

1 COMMONWEALTH OF KENTUCKY
2 BEFORE THE PUBLIC SERVICE COMMISSION
3

RECEIVED

4 In the Matter of:

5
6 SPECIAL CONTRACT FILING)
7 BY BIG RIVERS ELECTRIC) CASE NO. 2014-00134
8 CORPORATION PURSUANT TO)
9 807 KAR 5:011§13)

JUL 16
PUBLIC SERVICE
COMMISSION

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12 **PETITION OF BIG RIVERS ELECTRIC CORPORATION FOR CONFIDENTIAL**
13 **PROTECTION**
14

15 1. Big Rivers Electric Corporation (“Big Rivers”) hereby petitions the Kentucky
16 Public Service Commission (“Commission”), pursuant to 807 KAR 5:001 Section 13, KRS
17 61.878(1)(c) and KRS 278.160(3), to grant confidential protection to certain information Big
18 Rivers is filing with its responses to the Commission Staff’s (“PSC”), the Kentucky Office of the
19 Attorney General’s (“AG”), and Kentucky Industrial Utility Customers, Inc.’s (“KIUC”) Initial
20 Requests for Information. The information for which Big Rivers seeks confidential treatment is
21 hereinafter referred to as the “Confidential Information.”

22 2. The Confidential Information includes:

- 23 i. portions of the responses and/or attachments for the responses to Items 1 and 3 of
24 the Commission Staff’s Initial Request for Information (“PSC 1-1” and “PSC 1-
25 3,” respectively);
- 26 ii. portions of the responses and/or attachments for the responses to Items 2, 3, 4, 5,
27 6, 7, 8, 9, 10, 11, and 12 of the AG’s Initial Request for Information (“AG 1-2,”
28 “AG 1-3,” “AG 1-4,” “AG 1-5,” “AG 1-6,” “AG 1-7,” “AG 1-8,” “AG 1-9,” “AG
29 1-10,” “AG 1-11,” and “AG1-12,” respectively); and

1 iii. portions of the responses and/or attachments for the responses to Items 4, 7, 8, 9,
2 and 10 of KIUC's First Request for Information ("KIUC 1-4," "KIUC 1-7,"
3 "KIUC 1-8," "KIUC 1-9," and "KIUC 1-10," respectively).

4 3. One (1) copy of the paper attachments with the confidential information
5 underscored, highlighted with transparent ink, printed on yellow paper, or otherwise marked
6 "CONFIDENTIAL," is being filed with this petition in a separate sealed envelope marked
7 "CONFIDENTIAL." A copy of those pages, with the Confidential Information redacted, is
8 being filed with the original and each of the ten (10) copies of the responses to the information
9 requests filed with this petition. See 807 KAR 5:001 Sections 13(2)(a)(3), 13(2)(b).

10 4. One (1) copy of the electronic attachments containing Confidential Information is
11 contained in the confidential electronic files that accompany this petition. In some instances, the
12 Confidential Information is inextricably intertwined with non-confidential information in the
13 electronic spreadsheet attachments in response to certain requests. Big Rivers cannot redact only
14 the Confidential Information from the electronic spreadsheet attachments without making other
15 cells in the spreadsheets unusable or breaking the formulas contained therein, and so, the entirety
16 of those attachments must be made confidential. Likewise, there are other instances where the
17 pervasive nature of the confidential information would make public versions ineffectual and
18 unhelpful to the Commission. As such, the entirety of these confidential files have been redacted
19 from the original and each of the ten (10) copies of the responses to the information requests
20 filed with this petition. See 807 KAR 5:001 Sections 13(2)(a)(3), 13(2)(b). A motion for
21 deviation from the requirement that Big Rivers file paper copies of those electronic attachments
22 accompanies this petition.

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

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

9 7. If and to the extent the Confidential Information becomes generally available to
10 the public, whether through filings required by other agencies or otherwise, Big Rivers will
11 notify the Commission in writing. See 807 KAR 5:001 Section 13(10)(b).

12 8. As discussed below, the Confidential Information is being submitted
13 confidentially pursuant to 807 KAR 5:001 Section 13(9)(a) and/or is entitled to confidential
14 protection based upon KRS 61.878(1)(c)(1). 807 KAR 5:001 Section 13(2)(a)(1).

15 **I. Information Submitted Pursuant to 807 KAR 5:001 Section 13(9)(a)**

16 9. 807 KAR 5:001 Section 13(9)(a) provides:

17 A person who files any paper that contains material that has previously been
18 deemed confidential or for which a request or motion for confidential treatment is
19 pending shall submit one (1) copy of the paper with the adjudged or alleged
20 confidential material underscored or highlighted, and ten (10) copies of the paper
21 with those portions redacted; and

- 22
23 1. If the confidential status of the material has been determined
24 previously, a written notice identifying the person who originally
25 submitted the material, the date on which a determination on the
26 materials confidentiality was made and, if applicable, the case
27 number in which the determination was made; or
28

1 2. If a request for confidential treatment of the material is pending,
2 a written notice identifying the person who made the request and
3 the date on which the request was submitted.
4

5 10. The Confidential Information contained in the questions, responses, and/or
6 attachments to AG 1-2, AG 1-3, AG 1-4, AG 1-5, AG 1-6, AG 1-7, AG 1-8, AG 1-9, AG 1-10,
7 AG 1-11, and KIUC 1-9 consists of material for which Big Rivers sought confidential protection
8 in its petition for confidential treatment filed April 4, 2014, which petition is pending.

9 **II. Information Protected By KRS 61.878(1)(c)(1)**

10 **A. Big Rivers' Faces Actual Competition**

11 11. KRS 61.878(1)(c)(1) protects "records confidentially disclosed to an agency or
12 required by an agency to be disclosed to it, generally recognized as confidential or proprietary,
13 which if openly disclosed would permit an unfair commercial advantage to competitors of the
14 entity that disclosed the records."

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

21 13. Big Rivers also competes for reasonably-priced credit in the credit markets, and
22 its ability to compete is directly impacted by its financial results and business risks assumed.
23 Any event that adversely affects Big Rivers' margins will adversely affect its financial results
24 and potentially impact the price it pays for credit. As was described in the proceeding before this

1 Commission in the Big Rivers unwind transaction case, Big Rivers expects to be in the credit
2 markets on a regular basis in the future.¹

3 14. Accordingly, Big Rivers has competitors in both the power and capital markets,
4 and its Confidential Information should be protected to prevent the imposition of an unfair
5 competitive advantage.

6 **B. The Confidential Information is Generally Recognized as Confidential or**
7 **Proprietary**

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

11 16. The Confidential Information contained in the questions, responses, and/or
12 attachments to PSC 1-1, AG 1-2, AG 1-3, AG 1-4, AG 1-5, AG 1-6, AG 1-7, AG 1-8, AG 1-9,
13 AG 1-10, AG 1-11, and KIUC 1-9 reveals or explains confidential terms of three purchase power
14 agreements (“PPAs”) that Big Rivers has entered into with municipal electric systems located in
15 Nebraska. KRS 278.160(3) specifically recognizes that terms of a special contract are not
16 required to be publicly disclosed if such terms are entitled to protection under KRS
17 61.878(1)(c)(1). Big Rivers is advised by counsel for the counterparties the portions of the PPAs
18 for which Big Rivers seeks confidential treatment are not subject to disclosure under the
19 applicable open records laws of the State of Nebraska. Additionally, the Commission has
20 previously granted confidential treatment to similar information. *See, e.g., In the Matter of:*
21 *Application of Big Rivers Electric Corporation for a General Adjustment in Rates*, Order, P.S.C.

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 Case No. 2012-00535 (April 25, 2013) (granting confidential treatment to details of sensitive
2 commercial negotiations).

3 17. The Confidential Information contained in the responses and/or attachments to
4 PSC 1-1, PSC 1-3, KIUC 1-7, KIUC 1-8, KIUC 1-9, and KIUC 1-10 consists of confidential
5 correspondence, confidential proposals, and confidential analyses, projections of Big Rivers'
6 revenues and expenses, and projections of other entities' revenues and expenses provided
7 confidentially to Big Rivers, which are based on the confidential terms of the PPAs and the
8 confidential negotiations between the parties. The Commission has previously granted
9 confidential treatment to similar information. *See, e.g., In the Matter of: Application of Big*
10 *Rivers Electric Corporation for a General Adjustment in Rates*, Order, P.S.C. Case No. 2012-
11 00535 (April 25, 2013) (granting confidential treatment to models provided by Big Rivers'
12 consultants and to details of sensitive commercial negotiations).

13 18. The Confidential Information contained in the attachments to AG 1-12 and KIUC
14 1-4 consists of Big Rivers' production cost modeling, financial forecast models, and capital
15 budget, including data regarding planned outages, projected off-system sales volumes and
16 revenue, projected margins, and projected O&M ("O&M") expenses, and projected capital
17 expenditures.

18 19. Public disclosure of the Confidential Information would reveal detailed
19 information relating to Big Rivers' projected variable O&M costs for production factors such as
20 fuel; projected margins; and projected off-system sales price, volume, and revenue. This
21 information provides insight into Big Rivers' cost of producing power and would indicate the
22 prices at which Big Rivers is willing to buy or sell power and production factors. The
23 information is also indicative of the market conditions Big Rivers expects to encounter and its

1 ability to compete with competitors. The Commission has previously granted confidential
2 treatment to similar information. *See, e.g., In the Matter of: Application of Big Rivers Electric*
3 *Corporation for a General Adjustment in Rates*, Order, P.S.C. Case No. 2012-00535 (April 25,
4 2013); *In the Matter of: Application of Big Rivers Electric Corporation for a General Adjustment*
5 *in Rates*, Order, P.S.C. Case No. 2012-00535 (August 14, 2013); *In the Matter of: Application of*
6 *Big Rivers Electric Corporation for Approval of its 2012 Environmental Compliance Plan, for*
7 *Approval of its Amended Environmental Cost Recovery Surcharge Tariff, for Certificates of*
8 *Public Convenience and Necessity, and for Authority to Establish a Regulatory Account*, Letter,
9 P.S.C. Case No. 2012-00063 (August 15, 2012).

10 20. Public disclosure of information relating to Big Rivers' projected capital
11 expenditures and planned outages would reveal when Big Rivers will have excess power
12 available to sell into the market, or when Big Rivers' generation levels will drop due to
13 maintenance and construction and will have to resort to purchased power to meet its native load.
14 The Commission has previously granted confidential treatment to similar information. *See, e.g.,*
15 *In the Matter of: Application of Big Rivers Electric Corporation for a General Adjustment in*
16 *Rates*, Order, P.S.C. Case No. 2012-00535 (April 25, 2013); P.S.C. Administrative Case No.
17 387, Letter (July 20, 2010).

18 21. As such, the Confidential Information is generally recognized as confidential and
19 proprietary.

20 **C. Disclosure of the Confidential Information Would Permit an Unfair Commercial**
21 **Advantage to Big Rivers' Competitors**

22 22. Disclosure of the Confidential Information would permit an unfair commercial
23 advantage to Big Rivers' competitors. As discussed above, Big Rivers faces actual competition

1 in the wholesale power market and in the credit market. It is likely that Big Rivers would suffer
2 competitive injury if the Confidential Information was publicly disclosed.

3 23. In PSC Case No. 2003-00054, the Commission granted confidential protection for
4 bids submitted to Union Light Heat & Power (“ULH&P”). ULH&P’s argued, and the
5 Commission implicitly accepted, that the bidding contractors would not want their bid
6 information publicly disclosed, and that disclosure would reduce the contractor pool available to
7 ULH&P, which would drive up ULH&P’s costs, hurting its ability to compete with other gas
8 suppliers. Order dated August 4, 2003, in *In the Matter of: Application of the Union Light, Heat
9 and Power Company for Confidential Treatment*, PSC Case No. 2003-00054. Similarly, in *Hoy
10 v. Kentucky Indus. Revitalization Authority*, the Kentucky Supreme Court found that without
11 protection for confidential information provided to a public agency, “companies would be
12 reluctant to apply for investment tax credits for fear the confidentiality of financial information
13 would be compromised. *Hoy v. Kentucky Indus. Revitalization Authority*, 907 S.W.2d 766, 769
14 (Ky. 1995).

15 24. In Big Rivers’ case, Big Rivers is currently in negotiations with potential
16 counterparties for other PPAs and expects to engage in negotiations with other counterparties in
17 the future. If confidential treatment of the confidential terms, discussions, analyses, and
18 negotiations related to the PPAs is denied, potential counterparties would know that such
19 information related to them could be publicly disclosed, which could reveal information to their
20 competitors about their competitiveness. Because many companies would be reluctant to have
21 such information disclosed, public disclosure of the Confidential Information would likely
22 reduce the pool of counterparties willing to negotiate with Big Rivers, reducing Big Rivers’

1 ability to sell power and impairing its ability to compete in the wholesale power and credit
2 markets.

3 25. Additionally, in PSC Case No. 2003-00054, the Commission granted confidential
4 protection to bids submitted to ULH&P. In addition to the other arguments discussed above,
5 ULH&P argued, and the Commission implicitly accepted, that if the bids it received were
6 publicly disclosed, contractors on future work could use the bids as a benchmark, which would
7 likely lead to the submission of higher bids. Order dated August 4, 2003, in *In the Matter of:*
8 *Application of the Union Light, Heat and Power Company for Confidential Treatment*, PSC Case
9 No. 2003-00054. The Commission also implicitly accepted ULH&P's further argument that the
10 higher bids would lessen ULH&P's ability to compete with other gas suppliers. *Id.* Similarly,
11 public disclosure of the confidential terms, discussions, analyses, and negotiations related the
12 PPAs would allow potential counterparties to future PPAs with Big Rivers to use such
13 information as a benchmark for negotiations, leading to less favorable prices and terms for power
14 sales for Big Rivers and placing Big Rivers at an unfair competitive disadvantage in the
15 wholesale power and credit markets. Public disclosure of the Confidential Information will also
16 impair Big Rivers' ability to enter into future PPAs with other wholesale suppliers, who are
17 competitors to Big Rivers, and who will have detailed knowledge of the terms upon which Big
18 Rivers has previously entered into wholesale power sales agreements. These competitors would
19 then be able to tailor their bids or proposals, which will give them an unfair competitive
20 advantage in competing with Big Rivers to be the wholesale supplier in the PPAs. Thus, Big
21 Rivers' competitiveness will be adversely affected if other suppliers are given such an unfair
22 competitive advantage, or if limitations are imposed upon Big Rivers' ability to improve upon
23 terms, or tailor contract terms to make Big Rivers more competitive under circumstances that

1 vary from the circumstances under which Big Rivers was willing to agree to the terms of the
2 PPAs.

3 26. If the Confidential Information relating to material such as Big Rivers'
4 projections of fuel costs and power prices is publicly disclosed, market participants would have
5 insight into the prices at which Big Rivers is willing to buy and sell fuel and power and could
6 manipulate the bidding process, which would lead to higher costs or lower revenues to Big
7 Rivers and which would place it at an unfair competitive disadvantage in the wholesale power
8 market and credit markets.

9 27. Potential market power purchasers could use the information related to Big
10 Rivers' projected off-system sales and revenues, generation levels, generator availability,
11 planned outages, and future planning to know when Big Rivers will have excess power to sell
12 into the wholesale market and could use that information to manipulate their bids, leading to
13 lower revenues to Big Rivers and placing it at an unfair competitive disadvantage in the credit
14 markets.

15 28. Additionally, public disclosure of the prices of fuel and other variable cost
16 information, and information about Big Rivers' wholesale power needs would give the power
17 producers and marketers with which Big Rivers competes in the wholesale power market insight
18 into Big Rivers' cost of producing power and need for power and energy during the periods
19 covered by the information. Knowledge of this information would give those power producers
20 and marketers an unfair competitive advantage because they could use that information to
21 potentially underbid Big Rivers in wholesale transactions. It would also give potential suppliers
22 to Big Rivers a competitive advantage because they will be able to manipulate the price of power

1 bid to Big Rivers in order to maximize their revenues, thereby driving up Big Rivers' costs and
2 impairing Big Rivers' ability to compete in the wholesale power and credit markets.

3 29. Accordingly, the public disclosure of the information that Big Rivers seeks to
4 protect would provide Big Rivers' competitors with an unfair commercial advantage.

5 **III. Time Period**

6 30. Big Rivers requests that the Confidential Information contained in the attachments
7 to AG 1-12 and KIUC 1-4 remain confidential for a period of five (5) years from the date of this
8 petition, which should allow sufficient time for the projected data to become historical and
9 sufficiently outdated that it could not be used to determine similar confidential information at
10 that time or to competitively disadvantage Big Rivers.

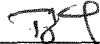
11 31. Big Rivers requests that the remainder of the Confidential Information remain
12 confidential indefinitely because so long as Big Rivers is in the wholesale power market, the
13 public disclosure of the confidential terms, discussions, analyses, and negotiations related to the
14 PPAs could be used to Big Rivers' competitive disadvantage for the reasons stated above. 807
15 KAR 5:001 Section 13(2)(a)(2).

16 **IV. Conclusion**

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

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


1 On this the 15th day of July, 2014.

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18
19 **Certificate of Service**

20
21 I certify that a true and accurate copy of the foregoing was or will be served by regular
22 mail, by Federal Express, or by hand delivery upon the persons listed on the accompanying
23 service list, on or before the date the foregoing is filed with the Kentucky Public Service
24 Commission.

25
26 On this the 15th day of July, 2014,

27
28
29 
30 _____
Counsel for Big Rivers Electric Corporation