

RECEIVED
JAN 28 2014
PUBLIC SERVICE
COMMISSION

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY

In the Matter of:

Application of Big Rivers Electric)
Corporation for a General) Case No. 2012-00535
Adjustment In Rates)

**PETITION OF BIG RIVERS ELECTRIC CORPORATION FOR CONFIDENTIAL
TREATMENT**

1. Big Rivers Electric Corporation ("Big Rivers") hereby petitions the Kentucky Public Service Commission ("Commission"), pursuant to 807 KAR 5:001 Section 13 and KRS 61.878, to grant confidential treatment to certain information Big Rivers is filing with its responses to the Public Service Commission Staff's and the Joint Intervenors' Initial Rehearing Requests for Information. The information for which Big Rivers seeks confidential treatment is hereinafter referred to as the "Confidential Information."

2. The Confidential Information includes:

- a. portions of the responses and/or attachments for the responses to Items 1 and 4 of the Commission Staff's Initial Rehearing Request for Information ("PSC Rehearing 1-1" and "PSC Rehearing 1-4," respectively); and
- b. portions of the responses and/or attachments for the responses to Items 1 and 15 of the Joint Intervenors' Initial Rehearing Request for Information ("JI Rehearing 1-1" and "JI Rehearing 1-15," respectively).

3. One (1) copy of the paper responses or attachments with the confidential information underscored, highlighted with transparent ink, printed on yellow paper, or otherwise marked "CONFIDENTIAL," is being filed with this petition in a separate sealed envelope

1 marked "CONFIDENTIAL." A copy of those pages, with the Confidential Information
2 redacted, is being filed with the original and each of the ten (10) copies of the responses to the
3 information requests filed with this petition. *See* 807 KAR 5:001 Sections 13(2)(a)(3), 13(2)(b).

4 4. One (1) copy of the electronic attachments containing Confidential Information is
5 contained in the confidential electronic files that accompany this petition. The pervasive nature
6 of the Confidential Information in the electronic attachments would make public versions
7 ineffectual and unhelpful to the Commission. As such, the entirety of these confidential files
8 have been redacted from the original and each of the ten (10) copies of the responses to the
9 information requests filed with this petition. *See* 807 KAR 5:001 Sections 13(2)(a)(3), 13(2)(b).
10 A motion for deviation from the requirement that Big Rivers file paper copies of those electronic
11 attachments accompanies this petition.

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

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

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

1 8. As discussed below, the Confidential Information is entitled to confidential
2 treatment based upon KRS 61.878(1)(m), KRS 61.878(1)(a), or KRS 61.878(1)(c)(1). *See* 807
3 KAR 5:001 Section 13(2)(a)(1).

4 **I. Information Protected by KRS 61.878(1)(m)**

5 9. KRS 61.878(1)(m)(1) protects “[p]ublic records the disclosure of which would
6 have a reasonable likelihood of threatening the public safety by exposing a vulnerability in
7 preventing protecting against, mitigating, or responding to a terrorist act. . . .”

8 10. Certain of the electronic files produced in response to JI Rehearing 1-1 contain
9 critical energy infrastructure information regarding the reliability of Big Rivers’ transmission
10 system, as well as studies regarding the reliability of Big Rivers’ transmission system and the
11 regional transmission system, and maps of Big Rivers’ transmission system. These files are
12 contained on the CONFIDENTIAL electronic media filed with this petition in the folder labeled
13 “CRITICAL ENERGY INFRASTRUCTURE INFORMATION.”

14 11. As disclosure of this information would provide the public with detailed
15 schematics of the local and regional transmission system as well as an explanation of their
16 vulnerabilities, this information should be granted confidential treatment.

17 **II. Information Protected By KRS 61.878(1)(a)**

18 12. KRS 61.878(1)(a) protects “[p]ublic records containing information of a personal
19 nature where the public disclosure thereof would constitute a clearly unwarranted invasion of
20 personal privacy.”

21 13. The Confidential Information contained in Big Rivers’ response to JI Rehearing
22 1-15 consists of detailed billing information, supporting calculations, and energy usage related to
23 a single customer. Public disclosure of the Confidential Information would constitute an

1 unwarranted invasion of this customer's privacy, and as such, it should be granted confidential
2 treatment.

3 **III. Information Protected By KRS 61.878(1)(c)(1)**

4 **A. Big Rivers Faces Actual Competition**

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

9 15. As a generation and transmission cooperative, Big Rivers competes in the
10 wholesale power market to sell energy that it produces in excess to its members' needs. This
11 includes not only the over-the-counter day-ahead and over-the-counter hourly markets to which
12 Big Rivers has access by virtue of its membership in Midcontinent Independent System
13 Operator, Inc. ("MISO"), but also for direct, bilateral long-term agreements. Big Rivers' ability
14 to successfully compete in these markets is dependent upon a combination of its ability to: 1)
15 obtain the maximum price for the power it sells, and 2) keep its cost of production as low as
16 possible. Fundamentally, if Big Rivers' cost of producing a unit of power increases, its ability to
17 sell that unit in competition with other utilities is adversely affected.

18 16. Big Rivers also competes for reasonably priced credit in the credit markets, and
19 its ability to compete is directly impacted by its financial results. Lower revenues and any events
20 that adversely affect Big Rivers' margins will adversely affect its financial results and potentially
21 impact the price it pays for credit. A competitor armed with Big Rivers' proprietary and
22 confidential information will be able to increase Big Rivers' costs or decrease Big Rivers'
23 revenues, which could in turn affect Big Rivers' creditworthiness. A utility the size of Big

1 Rivers that operates generation and transmission facilities will always have periodic cash and
2 borrowing requirements for both anticipated and unanticipated needs. Big Rivers expects to be
3 in the credit markets on a regular basis in the future, and it is imperative that Big Rivers improve
4 and maintain its credit profile.

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

8 **B. The Confidential Information is Generally Recognized as Confidential**
9 **or Proprietary**

10
11 18. The Confidential Information for which Big Rivers seeks confidential treatment
12 under KRS 61.878(1)(c)(1) is generally recognized as confidential or proprietary under Kentucky
13 law.

14 19. The Confidential Information attached to the responses to PSC Rehearing 1-1 and
15 PSC Rehearing 1-4 includes Big Rivers' operating and maintenance ("O&M") expense
16 projections, including projections of fuel costs and emission allowance costs, information about
17 planned outages and generation levels, and detailed budgets for capital projects.

18 20. All of the files provided in response to JI Rehearing 1-1, except those files in the
19 folder labeled "CRITICAL ENERGY INFRASTRUCTURE INFORMATION," are Confidential
20 Information that is protected by KRS 61.878(1)(c)(1), and they consist of communications
21 involving commercially sensitive negotiations relating to the development of the System Support
22 Resource agreement and budget for Big Rivers' Coleman generating station and supporting data
23 and information relating to the negotiations. These files also contain production cost modeling
24 outputs, data regarding planned outages, projected off-system sales volumes and revenue,

1 projected O&M expenses, including projected costs of fuel, and projected data relating to
2 emission allowances.

3 21. Public disclosure of the Confidential Information would reveal detailed
4 information relating to Big Rivers' projected variable O&M costs for production factors such as
5 fuel and emission allowances; and projected off-system sales price, volume, and revenue. This
6 information provides insight into Big Rivers' cost of producing power and would indicate the
7 prices at which Big Rivers is willing to buy or sell power and production factors. The
8 information is also indicative of the market conditions Big Rivers expects to encounter and its
9 ability to compete with competitors. The Commission has previously granted confidential
10 treatment to similar information. *See, e.g., In the Matter of: Application of Big Rivers Electric*
11 *Corporation for a General Adjustment in Rates, Order, P.S.C. Case No. 2012-00535 (April 25,*
12 *2013) (the "April 25 Confidentiality Order"); In the Matter of: Application of Big Rivers Electric*
13 *Corporation for a General Adjustment in Rates, Order, P.S.C. Case No. 2012-00535 (August 14,*
14 *2013) (the "August 14 Confidentiality Order"); In the Matter of: Application of Big Rivers*
15 *Electric Corporation for Approval of its 2012 Environmental Compliance Plan, for Approval of*
16 *its Amended Environmental Cost Recovery Surcharge Tariff, for Certificates of Public*
17 *Convenience and Necessity, and for Authority to Establish a Regulatory Account, Letter, P.S.C.*
18 *Case No. 2012-00063 (August 15, 2012).*

19 22. Public disclosure of information relating to Big Rivers' projected capital
20 expenditures and planned outages would reveal when Big Rivers will have excess power
21 available to sell into the market, or when Big Rivers' generation levels will drop due to
22 maintenance and construction and will have to resort to purchased power to meet its native load.
23 The Commission has previously granted confidential treatment to similar information. *See, e.g.,*

1 April 25 Confidentiality Order, P.S.C. Case No. 2012-00535; P.S.C. Administrative Case No.
2 387, Letter (July 20, 2010).

3 23. Information related to sensitive negotiations between Big Rivers and other entities
4 illuminates Big Rivers' long-term business strategy and is generally subject to confidentiality
5 agreements among the various parties involved. The Commission has previously granted
6 confidential treatment to similar information. *See, e.g.*, April 25 Confidentiality Order, P.S.C.
7 Case No. 2012-00535 (granting confidential treatment to details of sensitive commercial
8 negotiations between Big Rivers, Alcan Primary Products Corporation, and Century Aluminum
9 of Kentucky General Partnership which were subject to a confidentiality agreement among the
10 parties).

11 24. Finally, public disclosure of the Confidential Information would reveal Big
12 Rivers' fundamental financial data and projections. Information such as this which bears upon a
13 company's detailed inner workings is generally recognized as confidential or proprietary. *See,*
14 *e.g., Hoy v. Kentucky Indus. Revitalization Authority*, 907 S.W.2d 766, 768 (Ky. 1995) ("It does
15 not take a degree in finance to recognize that such information concerning the inner workings of
16 a corporation is 'generally recognized as confidential or proprietary'"). Additionally, the
17 Commission has previously granted confidential treatment to this type of information. *See, e.g.,*
18 April 25 Confidentiality Order, P.S.C. Case No. 2012-00535 (granting confidential treatment to
19 Big Rivers' Financial Model); *In the Matter of: An Examination of the Application of the Fuel*
20 *Adjustment Clause of East Kentucky Power Cooperative, Inc. From November 1, 2011 Through*
21 *April 30, 2012*, Order, P.S.C. Case No. 2012-00319 (February 21, 2013).

22

1 **C. Disclosure of the Confidential Information Would Result in an Unfair**
2 **Commercial Advantage to Big Rivers' Competitors**

3
4 25. Disclosure of the Confidential Information would grant Big Rivers' competitors
5 an unfair commercial advantage. As discussed above in Section III. A, Big Rivers faces actual
6 competition in both the short- and long-term wholesale power markets and in the credit markets.
7 It is likely that Big Rivers' ability to compete in these markets would be adversely affected if the
8 Confidential Information were publicly disclosed, and Big Rivers seeks protection from such
9 competitive injury.

10 26. The Confidential Information includes material such as Big Rivers' projections of
11 fuel and emissions costs and power prices. If that information is publicly disclosed, market
12 participants would have insight into the prices at which Big Rivers is willing to buy and sell fuel
13 and could manipulate the bidding process, impairing its ability to generate power at competitive
14 rates and thus to compete in the wholesale power markets. Furthermore, any competitive
15 pressure that adversely affects Big Rivers' revenue and margins could make the company appear
16 less creditworthy and thus impair its ability to compete in the credit markets. These effects were
17 recognized in P.S.C. Case No. 2003-00054, in which the Commission granted confidential
18 treatment to bids submitted to Union Light, Heat & Power ("ULH&P"). ULH&P argued, and
19 the Commission implicitly accepted, that if the bids it received were publicly disclosed,
20 contractors on future work could use the bids as a benchmark, which would likely lead to the
21 submission of higher bids. *In the Matter of: Application of the Union Light, Heat and Power*
22 *Company for Confidential Treatment, Order, PSC Case No. 2003-00054 (August 4, 2003).* The
23 Commission also implicitly accepted ULH&P's further argument that the higher bids would
24 lessen ULH&P's ability to compete with other gas suppliers. *Id.* Similarly, potential fuel and
25 power suppliers manipulating Big Rivers' bidding process would lead to higher costs or lower

1 revenues to Big Rivers and would place it at an unfair competitive disadvantage in the wholesale
2 power market and credit markets.

3 27. Potential market power purchasers could use the information related to Big
4 Rivers' projected off-system sales and revenues, planned outages, and future planning to know
5 when Big Rivers will have excess power to sell into the wholesale market and could use that
6 information to manipulate their bids, leading to lower revenues to Big Rivers and placing it at an
7 unfair competitive disadvantage in the credit markets.

8 28. Additionally, public disclosure of the prices of fuel, emission allowance, and
9 other variable cost information, and information about Big Rivers' wholesale power needs would
10 give the power producers and marketers with which Big Rivers competes in the wholesale power
11 market insight into Big Rivers' cost of producing power and need for power and energy during
12 the periods covered by the information. Knowledge of this information would give those power
13 producers and marketers an unfair competitive advantage because they could use that
14 information to potentially underbid Big Rivers in wholesale transactions. It would also give
15 potential suppliers to Big Rivers a competitive advantage because they will be able to manipulate
16 the price of power bid to Big Rivers in order to maximize their revenues, thereby driving up Big
17 Rivers' costs and impairing Big Rivers' ability to compete in the wholesale power and credit
18 markets.

19 29. Finally, the Commission has consistently recognized that internal strategic
20 planning information and related materials are entitled to confidential treatment, as these
21 documents typically relate to the company's economic status and business strategies. *See, e.g.,*
22 *Marina Management Servs. v. Cabinet for Tourism, Dep't of Parks*, 906 S.W.2d 318, 319 (Ky.
23 1995) (unfair commercial advantage arises simply from "the ability to ascertain the economic

1 status of the entities without the hurdles systemically associated with the acquisition of such
2 information about privately owned organizations”); *In the Matter of: The Joint Application of*
3 *Duke Energy Corp., Cinergy Corp., Duke Energy Ohio, Inc., Duke Energy Kentucky, Inc.,*
4 *Diamond Acquisition Corp., and Progress Energy, Inc., for Approval of the Indirect Transfer of*
5 *Control of Duke Energy Kentucky, Inc., P.S.C Case No. 2011-00124 (Dec. 5, 2011); In the*
6 *Matter of: The Joint Petition of Kentucky-American Water Co., Thames Water Aqua Holdings*
7 *GmbH, RWE Aktiengesellschaft, Thames Water Aqua U.S. Holdings, Inc., and Am. Water Works*
8 *Co., Inc. for Approval of a Change in Control of Kentucky-American Water Co., P.S.C. Case No.*
9 *2006-00197 (Aug. 29, 2006) (holding that reports from the joint applicants’ financial advisors*
10 *and all board of director minutes and information is confidential because competitors could use it*
11 *to gain unfair competitive advantage).*

12 30. Accordingly, the public disclosure of the information that Big Rivers seeks to
13 protect would provide Big Rivers’ competitors with an unfair commercial advantage.

14 IV. Time Period

15 31. Big Rivers requests that the Confidential Information protected by KRS
16 61.878(1)(m) remain confidential indefinitely because as long as the transmission system
17 remains in place, the information should be confidential for the reasons stated above. Big Rivers
18 requests that the Confidential Information protected by KRS 61.878(1)(a) remain confidential
19 indefinitely because it is private customer data. Big Rivers requests that the rest of the
20 Confidential Information remain confidential for a period of five (5) years from the date of this
21 petition, which should allow sufficient time for the projected data to become historical and
22 sufficiently outdated that it could not be used to determine similar confidential information at
23 that time or to competitively disadvantage Big Rivers. *See* 807 KAR 5:001 Section 13(2)(a)(2).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37

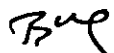
V. Conclusion

32. Based on the foregoing, the Confidential Information is entitled to confidential treatment pursuant to 807 KAR 5:001 Section 13 and KRS 61.878. If the Commission disagrees that Big Rivers' Confidential Information is entitled to confidential treatment, due process requires the Commission to hold an evidentiary hearing. *Utility Regulatory Comm'n v. Kentucky Water Serv. Co., Inc.*, 642 S.W.2d 591 (Ky. App. 1982).

WHEREFORE, Big Rivers respectfully requests that the Commission grant this petition and classify and treat as confidential the Confidential Information.

On this the 24th day of January, 2014.

Respectfully submitted,



James M. Miller
Tyson Kamuf
SULLIVAN, MOUNTJOY, STAINBACK
& MILLER, P.S.C.
100 St. Ann Street
P. O. Box 727
Owensboro, Kentucky 42302-0727
Phone: (270) 926-4000
Facsimile: (270) 683-6694
jmiller@smsmlaw.com
tkamuf@smsmlaw.com

Edward T. Depp
DINSMORE & SHOHL LLP
101 South Fifth Street
Suite 2500
Louisville, KY 40202
Phone: (502) 540-2347
Facsimile: (502) 585-2207
tip.depp@dinsmore.com

Counsel for Big Rivers Electric Corporation

Certificate of Service

I certify that a true and accurate copy of the foregoing was or will be served by Federal Express or by first class mail upon the persons listed on the accompanying service list, on or before the date this petition is filed with the Kentucky Public Service Commission.

On this the 24th day of January, 2014.

Tyson Kamuf /ams

Tyson Kamuf

1
2
3
4
5
6
7
8
9
10
11