

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

BIG RIVERS ELECTRIC CORPORATION'S )  
NOTICE OF CHANGES IN RATES AND )  
TARIFFS FOR WHOLESALE ELECTRIC SERVICE ) CASE NO. 9613  
AND OF A FINANCIAL WORKOUT PLAN )

O R D E R

On October 13, 1986, National-Southwire Aluminum Company ("NSA") filed motions to compel (1) identification of documents withheld by Big Rivers Electric Corporation ("Big Rivers"); (2) further information responses concerning off-system sales, the workout plan, communications with the Rural Electrification Administration ("REA") and the New York banks, and the need for Wilson ("motion to compel further information responses"); and (3) production of Big Rivers' board minutes. On October 14, 1986, NSA filed a motion to compel deposition testimony of Paul Schmitz concerning the workout plan.

MOTION TO COMPEL IDENTIFICATION OF DOCUMENTS,  
FURTHER INFORMATION RESPONSES AND DEPOSITION TESTIMONY

NSA's motions seek discovery of documents and discussions between Big Rivers and its creditors underlying the development of the financial workout plan. NSA cites Kentucky Rule of Civil Procedure 26.02 for the principle that all relevant matter, not privileged, is subject to discovery. This rule does not limit discovery to admissible evidence; it permits discovery reasonably calculated to lead to such evidence.

On October 20, 1986, Big Rivers filed a response to the motions to compel further information responses and deposition testimony of Paul Schmitz. On October 21, 1986, Big Rivers filed a response to the motion seeking identification of withheld documents. Big Rivers states that the only issue before the Commission is the reasonableness of its proposed rates. Approval is not being sought for the workout plan or, at this time, any debt refinancing. Big Rivers argues that discovery should not be compelled because extensive information has already been provided and the privileges of settlement and compromise, attorney-client and work product shield the information from disclosure.

The workout plan was negotiated by Big Rivers, REA and New York banks in an effort to settle two pending federal lawsuits, one by Big Rivers against REA to obtain committed loan funds and the other by REA to foreclose on Big Rivers' mortgages. The deliberations and drafts of the participants to this settlement are claimed to be privileged, based on the public policy of encouraging voluntary settlements of civil controversies. The attorney-client privilege is also claimed to protect disclosure of communications between Big Rivers and its creditors. This privilege has been extended to include communications with third parties who share a common interest with the client or are advancing a joint defense.

Big Rivers further claims that certain of the documents being requested are protected by the work product privilege which has not been waived by their disclosure to the creditors during settlement negotiations. Big Rivers argues that it has a common

interest with its creditors, despite being adversaries in two pending court actions, to resolve its financial problems.

NSA argues that none of the claimed privileges are available to Big Rivers under the existing circumstances. The privilege against disclosing information utilized in compromise and settlement negotiations is to prevent the admission of such evidence as proof of liability (See Federal Rule of Evidence 408). NSA states that such inadmissibility does not, however, create a blanket prohibition against discovering information calculated to achieve an understanding of the terms of the settlement and the process which lead the parties to reach their settlement.

NSA further argues that the joint defense or common interest attorney-client privilege is not applicable. These privileges are designed to permit the disclosure of otherwise privileged information to necessary third parties without fear that the disclosure will constitute a waiver of the privilege. NSA states that Big Rivers has failed to show that the documents and discussion are, in the first place, protected by the attorney-client privilege.

Based on NSA's motions, Big Rivers' responses and the parties' replies, the Commission is of the opinion and hereby finds that while Big Rivers has not asked the Commission for explicit approval of the workout plan it is an integral part of Big Rivers' rate case. Big Rivers stated in its Notice Of Changes In Rates that: "The purposes of the rate changes are to provide just and reasonable rates... to pay its debts as restructured," (Notice, p. 4), and that the proposed increase in revenues of \$7.5

million will "[F]all short of those required to meet all of the Big Rivers' obligations but for the debt payment deferral, and debt interest reduction that will be covered by the Workout Plan." (Notice, p. 9).

Consequently, for the Commission to meet its statutory duty to investigate the fairness, justness and reasonableness of Big Rivers' proposed rates, there must be a complete, detailed review of the underlying workout plan.

The Commission will not permit Big Rivers to present the workout plan to justify a \$7.5 million increase in revenues while it withholds information relevant to the process by which that plan was adopted. The fact that the workout plan was negotiated among parties having adverse interests does not create any presumption as to its reasonableness for ratemaking purposes. Neither Big Rivers' ratepayers nor the Commission participated in the negotiations or had any knowledge of the positions being discussed. The workout plan was simultaneously presented to the Commission and the public after Big Rivers had filed this rate case.

Based on a review of the privileges asserted by Big Rivers, the Commission finds that none of the privileges are available to block the discovery of information requested by NSA. With respect to the asserted confidentiality of Big Rivers' communications with its creditors in conjunction with settlement negotiations, the real issue is whether the attorney-client or work product privilege is lost by disclosing privileged information to other parties. Burlington Industries v. Exxon Corp., 65 F.R.D. 26,45

(D.Md. 1974). The Commission is persuaded by the District Court's holding that:

[C]onfidential information disclosed during settlement negotiations does not constitute a waiver of the entire attorney-client or work product privilege. It is a waiver limited to that information disclosed during the negotiations. Nevertheless, the court is not unmindful of the fact that privileges cannot be used as both a sword and a shield. A party cannot choose to disclose only so much of allegedly privileged matter as is helpful to his case. [citation omitted.] Once the party begins to disclose any confidential communication for a purpose outside the scope of the privilege, the privilege is lost for all communications relating to the same matter.

Burlington at 46. It is not uncommon for litigants to negotiate a settlement and elect to seal their agreement from public disclosure. Here Big Rivers and its creditors have publicized their settlement and expressly conditioned its acceptance on the Commission's authorization of rate increases necessitated by the settlement. This action is an impermissible attempt to disclose only that portion of the settlement that is helpful to Big Rivers' rate case. Any privilege that Big Rivers may have otherwise had is lost by presenting the workout plan as support for its request to increase rates.

Any claim that Big Rivers' communications with its creditors are protected by the common interest or joint defense attorney-client privilege is untenable. Big Rivers and its creditors are adversaries in the pending litigation from which the workout plan was negotiated. Big Rivers' allegations that it shares a common interest with its creditors to solve its financial problems raises serious concerns as to whether the workout plan

provides for anything other than a shifting of these financial problems to Big Rivers' ratepayers.

MOTION TO COMPEL PRODUCTION OF BOARD MINUTES

NSA seeks to compel production of omitted sections of the minutes of Big Rivers' board of directors meetings subsequent to June 20, 1980. In providing the minutes of meetings of its board, Big Rivers had deleted those sections it claimed to be protected by the attorney-client privilege. NSA claims that the privilege has been waived because certain outsiders, such as the general managers of Big Rivers' distribution cooperatives and an REA representative, were in attendance at many of the board meetings.

On October 20, 1986, Big Rivers filed a response in opposition to NSA's motion. Big Rivers argues that many of the deleted sections are not relevant to this rate case and they are all protected by the attorney-client privilege. For the privilege to apply the communication must be made in confidence. The presence of third parties at board meetings will not constitute a waiver of the privilege if the third parties are neither strangers nor outsiders but share a joint interest with the client or were "essential participants" in the discussions. Julian Raytheon Co., 93 F.R.D. 138,141 (D.Del. 1982). The representatives of the distribution coops and REA are claimed to be within the scope of those having a joint interest and essential participants.

Big Rivers also stated that many of the attorney-client discussions held at its board meetings concern ongoing or potential litigation, such as personal injury and construction claims, having no relevance to this rate case.

Based on NSA's motion and Big Rivers' response, the Commission finds that Big Rivers has not waived the attorney-client privilege applicable to its board meetings, and the omitted sections of the minutes of the meetings need not be produced.

IT IS THEREFORE ORDERED that:

1. NSA's motions to compel (1) identification of documents withheld; (2) further information responses; and (3) deposition testimony, all regarding the workout plan, be and they hereby are granted and Big Rivers shall respond to the requests within 7 days of the date of this Order.

2. NSA's motion to compel production of omitted sections of the minutes of Big Rivers board of directors' meetings be and it hereby is denied.

Done at Frankfort, Kentucky, this 29th day of October, 1986.

PUBLIC SERVICE COMMISSION

  
Chairman

  
Vice Chairman

  
Commissioner

ATTEST:

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Executive Director