

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

BIG RIVERS ELECTRIC CORPORATION'S)
APPLICATION FOR APPROVAL OF RESTRUCTURING)
AGREEMENT AND FOR AUTHORITY TO ISSUE) CASE NO. 10217
NOTES OR OTHER EVIDENCES OF INDEBTEDNESS)
PURSUANT THERETO)

O R D E R

On April 8, 1988, Big Rivers Electric Corp. ("Big Rivers") filed an application, pursuant to KRS 278.300, seeking: (1) approval of a Debt Restructuring Agreement ("Agreement") entered into with its creditors, the Rural Electrification Administration ("REA"), Manufacturers Hanover Trust Co. and Irving Trust Co.; and (2) authorization and approval to execute notes and other evidences of indebtedness to Manufacturers Hanover Trust Co. and Irving Trust Co. (Collectively referred to as "New York Banks"). Big Rivers' application further states that no Commission approval is being sought for the Agreement between Big Rivers and REA, or the evidences of indebtedness issued to REA, since KRS 278.300(10) exempts such financings from the Commission's jurisdiction.

Intervenors in this case include the Attorney General's Office, Utility and Rate Intervention Division ("AG"), National-Southwire Aluminum Company ("NSA"), and Alcan Aluminum Corporation ("Alcan").

On April 22, 1988, NSA filed a motion requesting a preliminary hearing limited to a determination of the Commission's subject matter jurisdiction in this case.¹ The motion is grounded in NSA's claim that Big Rivers' application is inconsistent in seeking approval of the Agreement as it relates to the New York Banks, while not seeking approval of the same Agreement as it relates to the REA. NSA argues that if Big Rivers' interpretation of KRS 278.300(10) is correct and REA financings are exempt from Commission jurisdiction, Big Rivers' bank financings must also be exempt since the REA's supervision and control over Big Rivers is not dependent upon the identity of the lender. NSA further argues that Big Rivers' current position is inconsistent with its two recent requests for Commission approval of Burdick Amendment refinancings in Case Nos. 10033 and 10155,² as well as the Commission assertion of jurisdiction over Big Rivers' workout plans in Case Nos. 9613 and 9885.³

On May 5, 1988, Big Rivers filed a response in opposition to NSA's motion for a preliminary hearing. The response states that the Commission's authority is purely statutory and KRS 278.300(1)

¹ NSA filed on May 4, 1988, a supplement to its motion citing additional case authority.

² Case No. 10033, Application of Big Rivers Electric Corporation for Authority To Issue Evidences of Indebtedness to Refinance Debt Under the Burdick Amendment, and Case No. 10155, Big Rivers Electric Corporation's Application For Authority To Issue Evidences of Indebtedness to Refinance Up to \$369,405,833.54 of Its Debt To The Federal Financing Bank.

³ Case No. 9613, Big Rivers Electric Corporation's Notice of Intent to File a Notice of Adjustments to Its Rates, and Case No. 9885, An Investigation of Big Rivers Electric Corporation's Rates For Wholesale Electric Service.

requires Commission approval of Big Rivers' evidences of indebtedness issued to the New York Banks. However, Big Rivers claims that the REA portion of the Agreement is exempted from KRS 278.300(1) because it falls within the exception set forth in KRS 278.300(10). Pursuant to this statutory exception, the REA financings are claimed to be beyond the scope of the Commission's jurisdiction. Big Rivers further urges that a preliminary hearing on the issue of subject matter jurisdiction is not necessary and that the Commission should deny NSA's motion.

NSA filed on May 9, 1988, a reply and a revised reply to Big Rivers' response. NSA argues that since there is only one Agreement, it is not possible for the Commission to exercise jurisdiction over a portion of the Agreement and disclaim jurisdiction over the remainder of the Agreement. NSA also raises substantive arguments on the merits of the Agreement as well as a claim of entitlement to a hearing arising from the Agreement's impact on rates. NSA subsequently filed on May 11, 1988, a motion requesting the Commission to establish a procedural schedule and hold a hearing on the Agreement.

Alcan filed on May 10, 1988, a memorandum supporting NSA motion and further stating that the Commission already asserted jurisdiction over the Agreement in Case Nos. 9613 and 9885. Consequently, Alcan recommends that the Commission convene a hearing to determine if the Agreement conforms to the Revised Workout Plan approved in Case No. 9885.

FINDINGS

Based on the motion, responses, memoranda, and evidence of record, and being advised, the Commission is of the opinion and hereby finds that NSA's motion raises purely legal questions regarding the Commission's subject matter jurisdiction. A review of the pleadings clearly indicates that these jurisdictional issues have been fully and adequately briefed and that oral argument is not necessary.

The Commission recognizes that its authority to approve evidences of indebtedness arises from the jurisdictional grant contained in KRS 278.300(1), which provides that:

No utility shall issue any securities or evidences of indebtedness, or assume any obligation or liability in respect to the securities or evidences of indebtedness of any other person until it has been authorized so to do by order of the commission.

This general authority to approve securities is, however, subject to the exception set forth in KRS 278.300(10):

This section [KRS 278.300] does not apply in any instance where the issuance of securities or evidences of indebtedness is subject to the supervision or control of the federal government or any agency thereof, but the commission may appear as a party to any proceeding filed or pending before any federal agency if the issuance of the securities or evidences of indebtedness will materially affect any utility over which the commission has jurisdiction.

NSA's motion raises the question of whether the Commission has jurisdiction to approve Big Rivers' evidences of indebtedness to the REA. This is not a question of first impression. In West Kentucky RECC v. Energy Regulatory Com'm, No. 80-CI-1747 (Franklin Circuit Court, 1982) (Unpublished), the Court ruled that when a rural electric cooperative borrows funds through the REA, such

financings are exempt from the provisions of KRS 278.300 by KRS 278.300(10). Furthermore, the Commission has previously ruled that the West Kentucky RECC decision was applicable to Big Rivers' borrowings through the REA. See Case No. 7990, Application of Big Rivers Electric Corporation, Order dated March 27, 1984. Thus the Commission has no authority to approve the evidences of indebtedness issued to the REA. If this result is inconsistent with the Commission's exercise of authority over the evidences of indebtedness issued to the New York Banks, any such inconsistency is created not by the Commission but by the regulatory scheme legislatively enacted in KRS 278.300.

Big Rivers' two prior applications for approval of refinancings under the Burdick Amendment, and its 1987 successor, are not inconsistent with this present case. In both of those refinancings, Big Rivers borrowed funds through the Louisville Bank for Cooperatives, not the REA. The Louisville Bank for Cooperatives is a private lending institution, not an agency of the federal government.

Notwithstanding the Commission's lack of jurisdiction over Big Rivers borrowings through the REA, the Commission has asserted general jurisdiction over the Agreement in Case Nos. 9613 and 9885, to the extent that the Agreement incorporates specific rates for Big Rivers during the term of the refinancings. In Case No. 9885 the Commission approved Big Rivers' Revised Workout Plan subject to the adoption of certain modifications by the REA and the New York Banks. These entities subsequently acknowledged in writing their acceptance of the Commission's modifications.

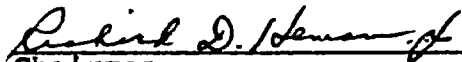
Therefore, it is appropriate and necessary to schedule a hearing to afford the parties an opportunity to examine the Agreement to determine if it substantially conforms to the Revised Workout Plan as approved. This hearing will also encompass Big Rivers' request to issue evidences of indebtedness to the New York Banks. The Commission is cognizant that KRS 278.300(2) requires that this case be disposed of within 60 days of its filing, if possible. Every effort will be made to comply with this time limit.

IT IS THEREFORE ORDERED that:

1. NSA's motion for a preliminary hearing on jurisdictional issues be and it hereby is denied;
2. The Commission has subject matter jurisdiction in this case to the extent set forth in the above Findings; and
3. Big Rivers shall file its testimony in prepared form no later than May 13, 1988; Intervenors shall file their testimony, if any, in prepared form, no later than May 23, 1988; and a hearing be and it hereby is scheduled for June 1, 1988, at 9:00 a.m., Eastern Daylight Time, at the Commission's offices at Frankfort, Kentucky.

Done at Frankfort, Kentucky, this 13th day of May, 1988.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman

ATTEST:

Executive Director


Commissioner