

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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COMMISSION

In the Matter of:

THE APPLICATIONS OF BIG RIVERS)
ELECTRIC CORPORATION FOR:)
(I) APPROVAL OF WHOLESALE TARIFF)
ADDITIONS FOR BIG RIVERS ELECTRIC)
CORPORATIONS, (II) APPROVAL OF) CASE NO. 2007-00455
TRANSACTIONS. (III) APPROVAL TO ISSUE)
EVIDENCES OF INDEBTEDNESS, AND)
(IV) APPROVAL OF AMENDMENTS TO)
CONTRACTS; AND)

OF E.ON U.S., LLC, WESTERN KENTUCKY)
ENERGY CORP. AND LG&E ENERGY MARKETING,)
INC. FOR APPROVAL OF TRANSACTIONS)

**ATTORNEY GENERAL'S COMMENTS REGARDING THE PROPOSED
APPLICATION**

Comes now the intervenor, the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention, and submits his comments regarding the above referenced application. In sum, the Attorney General does not support the proposed transaction at this time.

I. INTRODUCTION

Big Rivers Electric Corporation (hereinafter "BREC" or "Big Rivers") and E.ON U.S., LLC, along with its subsidiaries, Western Kentucky Energy Corporation and LG&E Energy Marketing Incorporated, (hereafter collectively "E.ON") have jointly applied to the Commission for approval of various transactions as part of the above styled case. The proposed transactions are intended by the applicants to "unwind" or "undo" agreements among and between the parties and have been in place since approximately 1998. These agreements govern the operation of the BREC generating plants along with the allocation of the electricity generated by those plants. To

greatly simplify the existing agreements, E.ON currently operates all the BREC owned generating plants along with the one plant owned by the City of Henderson. The electricity generated by those plants is then sold back to Big Rivers for distribution to its three cooperatives, Kenergy, Jackson Purchase, and Meade County RECC, and to serve the requirements of the City of Henderson. Two aluminum smelters, Century Aluminum and Rio Tinto Alcan Primary Metals, are located within the service territory of Big Rivers and are served with power generated from the plants. The smelters' electrical service is governed by special contract with E.ON wherein its subsidiary, Western Kentucky Electric, sells power to Kenergy which, in turn, re-sells it to the smelters.

The existing agreements providing for E.ON's operation of the Big Rivers generating plants resulted from Big Rivers' reorganization plan as part of its \$1.1 billion Ch.11 bankruptcy filing in 1996. Immediately prior to the bankruptcy, Big Rivers had negotiated with PacifiCorp and had entered into agreements that would have provided PacifiCorp operational contracts similar to the existing contracts with E.ON. However, the Bankruptcy Court, in attempting to maximize the value to the estate, required that the operational contracts go through a bidding process. During the bidding process, E.ON's predecessor submitted a bid substantially higher (\$50 million dollars) than that of PacifiCorp, which led the Court to award the operational contracts to E.ON. Those contracts provided that E.ON would lease and operate Big Rivers generating plants for a period of 25 years (until 2023). Under the agreements E.ON would sell electrical power to Big Rivers to meet the needs of its members.¹

¹ See Testimony of Paul W. Thompson, December 14, 2007, Pages 3-5. Also see, *In re Big Rivers Elec. Corp.* 284 B.R. 580, 584 (W.D.Ky.,2002) (disgorgement of Examiner fees); *In re Big Rivers Elec. Corp.*, 233 B.R. 768, 771-77 (Bankr. W.D.Ky.1999) (awarding fees to professionals); *In re Big Rivers Elec. Corp.*, 233 B.R. 754 (Bankr. W.D.Ky.1999) (awarding compensation to the Examiner, including an enhanced fee, later reversed on appeal to the district court); *In re Big Rivers Elec. Corp.*, 233 B.R. 726, 728-33 (Bankr. W.D. Ky.), aff'd 233 B.R. 739, 742-

E.ON also bought the rights to operate the Henderson generating plant and the right to purchase from the City of Henderson any excess energy not needed to meet their demand. The agreements further provided that BREC would no longer supply power to the two aluminum smelters. Instead, the two aluminum smelters would buy power under special contracts with E.ON. The existing contracts with the two aluminum smelters are set to expire in 2010 and 2011.²

As a result of the 1998 transactions and subsequent lease transactions, Big Rivers emerged from bankruptcy with a series of convoluted lease agreements between it and its creditors and with negative equity. Currently, that equity is calculated to be at -11%. Further, its ability to expand its system was severely restricted due to its inability to access capital markets for borrowing. However, Big Rivers' cash flow remained strong and it comes into the proposed transaction in better shape than it was in 1998.

With the above brief background, in the current application, Big Rivers and E.ON propose, among other things, to undo the 1998 agreements and allow E.ON to remove itself as the operator of those plants. Under the proposed transactions, all future operational and financial activities for the Big Rivers and Henderson generating plants revert to BREC.

In exchange for allowing E.ON to remove itself from these contracts, E.ON has agreed to provide consideration to Big Rivers and the smelters in the form of cash, in-kind payments, property transfers, the reimbursement of certain expenses and forgiveness of certain debts of Big Rivers owed to E.ON. Big Rivers asserts that as a result of this consideration, it will be able to resume its mission in power generation in addition to its current role of providing transmission

45 (W.D.Ky.1998) (denying claim filed by prospective purchaser of Big Rivers); *In re Big Rivers Elec. Corp.*, 213 B.R. 962, 964-71 (Bankr.W.D.Ky.1997) (denying motion to disqualify bankruptcy judge and remove the Examiner).

² See Testimony of Paul W. Thompson, December 14, 2007, Pages 3-5.

services and limited power market sales. Big Rivers maintains that as a result of the payments from E.ON under the proposed transactions, Big Rivers will have a positive equity of 26% coming out of the transaction and will be in much better financial shape than it is today.

Further, the application proposes new contracts with the two aluminum smelters which guarantee their plants remain in operation until 2010 and 2011 (the current expiration date of the existing contracts) but provides no guarantee for continued operation after that time although they can continue to purchase power from Big Rivers system under contract rates until the expiration of the contracts in 2023. In addition to the consideration to Big Rivers, E.ON has negotiated additional consideration to be paid to the two aluminum smelters for their consent to the proposed transactions.

Although there are other areas addressed in the application, which will be discussed herein, operational and financial control and new smelter contracts seem to be the main thrust of the transaction.

The Attorney General's office reviewed the numerous filings of the applicants along with their amendments, participated in the various informal conferences held by the Commission and the others parties hereto, and participated in the public hearing held by the Commission on the matter on December 2nd and 3rd 2008. The Attorney General wishes to acknowledge the employees and representatives of both Big Rivers and E.ON's. Both entities have been well-served by these individuals and they were extremely helpful and forthright in their discussions with his office and further by providing detailed explanations and supplemental information in a highly complex case. However, as a result of his review and participation in the case, the Attorney General cannot support the proposed transaction at this time. The reasons for this position are set forth herein. In its barest essence, E.ON, Big Rivers and the smelters participated

in the negotiations which over the course of time have been able to mitigate rate impacts to the smelters that are associated with the proposed transaction. However, residential ratepayers have not been involved in the negotiations, and further unfavorable, unmitigated rate impacts are projected to occur for residential and commercial ratepayers under the proposed transaction. Without further mitigation of these rate impacts to residential ratepayers, particularly those arising after the original filing, the Attorney General's office cannot support the transaction at this time.

II. ARGUMENT

1. Public Interest/Reasons for Unwind

The joint applicants have offered many reasons why the proposed transactions are in the public interest although the reasons are different for each respective organization.

A. E.ON

E.ON states that it believes that the proposed transactions are in the public interest and that Big Rivers should be allowed to resume its mission as an electric generation and transmission cooperative. Further, E.ON states that the proposed transactions will allow Big Rivers and Kenergy to obtain new contracts for long-term power for the two aluminum smelters.³ E.ON states that it desires to remove itself from the existing agreements as these agreements are uneconomic and that they could expose E.ON to uncertain and unfavorable financial results through 2023.⁴

Paul W. Thompson testified at the hearing that E.ON is currently losing money under the agreements⁵ and during the confidential session clarified that to date E.ON has lost

³ Testimony of Paul W. Thompson, December 14, 2007, Page 16.

⁴ Testimony of Paul W. Thompson, December 14, 2007, Page 18.

⁵ Testimony of Paul W. Thompson, December 2, 2008, Tr., Page 201.

approximately \$_____.⁶ However, he acknowledged that there were several years initially when E.ON earned a profit under the agreements.⁷ In his testimony, Mr. Thompson also acknowledged that, while E.ON expected its losses to continue in the near-term, there were scenarios under which E.ON could earn a profit under the agreements with Big Rivers.⁸ From his testimony, upon the expiration of the two aluminum smelter contracts in 2010 and 2011, E.ON will not agree to renew those contracts on their existing terms but would attempt to market this power to achieve the highest return.⁹ Therefore, this power may or may not be sold to the aluminum smelters. Obviously, the smelters would need to secure new power supply contracts should the unwind not be approved as the current contracts expire in 2010 and 2011. It is also clear that the current prices enjoyed by the smelters would increase under either the proposed unwind transaction, with Big Rivers supplying their power or under a potential future agreement with E.ON.

Mr. Thompson also emphasized that there are numerous disagreements under the existing contracts with Big Rivers, some of which also involve the City of Henderson. From E.ON's perspective, it appears that these disagreements include plant maintenance issues, environmental issues (both current and future) and transmission issues upon the expiration of the smelter contracts.¹⁰ Mr. Thompson testified that the proposed transaction would clarify all of those issues with respect to E.ON and Big Rivers, but would leave in place any rights the City of Henderson

⁶ Testimony of Paul W. Thompson, December 3, 2008 Confidential Tr., Page 8. The amount is intentionally left blank; those parties which have executed the appropriate confidentiality agreement, and the PSC staff, can access the amount of the actual sum in the Confidential Transcript at p. 8.

⁷ Testimony of Paul W. Thompson, December 3, 2008, Confidential Tr., Page 8.

⁸ Testimony of Paul W. Thompson, December 3, 2008. Confidential Tr., Page 9.

⁹ Testimony of Paul W. Thompson, December 2, 2008, Tr., Page 202.

¹⁰ Testimony of Paul W. Thompson, December 2, 2008. Tr., Page 227-228.

would have to pursue litigation with regard to any of their issues.¹¹ However, this contradicts his earlier pre-filed testimony which indicates that E.ON contemplates a complete termination and release of its obligations under the existing agreements and that any obligations surviving the closing would be new obligations created by the Termination Agreement itself or by some other agreements or instruments contemplated in the Termination Agreement.¹² The testimony indicates that the City's consent is required for the transactions to be completed and close.¹³ While Mr. Thompson testified that the parties have negotiated with the City and provided summaries of the offers to the City in exchange for its consent, the City has not consented to the proposed transaction. As the City has not consented to the transaction, it would seem that future litigation is a possibility whether the unwind transaction is approved or not.

While E.ON asserts that it is in the public interest to approve the unwind transaction, it is obvious that the company's main interest in the proposed transaction is to minimize its exposure to possible future losses under the existing agreements. However, under the current agreements, the ordinary ratepayers have enjoyed reliable, low cost electricity. In fact, E.ON admits that the current agreements have been advantageous for Big Rivers, its member cooperatives and the smelters.¹⁴ While E.ON complains that the current set of agreements are uneconomic, E.ON admits that it freely entered into the current agreements with Big Rivers and that it did its due diligence prior to its acceptance of the terms of the current agreements.¹⁵ Clearly, the risk of future losses were among the risks that E.ON accepted in executing the existing agreements. Further, while E.ON may currently be experiencing losses and may do so for the near term, in

¹¹ Testimony of Paul W. Thompson, December 2, 2008. Tr., Page 211, 213.

¹² Direct Testimony of Paul W. Thompson, December 14, 2007, Page 9-10.

¹³ Testimony of Michael H. Core, December 2, 2008, Tr., Page 29.

¹⁴ Testimony of Paul W. Thompson, December 2, 2008. Tr., Page 199, 225.

¹⁵ Testimony of Paul W. Thompson, December 2, 2008. Tr. Page 224, 225

this time of economic uncertainty, these losses are no different than those faced by other suppliers of electricity, and E.ON, like those other suppliers, has opportunities in the future to return these contracts to profitability. Simply stated, any approval of the proposed transactions cannot hinge upon E.ON's profitability or lack of it. E.ON admits that it has made money in some years on the existing contracts and it accepted the risk of losses when it assumed operation of the Big Rivers plants. E.ON should not be excused from that responsibility merely because it experiences what may be short term losses.

B. Big Rivers

At the hearing, Big Rivers' witness Mr. Michael H. Core was questioned why the company viewed the proposed transaction as being in the public interest, in light of the fact that its power supply costs may increase under the proposed transaction whereas under the current agreements its costs were largely fixed. Mr. Core referred to his response contained in the company's response to Item 43 of the Attorney General's Initial Request for Information to the Joint Applicants dated February 14, 2008.¹⁶ In that response, Big Rivers noted that its power supply costs may increase but that the transaction shielded its members from rate increases and from increases in the environmental surcharge and fuel adjustment charge for the first five years.¹⁷ However, this is no longer the case. While Big Rivers does not propose to increase its base rates until approximately 2017, the financial model submitted in October 2008 indicates the creation of new environmental and fuel adjustment surcharges which effectively increase rates and which also appear to increase yearly. These increases are offset (temporarily) by the

¹⁶ Testimony of Michael H. Core, December 2, 2008, Tr., Page 24.

¹⁷ Response to the Attorney General's Initial Request for Information to Joint Applicants, February 14, 2008, Item 43.

application of a credit in the form of the Member Rate Stabilization Mechanism (MRSM) which provides for gradual increases in the environmental and fuel adjustment surcharges until the Economic Reserve is exhausted in 2013.¹⁸ However, the effective rates paid by ratepayers will increase should the unwind transaction be approved.

Further, the company's response to Item 43 states that even though the power costs are largely fixed under the current lease agreements with E.ON, there is no flexibility for load growth or any guarantee of a long-term availability of power for members at the end of the current lease agreements.¹⁹

Regarding the issue of load growth, Mr. C. William Blackburn testified that the existing agreements limit system expansion and that the proposed unwind transaction would resolve that issue.²⁰ Further, Mr. Michael H. Core has testified that the proposed unwind will give Big Rivers the flexibility it now lacks to embrace economic development.²¹ However, when questioned at the hearing, Mr. Core testified that Big Rivers currently utilizes its Rate Schedule 10 to address new or expanded loads over 5 megawatts.²² Upon further questioning, Mr. Core admitted that the potential for load growth currently exists under the current lease agreements with E.ON.²³ In fact, Mr. Core was not able to point to any specific incident where Big Rivers lost a prospect due to its electrical rates under the current agreements.²⁴ Moreover, Mr. Burns E. Mercer, President and CEO of Meade County RECC was also unable to identify any specific instance where Big Rivers lost an economic development prospect due to its electrical rates under the current

¹⁸ Supplemental Direct Testimony of William Steven Seelye, October 9, 2008, Pages 3-10.

¹⁹ Response to the Attorney General's Initial Request for Information to Joint Applicants, February 14, 2008, Item 43.

²⁰ Direct Testimony of C. William Blackburn, December 2007, Page 11.

²¹ Direct Testimony of Michael H. Core, December 2007, Page 14.

²² Testimony of Michael H. Core, December 2, 2008, Tr., Page 40.

²³ Testimony of Michael H. Core, December 2, 2008, Tr., Page 40.

agreements.²⁵ Additionally, Mr. Blackburn testified that Big Rivers intends to continue its Rate Schedule 10 under the proposed unwind transaction and that Big Rivers specifically wanted to avoid a situation where a new customer landed in its service area which would require Big Rivers to build new generation.²⁶ Clearly, the company would limit its own ability to pursue economic development under the proposed unwind transaction. Therefore, the issue of load growth/economic development does not appear to be a genuine concern under the proposed transaction and the Commission should not consider load growth/economic development as a factor in deciding whether to approve the proposed transaction.

In regard to the issue of a guarantee of long-term availability of power for members at the end of the current lease agreements, Mr. Core testified that at the end of the lease, the generating plants revert to Big Rivers and that it is assumed that those plants would be in a condition to provide power to meet the member co-ops' needs, but that "that remains to be seen."²⁷ Mr. Core further testified that the members' contracts expire in 2022, and that in order for the members to extend their contracts, Big Rivers would need to develop a plan that would meet their load and growth.²⁸ The clear implication is that the members might not renew their contracts with Big Rivers. However, upon further questioning regarding this issue, Mr. Core admitted that he did not believe this to be the case.²⁹ In fact, Mr. Burns E. Mercer, testified that the three cooperatives served by Big Rivers recently voted to extend their contracts with Big Rivers.³⁰ This extension was referenced in the application as being an extension of the members' wholesale power supply

²⁴ Testimony of Michael H. Core, December 2, 2008, Tr., Page 55.

²⁵ Testimony of Burns E. Mercer, December 2, 2008, Tr., Page 240-241.

²⁶ Testimony of C. William Blackburn, December 3, 2008, Tr., Page 105

²⁷ Testimony of Michael H. Core, December 2, 2008, Tr., Page 40-41.

²⁸ Testimony of Michael H. Core, December 2, 2008, Tr., Page 40-41.

²⁹ Testimony of Michael H. Core, December 2, 2008, Tr., Page 41-42.

³⁰ Testimony of Burns E. Mercer, December 2, 2008, Tr., Page 236.

contracts with Big Rivers until 2043.³¹ Therefore, this issue is also not a genuine concern and the Commission should not consider this to be a factor in deciding whether to approve the proposed transaction.

In addition to the above factors, Big Rivers states that it is unable to finance significant new capital additions under the existing lease agreements and that the current arrangement between Big Rivers and its creditors is complex.³² Mr. C. William Blackburn testified that the proposed unwind transaction would correct this structural inflexibility and would provide Big Rivers greater flexibility to borrow funds to finance its new capital requirements should the proposed unwind transaction be approved.³³ Further, Mr. Michael H. Core testified that the inability to adequately finance capital expenditures puts more risk on Big Rivers' members in that the members bear all of the responsibility for raising capital that cannot be provided by internal funds.³⁴ However, Mr. Blackburn admits that this greater flexibility is not necessary under the current lease agreements, under which Big Rivers only requires modest future capital requirements.³⁵ In fact, access to capital markets and increased borrowing capacity are only necessary for Big Rivers should the proposed unwind be approved.

Mr. Blackburn testified that a principal reason for pursuing the unwind transaction was that it enabled Big Rivers to improve its ability to finance as described in the unwind application.³⁶ However, Big Rivers made the decision at the time it emerged from bankruptcy to lease its generating facilities to E.ON and was aware that that decision would pose limitations on

³¹ Original Application, December 2007, Paragraph 50, Page 28.

³² Response to the Attorney General's Initial Request for Information to Joint Applicants, February 14, 2008, Item 43.

³³ Direct Testimony of C. William Blackburn, December 2007, Page 11.

³⁴ Response to the Attorney General's Initial Request for Information to Joint Applicants, February 14, 2008, Item 43, Page 2.

³⁵ Direct Testimony of C. William Blackburn, December 2007, Page 11.

its ability to obtain financing for capital improvements going forward.³⁷ At that time, Big Rivers was more concerned with maintaining a strong cash flow.³⁸ But in fact the existing lease agreements contain provisions which address the need for capital improvements at the generating plants and provide for contributions from Big Rivers for these projects only on a pro rata basis.³⁹ Clearly, these agreements work to limit Big Rivers' exposure should the need for large capital improvements become necessary such that Mr. Blackburn is correct in his assessment that this greater flexibility is not necessary under the current lease agreements, under which Big Rivers only requires modest future capital requirements.⁴⁰ It remains unclear how any improvement to Big Rivers' ability to borrow will improve its ability to provide reliable, low cost electrical service to its current ratepayers. Therefore, this should not be a factor considered by the Commission in deciding whether to approve the proposed transaction.

In summary, none of the reasons given by either E.ON or Big Rivers appear to support their assertion that the proposed unwind transaction is in the public interest. It appears that each company's interest is merely related to their own corporate interests and that any claimed benefit to the public or their own non-smelter ratepayers is tangential at best.

2. Proposed Unwind Transaction

The proposed unwind transaction provides that in exchange for the right to remove itself from the existing operational agreements, E.ON will pay consideration to Big Rivers in the form of cash, in-kind payments, property transfers, the reimbursement of certain expenses and

³⁶ Testimony of C. William Blackburn, December 3, 2008, Tr., Page 123.

³⁷ Testimony of Michael H. Core, December 2, 2008, Tr., Page 42-43.

³⁸ Testimony of Michael H. Core, December 2, 2008, Tr., Page 53.

³⁹ Testimony of Mark A. Bailey, December 2, 2008, Tr., Page 101-102. See Also; Testimony of Michael H. Core, December 2, 2008, Tr., Page 56-57.

⁴⁰ Direct Testimony of C. William Blackburn, December 2007, Page 11.

forgiveness of certain debts of Big Rivers owed to E.ON. Additionally, E.ON will also provide consideration in the form of cash payments to the two aluminum smelters.

A. Agreement Terms for BREC/E.ON

In regard to the consideration E.ON provided to Big Rivers, Mr. Michael H. Core testified that E.ON has increased the original consideration to be paid to Big Rivers under the proposed agreements from approximately \$622 million to \$755 million.⁴¹ Mr. Paul W. Thompson testified that from E.ON's perspective, the transaction is now valued at approximately \$842 million.⁴² He states that the reason for this discrepancy among the joint applicants' valuation is related to differences between the book valuations of certain assets transferred under the proposed agreements.⁴³ Mr. C. William Blackburn testified that the reasons for this increase in the consideration from that originally proposed are: (a) because of the increase in fuel prices, for which E.ON has contributed an additional \$82 million to the proposed Economic Reserve account;⁴⁴ and (b) Big Rivers is to receive reimbursement of approximately one-half of the costs of the Phillip Morris lease buyout.⁴⁵ However, while the joint applicants point to the added benefits to Big Rivers of this increase in consideration from E.ON, Big Rivers' projected expenses have dramatically increased for the time period 2009-2013. The Attorney General's expert Mr. David Brevitz conducted an analysis revealing that Big Rivers' projected expenses have increased from the February 2008 financial model to the October 2008 financial model by approximately \$572 million.⁴⁶ Clearly, E.ON's increased consideration does not cover the projected increase in expenses shown by Big Rivers' own financial model. In fact, Mr.

⁴¹ Testimony of Michael H. Core, December 2, 2008, Tr., Page 33.

⁴² Testimony of Paul W. Thompson, December 2, 2008, Tr., Page 208.

⁴³ Testimony of Paul W. Thompson, December 2, 2008, Tr., Page 208.

⁴⁴ Testimony of C. William Blackburn, December 3, 2008, Tr., Page 26.

⁴⁵ Testimony of C. William Blackburn, December 3, 2008, Tr., Page 59-60.

Blackburn indicated that this increase in consideration only offset \$290 million of the projected \$572 million increase in expenses.⁴⁷ This leaves approximately \$282 million as a projected shortfall that Big Rivers will have to address through an increase in base rates.

B. Agreement Terms for Smelters

1. Agreement with E.ON

E.ON has agreed to provide consideration payments to the two smelters. These payments are made up of public and confidential payments. E.ON's public payments include approximately \$70 million, to be placed in escrow for use over time to offset the smelters' increased fuel costs.⁴⁸ The agreement provides that the funds are available over a 10-year period unless depleted earlier by virtue of the smelters' power consumption, and that should one or both smelter(s) terminate service prior to the end of their new contracts they would not receive the balance of any funds remaining in the account.⁴⁹ E.ON structured this payment in this manner in an attempt to encourage the smelters to stay for the full 10-year period envisioned by the escrow agreement.⁵⁰

Additionally, E.ON has agreed to pay the smelters approximately \$17.5 million to offset other increases which were to be born primarily by the smelters.⁵¹ The confidential payment is given as being \$_____.⁵² The reasoning behind this payment is to compensate the smelters for giving up the low contractual rates through the end of their existing contracts set to

⁴⁶ Supplemental Direct Testimony of David Brevitz, November 21, 2008, Page 5-6.

⁴⁷ Testimony of C. William Blackburn, December 3, 2008, Tr., Page 26-27.

⁴⁸ Testimony of Paul W. Thompson, December 2, 2008, Tr., Page 214-215.

⁴⁹ Testimony of Paul W. Thompson, December 2, 2008, Tr., Page 206-207.

⁵⁰ Testimony of Paul W. Thompson, December 2, 2008, Tr., Page 206-207.

⁵¹ Testimony of Paul W. Thompson, December 2, 2008, Tr., Page 215-216.

⁵² Testimony of Paul W. Thompson, December 3, 2008. Confidential Tr., Page 7. The amount is intentionally left blank; those parties which have executed the appropriate confidentiality agreement, and the PSC staff, can access the amount of the actual sum in the Confidential Transcript at p. 7.

expire in 2010 and 2011.⁵³ In simplest terms, E.ON's payments to the smelters essentially provide that the proposed unwind transaction leaves the smelters unchanged with respect to their current position, at least to the date of the original expiration of the current contracts. The fact that the proposed transaction is essentially a "wash" for the smelters was confirmed by the smelter's expert, Henry W. Fayne, at the hearing of the case.⁵⁴

2. Agreement with Big Rivers

Big Rivers' agreement with the smelters provides that Big Rivers will sell energy to the two smelters based on the large industrial rate plus \$0.25 per megawatt-hour.⁵⁵

Additionally, the smelters will pay a TIER surcharge if required to ensure Big Rivers' TIER remains at least 1.24x. In summary, this surcharge provides that Big Rivers will project whether a positive TIER adjustment is required for the coming fiscal year to maintain a 1.24x TIER. If so, then Big Rivers will estimate the TIER adjustment surcharge based on budget for that year and will assess that charge in 12 monthly payments.⁵⁶ If the projected TIER adjustment is negative, then there is no TIER adjustment charge.⁵⁷ The TIER adjustment will be reviewed quarterly for modification, and may potentially provide a credit back to smelters.⁵⁸ The TIER Adjustment Surcharge is subject to limitation on the maximum amount the smelters are required to pay under the surcharge.⁵⁹ The amounts of these limitations are given in the Direct Testimony of C. William Blackburn, December 2007, at Pages 52 and 53.

⁵³ Testimony of Paul W. Thompson, December 2, 2008, Tr., Page 217-218.

⁵⁴ Testimony of Henry W. Fayne, December 3, 2008, Tr., Page 164-165.

⁵⁵ Testimony of C. William Blackburn, December 3, 2008, Tr., Page 73.

⁵⁶ Direct Testimony of C. William Blackburn, December 2007, Page 51-52.

⁵⁷ Direct Testimony of C. William Blackburn, December 2007, Page 52.

⁵⁸ Direct Testimony of C. William Blackburn, December 2007, Page 53.

⁵⁹ Direct Testimony of C. William Blackburn, December 2007, Page 52-53.

The agreements also provide that Big Rivers will agree to sell power otherwise deliverable to the smelters under three scenarios. Under the first scenario, Surplus Sales, a smelter must make prior written notice to Big Rivers of the amount requested to be sold along with times and durations of such sale. The smelter must then curtail its demand such that the combination of demand and energy sold as surplus does not exceed the smelter's hourly Base Demand.⁶⁰ Second, a smelter may request that Big Rivers make Undeliverable Energy Sales if damage or destruction at a smelter plant initially reduces the smelter's demand by at least 50MW per hour and such limitation is expected to continue for at least 48 hours.⁶¹ In that case, Big Rivers will use reasonable efforts to sell the amount of energy up to the reduction in the smelter's demand, subject to the same conditions applicable to Surplus Sales.⁶² The cause of the damage cannot be due to intentional or willful misconduct on the part of the smelter.⁶³ Under the third scenario, Potline Reduction Sales, Big Rivers agrees to sell excess electricity if a smelter has or will cease aluminum smelting operations on one of its potlines.⁶⁴ The agreements specify that the smelter must give Big Rivers at least 30 days notice and that only one potline can be affected.⁶⁵ The smelter must estimate that the cessation will last for 12 months or longer.⁶⁶ Under the terms of the agreement, a smelter is prohibited from making a request under this option if it has used this option within the previous 12-month period.⁶⁷ Additionally, Big Rivers has no obligation to make potline reduction sales until it has sold its own surplus energy or if transmission or other

⁶⁰ Direct Testimony of C. William Blackburn, December 2007, Page 44-45

⁶¹ Direct Testimony of C. William Blackburn, December 2007, Page 45.

⁶² Direct Testimony of C. William Blackburn, December 2007, Page 45.

⁶³ Direct Testimony of C. William Blackburn, December 2007, Page 45.

⁶⁴ Direct Testimony of C. William Blackburn, December 2007, Page 46.

⁶⁵ Direct Testimony of C. William Blackburn, December 2007, Page 46.

⁶⁶ Direct Testimony of C. William Blackburn, December 2007, Page 46.

⁶⁷ Direct Testimony of C. William Blackburn, December 2007, Page 46

constraints prevent Big Rivers from selling the requested amount of electricity.⁶⁸ However, under the terms of the agreements, specifically Article 10.3 of both smelter contracts, the sale of unused electricity under this scenario provides the opportunity for the smelters to earn a profit such that the possibility exists that the smelters could earn more selling their unused electricity than they might from smelting aluminum.⁶⁹

While the agreements purport to extend the life of the smelter contracts to 2023, the smelters have no obligation to remain on Big Rivers' system beyond the expiration of their original contract terms. According to the testimony of Mr. Blackburn, either one or both of the smelters can terminate their contract after the effective date upon one year notice to Big Rivers that they are ceasing all smelting activities at its plant.⁷⁰ However, termination under this provision cannot occur prior to December 31, 2010 and only one smelter can terminate prior to December 31, 2011 unless the transmission upgrades authorized by the Commission as part of Case No. 2007-00177 are not completed.⁷¹ Although the agreements contemplate the smelters remaining on Big Rivers system post unwind, each of the representatives for the smelters testified that the agreements contained no guarantees that they will remain beyond the expiration of their original contracts.⁷²

In fact, smelter expert Henry W. Fayne originally testified that if the long-term LME price of aluminum is \$2,100 per metric ton, then the smelters' long-term operations at the rates forecast in the model will be a close call and that certainly if costs increase significantly, the

⁶⁸ Direct Testimony of C. William Blackburn, December 2007, Page 46.

⁶⁹ Motion to Amend and Supplement Application, October 9, 2008, Exhibit 81

⁷⁰ Direct Testimony of C. William Blackburn, December 2007, Page 66.

⁷¹ Direct Testimony of C. William Blackburn, December 2007, Page 66.

⁷² Testimony of Wayne R. Hale, December 2, 2008, Page 147-148; Also, Testimony of Guy Authier, December 2, 2008, Page 155.

smelters will be unable to survive.⁷³ This Commission heard testimony from several witnesses, including the Attorney General's expert Mr. David Brevitz, indicating that Big Rivers' costs have, indeed, increased significantly.⁷⁴ While Mr. Fayne acknowledges the increases in smelter costs, his supplemental testimony indicates that the smelters continue to project they will be able to survive based on a long-term LME price of aluminum in the range of \$2,300-\$2,400 per metric ton.⁷⁵ Clearly, as the cost of electricity to the smelters has increased, they must earn more per ton from the aluminum they sell to offset this increase. However, the LME price of aluminum has fallen dramatically in the last 6 months.

At the hearing, Mr. Fayne was questioned regarding the current LME price of aluminum. His response was that the price of aluminum had fallen as of December 2, 2008 to below \$1,700 per metric ton.⁷⁶ At the hearing, the Attorney General introduced Exhibit AG-3 which indicated that the daily cash price of Aluminum had fallen to \$1,642 per metric ton. The Commission should take administrative notice of the fact that the LME price of aluminum has continued to fall. Indeed, on December 30, 2008, the LME price of aluminum had fallen to \$1,445 per metric ton (daily cash price) and the projected 27- month delivery price was \$1,737 per metric ton (LME price sheet for December 30, 2008 attached hereto as Exhibit AG-1). This is significantly lower than the prices contained in Mr. Fayne's last projections of record.

Mr. Fayne testified that the Alcan smelting plant produced approximately 410 million pounds of aluminum on a yearly basis and that Century produced approximately 538 million

⁷³ Testimony of Henry W. Fayne, January 25, 2008, Page 14.

⁷⁴ Supplemental Direct Testimony of David Brevitz, November 21, 2008, Page 5-6; Also, Testimony of Paul W. Thompson, December 2, 2008, Page 205-206; Also, Testimony of C. William Blackburn, December 3, 2008, Page 24-27.

⁷⁵ Testimony of Henry W. Fayne, December 3, 2008, Tr., Page 165-166.

⁷⁶ Testimony of Henry W. Fayne, December 3, 2008, Tr., Page 166-167.

pounds per year.⁷⁷ When questioned regarding the LME price of aluminum, Mr. Fayne indicated that the price per pound of aluminum was approximately \$1.45 six months prior to the hearing date, but as of the hearing date was approximately \$0.75.⁷⁸ To complete the analysis, if the smelters estimated their revenue based on the LME price 6 months ago, then Alcan could expect gross annual revenue of approximately \$595 million and Century could expect gross annual revenue of approximately \$780 million. However, with the current LME price of \$1,445 per metric ton or \$0.66 per pound, those gross revenues are cut by over half with gross revenues of \$270.6 million for Alcan and \$355 million for Century. Clearly, the current LME prices constitute a large downward swing in gross revenue for both companies. Although survival of the smelters was previously judged as a “close call” by Mr. Fayne at the aluminum prices of a year ago, it is now obvious that with the current and projected LME prices well-below those projected by Mr. Fayne, the smelters will be required to make some tough choices in the very near future regarding their Kentucky operations. As proof of this, the Commission should take administrative notice that on December 10, 2008 the Associated Press reported that Rio Tinto, the parent company of the Alcan smelter, announced job cuts of 14,000 in its worldwide operations along with reductions in capital investments and the sales of unnamed assets (a copy of the associated press article as reprinted by MNSBC.com is attached hereto as Exhibit AG-2). Although the Alcan Kentucky operations were not specifically mentioned in the article, despite any claims to the contrary, it is obvious that these organizations will take whatever actions are appropriate to ensure their corporate survival even if that includes closing the Kentucky smelting plants. With no guarantees of operation past their original contract expiration dates, it is imperative that the Commission review the proposed transaction with an abundance of caution.

⁷⁷ Testimony of Henry W. Fayne, December 3, 2008, Tr., Page 172-173.

The smelters' payments to Big Rivers as projected under the financial model will be made only if the smelters continue their Kentucky operations.⁷⁹ If one or both smelters cease their Kentucky operations, Big Rivers will have a large amount of excess capacity. Big Rivers' testimony indicates that it *believes* it will be able to sell such power in the wholesale markets.⁸⁰ However, under the existing agreements, Big Rivers and the non-smelter ratepayers are shielded from the majority of the effects of a smelter's closure. Finally, while the Attorney General acknowledges that jobs are important for the Commonwealth's citizens, jobs alone cannot be the reason for approval of the proposed transaction, especially in light of the serious concerns regarding the ongoing viability of not only the post-unwind Big Rivers, but also that of the smelters.

C. Agreement Terms for Henderson

The parties have acknowledged that the City of Henderson's consent is required for the proposed unwind transaction to close. Mr. Paul W. Thompson testified that as of December, 2007, the joint applicants were currently discussing and negotiating with Henderson for this consent.⁸¹ He further testified that E.ON, WKEC and LEM each anticipate that a mutually acceptable agreement will be reached with Henderson, and that they committed to file that agreement as a supplement to the record once it was substantially complete.⁸² Mr. Thompson explained that E.ON offered Henderson the following: (a) \$1 million for its consent; (b) \$3 million for repairs to its station 2 plant after closing; and (3) reimbursement of its legal fees incurred as part of the unwind transactions in an amount not to exceed \$1.4 million.⁸³

⁷⁸ Testimony of Henry W. Fayne, December 3, 2008, Tr., Page 173.

⁷⁹ Testimony of C. William Blackburn, December 3, 2008, Tr., Page 116.

⁸⁰ Testimony of C. William Blackburn, December 3, 2008, Tr., Page 46.

⁸¹ Direct Testimony of Paul W. Thompson, December 14, 2007, Page 9.

⁸² Direct Testimony of Paul W. Thompson, December 14, 2007, Page 9.

⁸³ Supplemental Direct Testimony of Paul W. Thompson, October 9, 2008, Page 13

In addition to the above-stated consideration E.ON offered to Henderson, Big Rivers has proposed to increase amounts it pays to Henderson for the excess energy produced by Henderson's generating plants. Mr. David Spainhoward testified that Big Rivers has offered to increase the amount paid to Henderson for this excess electricity from \$1.50/MWh to \$2.50/MWh and has filed amendments to its agreement with Henderson indicating that change.⁸⁴ Big Rivers is requesting that the Commission not only approve those amendments,⁸⁵ but for the Commission to issue a ruling finding the amendments to be "fair, just and reasonable."⁸⁶

However, Henderson has rejected the offers from both E.ON and Big Rivers.⁸⁷ While Henderson did not present any testimony at the hearing, it did submit a report prepared by Exothermic Engineering regarding the condition of its Station 2 plant. Further, discovery responses indicate that Henderson's two remaining core issues of concern are compensation for its excess energy, and plant maintenance.⁸⁸

With respect to the issue of excess energy, Henderson has issued a counter-offer to Big Rivers for the sum of \$10.88/MWh.⁸⁹ This is substantially more than the offer of \$2.50/MWh offered by Big Rivers. However, Big Rivers has rejected this counteroffer stating that its offer is its best and final offer to the City.⁹⁰ It is significant to note that the financial model submitted by Big Rivers with its application does not show any additional monies to be paid by Big Rivers to Henderson beyond its last offer.⁹¹ Moreover, Big Rivers "best and final offer" was in March of

⁸⁴ Supplemental Direct Testimony of David A. Spainhoward, October 2008, Page 9.

⁸⁵ Supplemental Direct Testimony of David A. Spainhoward, October 2008, Page 9.

⁸⁶ Supplemental Direct Testimony of David A. Spainhoward, October 2008, Page 10.

⁸⁷ Testimony of Michael H. Core, December 2, 2008, Tr., Page 29, Also, Testimony of Paul W. Thompson, December 2, 2008, Tr., Page 203.

⁸⁸ Supplemental Direct Testimony of David Brevitz, November 11, 2008, Page 8-9.

⁸⁹ Testimony of Mark A. Bailey, December 2, 2008, Tr., Page 72.

⁹⁰ Testimony of Mark A. Bailey, December 2, 2008, Tr., Page 73-74.

⁹¹ Testimony of Mark A. Bailey, December 2, 2008, Tr., Page 73.

2008 and was rejected by Henderson.⁹² Big Rivers has offered no evidence of further negotiations beyond their last offer and negotiations appear to have currently stalled. Clearly, Big Rivers and Henderson remain far apart on the issue of excess energy; thus Henderson's consent to the transaction at this point appears questionable at best.

Concerning the issue of the maintenance issue of Station 2, Mr. Thompson testified that E.ON made its last offer to the City in October of 2008 and that E.ON has received the City's rejection.⁹³

There is also contradictory testimony regarding the modifications of the agreements with Henderson. Mr. Spainhoward testified that the proposed amendments merely move up the termination date of the current lease with the City and stated that the City retains any contractual rights that are "intended to survive" the expiration.⁹⁴ At the hearing, Mr. Spainhoward was questioned regarding what rights were intended to survive under the proposed amendments. Mr. Spainhoward testified that E.ON intended to preserve some of the contractual rights between the parties but was unable to articulate specifically what rights belonging to the City under the existing agreements the parties intend to survive the unwind.⁹⁵ However, the testimony of Paul W. Thompson indicates that E.ON contemplates a complete termination and release of its obligations under the existing agreements and that any obligations surviving the closing would be new obligations created by the Termination Agreement itself or by some other agreements or instruments contemplated in the Termination Agreement.⁹⁶ Since these rights encompass the City's concerns related to plant operation and maintenance, it seems obvious that the City would

⁹² Testimony of Michael H. Core, December 2, 2008, Tr., Page 29-30.

⁹³ Testimony of Paul W. Thompson, December 2, 2008, Tr., Page 203.

⁹⁴ Supplemental Direct Testimony of David A. Spainhoward, October 2008, Page 11.

⁹⁵ Testimony of David A. Spainhoward, December 2, 2008, Page 248.

⁹⁶ Direct Testimony of Paul W. Thompson, December 14, 2007, Page 9-10.

be reluctant to consent to a transaction that limits its ability to pursue redress for what it contends to be improper operation and maintenance of its plant.

Further, Big Rivers request that the Commission issue a ruling finding the Station 2 amendments to be “fair, just and reasonable”⁹⁷ is premature. Since the documents have not been accepted or executed by the City, they do not represent an “amendment” at all. Big Rivers might just as well have asked the Commission to issue a finding that pages of blank paper represent an amendment that is “fair, just and reasonable.” Clearly, the Commission cannot make a finding that an unexecuted document is fair, just or reasonable since the document, obviously, does not represent an agreement of the parties. Indeed, it is merely one side’s proposal.

D. Future Rate Increases

The rates projected by the October 2008 financial model submitted by Big Rivers indicate the expected levels of rates under the proposed transaction. However, as noted by Mr. David Brevitz, the effective rates for rural consumers indicated in the October 2008 financial model have increased substantially over the model submitted by Big Rivers in February 2008.⁹⁸ The increase in effective rates over those indicated in the February 2008 financial model appear to be driven primarily by increases in projected operating costs, increased interest costs and increased capital expenditures.⁹⁹ These cost increases are acknowledged by Big Rivers and, indeed, Big Rivers prepared and submitted its Exhibit Big Rivers Redirect #5 to address these cost increases.¹⁰⁰ Mr. Blackburn testified that with that Exhibit, Big Rivers was attempting to show that the increases were offset by increases in the consideration paid by E.ON to mitigate the

⁹⁷ Supplemental Direct Testimony of David A. Spainhoward, October 2008, Page 10.

⁹⁸ Supplemental Direct Testimony of David Brevitz, November 2008, Page 4-5.

⁹⁹ Supplemental Direct Testimony of David Brevitz, November 2008, Page 5-6.

¹⁰⁰ Testimony of C. William Blackburn, December 3, 2008, Tr., Page 24-27.

increased expenses.¹⁰¹ However, as shown by Mr. Brevitz in his testimony, the increase in costs amount to approximately \$572 million.¹⁰² The total offsets indicated by Mr. Blackburn total only approximately \$290 million.¹⁰³ Clearly, there will be a deficit of approximately \$282 million which will be made up from the increases now shown in rural rates. When compared to the current rural rates under the existing lease agreements, these increases are substantial on a year over year basis.¹⁰⁴

Big Rivers maintains, at least for now, that approval of the proposed unwind does not guarantee that the Commission will approve future rate increases projected by Big Rivers in the financial model.¹⁰⁵ However, if the Commission chooses to approve the transaction and the closing take place, realistically, the Commission will have little alternative but to approve the rate increases shown in the financial model as the future viability of Big Rivers will depend upon those projected increases.

There was testimony at the hearing that indicated that, for 2009, rural rates are drastically higher under the existing lease agreement than those projected under the unwind.¹⁰⁶ As explained by Mr. Blackburn, this increase under the existing lease agreement is due to Big Rivers intention to request an increase in rates if the unwind does not occur.¹⁰⁷ Mr. Blackburn testified that should the unwind not occur, Big Rivers intends to request an increase of approximately 20-25%.¹⁰⁸ Mr. Blackburn testified that this increase was due to Big Rivers desire to increase the cash reserves it

¹⁰¹ Testimony of C. William Blackburn, December 3, 2008, Tr., Page 26.

¹⁰² Supplemental Testimony of David Brevitz, November 2008, Page 6.

¹⁰³ Testimony of C. William Blackburn, December 3, 2008, Tr., Page 26.

¹⁰⁴ Supplemental Direct Testimony of David Brevitz, November 2008, Page 5.

¹⁰⁵ Testimony of C. William Blackburn, December 3, 2008, Tr., Page 47.

¹⁰⁶ Testimony of C. William Blackburn, December 3, 2008, Tr., Page 23.

¹⁰⁷ Testimony of C. William Blackburn, December 3, 2008, Tr., Page 23.

¹⁰⁸ Testimony of C. William Blackburn, December 3, 2008, Tr., Page 23.

depleted as a result of its buyout of its leases with Bank of America and Phillip Morris.¹⁰⁹

However, for this Commission to approve a rate increase of 20-25%, or \$25 million,¹¹⁰ merely to improve Big Rivers' cash position without any other supporting cause or need is questionable in light of the fact that Big Rivers originally represented to the Commission that the lease buyouts accomplished over the summer would have no effect on the proceeding.

As previously admitted by Mr. Thompson, Big Rivers ratepayers have enjoyed reliable, low-cost electricity for the last 10 years under the existing agreements.¹¹¹ Mr. Core agreed in his testimony that, under the current lease agreements, Big Rivers' rates have been relatively low and stable over the last 10 years.¹¹² Further, Mr. Blackburn testified that Big Rivers is aware that "rates are just higher" under the unwind and higher rates under the proposed unwind are "just a fact."¹¹³ Further, he admits that "**they are higher than if we stay in the Existing Transaction.**"¹¹⁴ Lastly, Mr. Core testified that should the proposed unwind be approved Big Rivers customers will not likely see an appreciable increase in the quality of service they receive should the proposed unwind be approved.¹¹⁵ Therefore, from the perspective of the ordinary rural ratepayers, the proposed unwind will not appreciably increase their quality of service yet proposes substantial yearly increases to their utility costs. Since the ordinary ratepayers have enjoyed stable rates and reliable electricity for the last 10 years under the existing lease agreements, there is little reason to approve the proposed unwind transaction at this time merely

¹⁰⁹ Testimony of C. William Blackburn, December 3, 2008, Tr., Page 142.

¹¹⁰ Testimony of C. William Blackburn, December 3, 2008, Tr., Page 142.

¹¹¹ Testimony of Paul W. Thompson, December 2, 2008, Tr., Page 199.

¹¹² Testimony of Michael H. Core, December 2, 2008, Tr., Page 44.

¹¹³ Testimony of C. William Blackburn, December 3, 2008, Tr., Page 53.

¹¹⁴ Testimony of C. William Blackburn, December 3, 2008, Tr., Page 53.

¹¹⁵ Testimony of Michael H. Core, December 2, 2008, Tr., Page 43-44.

to benefit the corporate objectives of E.ON, Big Rivers and the two aluminum smelters. The last of which will not even guarantee their continued presence in Kentucky.

3. Physical Condition of the Plants

Under the proposed unwind, Big Rivers will regain operational control of their generating plants. They will also be responsible for maintenance of those plants going forward. The terms of the proposed agreements provide that each of the generating facilities, as of closing, must be in all material respects in good condition and state of repair, ordinary wear and tear excepted, and consistent with prudent utility practice as determined in the reasonable judgment of Big Rivers.¹¹⁶ Mr. Spainhoward testified that the conditions of the plants will be monitored up to closing. However, the agreements provide that only an occurrence resulting in “Material Casualty Damage” would delay the closing.¹¹⁷ Therefore, as a practical matter and as admitted by Mr. Bailey in his testimony, “[i]n essence, Big Rivers will assume control of the plants as they are.”¹¹⁸ Mr. Bailey testifies that Big Rivers continues to perform its due diligence in monitoring the condition of the plants.¹¹⁹ In his Exhibit MAB-8 submitted as part of his supplemental direct testimony, he has already, prior to the closing, stated in an internal memorandum to the Big Rivers Board of Directors dated May 29, 2008 that he has examined the various reports prepared by Stanley consultants, the Stone & Webster reports prepared by the smelters and the Exothermic Engineering reports prepared by Henderson and that he is satisfied that Big Rivers is taking back plants that are in appropriate condition to perform as anticipated by the unwind financial

¹¹⁶ Direct Testimony of Mark A. Bailey, December 2007, Page 14.

¹¹⁷ Supplemental Direct Testimony of David A. Spainhoward, October 2008, Exhibit DAS-2, Paragraph 1.

¹¹⁸ Direct Testimony of Mark A. Bailey, December 2007, Page 15.

model.¹²⁰ Further, Mr. Bailey states in the memorandum that “...it has been my observation that many of the items documented in many of these reports should have very little impact on the ability of the plants to produce low-cost, reliable electricity” and that “I am comfortable with the current condition of the generating facilities.”¹²¹ However, when questioned regarding the conditions of the generating plants at the hearing, Mr. Bailey stated that he could not testify as to what is considered “normal industry practice”¹²² but admitted that some of the conditions were not normal for the plants with which he has been associated.¹²³ Additionally, at the hearing, when questioned regarding a picture indicating a rope and/or duct tape holding used to support piping or conduit, Mr. Bailey stated that although he could not state what is normal, in the plants he has worked and been associated that such a condition would not be considered normal.¹²⁴ The Attorney General would note that **all** the reports prepared by outside consultants, including Stanley, Stone & Webster and the Exothermic Engineering indicate deficiencies in the plant conditions, some being indicated by the inspectors as serious and some not. However, Mr. Bailey has testified that these reports have been reviewed and that the deficiencies noted do not reflect any conditions which, in his opinion, would affect the operation or reliability of the plants. However, the statements of the joint applicants regarding plant conditions should be viewed with caution. While Mr. Bailey stated that he could not testify as to what is normal industry practice, the three separate engineering consulting firms who inspected the plants and their maintenance records are in agreement that the plants have numerous operational and maintenance issues which must be addressed. While these reports have been downplayed by the joint applicants,

¹¹⁹ Supplemental Direct Testimony of Mark A. Bailey, October 2008, Page 3-4.

¹²⁰ Supplemental Direct Testimony of Mark A. Bailey, October 2008, Exhibit MAB-8.

¹²¹ Supplemental Direct Testimony of Mark A. Bailey, October 2008, Exhibit MAB-8.

¹²² Testimony of Mark A. Bailey, December 2, 2008, Tr., Page 89-90

¹²³ Testimony of Mark A. Bailey, December 2, 2008, Tr., Page 89-90.

these consultants were chosen by them specifically for their expertise in the area of power plant operation and maintenance. The fact that the joint applicants dismiss the reports of their own consultants should be cause for concern. Therefore, the Commission should consider the statements from the parties regarding the condition of the plants to be simply what they are, self-serving statements designed to support a transaction that both E.ON and Big Rivers strongly desire be approved. To resolve the issue of plant conditions, the Commission should consider making a fact finding trip to the plants to satisfy itself as to the exact condition of the plants prior to making any decision whether to approve the proposed transaction along with an independent expert it engages.

III. CONCLUSION

As discussed by Mr. Brevitz, and as shown by the evidence at the hearing, the proposed transaction leaves many questions unanswered. In addition, the proposed transaction does little to directly benefit the non-smelter ratepayers of Big Rivers unless one considers yearly rate increases as a benefit. In fact, only the smelters, who participated in the negotiations, have been able to mitigate their rate impacts associated with the proposed transaction. Moreover unfavorable, unmitigated rate impacts are projected to occur for the residential and commercial ratepayers under the proposed transaction. However, without further mitigation of the unfavorable rate impacts that are projected to occur, particularly those arising after the original filing (between February and October 2008), the Attorney General's office cannot support the transaction at this time.

As is apparent from a review of the application, the various amendments thereto and the supporting documentation, the proposed transaction mainly benefits E.ON, which gets to remove

¹²⁴ Testimony of Mark A. Bailey, December 2, 2008, Tr., Page 84.

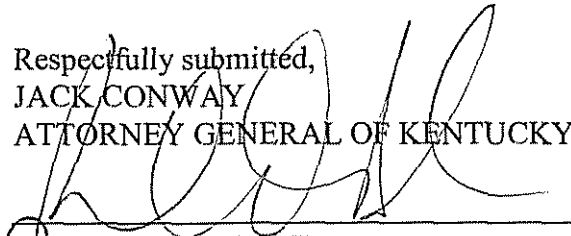
itself from contracts which hindsight has shown were apparently ill-advised (at least in the short term), and Big Rivers, which gets a chance to rise from the ashes of its 1998 bankruptcy.

The smelters also get the benefit of purchasing power at below market rates under the proposed transaction. The joint applicants claim that the proposed transaction is the best hope for securing smelters jobs in the future, however with the price of aluminum continuing to fall, it is by no means guaranteed that the smelters will even be around to take advantage of these rates, as even they have admitted.

Additionally, although E.ON has stated that it will not renew the smelters' contracts at the existing rates when their contracts expire in 2010 and 2011, clearly E.ON would entertain negotiations with the smelters to provide electricity at a cost that does not subsidize the smelter operations with below cost rates as is currently the case.

Quite simply, the existing lease agreements have worked well for the ordinary ratepayers of Big Rivers. As admitted by the joint applicants, the rate for electricity has been low and stable under the existing lease agreements. The proposed unwind will change that going forward. As admitted by Mr. Blackburn, "rates are just higher" under the unwind, "that's just a fact". With little benefit to the non-smelter ratepayers but much higher costs, the Attorney General does not support the transaction at this time.

Respectfully submitted,
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CERTIFICATE OF SERVICE AND NOTICE OF FILING

I hereby give notice that this the 31st day of December, 2008, I have filed the original and ten copies of the foregoing with the Kentucky Public Service Commission at 211 Sower Boulevard, Frankfort, Kentucky, 40601 and certify that this same day I have served the parties by mailing a true copy of same, postage prepaid, to those listed below.

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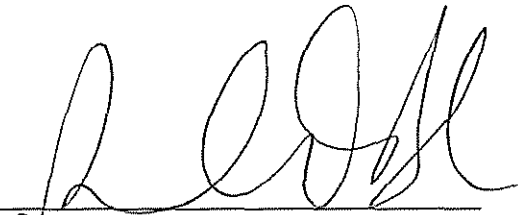
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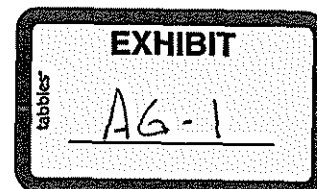
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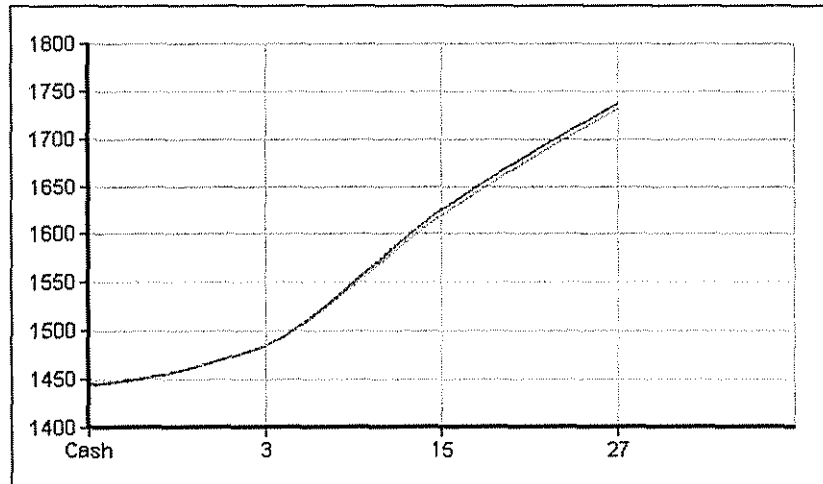
LME Official Prices (US\$/tonne) for 30 Dec 2008

LME Official Opening Stock (in tonnes)

	ALUMINIUM	DATE	ALUMINIUM
CASH BUYER	1,445 00	30 Dec 2008	2302025
CASH SELLER & SETTLEMENT	1,445 50		
3-MONTHS BUYER	1,484 00		
3-MONTHS SELLER	1,485 00		
15-MONTHS BUYER	1,620 00		
15-MONTHS SELLER	1,625 00		
27-MONTHS BUYER	1,732 00		
27-MONTHS SELLER	1,737 00		

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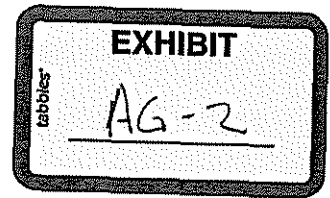


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Mining giant Rio Tinto to cut 14,000 jobs

Company will reduce capital investment amid waning demand for metals

The Associated Press

updated 8:40 a.m. ET. Wed. Dec. 10, 2008

SYDNEY, Australia - Rio Tinto Group, one of the world's largest miners, will cut 14,000 jobs worldwide and reduce capital investment as part of new measures to reduce its debt amid waning demand for iron ore and other metals, the company said Wednesday.

The job cuts — accounting for 12.5 percent of the company's 112,000-person work force — and reduction in operating expenditure are expected to save at least 2.5 billion Australian dollars (\$1.6 billion) a year by 2010, the London-based company said in a statement.

The cuts will mostly be on the contractor side, where 8,500 positions will be eliminated.

Rio Tinto has offices in 40 countries, with most of its employees in Australia and North America, as well as significant operations in South America and southern Africa.

The company also said it will try to sell "significant assets" that were not previously listed for sale in order to reach its goal of trimming AU\$10 billion (\$6.6 billion) from its debt by the end of next year.

"Given the difficult and uncertain economic conditions, and the unprecedented rate of deterioration of our markets, our imperative is to maximize cash generation and pay down debt," Chief Executive Tom Albanese said in the statement. "We have undertaken a thorough review of all our operations and are executing a range of actions."

"By taking these tough decisions now we will be well positioned when the recovery comes," Albanese said.

Rio Tinto's AU\$38.9 billion debt was a key factor in rival BHP Billiton withdrawing its hostile takeover bid last month in the midst of the global economic downturn. Much of that debt is from its \$38.1 billion acquisition of Canadian company Alcan last year.

Other mining companies would likely take similar measures in response to reduced demand, said John Meyer, an analyst at Fairfax IS investment bank in London. The booming demand in recent years led to expansion and job growth for many mining companies that is no longer sustainable, he said.

"The scale of the cuts looks dramatic but we would expect to see this across the industry," he said. "Companies have expanded in recent years in response to high metals prices, but that's over now. With the recent severe falls in demand, and the recent (economic) climate, we can see mining companies pulling back markedly."

Rio Tinto spokesman Ian Head said there were no details yet on where, when or how the staff cuts would come. The Rio Tinto statement anticipated severance costs of AU\$400 million.

"We're working our way through the implications of this," Head said. "We don't expect to know more until sometime in the first quarter of next year."

The world's second-largest aluminum producer stressed it remains committed to its strategy of finding, developing and operating large, long life, low cost mining assets.

The company currently expects its global iron ore production and shipments for fiscal 2009 to be around 200 million metric tons (220.46 million tons). Aluminum production is forecast at 200,000 tons (224,000 tons) and copper production at 830,000 tons (929,600 tons).

Rio Tinto is counting on the further industrialization of countries such as China and India to support higher levels of demand for metals and minerals.

In London, Rio shares were up 145 pence, or 11.5 percent, to 14.03 pounds. In Sydney, where trading ended before the announcement, its stock rose 12.14 percent to AU\$37.40.

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