



Steven L. Beshear
Governor

Leonard K. Peters
Secretary
Energy and Environment Cabinet

Commonwealth of Kentucky
Public Service Commission
211 Sower Blvd.
P.O. Box 615
Frankfort, Kentucky 40602-0615
Telephone: (502) 564-3940
Fax: (502) 564-3460
psc.ky.gov

David L. Armstrong
Chairman

James Gardner
Vice-Chairman

John W. Clay
Commissioner

June 27, 2008

Ms. Stephanie Stumbo
Executive Director
Kentucky Public Service Commission
Post Office Box 615
Frankfort, KY 40602

Re: Case No. 2007-00455

Dear Ms. Stumbo:

On June 26, 2008, Big Rivers Electric Corporation filed in the record of this case a request for a Staff Advisory Opinion. Enclosed for informational purposes is a copy of the Staff Advisory Opinion, dated June 27, 2008, which was sent to Big Rivers Electric Corporation.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard G. Raff".

Richard G. Raff
Staff Attorney

RGR:v

Enclosure



Steven L. Beshear
Governor

Leonard K. Peters
Secretary
Energy and Environment Cabinet

Commonwealth of Kentucky
Public Service Commission
211 Sower Blvd.
P.O. Box 615
Frankfort, Kentucky 40602-0615
Telephone: (502) 564-3940
Fax: (502) 564-3460
psc.ky.gov

David L. Armstrong
Chairman

James Gardner
Vice-Chairman

John W. Clay
Commissioner

June 27, 2008

**VIA FACSIMILE (270/683-6694)
AND U.S. MAIL**

Mr. James M. Miller
Sullivan, Mountjoy, Stainback & Miller
Post Office Box 727
Owensboro, Kentucky 42302-0727

Re: Application of Big Rivers Electric Corporation
Case No. 2007-00455
Request for Staff Advisory Opinion

Dear Mr. Miller:

On June 26, 2008, you filed in the record of the above-referenced case on behalf of your client, Big Rivers Electric Corporation, a letter dated June 24, 2008 requesting a Staff Advisory Opinion on the issue of whether or not approval is required from the Commission for Big Rivers to terminate a leveraged lease of its D. B. Wilson Unit 1 ("Wilson Unit") that was entered into with Bank of America Leasing Corporation ("BkA") in 2000. Attached to your letter are: 1) an affidavit of C. William Blackburn, V.P. Financial Services, CFO, and Interim V.P. Power Supply for Big Rivers; 2) an unsigned letter agreement dated June 24, 2008 between E.ON U.S. LLC and Big Rivers regarding the conditions under which Big Rivers may have to pay \$1 million toward the consideration of the BkA lease termination ("Reimbursement Agreement"); and 3) an unsigned letter agreement dated June 24, 2008 among E.ON, Big Rivers, Alcan Primary Products Corporation ("Alcan") and Century Aluminum of Kentucky, General Partnership ("Century") regarding the sharing of costs to terminate the BkA lease ("Cost Share Agreement").

Staff notes at the outset that the issue of terminating the BkA leveraged lease has been raised and discussed among the parties to Big Rivers Case No. 2007-00455 for over a week now, as evidenced by the following:

1. Letter dated June 18, 2008 filed jointly by Big Rivers and the E.ON Parties in the above-referenced case, explaining the decision to terminate the BkA leveraged lease, the financial benefits of closing the termination by June 30, 2008, the impact of such termination, and the legal conclusion of the authors that no Commission approval is required to terminate the lease.
2. June 19, 2008 informal conference among all parties to the above-referenced case at which the June 18, 2008 letter was distributed and discussed.
3. June 26, 2008 informal telephone conference among all parties during which a discussion was held on Big Rivers' June 24, 2008 letter requesting a Staff Advisory Opinion, and during which all parties agreed that Commission approval is not needed to terminate the BkA leveraged lease based on the representations that Big Rivers would incur no additional risks as a result of the termination.

Big Rivers now proposes to terminate the BkA lease to take advantage of favorable financial terms which are available only if the termination is closed by June 30, 2008. Pursuant to the terms of the Cost Share Agreement, Big Rivers will be responsible for \$1 million of the termination cost, with Alcan and Century being jointly responsible for \$1 million and E.ON being responsible for the balance. As discussed in the Blackburn affidavit, the BkA lease transaction is supported by credit enhancements from Ambac Assurance Corporation ("Ambac"), whose financial rating was downgraded by Moody's Investment Service on June 20, 2008. Due to this downgrade, Big Rivers will be obligated to replace the Ambac credit enhancements with those of a higher-rated financial entity unless the lease is terminated. By terminating the lease now, the risks and costs associated with securing a substitute financial entity will be eliminated, and there will be no new risks created for Big Rivers, whether or not the Commission approves the unwind of the 1998 lease between Big Rivers and E.ON as requested in Case No. 2007-00455 ("Unwind Transaction").

Under the terms of the Reimbursement Agreement, Big Rivers' obligation to reimburse E.ON \$1 million of the BkA lease termination closing costs will be payable only if the Commission approves both the payment and the Unwind Transaction, and the Unwind Transaction closes. The termination of the BkA lease, as now proposed, will not involve the issuance of any new evidences of indebtedness by Big Rivers.

As your letter points out, in Case No. 1999-00450, the Commission asserted jurisdiction over the lease of the Wilson Unit to BkA based on the provisions of the lease that required Big Rivers to issue notes to evidence its indebtedness under the lease and

Mr. James M. Miller
June 27, 2008
Page 3

enter into a mortgage agreement to secure the payment thereof. The issuance of notes and mortgages, which are evidences of indebtedness, were found to be within the ambit of 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.

In a subsequent Order issued in that case on January 28, 2000, the Commission also found that the leasing of the Wilson Unit, with an immediate leaseback to Big Rivers, did not constitute a change in control and, consequently, no Commission approvals were required under the change in control statutes, now codified as KRS 278.020(5) and (6).

The proposed BkA lease termination will not require Big Rivers to issue any new evidences of indebtedness. To the contrary, Big Rivers will be retiring existing evidences of indebtedness, and such retirement does not require Commission approval under KRS 278.300 or any other provision of KRS Chapter 278. While Big Rivers will be potentially obligated to reimburse E.ON \$1 million of the termination costs, that obligation is expressly conditioned upon Commission review and approval. Thus, even assuming that this contingent obligation constitutes an evidence of indebtedness, the obligation to pay will not become unconditional and enforceable unless and until approved by the Commission.

As set forth above, when Big Rivers entered into the BkA lease, the Commission expressly found that there would be no change in control of Big Rivers or its assets that required approval under KRS Chapter 278. Since no control ever passed from Big Rivers under the BkA lease, the termination of that lease will not now result in a change of control of Big Rivers as a utility or of its assets that would require approval under KRS 278.020(5) or (6), or under 278.218, respectively.

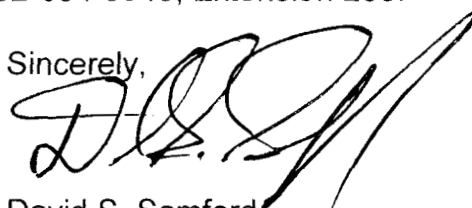
Based on a review of the unique facts set forth in the above-described letters, which are adopted and incorporated herein, the Commission's Orders in Case No. 1999-00450 approving the BkA lease, and an analysis of the applicable statutes, the Staff concludes that no Commission approvals are required for Big Rivers to terminate the BkA lease transaction. This opinion is specifically based on: (1) the representation in your June 24, 2008 letter that the early termination of this lease "is entirely without risk to Big Rivers and, indeed, is very beneficial to Big Rivers;" and (2) the signing of the Reimbursement Agreement and the Cost Share Agreement by the time of closing in substantially the same form as attached to your June 24, 2008 letter.

This letter represents Commission Staff's interpretation of the law as applied to the facts presented. This opinion is advisory in nature and is not binding on the Commission in

Mr. James M. Miller
June 27, 2008
Page 4

either the proceeding referenced in your letter or in any other proceeding. As your request relates to a case that is ongoing, a copy of this Advisory Opinion will be filed in the record of that case and served on all parties of record. Questions concerning this opinion should be directed to Richard Raff at 502-564-3940, Extension 263.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. S. Samford', with a long, sweeping flourish extending to the right.

David S. Samford
General Counsel

RGR:v

cc: Parties of Record in Case No. 2007-00455