

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY

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In the Matter of:

MAY 14 2013

Application of Big Rivers Electric)
Corporation for Approval to Issue) Case No. 2013-00125
Evidences of Indebtedness)

PUBLIC SERVICE
COMMISSION

**PETITION OF BIG RIVERS ELECTRIC CORPORATION FOR CONFIDENTIAL
PROTECTION**

1. Big Rivers Electric Corporation (“Big Rivers”) hereby petitions the Kentucky Public Service Commission (“Commission”), pursuant to 807 KAR 5:001 Section 13 and KRS 61.878, to grant confidential protection to certain information Big Rivers is filing with its responses to First Set of Data Requests from Kentucky Industrial Utility Customers, Inc. (“KIUC”). The information Big Rivers seeks to protect as confidential is hereinafter referred to as the “Confidential Information.”

2. The Confidential Information includes portions of attachments for Big Rivers’ responses to Items 2, 6, and 15 of KIUC’s First Set of Data Requests (“KIUC 1-2,” “KIUC 1-6,” and “KIUC 1-15,” respectively).

3. One (1) copy of the hardcopy pages containing Confidential Information, with the Confidential Information highlighted with transparent ink, printed on yellow paper, or otherwise marked “CONFIDENTIAL,” is being filed with this petition. A copy of those pages with the Confidential Information redacted is being filed with the original and each of the ten (10) copies of the responses to the information requests filed with this petition. 807 KAR 5:001 Sections 13(2)(a)(3) and 13(2)(b).

4. A copy of this petition with the Confidential Information redacted has been served on all parties to this proceeding. 807 KAR 5:001 Section 13(2)(c). A copy of the Confidential Information has been served on all parties that have signed a confidentiality agreement.

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

6. If and to the extent the Confidential Information becomes generally available to the public, whether through filings required by other agencies or otherwise, Big Rivers will notify the Commission and have the information's confidential status removed. 807 KAR 5:001 Section 13(10)(b).

7. As discussed below, the Confidential Information is entitled to confidential protection based upon KRS 61.878(1)(c)(1), which protects "records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records." KRS 61.878(1)(c)(1); 807 KAR 5:001 Section 13(2)(a)(1).

I. Big Rivers Faces Actual Competition.

8. Big Rivers, as a participant in the credit markets and the wholesale power markets, faces economic competition from other entities.

9. Big Rivers competes in the wholesale power market to sell energy it produces in excess of its members' needs. Big Rivers' ability to successfully compete in the wholesale power market is dependent upon a combination of its ability to negotiate the maximum price for

the power sold and its ability to keep its cost of production as low as possible. If Big Rivers' cost of producing a kilowatt-hour of energy increases, its ability to sell that kilowatt-hour in competition with other utilities is adversely affected.

10. Big Rivers also competes for reasonably priced credit in the credit markets, and its ability to compete is directly impacted by its financial results. Any event that adversely affects Big Rivers' margins will adversely affect its financial results and potentially impact the price it pays for credit. As was described in the proceeding before this Commission in the Big Rivers Unwind Transaction, PSC Case No. 2007-00455, Big Rivers expects to be in the credit markets on a regular basis in the future.¹

11. As is evidenced by these economic pressures, Big Rivers has "competitors" as contemplated under KRS 61.878(1)(c)(1) and faces actual competition from other market participants.

II. The Confidential Information is Generally Recognized as Confidential or Proprietary.

12. The Confidential Information for which Big Rivers seeks confidential treatment under KRS 61.878(1)(c)(1) is generally recognized as confidential or proprietary under Kentucky law.

13. The Confidential Information contained in the attachment to the response to KIUC 1-2 is (i) Appendix B to Big Rivers' *Corrective Plan to Achieve Two Credit Ratings of Investment Grade* and consists of details of Big Rivers' ongoing activities to mitigate the loss of the smelter load and details of proposals and negotiations that are subject to one or more confidentiality agreements; and (ii) portions of a presentation to RUS consisting of information

¹ See Order dated March 6, 2009, in *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.

about planned outages, projected off-system sales information, and projected operating and maintenance (“O&M”) costs.

14. The Confidential Information contained in the attachment to the response to KIUC 1-6 includes forecasted information about Big Rivers’ projected off-system sales of excess energy and projected O&M costs, including forecasted fuel costs.

15. The Confidential Information contained in the attachment to the response to KIUC 1-15 is contained in a presentation to RUS and consists of projected off-system sales information and projected O&M costs.

16. Information about a company’s detailed inner workings is generally recognized as confidential or proprietary. *See, e.g., Hoy v. Kentucky Indus. Revitalization Authority*, 907 S.W.2d 766, 768 (Ky. 1995) (“It does not take a degree in finance to recognize that such information concerning the inner workings of a corporation is ‘generally recognized as confidential or proprietary’”); *Marina Management Servs. v. Cabinet for Tourism, Dep’t of Parks*, 906 S.W.2d 318, 319 (Ky. 1995) (unfair commercial advantage arises simply from “the ability to ascertain the economic status of the entities without the hurdles systemically associated with the acquisition of such information about privately owned organizations”).

17. Additionally, the Commission has consistently recognized that internal strategic planning information is entitled to confidential treatment, as these documents typically relate to the company’s economic status and business strategies. *See, e.g., In the Matter of: The Joint Application of Duke Energy Corp., Cinergy Corp., Duke Energy Ohio, Inc., Duke Energy Kentucky, Inc., Diamond Acquisition Corp., and Progress Energy, Inc., for Approval of the Indirect Transfer of Control of Duke Energy Kentucky, Inc.*, PSC Case No. 2011-00124 (Dec. 5, 2011); *In the Matter of: The Joint Petition of Kentucky-American Water Co., Thames Water*

Aqua Holdings GmbH, RWE Aktiengesellschaft, Thames Water Aqua U.S. Holdings, Inc., and Am. Water Works Co., Inc. for Approval of a Change in Control of Kentucky-American Water Co., PSC Case No. 2006-00197 (Aug. 29, 2006).

18. Moreover, the Commission has previously granted confidential protection to information similar to the Confidential Information. *See, e.g.*, letters from the Commission dated July 28, 2011, and December 20, 2011, in *In the Matter of: Application of Big Rivers Electric Corporation for a General Adjustment in Rates*, PSC Case No. 2011-00036 (granting confidential treatment to multi-year forecast); letter from the Commission dated December 21, 2010, in *In the Matter of: The 2010 Integrated Resource Plan of Big Rivers Electric Corporation*, PSC Case No. 2010-00443 (granting confidential treatment to fuel cost projections, revenue projections, market price projections, financial model outputs, etc.); two letters from the Commission dated December 11, 2012, in *In the Matter of: Application of Big Rivers Electric Corporation for Approval of its 2012 Environmental Compliance Plan, for Approval of its Amended Environmental Cost Recovery Surcharge Tariff, for Certificates of Public Convenience and Necessity, and for Authority to Establish a Regulatory Account*, PSC Case No. 2012-00063 (granting confidential treatment to Big Rivers' O&M expenses, and off-system sales and revenues).

19. Additionally, the attachment to KIUC 1-6 containing the Confidential Information is the subject of a pending petition for confidential treatment in PSC Case No. 2012-00535. Although the Commission recently denied confidential treatment to historical off-system sales information in that case, the Confidential Information contained in the attachment to the response to KIUC 1-6 is all forecasted information even though the forecast begins in January 2013.

20. The confidential Appendix B contained in the attachment to KIUC 1-2 is the subject of pending petitions for confidential treatment in PSC Case No. 2012-00492 and PSC Case No. 2012-00535, and the same information was granted confidential treatment by order dated April 25, 2013, in PSC Case No. 2012-00535.

21. The Confidential Information contained in the presentations in KIUC 1-2 and KIUC 1-15 contain the same type of information that was granted confidential treatment by order dated April 25, 2013, in PSC Case No. 2012-00535.

22. Accordingly, the information for which Big Rivers seeks confidential treatment is recognized as confidential or proprietary under Kentucky law and is entitled to confidential protection as further discussed below.

III. Disclosure of the Confidential Information Would Permit an Unfair Commercial Advantage to Big Rivers' Competitors.

23. Disclosure of the Confidential Information would permit an unfair commercial advantage to Big Rivers' competitors. As discussed above, Big Rivers faces actual competition in the wholesale power market and in the credit market. It is likely that Big Rivers would suffer competitive injury if that Confidential Information was publicly disclosed, and the information should therefore be subject to confidential treatment.

24. Public disclosure of the Confidential Information would reveal detailed information relating to Big Rivers' projected cost of producing power (including projected fuel and other O&M costs); projected off-system sales volumes and prices; and Big Rivers' future need for power or availability of excess power to sell into the market. Access to this information would grant competitors and suppliers an unfair competitive advantage, allowing them to adjust their prices in response to the prices at which Big Rivers is willing to buy or sell power, production inputs and similar commodities.

25. Some Confidential Information includes material such as Big Rivers' projections of fuel costs and off-system sales prices. If that information is publicly disclosed, market participants would have insight into the prices at which Big Rivers is willing to buy fuel or buy and sell power. In PSC Case No. 2003-00054, the Commission granted confidential protection to bids submitted to Union Light, Heat & Power ("ULH&P"). ULH&P argued, and the Commission implicitly accepted, that if the bids it received were publicly disclosed, contractors on future work could use the bids as a benchmark, which would likely lead to the submission of higher bids. Order in *In the Matter of: Application of the Union Light, Heat and Power Company for Confidential Treatment*, P.S.C. Case No. 2003-00054 (Aug. 4, 2012). The Commission also implicitly accepted ULH&P's further argument that the higher bids would lessen ULH&P's ability to compete with other gas suppliers. *Id.* In Big Rivers' case, disclosure of its fuel and market price projections could be used as a benchmark, which suppliers or purchasers could use to manipulate the bidding process, leading to higher prices or reduced revenues for Big Rivers and impairing its ability to compete in the wholesale power and credit markets.

26. Potential market power purchasers could use the information related to Big Rivers' projected off-system sales and revenues to know when Big Rivers is long on power and could use that information to manipulate their bids, leading to lower revenues to Big Rivers and placing it at an unfair competitive disadvantage in the credit markets.

27. Additionally, public disclosure of the fuel prices, other variable cost information, and information about Big Rivers' wholesale power needs would give the power producers and marketers with which Big Rivers competes in the wholesale power market insight into Big Rivers' cost of producing power and need for power and energy during the periods covered by

the information. Knowledge of this information would give those power producers and marketers an unfair competitive advantage because they could use that information to potentially underbid Big Rivers in wholesale transactions. It would also give potential suppliers to Big Rivers a competitive advantage because they will be able to manipulate the price of power bid to Big Rivers in order to maximize their revenues, thereby driving up Big Rivers' costs and impairing Big Rivers' ability to compete in the wholesale power and credit markets.

28. In light of the above, the Confidential Information claimed by Big Rivers should be granted confidential protection.

IV. Time Period

29. Big Rivers requests that the Confidential Information remain confidential for a period of five (5) years from the date of this petition because that matches the period for which confidential protection of the Confidential Information is sought in Case No. 2012-00535 and which should allow sufficient time for the projected data to become historical and sufficiently outdated that it could not be used to determine similar confidential information at that time. 807 KAR 5:001 Section 13(2)(a)(2).

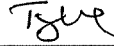
V. Conclusion

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

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

On this the 13th day of May, 2013.

Respectfully submitted,



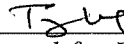
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Counsel for Big Rivers Electric Corporation

Certificate of Service

I certify that, on the date this petition was filed with the Kentucky Public Service Commission, a true and accurate copy of the foregoing was served by Federal Express or by hand delivery upon the persons listed on the service list that accompanies this petition.

On this the 13th day of May, 2013.



Counsel for Big Rivers Electric Corporation