

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF BIG RIVERS ELECTRIC )  
CORPORATION FOR AN ADJUSTMENT IN ) CASE NO.  
RATES ) 2009-00040

O R D E R

Big Rivers Electric Corporation (“Big Rivers”) has filed a motion to strike the post-hearing brief of Kentucky Industrial Utility Customers, Inc. (“KIUC”) on the grounds that it “offers and relies upon information from documents that are not evidence in the record of this case.” Specifically, Big Rivers objects to two documents attached to KIUC’s brief. The first document consists of the balance sheet pages from Big Rivers’ January operating reports on file with the Commission for the years 2002 through 2009 (“Attachment A”). With the exception of the page for January 2008, Big Rivers notes that none of these documents were filed in the record of this proceeding and that the conclusions reached by KIUC using Attachment A were not part of KIUC’s testimony or any other testimony in this record.

The second document is the Moody’s Investors Service March Credit Opinion on Big Rivers (“Attachment B”). Big Rivers asserts that this document is also not in the record of this case, but was filed by Big Rivers in Case No. 2007-00455 as part of its

Unwind Transaction.<sup>1</sup> Big Rivers argues that the Commission's adjudication of Big Rivers' request for interim rate relief should be based solely on the evidentiary record to which Big Rivers has had the opportunity to respond. Big Rivers further argues that KIUC has improperly filed and incorporated into its post-hearing brief documents that are not in the record of this case.

In its response, KIUC argues that the record in this case remains open given that Big Rivers' request for interim rate relief is part of its application for a permanent base rate increase and the base rate case is still in the discovery phase. KIUC also argues that since the information contained in Attachment A is filed with the Commission monthly by Big Rivers, that information is part of the Commission's official records. Lastly, KIUC asserts that it requested Big Rivers to file Attachment B in response to a data request and that by KIUC's agreement with Big Rivers this data request was limited to Moody's information relevant to the rate case and not the Unwind Transaction. KIUC maintains that the Moody's credit rating and the discussion of the liquidity provided by the line of credit with the National Rural Utilities Cooperative Finance Corporation are relevant to Big Rivers' request for interim rate relief. Thus, KIUC contends that Attachment B should already be part of the record.

Simultaneous with the response, KIUC filed a motion, pursuant to 807 KAR 5:001, Section 5(5), to incorporate by reference into the record of this case Attachments

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<sup>1</sup> The Application of Big Rivers Electric Corporation for: (I) Approval of Wholesale Tariff Additions for Big Rivers Electric Corporation, (II) Approval of 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 (Ky. PSC March 6, 2009).

A and B. KIUC maintains that the “record in this matter is still open and there is no equitable reason to exclude relevant information.” KIUC cites to KRS 278.310<sup>2</sup> and notes that this statute recognizes that the technical rules of evidence need not apply to Commission proceedings. KIUC argues that the Commission can, and should, take administrative notice of the relevant information contained in the attachments. KIUC maintains that the single balance sheet page from the January 2002-2009 financial records of Big Rivers are probative in deciding Big Rivers’ request for interim rate relief. Further, KIUC maintains that the Moody’s report is relevant because “it is important for the Commission to understand all available sources of cash [available to Big Rivers] in lieu of an emergency rate increase.”

In its reply, Big Rivers reasserted its arguments that Attachments A and B are not in the record and that it did not have an opportunity to respond to those documents or to the incorrect interpretation which it claims KIUC has given those documents in its brief. Big Rivers argues that KIUC’s attempt to present additional evidence after the close of the March 26, 2009 hearing is in contravention of the Commission’s rules and procedural Order and would improperly deny Big Rivers the right to respond to the evidence proffered by KIUC.

In response to KIUC’s motion to incorporate by reference, Big Rivers states that it has no objection to KIUC’s motion but suggests that those documents should not be

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<sup>2</sup> KRS 278.310 provides in full as follows:

All hearings and investigations before the commission or any commissioner shall be governed by rules adopted by the commission, and in the conduct thereof neither the commission nor the commissioner shall be bound by the technical rules of legal evidence.

considered or relied upon in connection with the decision on Big Rivers' request for interim rate relief given that the Commission does not accept evidence after the close of testimony pursuant to 807 KAR 5:001, Section 5(4). Big Rivers noted, nonetheless, that the Moody's report is of questionable relevance because it gives a financial rating for Big Rivers in a scenario where the Unwind Transaction closes, and Big Rivers' request for interim rate relief is premised upon the assumption that the Unwind Transaction does not close.

Having reviewed the pleadings and being otherwise sufficiently advised, the Commission finds that Big Rivers' motion to strike should be denied and KIUC's motion to incorporate by reference should be granted. The Commission may, as KIUC points out, take administrative notice of relevant information previously filed by Big Rivers with the Commission. In making our decision to incorporate Attachments A and B by reference, we will not consider those documents as part of our adjudication of Big Rivers' request for interim rate relief. Rather, these documents will only be considered in conjunction with our future adjudication of Big Rivers' request for permanent rate relief.

IT IS THEREFORE ORDERED that:

1. Big Rivers' motion to strike KIUC's brief is denied.
2. KIUC's motion to incorporate by reference is granted.

By the Commission

ENTERED  
MAY 27 2009 *AL*  
KENTUCKY PUBLIC  
SERVICE COMMISSION

ATTEST:

*for: [Signature]*  
Executive Director

Case No. 2009-00040

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