

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AN ELECTRONIC EXAMINATION OF THE)	
APPLICATION OF THE FUEL ADJUSTMENT)	CASE NO.
CLAUSE OF BIG RIVERS ELECTRIC)	2023-00013
CORPORATION FROM NOVEMBER 1, 2020)	
THROUGH OCTOBER 31, 2022)	

ORDER

This matter arises upon three motions for confidential treatment filed by Big Rivers Electric Corporation (BREC). On September 22, 2023, BREC filed a motion, pursuant to 807 KAR 5:001 Section 13; KRS 61.878; and KRS 278.160(3), requesting that the Commission grant indefinite confidential treatment for BREC's responses to Commission Staff's First Request for Information (Staff's First Request), Items 12 (including Attachments A and B) and 13 (Attachment); and confidential treatment for five years for its responses to Staff's First Request, Items 32, 33, 34, and redactions from the direct testimony of Terry Wright, Jr. (Wright Direct Testimony).

On October 20, 2023, BREC filed a motion, pursuant to 807 KAR 5:001 Section 13; KRS 61.878; and KRS 278.160(3), requesting that the Commission grant indefinite confidential treatment for BREC's responses to Commission Staff's Second Request for Information (Staff's Second Request), Items 6 and 27, and confidential treatment for five years for its responses to Staff's Second Request, Items 1, 3, 4, 5, and 26.

On November 16, 2023, BREC filed a motion, pursuant to 807 KAR 5:001, Section 13, and KRS 61.878, requesting that the Commission grant confidential

treatment for ten years for redactions from BREC’s response to Staff’s Third Request for Information (Staff’s Third Request), Item 1.

LEGAL STANDARD

The Commission is a public agency subject to Kentucky's Open Records Act, which requires that all public records “be open for inspection by any person, except as otherwise provided by KRS 61.870 to 61.884.”¹ Exceptions to the free and open examination of public records contained in KRS 61.878 should be strictly construed.² The party requesting that materials be treated confidentially has the burden of establishing that one of the exceptions is applicable.³

In support of its motions, BREC argued for the application of KRS 61.878(1)(a), which exempts from disclosure “[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy”; and KRS 61.878(1)(c)(1), which provides an exception to the requirement for public disclosure for records that are “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.”

SEPTEMBER 22, 2023 MOTION

BREC’s responses to Staff’s First Request, Items 12 and 13, include attachments consisting of negotiated terms of special contracts and off-system sales. These contracts relate to BREC’s power sales with in-state and out-of-state municipalities, and to short term contracts with non-members. BREC argued this information was

¹ KRS 61.872(1).

² See KRS 61.871.

³ 807 KAR 5:001, Section 13(2)(c).

proprietary and disclosure of this information would give potential competitors and fuel vendors in the energy markets inside information about BREC's fuel procurement strategy and would constitute a clearly unwarranted invasion of customers' privacy.

BREC's response to Staff's First Request, Item 32, includes an attachment showing projected fuel requirements for years 2023 and 2024. BREC argued that disclosure of this information could be used by potential vendors to manipulate prices.

BREC's response to Staff's First Request, Item 33, includes an attachment showing sales projections for years 2023 and 2024. Projections related to market conditions are also included in the redactions from the Wright Direct Testimony. BREC argued that disclosure of this information would give competitors, marketers, and vendors a competitive advantage in any existing or prospective commercial relationship involving BREC.

BREC's response to Staff's First Request, Item 34, includes an attachment showing planned maintenance outages for BREC's generating units for years 2023 and 2024. BREC argued that disclosure of this information, including the number, duration, and timing of outages, would give prospective contractors and vendors a distinct advantage in negotiations with those contractors and vendors.

Having considered the motion and the material at issue, the Commission finds that BREC's September 22, 2023 motion for confidential treatment should be granted in part and denied in part regarding time period. Special contracts and off-system sales information and related usage data should remain confidential because this information would disadvantage BREC with its competitors, who could use the information in the energy market with knowledge of BREC's energy purchase history and need based on

usage. In addition, public disclosure of this information could harm BREC in negotiating future special contracts.⁴ However, in accordance with Commission precedent, confidential treatment for special contract terms and non-member sales should be limited to ten years, at which time this data will be obsolete because each purchaser's demand will have changed sufficiently.⁵

Fuel consumption forecasts should remain confidential because of potential manipulation of future coal bids based on this data.⁶ Revenue forecasts should be granted confidential treatment because this information would allow competitors to determine BREC's pricing and affect bidding in energy markets.⁷ Timing of planned outages and generation unit availability information should be confidential because disclosure of this information would allow other energy market participants to know when BREC's need for purchased power would spike.⁸ The designated material therefore meets the criteria for confidential treatment and should be exempted from public disclosure for five years pursuant to 807 KAR 5:001, Section 13, and KRS 61.878(1)(c)(1).

⁴ See Case No. 2016-00117, *Joint Application of Kenergy Corp. and Big Rivers Electric Corporation for Approval of Contracts* (Ky. PSC Dec. 22, 2021), Order at 2.

⁵ See Case No. 2016-00117, Dec. 22, 2021 Order at 2.

⁶ See Case No. 2018-00019, *Electronic Examination of the Application of the Fuel Adjustment Clause of East Kentucky Power Cooperative, Inc. from May 1, 2017 Through October 31, 2017* (Ky. PSC May 29, 2018), Order at 2.

⁷ See Case No. 2019-00096, *In the Matter of the 2019 Integrated Resource Plan of East Kentucky Power Cooperative, Inc.* (Ky. PSC Nov. 8, 2019), Order.

⁸ See Administrative Case No. 20000387, *Electronic Review of the Adequacy of Kentucky's Generation Capacity and Transmission System* (Ky. PSC May 28, 2013), Order at 2.

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BREC's response to Staff's Second Request, Item 6, includes additional information concerning internal projections related to future energy purchases, market prices, and market conditions. BREC argued that disclosure of this information would give competitors, marketers, and vendors a competitive advantage in any existing or prospective commercial relationship involving BREC.

BREC's response to Staff's Second Request, Item 27, includes negotiated terms of special contracts. BREC argued that disclosure of this information would give potential competitors and fuel vendors in the energy markets inside information about BREC's fuel procurement strategy and would constitute a clearly unwarranted invasion of customers' privacy.

BREC's response to Staff's Second Request, Items 1, 3, and 4 includes projections related to pricing and capacity reductions from the Wright Direct Testimony. BREC argued that disclosure of this information would permit an unfair commercial advantage to BREC's competitors.

BREC's response to Staff's Second Request, Item 5, includes a breakdown of BREC's generation versus purchases on a seasonal basis. BREC argued that disclosure of this information would negatively impact its ability to successfully compete in the wholesale power markets.

BREC's response to Staff's Second Request, Item 26 includes detailed data in the requested spreadsheet format with confidential information that BREC claims is inextricably intertwined with non-confidential information. BREC argued that it cannot redact only the confidential information without making the other cells in the

spreadsheet unusable, and disclosure of this information would provide an unfair competitive advantage to BREC's competitors.

Having considered the motion and the material at issue, the Commission finds that BREC's October 20, 2023 motion for confidential treatment should be granted in part and denied in part regarding time period. Redactions from responses to Staff's Second Request, Item 6, should be granted confidential treatment because competitors could use this information to their advantage in the energy market by knowing BREC's pricing model and factors affecting what BREC is willing to pay for power. However, confidential treatment should only be granted for five years, which will allow adequate time for the information to become sufficiently outdated to no longer pose a competitive risk to BREC.⁹

The Commission finds that BREC's motion for confidential treatment for responses to Item 27 be granted. Special contracts and off-system sales information and related usage data should remain confidential because disclosure of this information could disadvantage BREC with its competitors, who could use the information in the energy market with knowledge of BREC's energy purchase history and need based on usage. In addition, public disclosure of this information could harm BREC in negotiating future special contracts.¹⁰ In accordance with Commission precedent, confidential treatment for special contract terms and non-member sales

⁹ See Administrative Case No. 387, *Electronic Review of the Adequacy of Kentucky's Generation Capacity and Transmission System* (Ky. PSC May 9, 2022), Order at 3.

¹⁰ See Case No. 2016-00117, Dec. 22, 2021 Order at 2.

should be limited to ten years, at which time this data will be obsolete because each purchaser's demand will have changed sufficiently.¹¹

The Commission also finds that BREC's motion for confidential treatment for responses to Items 1, 3, 4, 5, and 26 be granted. Projections related to pricing and capacity from redactions of the Wright Direct Testimony would permit an unfair commercial advantage to BREC's competitors. Data comparing generation versus purchases on a seasonal basis should be granted confidential treatment because competitors could use this information to their advantage in the energy market. Confidential treatment would prevent the imposition of an unfair competitive advantage to those competitors. The designated material therefore meets the criteria for confidential treatment and should be exempted from public disclosure for five years pursuant to 807 KAR 5:001, Section 13, and KRS 61.878(1)(c)(1).

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BREC's response to Staff's Third Request, Item 1, is an update to provide additional information to Staff's Second Request, which includes Seasonal Accredited Capacity volumes, and attachments to the Midcontinent Independent System Operator, Inc. (MISO) spreadsheet previously provided in response to this request.

Having considered the motion and the material at issue, the Commission finds that BREC's November 16, 2023 motion for confidential treatment should be granted. Future plans concerning pricing and energy bidding and purchase information should be kept confidential because competitors could use this information to their advantage in the MISO energy market by knowing BREC's pricing model and factors affecting what

¹¹ See Case No. 2016-00117, Dec. 22, 2021 Order at 2.

BREC is willing to pay for power.¹² The designated material therefore meets the criteria for confidential treatment and should be exempted from public disclosure for ten years pursuant to 807 KAR 5:001, Section 13, and KRS 61.878(1)(c)(1).

IT IS THEREFORE ORDERED that:

1. BREC's September 22, 2023 motion for confidential treatment is granted in part and denied in part regarding time period.

2. BREC's responses to Staff's First Request, Items 12 and 13, granted confidential treatment by this Order shall not be placed in the public record or made available for public inspection for ten years or until further order of this Commission.

3. BREC's responses to Staff's First Request, Items 32, 33, 34, and redactions from the Wright Direct Testimony, 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.

4. BREC's October 20, 2023 motion for confidential treatment is granted in part and denied in part regarding time period.

5. BREC's responses to Staff's Second Request, Items 1, 3, 4, 5, 6, and 26, 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.

¹² See Case No. 2023-00264, *An Electronic Examination of the Application of the Fuel Adjustment Clause of East Kentucky Power Cooperative, Inc. from November 1, 2021 Through April 30, 2022* (Ky. PSC Feb. 14, 2023), Order at 2.

6. BREC's responses to Staff's Second Request Item 27, granted confidential treatment by this Order, shall not be placed in the public record or made available for public inspection for ten years or until further order of this Commission.

7. BREC's November 16, 2023 motion for confidential treatment is granted.

8. BREC's responses to Staff's Third Request, Item 1, granted confidential treatment by this Order shall not be placed in the public record or made available for public inspection for ten years or until further order of this Commission.

9. 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).

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

11. 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, BREC 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.

12. The Commission shall not make the requested material 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.


PUBLIC SERVICE COMMISSION



Chairman



Vice Chairman



Commissioner



ATTEST:



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