

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

* * * * *

In the Matter of:

NATIONAL-SOUTHWIRE ALUMINUM COMPANY,)	
)	
Complainant,)	
)	
v.)	CASE NO. 9437
)	
)	
BIG RIVERS ELECTRIC CORPORATION,)	
)	
Defendant.)	

ORDER

On October 2, 1985, National-Southwire Aluminum Company ("NSA") filed a complaint against its wholesale supplier of electric power, Big Rivers Electric Corporation ("Big Rivers"), alleging that its wholesale rates should be reduced by reassigning from the Wilson generating plant to Big Rivers' existing system¹ an off-system sale of 54 megawatt ("MW") and by disallowing for rate-making purposes any coal costs in excess of \$25 per ton. NSA further alleges that the resulting reduction in Big Rivers' rates should be applied first to reduce NSA's rate to 22 mills and then to reduce all other customers' rates. NSA claims that its proposed methodology for rate reductions is

¹ The characterization of Big Rivers' system as being divided into two portions, the Wilson generating plant and its existing system, is a recognition that for rate-making purposes the Wilson generating plant has not been included in Big Rivers' rate base.

justified by both its need for a 22 mill rate to remain in operation and its subsidization since 1981 of a competitor aluminum company also supplied by Big Rivers.

On October 24, 1985, Big Rivers filed an answer denying the substance of NSA's complaint and alleging that: (1) the issues have already been litigated in Case No. 9163, Big Rivers Corporation's Notice Of Changes In Its Rates For Electricity Sold To Member Cooperatives, and are barred from relitigation herein by the doctrine of res judicata; (2) the issues should be adjudicated in the commission's forthcoming proceeding on state-wide power planning in lieu of this docket; and (3) NSA, lacking a service contract with Big Rivers, must direct its complaint against its retail electric supplier, Green River Electric Corporation ("Green River"). Big Rivers also filed a motion to dismiss the complaint on the grounds of res judicata and NSA's failure to proceed against its retail electric supplier, Green River.

NSA filed a response in opposition to Big Rivers' motion to dismiss on November 21, 1985. NSA argues that res judicata has no application to this case because the findings of fact made in Case No. 9163 involved the legislative function of rate-making, not a judicial function of adjudication, and that the Commission failed to make any specific findings with respect to the regulatory treatment to be accorded the off-system sale of 54 MW. NSA further alleges that the magnitude of its power bill, coupled with Green River's usual practice of directly passing

through wholesale power increases, sufficiently justifies a complaint action directly against Big Rivers.

Based on the pleadings of record and being advised, the Commission is of the opinion and hereby finds that res judicata will not bar NSA's complaint, if NSA is able to carry its burden of proof to establish that a significant change of conditions or circumstances has occurred since the Commission's Order in Case No. 9163. (See Bank of Shelbyville v. Peoples Bank of Bagdad, Ky., 551 S.W.2d 234 (1977).) While Big Rivers' motion to dismiss is overruled on this issue, the Commission expressly rejects NSA's claim that the Order in Case No. 9163 contained no explicit findings of fact on the regulatory treatment of the 54 MW off-system sale. Although the summary of findings contained at page 29 of that Order does not discuss the off-system sale, it is extensively discussed at page 13, wherein the Commission found that it "[A]grees with Big Rivers' position that the firm sale of 54 megawatts to MEAM is properly assigned to the Wilson system." Consequently, this finding will not be modified absent the requisite showing of changed circumstances.

The Commission recognizes that the second basis supporting Big Rivers' motion to dismiss, its lack of a contract with NSA, does have some merit. NSA's power supply contract is with only Green River, although the contract rate is a pass-through of Big Rivers' wholesale rate plus a small increment per kilowatt hour for Green River. Further, NSA was an intervenor and active participant in Big Rivers' last rate case, No. 9163, due to NSA's substantial interest in Big Rivers' rates. Under these

circumstances, NSA's complaint as to rates should be filed against both Green River and Big Rivers. The Commission will therefore deny Big Rivers' motion to dismiss for failure to proceed against the proper party, but will require NSA to amend its complaint within 10 days to include Green River as a defendant. The Commission further recognizes that Big Rivers' three other member distribution cooperatives² are listed on the service list for this case although none have intervened. The member cooperatives may properly allow the defendants to protect whatever interest they may have in this proceeding, or each cooperative may intervene if it perceives that its interest does not coincide with the defendants'.

The Commission further finds on its own motion that NSA's complaint should be handled in an orderly and expeditious manner. Therefore, the Commission has established a procedural schedule, set forth in Appendix A attached hereto, to be followed in this case. Deviation from this procedural schedule will be granted only upon written motion setting forth extraordinary circumstances.

IT IS THEREFORE ORDERED that:

1. Big Rivers' motion to dismiss be and it hereby is denied.

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Henderson-Union Rural Electric Cooperative Corporation, Jackson Purchase Electric Cooperative Corporation, and Mead County Rural Electric Cooperative Corporation.

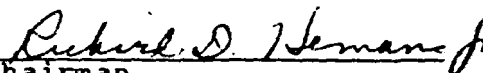
2. NSA shall have the burden of proving that a change in circumstances has occurred since the Commission's Order entered May 6, 1985, in Case No. 9163 sufficient to justify a modification of that Order.

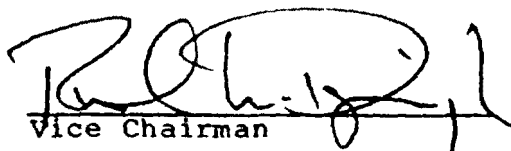
3. Within 10 days of the date of this Order, NSA shall amend its complaint to include Green River as a defendant.

4. The procedural schedule set forth in Appendix A attached hereto be and it hereby is adopted.

Done at Frankfort, Kentucky, this 9th day of December, 1985.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:

Secretary

APPENDIX A

APPENDIX TO AN ORDER OF THE PUBLIC SERVICE COMMISSION In Case
No. 9437 dated December 9, 1985.

Procedural Schedule

January 10, 1986	Completion of discovery by NSA.
January 24, 1986	Submission of prefiled testimony by NSA.
February 21, 1986	Completion of Discovery by defendants and intervenor.
March 7, 1986	Submission of prefiled testimony by defendants and intervenors.
March 20, 1986	Hearing to begin at 9 a.m. E.S.T. at the Commission's office in Frankfort, Kentucky, for cross- examination of all witnesses and rebuttal testimony, if any.
April 9, 1986	Submission of Briefs.