies with the market price of aluminum and included periodic adjustments based on its future production costs. Petition at 5, 6.

4. The rate Century initially proposed incorporated three tranches of sequential rate support specifically (i) all available energy intensive industrial consumer tax credits totaling $19.4 million, (ii) $20 million of fixed costs currently borne by other

customers and (iii) an account potentially containing under recovered revenues that would be paid by other ratepayers during periods of low aluminum market prices. Id. at 6.

5. The APCo alternative rate mechanism and CR Ex. 6 modified the Century proposals to limit the scope of potential ratepayer liability, although other ratepayers would continue to pay a portion of revenue shortfalls. Ex. SHF-1, CR Ex. 6.

6. Century requested that the Commission end the special rate established in Case No. 05-1278-E-PC-PW-42T. Ex. HF-R at 4.

7. Century modified its initial rate proposal to incorporate revised cost estimates, a rate floor, an extended period for recovery of start-up costs and a declining Operating Margin as aluminum market prices drop. Ex. HF-R at 1, 2.

8. All parties other than Century recommended that the Commission reject both the original and revised Century rate proposals. Ex. MAR-D, CAD Ex. 1, Ex. SHF-1, WVEUG Ex. 1.

9. Subsequent to the hearing, CAD filed a motion requesting to supplement the record with its Alternative CAD Plan. August 20, 2012 CAD Filing.

10. The Alternative CAD Plan included a minimum rate that Century should pay for electricity that did not vary downward with the market price for aluminum. Id.

11. The CAD Plans result in low, or even negative, cash flow to Century at low aluminum prices.

12. The CAD plans do not fully explain a deferral mechanism and do not appear to provide for reasonable deferral mechanisms for revenue shortfalls that the Act permits us to consider.

13. The electric bills that Century would pay on a current basis under the APCo Plan or the plan described in CR Ex. 6 result in reduced or even negative net cash flow to Century during periods of low aluminum prices.

14. A special rate is necessary for Century to reopen and operate its Ravenswood, West Virginia facility. Ex. JH-1 at 2.

15. If restarted, Century will have a contract demand exceeding two hundred fifty thousand kilowatts in West Virginia under normal operating conditions. Ex. GH-D at 3.

16. If restarted, Century will employ or rehire over three hundred employees. Id. at 3.

17. Century is viable over time if it can obtain a price for electricity that varies with fluctuations in aluminum prices. Ex. HF-D at 11.

18. A power rate that varies with aluminum prices will create revenue shortfalls and excess revenues, because of fluctuations in aluminum prices that the Commission must address when fashioning a rate mechanism. Ex. RA-1 at 4-7.

19. Century invested approximately $18 million in the three years preceding the curtailment of production at the Ravenswood facility in 2009. Ex. GH-D at 3.

20. Century plans to invest $90 million at the startup of the Ravenswood plant including $40.5 million for operational readiness, $39.5 million to procure raw materials and $9.1 million for initial modernization. CR Ex. 3.

21. Century plans to invest an additional $44 million in annual modernization over years two through nine of its operations. Id., Tr. II at 35.

22. Century witness Mr. Adams has extensive experience as a forecaster of aluminum prices. Tr. I at 249.

23. Although Mr. Adams presented a range of possible aluminum prices, he forecasted an average aluminum price of approximately $2,450 per metric ton over the period from 2012 through 2021. Ex. RA-1 at 4.

24. The aluminum market experiences cycles with significant and rapid price volatility. Ex. JH-1 at 3.

25. The Ravenswood facility can be viable for an extended period of time, provided it can obtain a price for electricity that varies with the price of aluminum prices and provided it makes reasonable capital investments. Tr. I at 233.

26. Century will require all the available support from the energy intensive industrial consumer tax credit in order to make reopening of the Ravenswood plant viable because aluminum prices are volatile and may fluctuate significantly from month to month and year to year.

27. Century and APCo estimated that there was at least $17.3 million per year in fixed costs transferred to other customers after Century curtailed its operations in 2009. Ex. HF-D at 7, Ex. SHF-1 at 9.

28. Century and APCo included $2.7 million per year in their calculations to supplement the estimated costs currently borne by other customers, for a total of $20 million in additional support annually beyond the available tax credits. Id.

29. Century used cost of production models and various inputs to those models to support variable electric rates that it is able to pay based on a three-year start-up phase and a subsequent full production phase that are reflected in Tables 1 and 2 in this Order. Ex. HF-D, HF-R.

30. The Commission previously deferred consideration of the under-recovery balance accrued by Century under its current rate mechanism to this proceeding. APCo ENEC Order at 8, 9, 20.

31. Century requested a protective order to prevent public release of data and models filed under seal. May 11, 2012 and June 29, 2012 Motions for Protective Order.

CONCLUSIONS OF LAW

1. Century is an energy intensive industrial customer that qualifies for a special rate. W.Va. Code §24-2-1j.

2. Century participated in unsuccessful rate negotiations with APCo prior to filing its petition for a Special Rate. W.Va. Code §24-2-1j(d).

3. Century provided reasonable evidence supporting the need for a special rate. W.Va. Code §24-2-1j(e)(6).

4. The Commission must consider the availability of tax credits under W.Va. Code §11-13CC-1 et seq., before allocating any revenue shortfall to other customers in this proceeding. W.Va. Code §24-2-1j(g).

5. The Commission must identify the unallocated revenue shortfall in need of funding by tax credits available under W.Va. Code §11-13CC-1 et seq., W.Va. Code §24-2-1j(g).

6. APCo is eligible for receipt of the tax credits available to offset revenue shortfalls created by the special rate to Century. W.Va. Code §24-2-1j(g).

7. It is reasonable to allocate all of the available $20 million in tax credits to offset projected volatility of aluminum prices and utility revenue shortfalls attributable to the special rate created in this proceeding, less the three percent designated for coal operators. W.Va. Code §24-2-1j(g).

8. The rate mechanism Century proposed in the Petition and the revised rate mechanism from the rebuttal testimony will place an unreasonable rate burden on other customers by requiring those customers to be responsible for revenue shortfalls during periods of low aluminum prices.

9. The potential revenue shortfall that is allocated to other customers during periods of low aluminum prices under the Century proposal is too large to sustain a finding that it is "not unreasonable."

10. CR Ex. 6 and the proposals from CAD will place an unreasonable burden on Century and would affect Century's economic viability because the proposals do not provide sufficient cash flow for Century during times of low aluminum market prices.

11. The CR Ex. 6 plan provides more protection to other customers and comes closer to not imposing an unreasonable burden on other customers than does the revised Century Plan.

12. The CR Ex. 6 plan limits Century's cash flow and results in significant negative cash flows for Century at the lower end of reasonably expected aluminum prices.

13. Both the APCo plan and the CR Ex. 6 plan make it unlikely that Century will have sufficient cash flow during periods of low aluminum prices to sustain continued operations.

14. There is not sufficient flexibility in the CAD plans to provide a reasonable expectation that Century could reopen the Ravenswood facility or could operate for an extended period of time; therefore, the CAD plans do not comply with the intent of the Act.

15. The market forecast from Mr. Adams for an average aluminum price over the period of 2012 through 2021 is reasonable to employ in crafting a special rate.

16. Mr. Adams included in his projections of future aluminum prices a range consisting of a low, base and upside case, and under the low case, our analysis indicates that the Tracking Account will have a positive balance of $124 million.

17. To the extent that there is a risk associated with current revenue shortfalls it is reasonable to place that risk on Century rather than other ratepayers.

18. It is reasonable to establish a variable special electricity rate for Century over ten years based on the LME market price of aluminum, as set forth in Tables 1 and 2 in this Order, because Century is able to pay those amounts and because other ratepayers will not be responsible for accrued revenue shortfalls.

19. Employing the LME Rate provides Century a cash rate for electricity that allows it to be economically viable over an extended period of time that includes periods of low aluminum prices.

20. A reasonable floor for the special rate mechanism is $1,700 per metric ton because it balances Century's ability to pay against unlimited accrued receivables on APCo's books.

21. The revised cost estimates Century provided are a reasonable basis for constructing a special rate varying with the market price of aluminum.

22. The Commission will incorporate the revised Operating Margin structure Century proposed into the special rate because it is a substantial element of its cash flow and because Century will pay any net shortfall in the Tracking Account.

23. Century, instead of other ratepayers, should be responsible for any revenue shortfalls under the Century special rate.

24. A tracking account to record the difference between the Minimum Rate and the LME Rate paid by Century will smooth aluminum market price fluctuations and will assure that at the end of the contract, Century will pay the minimum cost-based rate if shortfalls exist.

25. A final surplus in the Tracking Account should first return $20 million per year in fixed costs currently borne by other ratepayers to those ratepayers because H.B. 101 contemplated that energy intensive industrial customers share in fixed costs to help keep rates low for all customers.

26. It is reasonable to share between Century and other ratepayers any accrued excess revenue in the Tracking Account beyond the amount required to compensate other ratepayers for the $20 million per year borne by them in the special rate structure. Because Century does not receive any of the first $20 million per year accrued excess revenue, it is reasonable to share any additional amount 75 percent to Century and 25 percent to other customers.

27. Century will be responsible for any shortfall in the Tracking Account accrued during the contract period along with a carrying charge equal to the monthly short-term cost of APCo debt.

28. It is reasonable to require a corporate guarantee and undertaking from the parent corporation of Century in the event that Century is unable to pay any approved shortfall in the Tracking Account at the end of this special rate contract.

29. Extended low aluminum prices could cause Century to close its Ravenswood plant or seek bankruptcy protection despite a special rate mechanism.

30. The Commission will condition the special rate on Century following through with its capital investment commitments from CR Ex. 3 by investing a minimum of $44 million in years two through nine.

31. If Century accepts the approved special rate mechanism, APCo and Century will file a copy of the special rate contract consistent with this Order no later than December 31, 2012. It is reasonable, however, to allow APCo or Century the right to request an extension of time for good cause shown.

32. The issue regarding a waiver of jurisdiction in West Virginia to allow Century to obtain electric service in Ohio is undeveloped and the matter is not properly before the Commission.

33. The Commission extended the prior special rate mechanism to facilitate the rapid startup of Century as economic conditions warrant. Case No. 09-0177-E-GI (Commission Order, September 30, 2009).

34. Given the record in this case, the use of the existing rate mechanism is not possible and a new contract is required to establish a special rate mechanism required in this Order.

35. Employing the special rate mechanism created by this Order justifies ending the existing special rate established in Case No. 05-1278-E-PC-PW-42T.

36. The existing special rate created in Case No. 05-1278-E-PC-PW-42T must be replaced in the event that Century declines to accept the special rate mechanism approved in this Order because that rate no longer reflects current electricity costs.

37. The terms of the special rate adopted by the Commission in Case No. 05-1278-E-PC-PW-42T require that other customers assume under recoveries in an ENEC proceeding in the event that the current mechanism is terminated but the precise amount will be audited there. (Commission Order, July 26, 2006) Appendix A.

38. It is reasonable to include the under-recovery from Case No. 05-1278-E-PC-PW-42T once verified, in the securitization proceeding, Case No. 12-1188-E-PC.

39. The CAD motions to supplement the record with its August 20, 2012 filing is reasonable and will be granted.

40. The Commission will direct the Executive Secretary to segregate the material subject to the protective treatment motions from the remnant of the case file until the Commission receives a WV FOIA request for that information.

ORDER

IT IS THEREFORE ORDERED that Century is eligible for a special rate pursuant to W.Va. Code §24-2-1j.

IT IS FURTHER ORDERED that if Century elects to accept the special rate mechanism established herein, APCo and Century shall enter into a special rate contract consistent with this Order and file a copy of that special contract by no later than December 31, 2012, unless an extension is granted by the Commission for good cause shown by either APCo or Century.

IT IS FURTHER ORDERED that APCo is eligible to receive all available tax credits during the term of the special contract as discussed more fully in this Order.

IT IS FURTHER ORDERED that Century and its corporate parent file a corporate guarantee and undertaking, along with the filing of a special contract, that is consistent with this Order and acceptable to APCo.

IT IS FURTHER ORDERED that the rate mechanism established in Case No. 05-1278-E-PC-PW-42T is terminated on the effective date of an executed special contract or December 31, 2012, whichever is earlier.

IT IS FURTHER ORDERED that if Century does not go forward with the Special Rate Mechanism as ordered herein, it shall either negotiate and finalize another special rate plan, negotiate and finalize a special contract for power supply, or select an appropriate tariff schedule for service.

IT IS FURTHER ORDERED that the under recovery recorded by APCo as a regulatory asset associated with service to Century under the rate mechanism previously approved by this Commission in Case No. 05-1278-E-PC-PW 42T will be included in the 2012 ENEC, subject to verification of the proper amount, and considered in the pending proposal for issuing bonds or like securities in Case No. 12-1188-E-PC.

IT IS FURTHER ORDERED that the May 11, 2012 and June 29, 2012 Motions for a Protective Order are deferred until the filing of a request under WV FOIA. The Executive Secretary shall maintain the unredacted versions of the sealed discovery responses and hearing exhibits under seal, separate and apart from the rest of the file pending further Order.

IT IS FURTHER ORDERED that the CAD motion to supplement the evidentiary record with its August 20, 2012 filing is granted.

IT IS FURTHER ORDERED that on entry of this Order, this matter shall be removed from the open docket of Commission cases.

IT IS FURTHER ORDERED that the Executive Secretary of the Commission serve a copy of this Order by electronic service on all parties of record who have filed an e-service agreement, on other parties by United States First Class Mail and on Staff by hand delivery.

A True Copy Teste
Sandra Squire
Sandra Squire
Executive Secretary

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