

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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In the Matter of:

APPLICATION OF SOUTH KENTUCKY RURAL)
ELECTRIC COOPERATIVE CORPORATION)
FOR APPROVAL TO PURCHASE THE FIXED) Case. No.
ASSETS OF THE MONTICELLO ELECTRIC) 2007-00374
PLANT BOARD, MONTICELLO, KY)

ATTORNEY GENERAL'S
BRIEF AS TO LEGALITY OF BIDDING PROCESS

Comes now the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention, and states as follows for his brief regarding the legality of the bidding process conducted by the Monticello Electric Plant Board with regard to the above-styled matter.

I. INTRODUCTION

For approximately fifty years, the City of Monticello, Kentucky, pursuant to KRS 96.550 through 96.900 [known as "The Little TVA Act"], has operated its own electrical distribution utility through a municipal corporation known as the Monticello Electric Plant Board ["MEPB"].^{1, 2} Ever since that time, the MEPB received its wholesale electric supply from the Tennessee Valley Authority ["TVA"]. However, MEPB on November 20, 2003 forwarded a letter to the TVA

¹ A copy of the ordinance adopted by the Monticello City Council on September 16, 1947, wherein the City agreed to be bound by the provisions of the Little TVA Act, is attached as "Exhibit A" to Petitioner's "Informal Conference Memorandum," filed of record November 13, 2007.

² Pursuant to KRS 96.740(1), municipal electric plant boards such as MEPB are municipal corporations with the right to sue and be sued.

providing five years' notice that MEPB intended to terminate its wholesale power supply contract with TVA.³ On August 1, 2006, the MEPB submitted a request for proposals ["RFP"] for the purchase of wholesale electric power from alternative providers.⁴

On January 11, 2007 the MEPB Board of Directors voted to sell all of its plant and assets to Petitioner, South Kentucky Rural Electric Cooperative Corporation ["SKRECC"].⁵ On January 23, 2007, the Monticello City Council voted in favor of the proposed sale. On April 9, 2007, the Monticello City Council adopted an ordinance which authorized placing a question on the ballot asking the voters of that city whether they approved the sale of MEPB to SKRECC.⁶ On August 20, 2007 SKRECC filed the instant petition with the Commission. On or about October 31, 2007 the Commission placed certain documents into the record regarding the proposed sale which is the subject of the instant proceeding.⁷ These documents, *inter alia*, called into question the procedures that MEPB followed regarding the proposed sale of its plant.

³ A more detailed summary of events surrounding the transaction and events leading up to it is attached as "Exhibit C" to Petitioner's "Informal Conference Memorandum."

⁴ See Petitioner's Responses to Attorney General's Data Requests, Exhibit D. While the stated purpose of the RFP was for the purchase of wholesale power, the RFP also stated that the MEPB reserved the right to "... accept any type proposal which is deemed most favorable to the [MEPB]" (Attachment D, p. 4); that it "... reserves the right to include alternative courses of action in evaluation of proposals," and the right to "... accept proposals other than the lowest cost Proposal ..." (Attachment D, p. 7); that it "... invites any competitive proposal to provide the MEPB with a reliable and economical supply of firm capacity and energy ...", and that it "... reserves the right to review and act upon alternative options that may be available to the MEPB in evaluation of the responses to this RFP." (Attachment D, p. 10).

⁵ A copy of the MEPB resolution is attached as "Exhibit D" to Petitioner's Informal Conference Memorandum.

⁶ See PSC 1-20, pp. 2-3.

⁷ See letter from Commission Staff Attorney Quang Nguyen, dated October 31, 2007, with attachments.

The Attorney General filed his motion to intervene in the instant proceeding on November 2, 2007, and submitted data requests to SKRECC on November 5, 2007. These data requests included questions regarding the RFP that MEPB submitted in 2006. On November 6, 2007, the voters of the City of Monticello approved the proposed sale. SKRECC filed its responses to the Attorney General's data requests into the record on November 13, 2007.⁸

On November 14, 2007 an informal conference was held in this matter to discuss various issues, in particular, whether the procedures the City of Monticello followed regarding the proposed transaction were in compliance with applicable law. The Attorney General submits the instant brief to address this particular issue.

II. APPLICABLE LAW

KRS 82.083 authorizes a city to sell or otherwise dispose of its real or personal property. That statute provides, in pertinent part:

- (3) Real or personal property may be:
- (a) Transferred, with or without compensation, to another governmental agency;
 - (b) Transferred, with or without compensation, for economic development purposes;
 - (c) Sold at public auction following publication of the auction in accordance with KRS 424.130(1)(b);
 - (d) Sold by electronic auction following publication of the auction, including the uniform resource link (URL) for the site of the electronic auction, in accordance with KRS 424.130(1)(b); or
 - (e) Sold by sealed bids in accordance with the procedure for sealed bids under KRS 45A.365(3) and (4).**
- (4) If a city receives no bids for the real or personal property, either at public or electronic auction or by sealed bid, the property may be disposed of, consistent with the public interest, in any manner deemed appropriate by the city. In those instances, a written description of the property, the

⁸ SKRECC had also previously responded to two (2) sets of data requests from Commission staff.

method of disposal, and the amount of compensation, if any, shall be made.
... [Emphasis added]

KRS 82.083 (3)(e) thus directs the reader to KRS 45A.365 (3) and (4).

This statute falls within the Kentucky Model Procurement Code [“KMPC”].

However, subparagraph (1) of KRS 45A.365 contains language dispositive

to this issue:

(1) All contracts or purchases shall be awarded by competitive sealed bidding, **except** as otherwise provided by KRS 45A.370 to 45A.385 **and for the purchase of wholesale electric power by municipal utilities as provided in KRS 96.901(1).** [Emphasis added]

In turn, KRS 96.901 (3) specifically, and expressly, exempts a municipal utility purchasing wholesale electric power from the dictates of the KMPC.⁹

Therefore, MEPB was not subject to the KMPC, and thus was not obligated to conduct sealed bidding. Nonetheless, MEPB went beyond the dictates of applicable law, and adhered to the requirements of the KMPC’s sealed bidding requirements. All evidence set forth in the record indicates that bids were solicited from multiple parties, and that they were sealed.

Clearly, the RFP was for the purchase of wholesale power. However, the language of the RFP clearly provided MEPB with the right to pursue

⁹ KRS 96.901 (3) states: “ A municipal utility that is purchasing wholesale electric power for resale to the ultimate customers of the municipal utility as provided under subsection (1) of this section **shall not be subject to the provisions of KRS 45A.365 and KRS 424.260.**” [Emphasis added]. It should be noted that KRS 424.260 (governing bids for materials, supplies equipment and services) contains yet *another* express exemption for municipalities purchasing wholesale electric power.

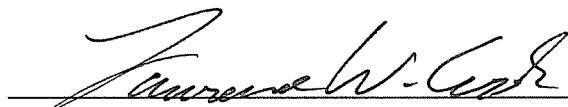
alternative courses of action.¹⁰ It was thus well within the MEPB's purview to accept the Petitioner's response to the RFP, which was an offer to purchase MEPB's operating assets and plant.

III. CONCLUSION

Based on all evidence submitted to date, it appears that the procedures followed by MEPB in soliciting bids were appropriate and in compliance with applicable law.

Respectfully submitted,

GREGORY D. STUMBO
ATTORNEY GENERAL



DENNIS G. HOWARD, II
LAWRENCE W. COOK
ASSISTANT ATTORNEYS GENERAL
1024 CAPITAL CENTER DRIVE,
SUITE 200
FRANKFORT KY 40601-8204
(502) 696-5453
FAX: (502) 573-8315

¹⁰ See footnote 4, *supra*. It should also be noted that materials attached to the letter of Commission Staff Attorney Quang Nguyen, dated October 31, 2007 contained a copy of an *informal* letter from an Assistant Attorney General dated September 26, 2007, prior to the Attorney General's intervention in the instant matter, and well prior to the completion of discovery. The request for this letter was made by the Municipal Power Association of Kentucky in a letter dated August 20, 2007, which happens to be the same day that SKRECC filed its petition in the instant matter. Had the Office of the Attorney General known that this matter was pending in administrative litigation filed before the Public Service Commission, it would not have issued the letter, pursuant to 40 KAR 1:020 § 4, which precludes rendering opinions in matters being litigated, or with questions submitted in contemplation of litigation. The Attorney General's prior informal letter has no precedential value either in the instant matter or any other litigation proceeding.


Certificate of Service and Filing

Counsel certifies that an original and ten photocopies of the foregoing were served and filed by hand delivery to Beth O'Donnell, Executive Director, Public Service Commission, 211 Sower Boulevard, Frankfort, Kentucky 40601; counsel further states that true and accurate copies of the foregoing were mailed via First Class U.S. Mail, postage pre-paid, to:

Allen Anderson
Manager
South Kentucky R.E.C.C.
P. O. Box 910
Somerset, KY 42502-0910

Hon. Darrell Saunders
Attorney for SKRECC
P.O. Box 1324
Corbin, Kentucky 40702

this 21st day of November, 2007



Assistant Attorney General