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1 3 4	COMMONWEALTH OF KENTUCKY BEFORE THE PUBLIC SERVICE COMMISSION In the Matter of: COMMONWEALTH OF KENTUCKY BEFORE THE PUBLIC SERVICE COMMISSION
5 6 7 8 9	AN EXAMINATION OF THE APPLICATION) OF THE FUEL ADJUSTMENT CLAUSE OF) BIG RIVERS ELECTRIC CORPORATION) CASE NO. 2010-00495 FROM JULY 17, 2009 THROUGH) OCTOBER 31, 2010)
11 12 13 14	PETITION OF BIG RIVERS ELECTRIC CORPORATION FOR CONFIDENTIAL PROTECTION
15	1. Big Rivers Electric Corporation (" <u>Big Rivers</u> ") hereby petitions the Kentucky
16	Public Service Commission ("Commission"), pursuant to 807 KAR 5:001 Section 7 and KRS
17	61.878(1)(c), to grant confidential protection to two exhibits contained in Big Rivers' responses
18	to the information requested in Appendix B to the Commission's January 26, 2011, Order in this
19	matter. The information Big Rivers seeks to protect as confidential is (i) an exhibit to Big
<u>ا</u> ل	Rivers' response to Item 9 of the information requests containing Big Rivers' planned
21	maintenance schedule for the years 2011 and 2012 (the "Planned Maintenance Schedule") and
22	(ii) an exhibit to Big Rivers' response to Item 24b of the information requests containing a fuel
23	contract solicitation bid tabulation sheet (the "Bid Tabulation Sheet").
24	2. Big Rivers seeks confidential treatment of the entirety of both exhibits (the
25	"Confidential Information"). One (1) sealed copy of the Confidential Information printed on
26	yellow paper (since the entirety of each exhibit is confidential) is attached to this Petition. A
27	page indicating that the entirety of each exhibit has been redacted is attached to each of the ten
28	(10) copies of Big Rivers' responses to Items 9 and 24b filed with this Petition. 807 KAR 5:001

Sections 7(2)(a)(2), 7(2)(b).

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3. There are currently no other parties to this proceeding on which copies of this Petition and the redacted exhibits can be served. Big Rivers will provide a copy of these documents to any person who is granted full intervention by the Commission in this proceeding and who signs a confidentiality agreement. 807 KAR 5:001 Section 7(2)(c).

- 4. 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 its confidential status removed. 807 KAR 5:001 Section 7(9)(a).
 - 5. 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).

I. Big Rivers' Faces Actual Competition

- 6. Big Rivers competes in the wholesale power market to sell energy excess to its members' needs. Big Rivers' ability to successfully compete in the wholesale power market is dependent upon a combination of its ability to get the maximum price for the power sold, and keeping the cost of producing that power as low as possible. Fundamentally, if Big Rivers' cost of producing a kilowatt hour increases, its ability to sell that kilowatt hour in competition with other utilities is adversely affected. As is well-documented in multiple proceedings before this Commission, Big Rivers' margins are derived almost exclusively from its off-system sales.
- 22 7. Big Rivers also competes for reasonably-priced credit in the credit markets, and 23 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
- 2 price it pays for credit. As was described in the proceeding before this Commission in the Big
- 3 Rivers unwind transaction case, Big Rivers expects to be in the credit markets on a regular basis
- 4 in the future.¹

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II. The Confidential Information is Generally Recognized as Confidential or

6 Proprietary

- 8. The two exhibits that make up the Confidential Information (the Planned Maintenance Schedule and the Bid Tabulation Sheet) contain the type of information that is generally recognized as confidential or proprietary under Kentucky law.
- 10 9. The Planned Maintenance Schedule contains Big Rivers' planned maintenance 11 schedule for 2011 and 2012. Disclosure of that information will allow Big Rivers' suppliers and 12 competitors to know Big Rivers' future maintenance plans and will give them insight into Big Rivers' wholesale power needs. Information about a company's detailed inner workings is 15 14 generally recognized as confidential or proprietary. See, e.g., Hoy v. Kentucky Indus. 15 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 16 17 recognized as confidential or proprietary"). The Commission previously granted confidential 18 treatment to this type of information. See, e.g., letter from the Commission dated July 20, 2010, 19 in Administrative Case No. 387 (granting confidential treatment to a list of future scheduled 20 outages that Big Rivers filed as part of the supplement to its annual report).

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.

10. The Bid Tabulation Sheet contains confidential bids supplied by fuel suppliers and Big Rivers' ranking of those bids, and it gives insight into the internal, confidential bid selection methodology that Big Rivers uses. The Commission has often found that similar information relating to competitive bidding is generally recognized as confidential and proprietary. See, e.g., Order dated August 4, 2003, in In the Matter of: Application of the Union Light, Heat and Power Company for Confidential Treatment, PSC Case No. 2003-00054 (finding that bids submitted to a utility were confidential). In fact, the Commission has granted confidential protection to the same type of information that is presented in the bid tabulation sheet when provided by other utilities in cases involving a review of their fuel adjustment clauses. See, e.g., letter from the Commission dated October 23, 2009, granting confidential protection to East Kentucky Power Cooperative, Inc.'s bid tabulation sheet and related information in Case No. 2009-00286; letter from the Commission dated December 11, 2009, granting confidential protection to Kentucky Utilities Company's coal bid analysis procedure in Case No. 2009-00287. The Commission has also granted confidential protection to the bid tabulation sheets that Big Rivers filed in previous reviews of its fuel adjustment clause. See letter from the Commission dated May 10, 2010, in Case No. 2009-00510; letter from the Commission dated September 22, 2010, in Case No. 2010-00269.

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11. 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. As such, the Confidential Information is generally recognized as confidential and proprietary.

III. Disclosure of the Confidential Information Would Permit an Unfair Commercial

2 Advantage to Big Rivers' Competitors

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12. 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 the Confidential Information was publicly disclosed. In PSC Case No. 2003-00054, the Commission granted confidential protection for bids submitted to Union Light Heat & Power ("ULH&P"). ULH&P's argued, and the Commission implicitly accepted, that the bidding contractors would not want their bid information publicly disclosed, and that disclosure would reduce the contractor pool available to ULH&P, which would drive up ULH&P's costs, hurting its ability to compete with other gas suppliers. Order dated August 4, 2003, in In the Matter of: Application of the Union Light, Heat and Power Company for Confidential Treatment, PSC Case No. 2003-00054. In PSC Case No. 2005-00433, the Commission recognized that public disclosure of confidential information contained in a company's financial statements could shrink the pool of investors available to that company, resulting in competitive harm to that company. Order dated April 3, 2006, in In the Matter of: The Joint Application of Nuon Global Solutions USA, BV, Nuon Global Solutions USA, Inc., AIG Highstar Capital II, LP, Hydro Star, LLC, Utilities, Inc. and Water Service Corporation of Kentucky for Approval of an Indirect Change in Control of a Certain Kentucky Utility Pursuant to the Provisions of KRS 278.020(5) and (6) and 807 KAR 5:001, Section 8, PSC Case No. 2005-00433. And in Hoy v. Kentucky Indus. Revitalization Authority, the Kentucky Supreme Court found that without protection for confidential information provided to a public agency, "companies would be reluctant to apply for investment tax credits for fear the confidentiality of financial information

- would be compromised. *Hoy v. Kentucky Indus. Revitalization Authority*, 907 S.W.2d 766, 769 (Ky. 1995).
- 13. In Big Rivers' case, with respect to the Bid Tabulation Sheet, if confidential treatment is denied, potential bidders would know that their bids would be publicly disclosed, which could reveal information to their competitors about their competitiveness. Because many companies would be reluctant to have such information disclosed, public disclosure of Big Rivers' bid tabulation sheet would likely suppress the competitive bidding process and reduce the pool of bidders willing to bid to supply Big Rivers' fuel needs, driving up Big Rivers' fuel costs (which could then drive up the cost of credit to Big Rivers) and impairing its ability to compete in the wholesale power market.

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Also, the information contained in the bid tabulation sheet reveals the procedure and strategies Big Rivers follows and the factors and inputs it considers in evaluating bids for fuel supply. If the document is publicly disclosed, potential bidders could manipulate the bid solicitation process to the detriment of Big Rivers and its members by tailoring bids to correspond to and comport with Big Rivers' bidding criteria and process. In PSC Case No. 2003-00054, the Commission granted confidential protection to bids submitted to ULH&P. In addition to the other arguments discussed above, 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 dated August 4, 2003, in *In the Matter of: Application of the Union Light, Heat and Power Company for Confidential Treatment*, PSC Case No. 2003-00054. 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.* Similarly, potential bidders manipulating Big

- Rivers' bidding process would lead to higher fuel costs to Big Rivers and would place it at an
- 2 unfair competitive disadvantage in the wholesale power market.
- 3 15. Additionally, the power producers and marketers with which Big Rivers competes
- 4 could use the information to determine Big Rivers' power production costs and could use those
- 5 figures to potentially underbid Big Rivers in wholesale transactions, which would further
- 6 constitute an unfair competitive disadvantage to Big Rivers.
- 7 16. With respect to the Planned Maintenance Schedule, public disclosure of that
- 8 document would allow Big Rivers' competitors to know when Big Rivers' generating plants will
- 9 be down for maintenance and thus know a crucial input into Big Rivers' generating costs and
- 10 need for power and energy during those periods. With that information, potential suppliers to
- Big Rivers 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.
- 14 17. Additionally, Big Rivers' competitors in the wholesale power market could use
- the information from the Planned Maintenance Schedule to potentially underbid Big Rivers to
- 16 Big Rivers' competitive disadvantage in competing for wholesale sales, and prospective
- purchasers of Big Rivers' power supply in the wholesale market could use the information to
- manipulate the bidding process to the detriment of Big Rivers, impairing Big Rivers' ability to
- 19 get the best price for its off-system sales during its scheduled outages.

IV. The Confidential Information is Entitled to Confidential Protection

- 21 18. Based on the foregoing, the Confidential Information is entitled to confidential
- 22 protection.

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V. The Commission is Required to Hold an Evidentiary Hearing

1	19. The Confidential Information should be given confidential protection. If the
2	Commission disagrees that Big Rivers is entitled to confidential protection, due process requires
3	the Commission to hold an evidentiary hearing. Utility Regulatory Com'n v. Kentucky Water
4	Service Co., Inc., 642 S.W.2d 591 (Ky. App. 1982).
5	WHEREFORE, Big Rivers respectfully requests that the Commission classify and protect
6	as confidential the Confidential Information.
7	On this the <u>lo</u> tay of February, 2011.
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