

1 COMMONWEALTH OF KENTUCKY
2 BEFORE THE PUBLIC SERVICE COMMISSION
3

4 In the Matter of:

5
6 *BIG RIVERS ELECTRIC CORPORATION'S FILING*
7 *OF WHOLESALE CONTRACTS PURSUANT*) Case No. 2014-
8 *TO KRS 278.180 AND 807 KAR 5:011 §13*)

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APR 4 2014

PUBLIC SERVICE
COMMISSION

10
11 PETITION OF BIG RIVERS ELECTRIC CORPORATION
12 FOR CONFIDENTIAL PROTECTION
13

14 1. Big Rivers Electric Corporation ("Big Rivers") hereby petitions the Kentucky
15 Public Service Commission ("Commission"), pursuant to 807 KAR 5:001 Section 13, KRS
16 61.878(1)(c) and KRS 278.160(3), to grant confidential protection to (i) portions of three
17 purchase power agreements ("PPAs") that Big Rivers has entered into with municipal electric
18 systems located in Nebraska, and (ii) portions of a summary of those PPAs. The information Big
19 Rivers seeks to protect as confidential is hereinafter referred to as the "Confidential
20 Information."

21 2. One (1) sealed copy of the pages containing Confidential Information, with the
22 Confidential Information highlighted with transparent ink, printed on yellow paper, or otherwise
23 marked "CONFIDENTIAL," is being filed with this petition. An original and ten (10) copies of
24 the pages containing Confidential Information, with the Confidential Information redacted, is
25 also being filed with this petition. 807 KAR 5:001 Sections 13(2)(a)(3), 13(2)(b).

26 3. There are currently no other parties to this proceeding on which copies of this
27 petition can be served. 807 KAR 5:001 Section 13(2)(c).

28 4. If and to the extent the Confidential Information becomes generally available to
29 the public, whether through filings required by other agencies or otherwise, Big Rivers will

1 notify the Commission and have its confidential status removed. 807 KAR 5:001 Section
2 13(10)(a).

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

9 **I. Big Rivers’ Faces Actual Competition**

10 6. Big Rivers competes in the wholesale power market to sell energy excess to its
11 members’ needs. Big Rivers’ ability to successfully compete in the wholesale power market is
12 dependent upon a combination of its ability to get the maximum price for the power sold, the
13 best terms available and keeping the cost of producing that power as low as possible.
14 Fundamentally, if Big Rivers’ cost of producing a kilowatt hour or its business risk increases, its
15 ability to sell that kilowatt hour in competition with other utilities is adversely affected.

16 7. Big Rivers also competes for reasonably-priced credit in the credit markets, and
17 its ability to compete is directly impacted by its financial results and business risks assumed.
18 Any event that adversely affects Big Rivers’ margins will adversely affect its financial results
19 and potentially impact the price it pays for credit. As was described in the proceeding before this
20 Commission in the Big Rivers unwind transaction case, Big Rivers expects to be in the credit
21 markets on a regular basis in the future.¹

¹ 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 **II. The Confidential Information is Generally Recognized as Confidential or**
2 **Proprietary**

3 8. The Confidential Information consists of the confidential terms of PPAs and a
4 summary of those confidential terms. KRS 278.160 specifically recognizes that terms of a
5 special contract are not required to be publicly disclosed if such terms are entitled to protection
6 under KRS 61.878(1)(c)(1). KRS 278.160(3).

7 9. The Confidential Information is not publicly available, is not disseminated within
8 Big Rivers except to those employees and professionals with a legitimate business need to know
9 and act upon the information, and is not disseminated to others without a legitimate need to
10 know and act upon the information. Big Rivers is advised by counsel for the counterparties that
11 the portions of the PPAs for which Big Rivers seeks confidential treatment are not subject to
12 disclosure under the applicable open records laws of the State of Nebraska. As such, the
13 Confidential Information is generally recognized as confidential and proprietary.

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

16 10. Disclosure of the Confidential Information would permit an unfair commercial
17 advantage to Big Rivers' competitors. As discussed above, Big Rivers faces actual competition
18 in the wholesale power market and in the credit market. It is likely that Big Rivers would suffer
19 competitive injury if the Confidential Information was publicly disclosed. In PSC Case No.
20 2003-00054, the Commission granted confidential protection for bids submitted to Union Light
21 Heat & Power ("ULH&P"). ULH&P's argued, and the Commission implicitly accepted, that the
22 bidding contractors would not want their bid information publicly disclosed, and that disclosure
23 would reduce the contractor pool available to ULH&P, which would drive up ULH&P's costs,

1 hurting its ability to compete with other gas suppliers. Order dated August 4, 2003, in *In the*
2 *Matter of: Application of the Union Light, Heat and Power Company for Confidential*
3 *Treatment*, PSC Case No. 2003-00054. Similarly, in *Hoy v. Kentucky Indus. Revitalization*
4 *Authority*, the Kentucky Supreme Court found that without protection for confidential
5 information provided to a public agency, “companies would be reluctant to apply for investment
6 tax credits for fear the confidentiality of financial information would be compromised.” *Hoy v.*
7 *Kentucky Indus. Revitalization Authority*, 907 S.W.2d 766, 769 (Ky. 1995).

8 11. In Big Rivers’ case, Big Rivers is currently in negotiations with potential
9 counterparties for other PPAs and expects to engage in negotiations with other counterparties in
10 the future. If confidential treatment of the confidential terms of the PPAs is denied, potential
11 counterparties would know that the confidential terms of their contracts would be publicly
12 disclosed, which could reveal information to their competitors about their competitiveness.
13 Because many companies would be reluctant to have such information disclosed, public
14 disclosure of the Nebraska PPAs would likely reduce the pool of counterparties willing to
15 negotiate with Big Rivers, reducing Big Rivers’ ability to sell power and impairing its ability to
16 compete in the wholesale power and credit markets.

17 12. Additionally, in PSC Case No. 2003-00054, the Commission granted confidential
18 protection to bids submitted to ULH&P. In addition to the other arguments discussed above,
19 ULH&P argued, and the Commission implicitly accepted, that if the bids it received were
20 publicly disclosed, contractors on future work could use the bids as a benchmark, which would
21 likely lead to the submission of higher bids. Order dated August 4, 2003, in *In the Matter of:*
22 *Application of the Union Light, Heat and Power Company for Confidential Treatment*, PSC Case
23 No. 2003-00054. The Commission also implicitly accepted ULH&P’s further argument that the

1 higher bids would lessen ULH&P's ability to compete with other gas suppliers. *Id.* Similarly,
2 public disclosure of the confidential terms of the PPAs would allow potential counterparties to
3 future PPAs with Big Rivers to use the terms as a benchmark for negotiations, leading to less
4 favorable prices and terms for power sales for Big Rivers and placing Big Rivers at an unfair
5 competitive disadvantage in the wholesale power and credit markets. Public disclosure of the
6 Confidential Information will also impair Big Rivers' ability to enter into future PPAs because
7 other wholesale suppliers, who are competitors to Big Rivers, will have detailed knowledge of
8 the terms upon which Big Rivers has previously entered into wholesale power sales agreements.
9 These competitors would then be able to tailor their bids or proposals, which will give them an
10 unfair competitive advantage in competing with Big Rivers to be the wholesale supplier in the
11 PPA. Thus, Big Rivers' competitiveness will be adversely affected if other suppliers are given
12 such an unfair competitive advantage, or if limitations are imposed upon Big Rivers' ability to
13 improve upon terms, or negotiate different contract terms to make Big Rivers more competitive
14 under circumstances that vary from the circumstances under which Big Rivers was willing to
15 agree to the terms of the PPAs.

16 **IV. Time Period**

17 13. Big Rivers requests that the Confidential Information remain confidential
18 indefinitely because so long as Big Rivers is in the wholesale power market, the public
19 disclosure of the confidential terms of the PPAs that it has agreed to could be used to Big Rivers'
20 competitive disadvantage for the reasons stated above. 807 KAR 5:001 Section 13(2)(a)(2).

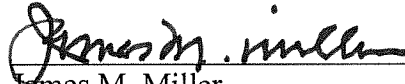
21 **V. Conclusion**

22 14. Based on the foregoing, the Confidential Information is entitled to confidential
23 protection. If the Commission disagrees that Big Rivers is entitled to confidential protection, due

1 process requires the Commission to hold an evidentiary hearing. *Utility Regulatory Com'n v.*
2 *Kentucky Water Service Co., Inc.*, 642 S.W.2d 591 (Ky. App. 1982).

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

5 On this the third day of April, 2014.

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7 

8 James M. Miller

9 Tyson Kamuf

10 SULLIVAN, MOUNTJOY, STAINBACK
11 & MILLER, P.S.C.

12 100 St. Ann Street

13 P. O. Box 727

14 Owensboro, Kentucky 42302-0727

15 Phone: (270) 926-4000

16 Facsimile: (270) 683-6694

17 jmiller@smsmlaw.com

18 tkamuf@smsmlaw.com

19
20 Counsel for Big Rivers Electric Corporation
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