

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

BIG RIVERS ELECTRIC CORPORATION'S)
APPLICATION FOR APPROVAL OF RESTRUCTURING)
AGREEMENT AND FOR AUTHORITY TO ISSUE) CASE NO. 10217
NOTES OR OTHER EVIDENCES OF INDEBTEDNESS)
PURSUANT THERETO)

O R D E R

On April 8, 1988, Big Rivers Electric Corporation ("Big Rivers") filed an application, pursuant to KRS 278.300, seeking: (1) approval of a Debt Restructuring Agreement ("Restructuring Agreement") dated August 31, 1987 and executed on March 30, 1988, among Big Rivers and its creditors, the Rural Electrification Administration ("REA"), Manufacturers Hanover Trust Company, and Irving Trust Company; and (2) authorization and approval to execute notes and other evidences of indebtedness to Manufacturers Hanover Trust Company and Irving Trust Company (Collectively the "Banks"). Big Rivers' application further states that no Commission approval is being sought for the Restructuring Agreement between Big Rivers and REA, or the evidences of indebtedness issued to REA, because the REA is an agency of the federal government and KRS 278.300(10) exempts such financings from the Commission's jurisdiction.

Motions to intervene in this case were filed by the Utility and Rate Intervention Division, Office of the Attorney General ("AG"), National-Southwire Aluminum Company ("NSA"), and Alcan

Aluminum Corporation ("Alcan"). All these motions were granted. Hearings were held in the Commission's offices in Frankfort, Kentucky, on June 1-3 and 6-7, 1988. Briefs were filed and the information requested during the hearings has been submitted.

Pending Petition and Motions

On May 26, 1988, NSA filed a Petition for Rehearing of the Commission's May 13, 1988 Order addressing jurisdictional issues. That Order denied NSA's request for a preliminary hearing on the issue of whether the Commission had jurisdiction, pursuant to KRS 278.300, over the entire Restructuring Agreement and all evidences of indebtedness to be issued including those to the REA. In ruling on the jurisdictional issue without a hearing, the Commission considered the written memoranda and concluded that KRS 278.300(10) exempted from the Commission's jurisdiction the Restructuring Agreement and the issuance of evidences of indebtedness insofar as they relate to the REA. The Commission's lack of jurisdiction, pursuant to KRS 278.300(10), over the REA financings was previously declared in Case No. 7990, Application of Big Rivers Electric Corporation, Order dated March 27, 1984. This jurisdictional declaration is in accord with the decision in West Kentucky RECC v. Energy Regulatory Com'm., No. 80-CI-1747 (Franklin Circuit Court 1982) (Unpublished).

NSA seeks rehearing on the grounds that the Commission's Order erred in finding that KRS 278.300(10) did not exempt Big Rivers' prior financings through the Louisville Bank for Cooperatives. NSA argues that such financings are exempt because the Louisville Bank for Cooperatives is a federally chartered

institution and is subject to supervision by the Farm Credit Administration. The Commission rejects NSA's argument as unpersuasive and declines to extend the jurisdictional exemption to include federally chartered banks. These institutions do not fall within the statutory exemption granted to "the federal government or any agency thereof." KRS 278.300(10).

NSA further argues on rehearing that the exemption set forth in KRS 278.300(10) is not dependent upon the identity of the lender and that no evidence of record demonstrates that the REA actually supervised or controlled the financing contemplated by the Restructuring Agreement. The statute is clear and unambiguous. The exemption applies in any instance where the financings are subject to the supervision or control of the federal government or a federal agency. The Restructuring Agreement has been executed by the "United States of America, acting through the Administrator of the Rural Electrification Administration."¹ Under the decision in West Kentucky RECC, exemption granted in the KRS 278.300(10) applies to the REA portion of the Restructuring Agreement and the issuances of indebtedness to the REA.

On June 6, 1988, NSA filed a Motion for Involuntary Dismissal on the grounds that Big Rivers has failed to demonstrate any right to receive authorization under KRS 278.300(3) for the financing transactions discussed in Big Rivers' application. Based on the

¹ Big Rivers Application, Exhibit A, Restructuring Agreement at page 46.

Commission's findings herein on the merits of Big Rivers' application, NSA's motion is denied.

On May 23, 1988, NSA filed a motion requesting the Commission to take administrative notice of numerous Orders issued by the Commission in previous Big Rivers' cases. No objections having been filed, the Commission will grant the motion. On June 6, 1988, NSA filed three motions each seeking leave to file material and documents. The first one relates to representations by Big Rivers concerning the Government Minimum Debt Service Schedule, the second relates to the Burdick Amendment, and the third relates to Big Rivers' representations concerning off-system sales. On June 28, 1988, Big Rivers filed its response to NSA's motions. Big Rivers has no objection to the filing of material related to the Government Minimum Debt Service Schedule, but it does object on the grounds of relevancy to both the Burdick Amendment documents and the representations concerning off-system sales. The Commission finds that Big Rivers' objections are well taken. However, the proffered material will be accepted for filing, but its use will be limited to the extent that it is relevant to the issue of whether the Restructuring Agreement comports with the Revised Workout Plan approved by the Commission in Case No. 9885, An Investigation of Big Rivers Electric Corporation's Rates for Wholesale Electric Service.

Discussion

The Commission's responsibility in this proceeding is to determine whether the Restructuring Agreement and the evidences of indebtedness to be issued to the Banks are:

For some lawful object within the corporate purposes of the utility, [are] necessary or appropriate for or consistent with the proper performance by the utility of its service to the public and will not impair its ability to perform that service, and [are] reasonably necessary and appropriate for such purposes.

KRS 278.300(3). It is clear that the Commission does not have jurisdiction under KRS 278.300 to grant, deny, or modify either the portion of the Restructuring Agreement between Big Rivers and REA or the evidences of indebtedness to be issued to the REA. Nevertheless, the Commission previously asserted jurisdiction pursuant to KRS 278.190 over the Restructuring Agreement to the extent that it impacted rates in Case Nos. 9885 and 9613.²

In Case No. 9613, the Commission denied Big Rivers' request for a rate increase upon the finding that the debt restructuring agreement incorporated rates that would not be fair, just, and reasonable for Big Rivers' customers. In Case No. 9885, Big Rivers submitted a Revised Workout Plan that, as approved by the Commission, will allow Big Rivers to restructure its debts without resulting in customer rates that are unfair, unjust, or unreasonable. As the Commission stated in its May 13, 1988 Order in this case, this proceeding is to review Big Rivers' financings with the Banks. This is not a rate case and this is not a proper forum to relitigate the Variable Aluminum Smelter Rate or other issues adjudicated in Case No. 9885.

² See Order dated August 10, 1988, Case No. 9885 and Order dated March 17, 1988, Case No. 9613, Big Rivers Electric Corporation's Notice of Intent to File a Notice of Adjustments to Its Rates.

The Restructuring Agreement before the Commission is the final document executed to implement the Revised Workout Plan approved by the Commission in Case No. 9885. Therefore, the Commission must of necessity review the totality of that agreement to insure that it substantially complies with the Revised Workout Plan as approved. To determine if the Restructuring Agreement conforms to the Revised Workout Plan, the two agreements must be reviewed not to merely note the existence of differences, but to determine the overall impact of any such differences. If the Restructuring Agreement is as beneficial to Big Rivers' ratepayers as the Revised Workout Plan approved in Case No. 9885, the two agreements are in substantial conformity.

Comparison of Agreements

The Commission has carefully reviewed all the evidence of record and makes the following findings of fact. The Restructuring Agreement contains the same Government Minimum Debt Service Schedule attached to the Revised Workout Plan. The schedule is reflected in Section 7.01(f) of the Restructuring Agreement and provides for a total repayment of debt by the year 2018. In addition, under both agreements, debt service payments in excess of the Government Minimum Debt Service Schedule are required based on Big Rivers' positive cash flow. All such excess payments will be applied to Big Rivers' debt and will also be credited against payment deficiencies in future years under the 5-year rolling interval default test.

The projected revenue and projected off-system sales included in the Restructuring Agreement are the same as in the Revised Workout Plan as approved in Case No. 9885. Regarding off-system sales, Big Rivers' creditors still bear the risk of any revenue shortfall due to insufficient revenue from sales above projected levels. Under the 5-year rolling interval default test, Big Rivers and the creditors share the risk of achieving the projected sales levels. Both agreements require Big Rivers to file the same three-step rate increase. Consequently, the Restructuring Agreement does not require the ratepayers to pay any additional rates not contemplated by the Revised Workout Plan as modified by the Commission in Case No. 9885.

Big Rivers was successful in extracting from its creditors certain concessions that had not been included in the Revised Workout Plan. The separate categories of debt owed by Big Rivers to the government have been converted into one total Government Debt note under the Restructuring Agreement. This greatly simplifies the structure of Big Rivers' debt. The creditors also agreed to set the interest rate on this note at a level that assumed Big Rivers would be paying off the highest-cost debt first. Through this process of converting to a Total Government Debt Note, and as a result of the Burdick Amendment refinancing, Big Rivers was able to gain a favorable reduction in the composite rate of interest from 8.91 percent to 8.36 percent.³ Big Rivers' creditors have consented to a method of discounting the payments

³ Schmitz Direct Testimony, page 4.

in excess of the Government Minimum Debt Service Schedule that are applied to the Total Government Debt note. This discounting will reduce the effective interest rate on the Total Government Debt note to 7.66 percent based on Big Rivers' financial projections.⁴

The Commission had expressed concern in Case No. 9885 regarding Big Rivers' ability to meet the minimum debt service payments in certain future years. The Revised Workout Plan had included a 5-year rolling period to test Big Rivers' compliance. The Restructuring Agreement has been beneficially changed to allow Big Rivers, under certain circumstances, to defer its December monthly payment to January. This effectively increases the 5-year rolling period for measuring Big Rivers' compliance. Furthermore, the application of the 5-year rolling interval default test has been clarified in the Restructuring Agreement. For any year that Big Rivers does not meet the Government Minimum Debt Service Schedule, but it meets the 5-year rolling interval default test as a result of excess payments in prior years, that year will remain at zero for future calculations under the 5-year rolling interval default test.⁵

The intervenors raised substantial concern that the default provision of the Restructuring Agreement would operate to effectively bind the Commission to approve the second and third steps of the rate increase discussed in Case No. 9885 and

⁴ Ibid.

⁵ Big Rivers' Response to the Commission's Information Request No. 1, dated May 2, 1988, Item No. 8, page 1.

contemplated by the Restructuring Agreement. NSA requested that a representative of the creditors be made available for cross-examination on the intent of the default provision. Big Rivers secured the appearance of Donald Malin, General Counsel for Manufacturers Hanover Trust Company, the principal author of the Restructuring Agreement. His testimony was not on behalf of his client or the creditors, but rather was to present his personal interpretation of the default provision. Mr. Malin testified that under Subsection 7.01(e), Big Rivers was obligated to apply to the Commission for the second and third steps of the rate increase. However, he indicated that should the Commission not grant the full amount requested, default would not occur as long as Big Rivers was able to meet the minimum debt service schedule payments.⁶ He also said that any future review by the Commission to modify the Variable Aluminum Smelter Rate based on fairness would similarly not be an event of default because such a review was expressly provided for in the Case No. 9885 Order.⁷

The Commission further finds that the Restructuring Agreement incorporates a number of additional changes from the Revised Workout Plan as approved in Case No. 9885. The total effect of these changes will be a positive benefit to the ratepayers.

Discussion

Based on the above findings of fact, the Commission further finds that the Restructuring Agreement is in substantial confor-

⁶ Hearing Transcript, Volume III, pages 58-61.

⁷ Ibid.

mity with the Revised Workout Plan. Big Rivers has succeeded in obtaining additional concessions from its creditors that were not provided for in the Revised Workout Plan as approved by the Commission in Case No. 9885. These concessions will be of benefit to Big Rivers and its ratepayers.

As a result of the Commission's decision in Case No. 9885 to approve the Revised Workout Plan with modifications, to establish the variable rate for the aluminum smelters, and to authorize a rate increase for the other customers, Big Rivers has been able to start down the road to financial recovery and stability. The Department of Justice has withdrawn its foreclosure litigation and Big Rivers' full efforts can now properly be directed to operating its system. The Commission is optimistic that the calm and stability that has been restored to Western Kentucky will further enhance Big Rivers' abilities to market power. The Restructuring Agreement and the long-term financial solution that it provides to Big Rivers are essential to Big Rivers' continued ability to provide reliable and adequate service and are, therefore, in the best interests of both Big Rivers and its ratepayers.

The Revised Workout Plan, as approved by the Commission in Case No. 9885, contemplated that Big Rivers would issue the indebtedness now provided for in the Restructuring Agreement. Big Rivers' issuance to the Banks of the indebtedness set forth in the pending application is a necessary and integral step to implement the Restructuring Agreement. The Commission, therefore, finds that the Restructuring Agreement and evidences of indebtedness to the Banks are for a lawful object within the corporate purpose of

Big Rivers' utility operations, are necessary and appropriate for and consistent with the proper performance of its service to the public and will not impair its ability to perform that service, and are reasonably necessary and appropriate for such purpose and should, therefore, be approved.

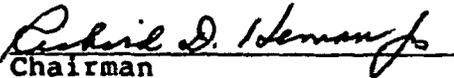
IT IS THEREFORE ORDERED that:

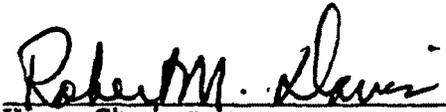
1. Big Rivers' application for approval of a Debt Restructuring Agreement and the issuance of evidences of indebtedness to the Banks be and they hereby are approved.
2. NSA's petition for rehearing be and it hereby is denied.
3. NSA's motions to file documents and materials be and they hereby are granted to the extent provided for in this Order.
4. Big Rivers is authorized to execute and to deliver to the Banks the Restructuring Agreement and the A, B, and C promissory notes as described therein, in subsections 3.03, 3.06(b), and 3.07, and to secure such evidences of indebtedness by execution and delivery of the Restated Mortgage and Security Agreement among Big Rivers, REA and the Banks, dated as of March 30, 1988, and filed as Exhibit F to the Restructuring Agreement.
5. Big Rivers is authorized to execute and deliver the Escrow Agreement, dated as of March 30, 1988, among the Banks, Big Rivers and Citizens Fidelity Bank & Trust Company, filed as Exhibit E to the Restructuring Agreement.
6. Any proceeds of the evidences of indebtedness authorized herein shall be used only for the lawful purposes as provided for in Big Rivers' application.

Nothing herein contained shall be deemed a warranty or finding of value of any securities or financing authorized herein on the part of the Commonwealth of Kentucky or any agency thereof.

Done at Frankfort, Kentucky, this 1st day of July, 1988.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:

Executive Director