

1 COMMONWEALTH OF KENTUCKY
2 BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY

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PUBLIC SERVICE
COMMISSION

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5 In the Matter of:

6
7 APPLICATION OF BIG RIVERS ELECTRIC)
8 CORPORATION FOR APPROVAL TO ISSUE)
9 EVIDENCES OF INDEBTEDNESS)

Case No. 2012-00492

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11
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 7 and KRS
17 61.878, to grant confidential protection to certain information Big Rivers is filing with its
18 responses to the first set of information requests from the Attorney General, Kentucky Industrial
19 Utility Customers, Inc. (“KIUC”), and Alcan Primary Products Corporation (“Alcan”). The
20 information Big Rivers seeks to protect as confidential is hereinafter referred to as the
21 “Confidential Information.”

22 2. The Confidential Information consists of (i) portions of financial reports provided
23 to Big Rivers’ Board of Directors and to credit rating agencies that are being provided as
24 attachments to Big Rivers’ responses to Item 9 of KIUC’s first request for information, and (ii) a
25 document that discloses Big Rivers’ business strategies with regard to renegotiating its existing
26 revolving credit agreements that is being provided as an attachment to Big Rivers’ response to
27 Item 8 of KIUC’s first request for information

28 3. Note that certain duplicative or irrelevant email attachments are not being
29 provided with Big Rivers’ responses to the information requests.

1 4. One (1) copy of the pages containing the Confidential Information with the
2 Confidential Information highlighted with transparent ink, printed on yellow paper, or otherwise
3 marked "CONFIDENTIAL," is being filed with this petition. A copy of the pages containing the
4 Confidential Information with the Confidential Information redacted is included and being filed
5 with the original and each of the ten (10) copies of Big Rivers' responses to the information
6 requests filed with this petition. 807 KAR 5:001 Sections 7(2)(a)(2) and 7(2)(b).

7 5. A copy of this petition and a copy of Big Rivers' responses to the information
8 requests with the Confidential Information redacted have been served on all parties to this
9 proceeding. 807 KAR 5:001 Section 7(2)(c). Big Rivers is also providing a copy of the
10 Confidential Information to each party, as and when the party signs a confidentiality agreement.

11 6. The Confidential Information is not publicly available in the form provided, is not
12 disseminated within Big Rivers except to those employees and professionals with a legitimate
13 business need to know and act upon the information, and is not disseminated to others without a
14 legitimate need to know and act upon the information.

15 7. If and to the extent the Confidential Information becomes generally available to
16 the public, whether through filings required by other agencies or otherwise, Big Rivers will
17 notify the Commission and have its confidential status removed. 807 KAR 5:001 Section
18 7(9)(a).

19 8. As discussed below, the Confidential Information is entitled to confidential
20 protection based upon KRS 61.878(1)(c)(1), which protects "records confidentially disclosed to
21 an agency or required by an agency to be disclosed to it, generally recognized as confidential or
22 proprietary, which if openly disclosed would permit an unfair commercial advantage to

1 competitors of the entity that disclosed the records.” KRS 61.878(1)(c)(1). 807 KAR 5:001
2 Section 2(a)(1).

3 **I. Big Rivers Faces Actual Competition**

4 9. Big Rivers competes in the wholesale power market to sell energy excess to its
5 members’ needs. Big Rivers’ ability to successfully compete in the wholesale power market is
6 dependent upon a combination of its ability to get the maximum price for the power sold, and
7 keeping the cost of producing that power as low as possible. Fundamentally, if Big Rivers’ cost
8 of producing a kilowatt hour increases, its ability to sell that kilowatt hour in competition with
9 other utilities is adversely affected. As is well documented in multiple proceedings before this
10 Commission, Big Rivers’ margins are derived almost exclusively from its off-system sales.

11 10. Big Rivers also competes for reasonably priced credit in the credit markets, and
12 its ability to compete is directly impacted by its financial results. Any event that adversely
13 affects Big Rivers’ margins will adversely affect its financial results and potentially impact the
14 price it pays for credit. As was described in the proceeding before this Commission in the Big
15 Rivers unwind transaction case, Big Rivers expects to be in the credit markets on a regular basis
16 in the future.¹

17 **II. The Confidential Information is Generally Recognized as Confidential or**
18 **Proprietary**

19 11. The Confidential Information for which Big Rivers seeks confidential treatment
20 under KRS 61.878(1)(c)(1) is generally recognized as confidential or proprietary under Kentucky
21 law.
22

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 12. The Confidential Information contained in the financing reports reveals sensitive
2 and proprietary information that gives insight into Big Rivers' cost of producing power or the
3 availability of power Big Rivers has to sell into the market. More specifically, the financial
4 reports include Confidential Information such as Big Rivers' recent and projected fuel costs and
5 other production costs. They include information within the same document that could be used
6 to readily calculate Big Rivers' production costs (such as the margins, which when combined
7 with other information provided in the same documents as the Confidential Information could
8 readily be used to calculate the Confidential Information). They also include production-related
9 information such as heat rates that could easily be used with information about Big Rivers made
10 available on the Navigant Consulting website to determine Big Rivers' production cost and
11 availability of power to sell into the market.

12 13. Public Disclosure of the Confidential Information contained in the financial
13 reports would reveal detailed information relating to Big Rivers' current and future cost of
14 producing power and Big Rivers' availability of excess power to sell into the market.
15 Knowledge of such projected data would give Big Rivers' suppliers and competitors an unfair
16 competitive advantage. Public disclosure of this information would help Big Rivers' suppliers,
17 buyers, and competitors to determine information about the amount of power Big Rivers has to
18 sell into the market. Public disclosure of the Confidential Information contained in the financial
19 reports will also give Big Rivers' suppliers, buyers, and competitors insight into Big Rivers' cost
20 of producing power and Big Rivers' view of future prices for fuel prices and other prices, which
21 would indicate the prices at which Big Rivers is willing to buy or sell such items.

22 14. The remaining Confidential Information is contained in a document that discloses
23 Big Rivers' strategies for renegotiating or otherwise dealing with the terms of its revolving credit

1 agreements that restrict Big Rivers' ability to use those agreements as a result of the notice of
2 termination that Century Aluminum of Kentucky General Partnership provided on August 20,
3 2012, and the eventual termination of Century's retail power contract.

4 15. Public disclosure of the Confidential Information contained in the negotiating
5 strategies document would allow the creditors with which Big Rivers is currently renegotiating
6 existing revolving credit agreements a negotiating and financing advantage over Big Rivers and
7 would thus impair Big Rivers' ability to negotiate and to secure the best possible outcome.

8 16. Information about a company's detailed inner workings is generally recognized as
9 confidential or proprietary. *See, e.g., Hoy v. Kentucky Indus. Revitalization Authority*, 907
10 S.W.2d 766, 768 (Ky. 1995) ("It does not take a degree in finance to recognize that such
11 information concerning the inner workings of a corporation is 'generally recognized as
12 confidential or proprietary'"). Additionally, as with Big Rivers' position with regard to the
13 Confidential Information contained in the negotiating document, the Commission has previously
14 granted confidential treatment of information where a utility argued for confidential treatments
15 on the ground that public disclosure of the information could be used to gain financial advantage
16 over the utility in negotiating making a proposed transaction more costly. *See Order dated*
17 *August 29, 2006, in In the Matter of: The Joint Petition of Kentucky-American Water Company,*
18 *Thames Water Aqua Holdings GMBH, RWE Aktiengesellschaft, Thames Water Aqua US*
19 *Holdings, Inc., and American Water Works Company, Inc. for Approval of a Change in Control*
20 *of Kentucky-American Water Company*, Case No. 2006-00197 (granting petition for confidential
21 treatment of financial adviser reports that the utility (RWE) asserted other entities could use to
22 "gain a financial advantage over RWE in 'the negotiation of relationships and agreements
23 relating to the Proposed Transaction' and possibility make the proposed transaction more costly

1 to RWE”). Likewise, the Commission has previously granted confidential treatment to
2 information similar to the Confidential Information contained in the financial reports. *See, e.g.,*
3 letters from the Commission dated July 28, 2011, and December 20, 2011, in *In the Matter of:*
4 *Application of Big Rivers Electric Corporation for a General Adjustment in Rates*, Case No.
5 2011-00036 (granting confidential treatment to multi-year forecast); letter from the Commission
6 dated December 21, 2010, in *In the Matter of: The 2010 Integrated Resource Plan of Big Rivers*
7 *Electric Corporation*, Case No. 2010-00443 (granting confidential treatment to fuel cost
8 projections, etc.); letter from the Commission dated December 11, 2012, in *In the Matter of:*
9 *Application of Big Rivers Electric Corporation for Approval of its 2012 Environmental*
10 *Compliance Plan, for Approval of its Amended Environmental Cost Recovery Surcharge Tariff,*
11 *for Certificates of Public Convenience and Necessity, and for Authority to Establish a*
12 *Regulatory Account*, Case No. 2012-00063 (granting confidential information to production cost
13 information and information that would reveal the amount of power Big Rivers has to sell into
14 the market).

15 **III. Disclosure of the Confidential Information Would Permit an Unfair Commercial**
16 **Advantage to Big Rivers’ Competitors**
17

18 17. Disclosure of the Confidential Information would permit an unfair commercial
19 advantage to Big Rivers’ competitors. As discussed above, Big Rivers faces actual competition
20 in the wholesale power market and in the credit market. It is likely that Big Rivers would suffer
21 competitive injury if that Confidential Information was publicly disclosed.

22 18. Public disclosure of the Confidential Information revealing Big Rivers’ cost of
23 producing power would give the power producers and marketers with which Big Rivers
24 competes an unfair competitive advantage because they could use that information to potentially
25 underbid Big Rivers in wholesale transactions. It would also give potential suppliers to Big

1 Rivers a competitive advantage because they will be able to manipulate the price of power bid to
2 Big Rivers in order to maximize their revenues, thereby driving up Big Rivers' costs and
3 impairing Big Rivers' ability to compete in the wholesale power and credit markets. The
4 Confidential Information revealing Big Rivers' production costs and the Confidential
5 Information revealing the amount of power Big Rivers has to sell into the market could be used
6 by power purchasers who could manipulate the bidding process, leading to lower revenues for
7 Big Rivers and impairing its ability to compete in the credit markets.

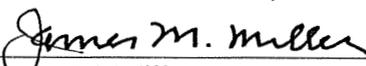
8 19. Public Disclosure of the Confidential Information contained in the negotiating
9 strategies document would allow the creditors with which Big Rivers is currently renegotiating
10 existing revolving credit agreements a negotiating and financing advantage over Big Rivers,
11 would impair Big Rivers' ability to negotiate and to secure the best possible outcome, and could
12 thus lead to higher costs to Big Rivers that would impair Big Rivers' ability to compete in the
13 credit markets.

14 **IV. Conclusion**

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

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

21 On this the third day of January, 2013.

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24 _____
25 James M. Miller
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