

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF BIG RIVERS ELECTRIC)
CORPORATION FOR A GENERAL) CASE NO.
ADJUSTMENT IN RATES) 2011-00036

O R D E R

On July 12, 2011, Big Rivers Electric Corporation ("Big Rivers") filed a motion requesting that Kentucky Industrial Utility Customers, Inc. ("KIUC") be compelled to file responses to Big Rivers' First Request for Information to KIUC, Item Nos. 1 and 41. In Item No. 1, Big Rivers requested KIUC provide copies of all information exchanged among Alcan Primary Products Corporation ("Alcan") or its corporate parent, Century Aluminum of Kentucky, General Partnership ("Century") or its corporate parent, and the KIUC witnesses in this case. (Alcan and Century are referred to as the "Smelters.") In Item No. 41, Big Rivers requested KIUC provide a list of the cash payments received by each Smelter from Big Rivers, Kenergy Corp., or a subsidiary or affiliate of E.ON U.S., LLC ("E.ON") in connection with the unwind of the Big Rivers generation lease transaction.¹

¹ Case No. 2007-00455, The Applications of Big Rivers Electric Corporation for: (1) Approval of Wholesale Tariff Additions for Big Rivers Electric Corporation, (2) Approval of Transactions, (3) Approval to Issue Evidences of Indebtedness, and (4) 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 Sep. 1, 2009).

KIUC filed an objection to Item Nos. 1 and 41 on June 23, 2011. KIUC claimed that the information sought in Item No. 1 is subject to the attorney-client privilege, the work-product rule, the common-interest rule, and that the request is vague and ambiguous by failing to identify a time period for the information sought. However, on July 14, 2011, KIUC filed supplemental information responsive to Item No. 1 and stated its belief that this item is now satisfied. Big Rivers subsequently filed a reply on July 22, 2011 agreeing that Item No. 1 had been satisfied.

As to Item No. 41, KIUC provided a partial response but objected to providing any information relating to payments received from E.ON on the grounds that the information is not relevant to this case and is confidential and proprietary. In its motion to compel, Big Rivers states, among other arguments, that confidentiality is not a basis for failing to fully respond to a request for information, citing 807 KAR 5:001, Section 7(5)(a), which provides that, "No party to any proceeding before the commission shall fail to respond to discovery by the commission or its staff or any other party to the proceeding on grounds of confidentiality." Big Rivers also claims that the information sought is relevant to the issue it has raised as to whether the Smelters are now attempting to relieve themselves of certain burdens under their power agreements, while retaining certain benefits received for entering into those agreements, all to the detriment of Big Rivers and its other customers.

In its July 21, 2011 response, KIUC stated that any information responsive to Item No. 41 on payments received by the Smelters from E.ON is two years old and not relevant to a determination now of what rates are fair, just, and reasonable for Big Rivers. KIUC further states that the payments from E.ON were intended to compensate

the Smelters for the early termination of their then-existing favorable power contracts with E.ON, and that the payments were compensation for a loss, rather than a windfall. Finally, KIUC claims that, since the Commission granted confidential protection to the information on E.ON's payments to the Smelters in Case No. 2007-00455, Big Rivers is now estopped, or alternatively barred by principles of *res judicata*, from obtaining such information in this case. KIUC asserts that the Commission's previous determination that Big Rivers should not have access to the information on E.ON payments cannot now be relitigated.

In its July 22, 2011 reply, Big Rivers claims that the information on E.ON's payments to the Smelters is relevant in this case due to KIUC referencing such payments in the direct testimony of two of its witnesses in this case. As to the issues of estoppel and *res judicata*, Big Rivers states that it is not now challenging the Commission's prior grant of confidentiality to the information on payments, and the Commission never previously determined that Big Rivers should not have access to that information.

Based on the motion to compel, the filings related thereto, and being otherwise sufficiently advised, the Commission finds that KIUC has sufficiently responded to Item No. 1 of Big Rivers' information request. With respect to Item No. 41, the KIUC testimony does refer to the E.ON payments to the Smelters, and Big Rivers is entitled to seek discovery related to its assertion that the Smelters are attempting to retain certain benefits under their power contracts while trying to avoid certain burdens. The Commission did not previously determine the issue of whether Big Rivers should have

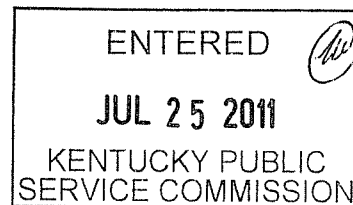
access to the payments by E.ON to the Smelters, so the claims of estoppel and *res judicata* have no application here.

Thus, KIUC needs to file in the record of this case the requested information on E.ON's payments to each Smelter. Further, based on our prior decision to grant that information confidential protection, we will continue that same treatment here. We expect KIUC to enter into a protective agreement with Big Rivers and other parties to afford them access to this information and to file the requested information here as soon as possible, but not later than 5:00 p.m. Eastern Daylight Time on July 26, 2011.

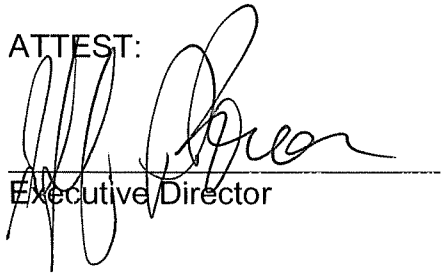
IT IS THEREFORE ORDERED that:

1. Big Rivers' motion to compel KIUC responses to Item No. 1 is denied as moot.
2. Big Rivers' motion to compel KIUC responses to Item No. 41 is granted and KIUC shall file no later than 5:00 p.m. Eastern Daylight Time on July 26, 2011 the requested information and serve copies on the parties along with any necessary non-disclosure agreement.

By the Commission



ATTEST:


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