

1 COMMONWEALTH OF KENTUCKY  
2 BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY

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5 In the Matter of:

PUBLIC SERVICE  
COMMISSION

6  
7 Application of Big Rivers Electric Corporation )  
8 for Approval of its 2012 Environmental )  
9 Compliance Plan, for Approval of its Amended )  
10 Environmental Cost Recovery Surcharge Tariff, )  
11 for Certificates of Public Convenience and )  
12 Necessity, and for Authority to Establish a )  
13 Regulatory Account )

Case No. 2012-00063

14  
15  
16 **PETITION OF BIG RIVERS ELECTRIC CORPORATION FOR CONFIDENTIAL**  
17 **PROTECTION**  
18

19 1. Big Rivers Electric Corporation ("Big Rivers") hereby petitions the Kentucky  
20 Public Service Commission ("Commission"), pursuant to 807 KAR 5:001 Section 7 and KRS  
21 61.878, to grant confidential protection to portions of Big Rivers' responses to Items 26 and 37  
22 of the Commission Staff's First Request for Information ("PSC 26" and "PSC 37," respectively);  
23 Items 27, 31, 46, 55, and 64 of the Attorney General's Initial Data Requests ("AG 27," "AG 31,"  
24 "AG 46" and "AG 55," "AG 64," respectively); Items 17, 36, 50, 52, and 54 of Kentucky  
25 Industrial Utility Customers, Inc.'s First Set of Data Requests ("KIUC 17," "KIUC 36," "KIUC  
26 50," "KIUC 52," "KIUC 54," respectively), and Items 3, 4, 19, 20, 27, 35, 56, and 57 of Ben  
27 Taylor and the Sierra Club's Initial Requests for Information ("SC 3," "SC 4," "SC 19," "SC  
28 20," "SC 27," "SC 35," "SC 56," and "SC 57," respectively). The portions of the responses that  
29 Big Rivers seeks to protect as confidential are hereinafter referred to as the "Confidential  
30 Information."

31 2. One (1) copy of the relevant pages of Big Rivers' responses to PSC 26, PSC 37,  
32 AG 27, AG 31, AG 46, AG 55, AG 64, KIUC 17, SC 3, SC 27, SC 35, SC 56, and SC 57 with

1 the Confidential Information highlighted or otherwise marked confidential. A copy of the  
2 relevant pages of those responses with the Confidential Information redacted are attached to the  
3 original and ten (10) copies of Big Rivers' responses to the requests for information filed with  
4 this petition. 807 KAR 5:001 Sections 7(2)(a)(2), 7(2)(b).

5 3. The confidential parts of the responses to KIUC 36, SC 4, SC 19, and SC 20 are  
6 electronic attachments contained on the copy of the CDs marked confidential and attached to this  
7 petition. Big Rivers is also filing ten (10) copies of this petition with the Confidential  
8 Information redacted (*i.e.*, without the attachments and CDs). 807 KAR 5:001 Sections  
9 7(2)(a)(2), 7(2)(b).

10 4. The confidential attachments to KIUC 50, 52, and 54 are provided both  
11 electronically and in hardcopy. One (1) copy of the electronic attachments and one (1) copy of  
12 the hardcopy attachments with the confidential information marked confidential is attached to  
13 this petition. Those attachments are redacted from the ten (10) copies of this petition Big Rivers  
14 is filing. 807 KAR 5:001 Sections 7(2)(a)(2), 7(2)(b).

15 5. A copy of this petition with the Confidential Information redacted has been served  
16 on all parties to this proceeding. 807 KAR 5:001 Section 7(2)(c). Big Rivers is also providing a  
17 copy of the Confidential Information to all parties, as they have all signed a confidentiality  
18 agreement.

19 6. The Confidential Information is not publicly available, is not disseminated within  
20 Big Rivers except to those employees and professionals with a legitimate business need to know  
21 and act upon the information, and is not disseminated to others without a legitimate need to  
22 know and act upon the information.

1           7.           If and to the extent the Confidential Information becomes generally available to  
2 the public, whether through filings required by other agencies or otherwise, Big Rivers will  
3 notify the Commission and have its confidential status removed. 807 KAR 5:001 Section  
4 7(9)(a).

5           8.           As discussed below, the Confidential Information is entitled to confidential  
6 protection based upon KRS 61.878(1)(m) and KRS 61.878(1)(c)(1).

7                               **I. Information Protected by KRS 61.878(1)(m)**

8           9.           KRS 61.878(1)(m) protects the disclosure of information “which would have a  
9 reasonable likelihood of threatening the public safety by exposing a vulnerability in preventing,  
10 protecting against, mitigating, or responding to a terrorist act and limited to:...f. Infrastructure  
11 records that expose a vulnerability referred to in this subparagraph through the disclosure of the  
12 location, configuration, or security of critical systems, including public utility critical systems.”  
13 Big Rivers’ response to SC 4 contains Big Rivers’ 2010 Integrated Resource Plan (“IRP”).  
14 There are three transmission system maps filed with the IRP, which could be used to analyze  
15 vulnerable locations in Big Rivers’ transmission system, which is a public utility critical system,  
16 and which could therefore threaten public safety. As such, the Commission should grant  
17 confidential protection to the transmission system maps contained in Big Rivers’ response to SC  
18 4.

19                               **II. Information Protected by KRS 61.878(1)(c)(1)**

20           10.           The remaining Confidential Information is entitled to confidential protection  
21 based upon KRS 61.878(1)(c)(1), which protects “records confidentially disclosed to an agency  
22 or required by an agency to be disclosed to it, generally recognized as confidential or proprietary,

1 which if openly disclosed would permit an unfair commercial advantage to competitors of the  
2 entity that disclosed the records.” KRS 61.878(1)(c)(1).

3 **A. Big Rivers Faces Actual Competition**

4 11. Big Rivers competes in the wholesale power market to sell energy excess to its  
5 members’ needs. Big Rivers’ ability to successfully compete in the wholesale power market is  
6 dependent upon a combination of its ability to get the maximum price for the power sold, and  
7 keeping the cost of producing that power as low as possible. Fundamentally, if Big Rivers’ cost  
8 of producing a kilowatt hour increases, its ability to sell that kilowatt hour in competition with  
9 other utilities is adversely affected. As is well documented in multiple proceedings before this  
10 Commission, Big Rivers’ margins are derived almost exclusively from its off-system sales.

11 12. Big Rivers also competes for reasonably priced credit in the credit markets, and  
12 its ability to compete is directly impacted by its financial results. Any event that adversely  
13 affects Big Rivers’ margins will adversely affect its financial results and potentially impact the  
14 price it pays for credit. As was described in the proceeding before this Commission in the Big  
15 Rivers unwind transaction case, Big Rivers expects to be in the credit markets on a regular basis  
16 in the future.<sup>1</sup>

17 **B. The Confidential Information is Generally Recognized as Confidential or**  
18 **Proprietary**

19  
20 13. As explained below, the Confidential Information for which Big Rivers seeks  
21 confidential treatment under KRS 61.878(1)(c)(1) is generally recognized as confidential or  
22 proprietary under Kentucky law.

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<sup>1</sup> See Order dated March 6, 2009, *In the Matter of: Joint Application of Big Rivers, E.ON, LG&E Energy Marketing, Inc., and Western Kentucky Energy Corporation for Approval to Unwind Lease and Power Purchase Transactions*, PSC Case No. 2007-00455, pages 27-30 and 37-39.

1           14.           The confidential attachment to Big Rivers' response to PSC 26 is a price  
2 sensitivity analysis, containing projected power prices.

3           15.           Big Rivers' response to PSC 37 contains a list of future outages.

4           16.           Big Rivers' response to AG 27 contains a proposal and a change order from  
5 Sargent 7 Lundy. These documents are confidential, and Sargent & Lundy has not given Big  
6 Rivers permission to publicly release them.

7           17.           Big Rivers' responses to AG 31 and 64 and SC 56 and 57 contain presentations  
8 Big Rivers gave to various entities. The presentations contain projections such as to rates,  
9 revenues, and margins.

10          18.           The confidential portions of the attachment to Big Rivers' response to AG 46  
11 contain Big Rivers' projected allowances.

12          19.           Big Rivers' response to AG 55 contains Big Rivers' projected margins.

13          20.           The confidential attachment to Big Rivers' response to KIUC 17 contains a  
14 proprietary and confidential proposal from PACE Global. PACE Global considers this  
15 information proprietary and confidential and has not given Big Rivers permission to publicly  
16 release the information. Big Rivers' response to KIUC 17 also contains a chart showing  
17 projected power prices that ACES Power Marketing ("ACES"), PACE Global, and IHS Global  
18 have provided to Big Rivers and which Big Rivers relies on. Additionally, these companies  
19 consider this information confidential and have not given Big Rivers permission to publicly  
20 release the information.

21          21.           Big Rivers' response to KIUC 36 contains a number of emails that contain  
22 confidential information such as inputs and outputs of models from ACES and PACE Global,  
23 production cost information; budgets; projections relating to fuel prices, power market prices,

1 rates and margins, and allowance prices and needs; budgets; and information relating to a  
2 budgetary proposal from a third party. The contractor considers this information confidential  
3 and has not given Big Rivers permission to publicly release the information.

4 22. Big Rivers' responses to KIUC 50 and KIUC 52 contain revenue projections  
5 based on the "Build Case" financial model.

6 23. Big Rivers response to KIUC 54 contains projections of Big Rivers' variable and  
7 fixed costs.

8 24. Big Rivers' response to SC 3 contains Big Rivers' budgeted variable and fixed  
9 O&M costs.

10 25. Big Rivers' response to SC 4 contains confidential portions of Big Rivers' 2005  
11 and 2010 IRP's. The Commission granted confidential protection to these portions by letter  
12 dated December 8, 2005, in Case No. 2005-00485 and by letter dated December 21, 2010, in  
13 Case No. 2010-00443. The information is confidential for the reasons stated in the petitions for  
14 confidential treatment filed in those cases.

15 26. The attachments to Big Rivers' responses to SC 19 and 20 are Big Rivers'  
16 financing forecast models, which contain Big Rivers' projected fuel, power, and allowance  
17 prices, forecasted rates, variable production costs, and related information.

18 27. Big Rivers' response to SC 27 contains information related to agreements Big  
19 Rivers entered into in 2011 for allowance trades in 2012 and 2013 and would reveal the value  
20 Big Rivers places on such allowances.

21 28. Big Rivers' response to SC 35 contains information related to Big Rivers'  
22 estimated fuel costs.

1           29.           Public disclosure of the Confidential Information would reveal Big Rivers’  
2 planned future outages and forecasted production costs, off-system sales prices, and related  
3 information. Knowledge of such projected data would give Big Rivers’ suppliers and  
4 competitors an unfair competitive advantage. Public disclosure of the Confidential Information  
5 will allow Big Rivers’ suppliers and competitors to know Big Rivers’ future maintenance plans,  
6 it will give them insight into Big Rivers’ wholesale power needs, and it will give Big Rivers’  
7 suppliers, buyers, and competitors insight into Big Rivers’ cost of producing power and into Big  
8 Rivers’ view of future prices for fuel prices, market power prices, and allowance prices, which  
9 would indicate the prices at which Big Rivers is willing to buy or sell such items.

10           30.           Information about a company’s detailed inner workings is generally recognized as  
11 confidential or proprietary. *See, e.g., Hoy v. Kentucky Indus. Revitalization Authority*, 907  
12 S.W.2d 766, 768 (Ky. 1995) (“It does not take a degree in finance to recognize that such  
13 information concerning the inner workings of a corporation is ‘generally recognized as  
14 confidential or proprietary’”). Moreover, the Commission has previously granted confidential  
15 treatment to similar information. *See, e.g.,* letters from the Commission dated July 28, 2011, and  
16 December 20, 2011, in *In the Matter of: Application of Big Rivers Electric Corporation for a*  
17 *General Adjustment in Rates*, PSC Case No. 2011-00036 (granting confidential treatment to  
18 multi-year forecast); letter from the Commission dated December 21, 2010, in *In the Matter of:*  
19 *The 2010 Integrated Resource Plan of Big Rivers Electric Corporation*, PSC Case No. 2010-  
20 00443 (granting confidential treatment to fuel cost projections, revenue projections, market price  
21 projections, financial model outputs, etc.); letter from the Commission dated July 20, 2010, in  
22 Administrative Case No. 387 (granting confidential treatment to a list of future scheduled  
23 outages that Big Rivers filed as part of the supplement to its annual report).

1                   **C. Disclosure of the Confidential Information Would Permit an Unfair**  
2                   **Commercial Advantage to Big Rivers' Competitors**  
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4           31. Disclosure of the Confidential Information would permit an unfair commercial  
5 advantage to Big Rivers' competitors. As discussed above, Big Rivers faces actual competition  
6 in the wholesale power market and in the credit market. It is likely that Big Rivers would suffer  
7 competitive injury if that Confidential Information was publicly disclosed.

8           32. Most of the Confidential Information relating to ACES, PACE Global, and the  
9 budgetary proposal from a third party is essentially the same as confidential information  
10 contained in the CD Big Rivers filed April 26, 2012, with its response to the Motion to Dismiss  
11 of Kentucky Industrial Utility Customers, Inc. ("KIUC"), and the CDs Big Rivers filed May 24,  
12 2012, May 29, 2012, and May 30, 2012, in response to the May 11, 2012, letter from KIUC's  
13 counsel to Big Rivers' counsel, which were also submitted under a petition for confidential  
14 treatment. In Case No. 2003-00054, the Commission granted confidential protection for bids  
15 submitted to Union Light, Heat & Power ("ULH&P"). ULH&P argued, and the Commission  
16 implicitly accepted, that the bidding contractors would not want their bid information publicly  
17 disclosed, and that disclosure would reduce the contractor pool available to ULH&P, which  
18 would drive up ULH&P's costs, hurting its ability to compete with other gas suppliers. Order  
19 dated August 4, 2003, in *In the Matter of: Application of the Union Light, Heat and Power*  
20 *Company for Confidential Treatment*, PSC Case No. 2003-00054. Similarly, in *Hoy v. Kentucky*  
21 *Indus. Revitalization Authority*, the Kentucky Supreme Court found that without protection for  
22 confidential information provided to a public agency, "companies would be reluctant to apply for  
23 investment tax credits for fear the confidentiality of financial information would be  
24 compromised. *Hoy*, Ky., 907 S.W.2d at 769.



1           33.           In Big Rivers' case, ACES, PACE Global, and the third party contractor have not  
2 given Big Rivers permission to release their information publicly, and they do not want the  
3 information they provided to Big Rivers on a confidential basis to be publicly disclosed.  
4 Suppliers such as these rely on the confidentiality of their information, and if they believed that  
5 the Commission would deny confidential treatment for the confidential information they provide  
6 to Big Rivers, it is likely that fewer suppliers would offer their services to Big Rivers. As such,  
7 public disclosure of the Confidential Information would likely reduce the pool of suppliers  
8 willing to enter into agreements with Big Rivers, resulting in increased prices for Big Rivers and  
9 impairing its ability to compete in the wholesale power and credit markets.

10           34.           The Confidential Information also includes future outage schedules and detailed  
11 information relating to Big Rivers' cost of producing power, including material such as Big  
12 Rivers' projections of fuel costs and power prices. If that information is publicly disclosed,  
13 potential fuel and power suppliers would have insight into the prices Big Rivers is willing to pay  
14 and could manipulate the bidding process, leading to higher prices for Big Rivers and impairing  
15 its ability to compete in the wholesale power and credit markets. In PSC Case No. 2003-00054,  
16 the Commission granted confidential protection to bids submitted to ULH&P. ULH&P argued,  
17 and the Commission implicitly accepted, that if the bids it received were publicly disclosed,  
18 contractors on future work could use the bids as a benchmark, which would likely lead to the  
19 submission of higher bids. Order dated August 4, 2003, in *In the Matter of: Application of the*  
20 *Union Light, Heat and Power Company for Confidential Treatment*, PSC Case No. 2003-00054.  
21 The Commission also implicitly accepted ULH&P's further argument that the higher bids would  
22 lessen ULH&P's ability to compete with other gas suppliers. *Id.* Similarly, potential fuel and  
23 power suppliers manipulating Big Rivers' bidding process would lead to higher costs to Big

1 Rivers and would place it at an unfair competitive disadvantage in the wholesale power market  
2 and credit markets.

3 35. Additionally, public disclosure of the Confidential Information would give the  
4 power producers and marketers with which Big Rivers competes in the wholesale power market  
5 insight into Big Rivers' cost of producing power and insight into when Big Rivers' generating  
6 plants will be down for maintenance and thus Big Rivers' need for power and energy during  
7 those periods. Knowledge of this information would give those power producers and marketers  
8 an unfair competitive advantage because they could use that information to potentially underbid  
9 Big Rivers in wholesale transactions. It would also give potential suppliers to Big Rivers a  
10 competitive advantage because they will be able to manipulate the price of power bid to Big  
11 Rivers in order to maximize their revenues, thereby driving up Big Rivers' costs and impairing  
12 Big Rivers' ability to compete in the wholesale power and credit markets.

### 13 **III. Conclusion**

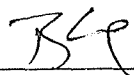
14 36. Based on the foregoing, the Confidential Information is entitled to confidential  
15 protection. If the Commission disagrees that Big Rivers is entitled to confidential protection, due  
16 process requires the Commission to hold an evidentiary hearing. *Utility Regulatory Com'n v.*  
17 *Kentucky Water Service Co., Inc.*, 642 S.W.2d 591 (Ky. App. 1982).

18 WHEREFORE, Big Rivers respectfully requests that the Commission classify and protect  
19 as confidential the Confidential Information.

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On this the 1<sup>st</sup> day of June, 2012.

  
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