

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

JUN 15 2009

PUBLIC SERVICE  
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 OBJECTION TO THE JOINT  
APPLICANTS' MOTION FOR INFORMAL CONFERENCE**

Comes now the intervenor, the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention, and in response to the Joint Applicants' Motion for an Informal Conference, submits the following objection:

On June 4, 2009, the Joint Applicants moved the Commission for an informal conference "for the purposes of discussing the outstanding issues related to the closing of the Unwind Transaction and allowing Commission Staff to meet collectively and individually with the parties to the case for the purpose of mediating the resolution of the outstanding issues." On Tuesday, June 9, 2009 the Attorney General advised the parties and Commission Staff via e-mail that he would be filing a response to the Joint Applicants' motion later in the week. On Wednesday, June 10, 2009 the Commission issued its order granting the Joint Applicants' motion. In that Order, the Commission stated:

“ . . . the role of the Commission staff should be limited to meeting collectively with the parties to discuss the outstanding issues and participate in any mediation of the outstanding issues.”

Although the Commission has granted said motion, the Attorney General nonetheless believes that Joint Applicants’ motion raises issues important enough to warrant filing the instant objection of record.

The Attorney General notes that his previous position on the proposed transaction, as stated in his brief, which is filed of record in the matter, was that his office could not support the transaction at this time because of too many outstanding and unresolved issues. Although the Commission ultimately approved the transaction as amended by the Joint Applicants, the recent withdrawal of Century Aluminum from the previously approved transaction and the new issues concerning Southwire<sup>1</sup> further reinforces the Attorney General's prior position that he cannot support the transaction. Therefore, the Attorney General is not sure how the Commission would be able to “mediate” his concerns with regard to these latest developments such that a settlement among all the parties could be reached.

Moreover, even assuming *arguendo* that the Attorney General’s concerns could be addressed, he believes that the Joint Applicants’ request that the Commission staff serve as a mediator on these new issues, which arose only after the final order was rendered in this case, creates a conflict for the Commission that is insurmountable. Indeed, a Commission staff attorney has noted in an e-mail that any change in the transaction beyond what was contemplated in the Commission’s final order will require review and re-approval by the Commission. In that e-mail, dated May 29<sup>th</sup>, 2009, the staff attorney notes:

---

<sup>1</sup>Southwire, an ultimate end-user of BREC, never intervened in this case. Nevertheless, its agreement is required for the consummation of the transaction. See December 3, 2008, Hearing Video, Witness – C. William Blackburn, 9:38 am.

“I have just read Big Rivers' press release regarding the Unwind Transaction being "stalled" due to Century's decision not to proceed and the possibility of continuing with the transaction without Century. I assume that you and Kendrick recognize this, but to avoid any misunderstanding, the Commission's March 6 Order approving the Unwind Transaction was based on the then existing proposal which included Century. ***Any change to that transaction will need to be refiled with the Commission for review and approval***” (emphasis added).

Clearly, the Commission staff recognizes that any changes in the transaction resulting from the proposed informal conference would necessitate re-filing and re-approval by the Commission.

The Attorney General objects to Joint Applicants' request for “mediation,” and notes that regardless of whether any or all parties consented to the Commission staff acting in the role of mediator in the matter, the simple fact remains that it is impermissible for the Commission to attempt to mediate a settlement that it will be later asked to re-approve.<sup>2</sup> To the Attorney's General's best knowledge, neither the Commission (an adjudicatory body) nor its staff have ever conducted formal mediation, and with good reason. By its very nature, mediation requires the mediator to speak with each party separately and individually in an attempt to understand the issues and to explore possible resolutions. In fact, that is exactly what the Joint Applicants have requested in their motion. If the Commission decides to act as a true mediator, it would of necessity require the Commission to engage in *ex parte* discussions. The language of the Commission's June 10<sup>th</sup> Order is thus at odds with itself: on the one hand it allows “mediation” (without defining the use of that term), yet it attempts to narrow the scope of Commission staff's role to something apparently less than true mediation.

The Attorney General must posit his strong objections to the Commission staff engaging in true mediation. Even assuming that any or all of the parties were to waive their own

---

objections, allowing the Commission to engage in separate *ex parte* discussions with one or more of the parties is clearly impermissible. While the Commission staff has attended settlement discussions by invitation of all parties to certain cases, staff's participation has been limited to listening and sharing any concerns relative to parties' agreements on specific terms and conditions. As stated in Joint Applicants' motion, the purpose of the informal conference is "mediating the resolution of any outstanding issues." However, that is not the role of the Commission in this matter. The Commission's role is to act as the adjudicatory body, examine the transactions before it and to decide whether they are in the public interest and reasonable.

Further, the current general rate case filed by Big Rivers, Case no. 2009-00040, is substantially related to the instant unwind case. Many of the issues in the instant matter share a common nucleus of operating facts with those asserted in the rate case. Although Big Rivers has asserted that the general rate case will be withdrawn if the unwind transaction closes, the fact remains that the case is currently before the Commission. Additionally, the Joint Applicants have previously stated, and the Commission has acknowledged, that Big Rivers' rates will go up more under the unwind transaction than in the general rate case. The Attorney General believes that the issues of the instant matter are so closely intertwined with those of the pending rate case, that were Commission staff to engage in any informal conference at this time (regardless of the nature of staff's role), it would not be possible for them to sufficiently isolate themselves to prevent being unfairly and unlawfully tainted so as to affect their impartiality pertaining to matters in the pending rate case. The specter of *ex parte* discussions, especially when coupled with certain exposure to evidence which will affect staff's impartiality in another pending matter, would create a scenario wholly contrary to well-established principles of law too numerous to cite

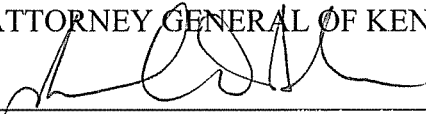
---

<sup>2</sup> See generally: *Louisville Gas and Elec. Co. v. Com. ex rel. Cowan*, 862 S.W.2d 897, Ky.App.,1993.

herein. The Commission, as an adjudicatory body, must take affirmative steps to avoid such a situation, and should therefore further limit the scope of the informal conference scheduled for June 16, 2009, to simply listening to whether the parties have any new information or update. Careful steps should be taken to avoid any discussion of any issues that could or might impact Big Rivers' pending rate case.

In light of the above objections, the Attorney General's Office declines to participate in any proposed "mediation" session. However, the Attorney General will voluntarily attend any informal conference for the purposes of receiving any information or update in the event that the Joint Applicants' requested the proposed informal conference to merely inform or update the Commission on any revised agreements which do not contravene the terms and conditions of the final order issued in the matter, including but not limited to the financial model. However, his attendance should not be construed to suggest, imply or infer that his position in this matter has changed from that expressed in his brief, which is in the record.

Respectfully submitted,  
JACK CONWAY  
ATTORNEY GENERAL OF KENTUCKY



---

DENNIS HOWARD II  
PAUL D. ADAMS  
ASSISTANT ATTORNEYS GENERAL  
FRANKFORT KY 40601-8204  
(502) 696-5453  
FAX: (502) 573-8315  
[Dennis.Howard@ag.ky.gov](mailto:Dennis.Howard@ag.ky.gov)  
[Paul.Adams@ag.ky.gov](mailto:Paul.Adams@ag.ky.gov)  
[Larry.cook@ag.ky.gov](mailto:Larry.cook@ag.ky.gov)

**CERTIFICATE OF SERVICE AND NOTICE OF FILING**

I hereby give notice that this the 15<sup>th</sup> day of June, 2009, I have filed the original and ten copies of the foregoing Attorney General's Request for Information 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.

C. William Blackburn  
Big Rivers Electric Corporation  
P. O. Box 24  
Henderson, KY 42420

Honorable Frank N. King, Jr.  
Dorsey, King, Gray, Norment & Hopgood  
318 Second Street  
Henderson, KY 42420

David Brown  
Stites & Harbison, PLLC  
1800 Providian Center  
400 West Market Street  
Louisville, KY 40202

Douglas L. Beresford  
Hogan & Hartson, LLP  
555 Thirteenth Street, N.W.  
Washington DC. 20004-1109

Honorable John N. Hughes  
124 West Todd Street  
Frankfort, KY 40601

Honorable Michael L. Kurtz  
Boehm, Kurtz & Lowry  
36 East Seventh Street Suite 1510  
Cincinnati, OH 45202

Honorable James M. Miller  
Sullivan, Mountjoy, Stainback & Miller,  
PSC  
P.O. Box 727  
Owensboro, KY 42302-0727

Honorable Kendrick R. Riggs  
Stoll Keenon Ogden, PLLC  
2000 PNC Plaza  
500 W Jefferson Street  
Louisville, KY 40202-2828

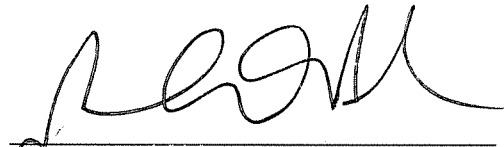
Honorable Allyson K. Sturgeon  
E.ON U.S. Services, Inc.  
220 West Main Street  
Louisville, KY 40202

George F Hobday Jr.  
Hogan & Hartson, L.L.P.  
555 Thirteenth Street, N.W.  
Washington DC 20004-1109

Don Meade  
Priddy, Cutler, Miller & Meade  
800 Republic Bldg.  
429 W. Muhammad Ali Blvd.  
Louisville KY 40202

Melissa D Yates  
Denton & Keuler, LLP  
555 Jefferson Street  
P. O. Box 929  
Paducah, KY 42002-0929

Gary Osborne  
International Brotherhood of Electrical  
Workers  
Local Union 101  
2911 W. Parrish Avenue  
Owensboro, KY 42301

A handwritten signature in black ink, appearing to read 'G. Osborne', written over a horizontal line.

Assistant Attorney General

N:\ORI\Padams\Public\BREC\2007-00455\2007-00455\_\_AG\_Objection 6\_15\_09.doc