

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF BIG RIVERS ELECTRIC	)	CASE NO.
CORPORATION FOR A DECLARATORY	)	2016-00278
ORDER	)	

ORDER

This matter arises upon the motion of Big Rivers Electric Corporation (“Big Rivers”) for an Order permitting it to use the deposition of Gary Quick (“Quick Deposition”) for purposes of cross-examination during the formal hearing in this matter scheduled for February 7, 2017. In support of the motion, Big Rivers states that the Quick Deposition was taken on June 13, 2011, in the course of the arbitration proceeding between Big Rivers and the city of Henderson, Kentucky, and the Henderson Utility Commission d/b/a Henderson Municipal Power & Light (jointly “Henderson”), docketed as American Arbitration Association Case No. 52 198 00173 10 (“Arbitration Matter”). Big Rivers states that it and Henderson executed an Agreed Protective Order because it appeared that discovery in the Arbitration Matter would involve confidential information. Although it was styled as an order, the document was not signed by the arbitration panel and is thus, in effect, a confidentiality agreement. The agreement covered everything produced in the Arbitration Matter and required the signatories to engage in negotiations before production of any documents was to take place “in a subsequent proceeding in a public court of law.”<sup>1</sup> Big Rivers states that it

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<sup>1</sup> Big Rivers Motion for an Order Permitting Use of Deposition at Hearing at 3.

attempted to negotiate reasonable terms with Henderson's counsel for the use of the Quick Deposition, but noted that an agreement could not be reached. Big Rivers asserts that it seeks authority to use the Quick Deposition for cross-examination purposes at the hearing because the deposition includes a discussion by Mr. Quick of issues relevant to the instant matter. Big Rivers also asserts that the Quick Deposition addresses issues that have been openly discussed by the parties to the instant matter in the public record and that no information to be used by Big Rivers from the Quick Deposition contains confidential, sensitive, proprietary, personal, and/or commercial information protected under the confidentiality agreement or under CR 26.03. Big Rivers further asserts that the contents of the Quick Deposition would assist the Commission in its deliberations of this matter.

On January 27, 2017,<sup>2</sup> Henderson filed its response objecting to Big Rivers' motion. Henderson contends that if the Quick Deposition raised an issue relevant to Big Rivers' application, Big Rivers should have addressed that issue during the discovery phase of this matter. Henderson also states that in response to Big Rivers' earlier request to use the Quick Deposition at the upcoming hearing in this matter, Henderson responded by requesting Big Rivers to explain the relevance of the deposition to the pending application and to identify specifically the portion or portions of the deposition Big Rivers intends to introduce. Henderson states that Big Rivers declined to do either and referenced only a lengthy passage spanning more than 80 pages of the deposition. Henderson further states that Big Rivers' motion failed to disclose the substance and

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<sup>2</sup> Although 807 KAR 5:001, Section 5, requires a response to be filed within seven days from the date of the motion, the Commission issued an Order on January 25, 2017, reducing the time period to three days, or on or before January 27, 2017.

relevance of the Quick Deposition to the instant action. Last, Henderson states that it reserves the right to introduce the arbitration testimony of Big Rivers' personnel on the same terms and for the same purposes governing Big Rivers' use of the Quick Deposition.

On January 30, 2017,<sup>3</sup> Big Rivers filed its reply in support of its motion, arguing that asking for the Quick Deposition through an information request would not have resolved the issue of the confidentiality agreement restrictions on the use of the deposition in this matter. Big Rivers detailed the facts of its negotiations with Henderson regarding the use of the Quick Deposition at the hearing in this matter and contends that it reasonably identified the relevant pages from the deposition and the purposes for which the deposition would be used. In particular, Big Rivers states that it plans "to have available for use at the hearing pages 112 through 194 of Mr. Quick's deposition. The purpose, for which the deposition would potentially be used, of course, is to compare what Mr. Quick said in his deposition against what he has said in the record of this case or what he says at the hearing."<sup>4</sup> Big Rivers argues that Henderson's request for Big Rivers to identify the topic and page number of the Quick Deposition that Big Rivers intends to use at the hearing amounts to Big Rivers' having to reveal all of its cross-examination for Mr. Quick prior to his testifying at the hearing.

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<sup>3</sup> Although 807 KAR 5:001, Section 5, requires a reply to be filed within five days from the date of the response, the Commission issued an Order on January 25, 2017, reducing the time period to three days, or on or before January 30, 2017.

<sup>4</sup> Reply of Big Rivers Electric Corporation to Response of City of Henderson, Kentucky and Henderson Utility Commission, d/b/a Henderson Municipal Power & Light to Big Rivers Electric Corporation's Motion for an Order Permitting Use of Deposition at Hearing at 3.

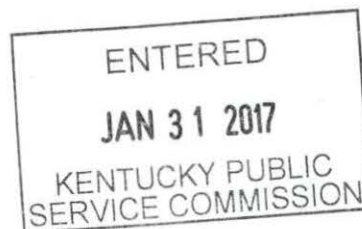
Big Rivers maintains that such a request is unreasonable. Last, Big Rivers states that it would not object to Henderson's reserving its rights to use the arbitration depositions of Big Rivers' personnel subject to Henderson's presenting Big Rivers with a proposal to use information covered by the confidentiality agreement, with an explanation comparable to what Big Rivers provided to Henderson, and that Big Rivers can take appropriate steps to protect any information Henderson proposes to use that Big Rivers considers to be confidential.

Having reviewed the pleadings and being otherwise sufficiently advised, the Commission finds that Big Rivers has established good cause to permit it to use the Quick Deposition. Big Rivers' use of the Quick Deposition at the hearing should be subject to the limitations agreed to by Big Rivers and noted herein. Specifically, Big Rivers should be limited to using pages 112 through 194 of the Quick Deposition to compare what Mr. Quick said in his deposition against what he has said in the record of this case or what he says at the hearing. The Commission further finds that to adequately provide us with the context for those portions of the deposition, Big Rivers should file the entire Quick Deposition with the Commission by February 2, 2017, with a petition for confidentiality. Similarly, if Henderson wishes to use any portion of the depositions of Big Rivers' personnel taken during the Arbitration Matter at the February 7, 2017 hearing, it should also file by February 2, 2017, a designation of the pages it intends to use, along with the entire depositions of those individuals and a petition for confidentiality.

IT IS HEREBY ORDERED that:

1. Big Rivers' motion to use the Quick Deposition is granted subject to the limitations set forth in the findings above.
2. Big Rivers shall file the Quick Deposition in its entirety, along with any petition for confidentiality no later than February 2, 2017.
3. If Henderson intends to use any portion of depositions taken of Big Rivers' personnel during the Arbitration Matter at the February 7, 2017 hearing, Henderson shall file those depositions in their entirety, along with any petition for confidentiality no later than February 2, 2017.
4. Henderson shall also file a designation of the specific testimony contained in each deposition which it intends to utilize at the February 7, 2017 hearing no later than February 2, 2017.
5. Any exhibits to be offered at the February 7, 2017 hearing which are not already in the record of this case shall be filed with the Commission and served upon the parties no later than February 3, 2017.

By the Commission



ATTEST:

  
Executive Director

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