

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF BIG RIVERS	)	
ELECTRIC CORPORATION FOR APPROVAL OF	)	CASE NO.
AMENDMENT TO POWER PURCHASE	)	2022-00296
AGREEMENT	)	

ORDER

On February 10, 2023, Big Rivers Electrical Corporation (BREC) filed a motion pursuant to 807 KAR 5:001, Section 13, and KRS 61.878, requesting that the Commission grant confidential protection for designated material contained in BREC’s response to Commission Staff’s First Request for Information, Items 1, 2, 6, 9, and 10 (respectively, PSC 1-1, PSC 1-2, PSC 1-6, PSC 1-9, and PSC 1-10) and to the Attorney General’s First Request for Information, Items 1, 7, 8, 9, 10, 17, and 18 (respectively, AG 1-1, AG 1-7, AG 1-8, AG 1-9, AG 1-10, AG 1-17, and AG 1-18). BREC requested confidential treatment for five years for the designated material contained in AG 1-17, and for an indefinite period for PSC 1-1, PSC 1-2, PSC 1-6, PSC 1-9, PSC 1-10, AG 1-1, AG 1-7, AG 1-8, AG 1-9, AG 1-10, and AG 1-18.

LEGAL STANDARD

The Commission is a public agency subject to Kentucky Open Records Act,<sup>1</sup> which requires that all public records “be open for inspection by any person, except as otherwise

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<sup>1</sup> KRS 61.870 through 61.884.

provided by KRS 61.870 to KRS 61.884.”<sup>2</sup> The exceptions to the free and open examination of public records should be strictly construed.<sup>3</sup> The party requesting that the materials be granted confidential protection has the burden of establishing that one of the exemptions is applicable.<sup>4</sup>

KRS 61.878(1)(a) provides an exception for “[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy[.]”

KRS 61.878(1)(c)(1) provides an exception to the requirement for public disclosure of records that are “generally recognized as confidential and proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records.”

Under KRS 278.160(3), provisions of a special contract that contain rates and conditions of service not filed in a utility’s general schedule may be exempt from public disclosure if such provision would otherwise be exempt from public disclosure under KRS 61.878(1)(c)(1).

Commission regulation 807 KAR 5:001, Section 13(2)(a)(3), requires a party to file documents highlighting or using other reasonable means to identify those portions of the designated material for which confidential treatment. If a party requests confidential treatment for an entire document, 807 KAR 5:001, Section 13(2)(a)(3)(b), provides that

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<sup>2</sup> KRS 61.872(1).

<sup>3</sup> KRS 61.878.

<sup>4</sup> 807 KAR 5:001E, Section 13(2)(c).

written notification that the entire document is confidential may be filed instead of the required highlighting or other reasonable means of identifying the designated material.

### BREC'S MOTION

The designated materials for which confidential treatment is requested pertain to a power purchase agreement (PPA) between BREC and Unbridled Solar, LLC (Unbridled Solar), formerly known as Henderson Solar, LLC.<sup>5</sup> The designated material is more specifically described as follows:

- BREC's response to PSC 1-1, PSC 1-6, PSC 1-10, AG 1-10, and AG 1-18 contains negotiated special contract terms between BREC, Meade County Rural Electric Cooperative Corporation (Meade County RECC), and Nucor Corporation (Nucor) regarding BREC's obligation to provide electric service to Nucor. BREC stated that the Commission previously granted confidential treatment to the designated material in Case Nos. 2019-00365 and 2020-00183.<sup>6</sup> BREC asserted that confidential treatment should be granted to the designated material under KRS 61.878(1)(c)(1) for reasons discussed below.

- BREC's response to PSC 1-2, AG 1-7, and AG 1-8 contains a financial analysis of and contract terms regarding the Unbridled PPA. BREC stated that the Commission previously granted confidential treatment to the designated material in Case

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<sup>5</sup> The power purchase agreement between BREC and Unbridled Solar is known as the Unbridled PPA between the parties and in the documents.

<sup>6</sup> Case No. 2020-00183, *Electronic Application of Big Rivers Electric Corporation for Approval of Solar Power Contracts*, (Ky. PSC Mar. 25, 2021) (March 25, 2021 Order); and Case No. 2019-00365 *Electronic Application of Big Rivers Electric Corporation of Big Rivers Electric Corporation and Meade County Rural Electric Cooperative Rivers Electric Corporation of Big Rivers Electric Corporation and Meade County Rural Electric Cooperative Corporation for (1) Approval of Contracts for Electric Service with Nucor Corporation; and (2) Approval of Tariff*, (Ky. PSC Mar. 12, 2020) (March 12, 2020 Order), and (KY PSC Sept. 30, 2020) (September 30, 2020 Order).

No. 2020-00183.<sup>7</sup> BREC asserted that confidential treatment should be granted to the designated material under KRS 61.878(1)(c)(1) for reasons discussed below.

- BREC's response to PSC 1-9 contains negotiated special contract terms between BREC, Meade County RECC, and Nucor regarding BREC's obligation to provide electric service to Nucor, and a financial analysis of and contract terms regarding the Unbridled PPA. BREC stated that the Commission previously granted confidential treatment to the designated material in Case Nos. 2019-00365 and 2020-00183.<sup>8</sup> BREC asserted that confidential treatment should be granted to the designated material under KRS 61.878(1)(c)(1) for the reasons discussed below.

- BREC's response to AG 1-1 contains email communication between BREC and National Grid Renewables (NGR) pertaining to contract term negotiations for an amendment to the Unbridled PPA. BREC asserted that confidential treatment should be granted to the designated material under KRS 61.878(1)(c)(1) for the reasons discussed below.

- BREC's response to AG 1-9 contains responses to BREC's request for proposal (RFP) for energy from solar facilities. BREC asserted that confidential treatment should be granted to the designated material under KRS 61.878(1)(c)(1) for the reasons discussed below.

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<sup>7</sup> Case No. 2020-00183, *Electronic Application of Big Rivers Electric Corporation for Approval of Solar Power Contracts* (Ky. PSC Mar. 25, 2021), Order.

<sup>8</sup> Case No. 2020-00183, March 25, 2021 Order; and Case No. 2019-00365, March 12, 2020 Order and September 30, 2020 Order.

- BREC's response to AG 1-17 contains projections of BREC's future energy and capacity positions. BREC asserted that confidential treatment should be granted to the designated material under KRS 61.878(1)(c)(1) for the reasons discussed below.

In its discussion of the applicability of KRS 61.878(1)(a) to the designated material, BREC provided only a generalized statement regarding the type of information that BREC asserted should be exempt from public disclosure under KRS 61.878(1)(a).

In contrast, BREC provided a robust discussion that the entirety of the designated material for which confidential treatment was requested should be exempt from public disclosure under KRS 61.878(1)(c)(1). BREC argued that confidential treatment should be granted for the designated material subject to KRS 61.878(1)(c)(1) because public disclosure would place BREC at a competitive disadvantage when negotiating future contracts. BREC further argued that public disclosure would provide BREC's competitors insight into the company's internal business strategies and therefore, create an unfair competitive advantage for BREC's competitors. Finally, BREC argued that portions of the designated material were previously granted confidential treatment in Case Nos. 2019-00365 and 2020-00183.

#### DISCUSSION AND FINDINGS

Having considered the motion and the material at issue, the Commission finds that BREC's motion should be granted as it relates to PSC 1-1, PSC 1-2, PSC 1-6, PSC 1-9, PSC 1-10, AG 1-7, AG 1-8, AG 1-10, and AG 1-18 because the designated materials meet the criteria for confidential treatment and should be exempted from public disclosure pursuant to KRS 61.878(1)(c)(1) and 807 KAR 5:001, Section 13. This is because public disclosure of the information could disadvantage BREC in the competitive marketplace.

This finding is also consistent with both a prior Order in this case<sup>9</sup> as well as prior Orders<sup>10</sup> related to these contracts in Case Nos. 2019-00365 and 2020-00183.

The Commission further finds BREC's argument that the designated material is exempt from public disclosure under KRS 61.878(1)(a) was based on a description of the information as proprietary and confidential, which the Commission notes is applicable to a finding under KRS 61.878(1)(c)(1) not KRS 61.878(1)(a). Additionally, BREC did not identify any information of a personal nature that if publicly disclosed, would result in an unwarranted invasion of personal privacy. Because confidential treatment is granted under KRS 61.878(1)(c)(1), the finding that confidential treatment should not be granted under KRS 61.878(1)(a) does not change the Commission's determination that BREC's motion for confidential treatment for the designated materials should be granted.

In AG 1-1, BREC did not highlight or identify any specific portion of the information that it was requesting to be held confidential. The response includes emails, versions of the contract, both the executed version as well as redlined versions, and a PowerPoint presentation. Commission regulation 807 KAR 5:001, Section 13(2)(a)(3), requires a party to file documents highlighting or using other reasonable means to identify those portions of the designated material for which confidential treatment. If a party requests confidential treatment for an entire document, 807 KAR 5:001, Section 13(2)(a)(3)(b), provides that written notification that the entire document is confidential may be filed instead of the required highlighting or other reasonable means of identifying the designated material. The Commission finds that there may be terms warranting

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<sup>9</sup> Order (Ky PSC Nov. 7, 2022).

<sup>10</sup> Case No. 2020-00183, March 25, 2021 Order; Case No. 2019-00365, March 12, 2020 Order and September 30, 2020 Order.

confidential treatment; however, the entirety of the attachments does not, so confidential protection should not be granted for AG 1-1 because BREC did not meet the burden of proof for the entirety of the document. BREC made redactions in the contracts filed in this case as well as in prior cases and did not request the entirety of the contract or amendment be given confidential treatment. The Commission notes BREC may refile a petition for confidential protection for AG 1-1 with the appropriate request and redactions.

IT IS THEREFORE ORDERED that:

1. BREC's February 10, 2023 motion for confidential treatment is granted in part and denied in part.

2. BREC's February 10, 2023 motion for confidential treatment for PSC 1-1, PSC 1-2, PSC 1-6, PSC 1-9, PSC 1-10, AG 1-7, AG 1-8, AG 1-9, AG 1-10, AG 1-17 and AG 1-18 is granted.

3. BREC's February 10, 2023 motion for confidential treatment for AG 1-1 is denied.

4. The designated material in BREC's response to AG 1-17 that was granted confidential treatment by this Order shall not be placed in the public record or made available for public inspection for five years or until further Order of this Commission.

5. The designated material in BREC's response to PSC 1-1, PSC 1-2, PSC 1-6, PSC 1-9, PSC 1-10, AG 1-7, AG 1-8, AG 1-9, AG 1-10, and AG 1-18 that was granted confidential treatment by this Order shall not be placed in the public record or made available for public inspection for an indefinite period or until further Order of this Commission.

6. Use of the designated material granted confidential treatment by this Order in any Commission proceeding shall comply with 807 KAR 5:001, Section 13(9).

7. BREC shall inform the Commission if the designated material granted confidential treatment becomes publicly available or no longer qualifies for confidential treatment.

8. If a nonparty to this proceeding requests to inspect the material granted confidential treatment by this Order and the period during which the material has been granted confidential treatment has not expired, shall have 30 days from receipt of written notice of the request to demonstrate that the material still falls within the exclusions from disclosure requirements established in KRS 61.878. If BREC is unable to make such demonstration, the requested material shall be made available for inspection. Otherwise, the Commission shall deny the request for inspection.

9. The Commission shall not make the requested material for which confidential treatment was granted available for inspection for 30 days from the date of service of an Order finding that the material no longer qualifies for confidential treatment in order to allow BREC to seek a remedy afforded by law.

10. The designated material denied confidential treatment by this Order is not exempt from public disclosure and shall be placed in the public record and made available for public inspection.

11. If BREC objects to the Commission's determination that the requested material not be granted confidential treatment, it must seek either rehearing pursuant to KRS 278.400 or judicial review of this Order pursuant to KRS 278.410. Failure to exercise



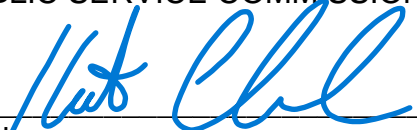
either of these statutory rights will be deemed as agreement with the Commission's determination of which materials shall be granted confidential treatment.


12. Within 30 days of the date of service of this Order, BREC shall file a revised version of the designated material for which confidential treatment was denied, reflecting as unredacted the information that has been denied confidential treatment.

13. The designated material for which BREC's request for confidential treatment has been denied shall neither be placed in the public record nor made available for inspection for 30 days from the date of service of this Order to allow BREC to seek a remedy afforded by law.

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PUBLIC SERVICE COMMISSION

  
Chairman

  
Vice Chairman

  
Commissioner

ENTERED  
AUG 03 2023 bsb  
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