

1 COMMONWEALTH OF KENTUCKY
2 BEFORE THE KENTUCKY PUBLIC SERVICE COMMISSION

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COMMISSION

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5 In the Matter of:

6
7 Application of Big Rivers Electric)
8 Corporation for a General) Case No. 2013-00199
9 Adjustment In Rates)

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11
12 **PETITION OF BIG RIVERS ELECTRIC CORPORATION FOR CONFIDENTIAL**
13 **TREATMENT**
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 13 and KRS
17 61.878, to grant confidential treatment to certain information Big Rivers is filing with its revised
18 responses to the Kentucky Office of the Attorney General’s (“AG”), Kentucky Industrial Utility
19 Customers, Inc.’s (“KIUC”), and Ben Taylor and the Sierra Club’s (the “Sierra Club” or “SC”)
20 data requests. The information for which Big Rivers seeks confidential treatment is hereinafter
21 referred to as the “Confidential Information.”

22 2. The Confidential Information includes:

- 23 a. portions of the responses and/or attachments for the revised responses to Items
24 196 and 202 of the AG’s initial requests for information (“AG 1-196” and “AG 1-
25 202,” respectively);
- 26 b. portions of the response and/or attachments for the revised response to Item 59 of
27 the AG’s second requests for information (“AG 2-59”);
- 28 c. portions of the responses and/or attachments for the revised responses to Items 21
29 and 22 of KIUC’s initial requests for information (“KIUC 1-21” and “KIUC 1-
30 22,” respectively); and

1 d. portions of the response and/or attachments for the revised response to Item 9 of
2 Ben Taylor and the Sierra Club’s Supplemental Requests for Information (“SC 2-
3 9”).

4 3. One (1) copy of the paper attachments with the confidential information
5 underscored, highlighted with transparent ink, printed on yellow paper, or otherwise marked
6 “CONFIDENTIAL,” is being filed with this petition in a separate sealed envelope marked
7 “CONFIDENTIAL.” A copy of those pages, with the Confidential Information redacted, is
8 being filed with the original and each of the ten (10) copies of the responses to the data requests
9 filed with this petition. *See* 807 KAR 5:001 Sections 13(2)(a)(3), 13(2)(b).

10 4. One (1) copy of the electronic attachments containing Confidential Information is
11 contained in the confidential electronic files that accompany this petition. In some instances, the
12 Confidential Information is inextricably intertwined with non-confidential information in the
13 electronic spreadsheet attachments in response to certain requests. Big Rivers cannot redact only
14 the Confidential Information from the electronic spreadsheet attachments without making other
15 cells in the spreadsheets unusable or breaking the formulas contained therein, and so, the entirety
16 of those attachments must be made confidential. As such, the entirety of these confidential files
17 have been redacted from the original and each of the ten (10) copies of the responses to the data
18 requests filed with this petition. *See* 807 KAR 5:001 Sections 13(2)(a)(3), 13(2)(b). A motion
19 for deviation from the requirement that Big Rivers file paper copies of those electronic
20 attachments accompanies the responses.

21 5. Additionally, the bodies of certain requests contain information identified by the
22 respective requesting party as confidential. This Confidential Information was provided by Big
23 Rivers in response to prior data requests in this proceeding, subject to a petition for confidential

1 treatment. As discussed below, this information is entitled to confidential treatment during the
2 pendency of the petition. *See* 807 KAR 5:001 Section 13(4).

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

7 7. The Confidential Information is not publicly available, is not disseminated within
8 Big Rivers except to those employees and professionals with a legitimate business need to know
9 and act upon the information, and is not disseminated to others without a legitimate need to
10 know and act upon the information.

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

14 9. As discussed below, the Confidential Information is entitled to confidential
15 treatment based upon 807 KAR 5:001 Section 13(4) or KRS 61.878(1)(c)(1). *See* 807 KAR
16 5:001 Section 13(2)(a)(1).

17 **I. Information Exempted from Public Disclosure by 807 KAR 5:001 Section 13(4)**

18 10. 807 KAR 5:001 Section 13(4) provides that material for which confidential
19 treatment was requested “shall be accorded confidential treatment” pending action on the
20 petition. Pursuant to 807 KAR 5:001 (9)(a), the parties included material in their data requests
21 that is subject to Big Rivers’ September 3rd Petition for Confidential Treatment in this
22 proceeding. This petition is still pending before the Commission.

1 11. SC 2-9 includes Confidential Information contained in Big Rivers' attachments
2 for the response to PSC 2-14.

3 12. Please see Big Rivers' September 3rd Petition for Confidential Treatment for
4 detailed explanations of the grounds originally cited on which the Confidential Information is
5 entitled to protection. As this petition is still pending before the Commission, the information is
6 entitled to confidential treatment pursuant to 807 KAR 5:001 Section 13(4).

7 **II. Information Exempted from Public Disclosure by KRS 61.878(1)(c)(1)**

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

9 13. KRS 61.878(1)(c)(1) protects "records confidentially disclosed to an agency or
10 required by an agency to be disclosed to it, generally recognized as confidential or proprietary,
11 which if openly disclosed would permit an unfair commercial advantage to competitors of the
12 entity that disclosed the records."

13 14. As a generation and transmission cooperative, Big Rivers competes in the
14 wholesale power market to sell energy that it produces in excess to its members' needs. This
15 includes not only the over-the-counter day-ahead and over-the-counter hourly markets to which
16 Big Rivers has access by virtue of its membership in Midcontinent Independent System
17 Operator, Inc. ("MISO"), but also for forward bilateral long-term agreements and wholesale
18 agreements with utilities and industrial customers. The completion of Phase 2 of Big Rivers'
19 transmission upgrades as well as the completion of a 345 kV interconnection with Vectren will
20 enhance Big Rivers' ability to export power off-system. Big Rivers' ability to successfully
21 compete in the market is dependent upon a combination of its ability to: 1) obtain the maximum
22 price for the power it sells; and 2) keep its cost of production as low as possible. Fundamentally,

1 if Big Rivers' cost of producing a unit of power increases, its ability to sell that unit in
2 competition with other utilities is adversely affected.

3 15. Big Rivers also competes for reasonably priced credit in the credit markets, and
4 its ability to compete is directly impacted by its financial results. Lower revenues and any events
5 that adversely affect Big Rivers' margins will adversely affect its financial results and potentially
6 impact the price it pays for credit. A competitor armed with Big Rivers' proprietary and
7 confidential information will be able to increase Big Rivers' costs or decrease Big Rivers'
8 revenues, which could in turn affect Big Rivers' apparent creditworthiness. A utility the size of
9 Big Rivers that operates generation and transmission facilities will always have periodic cash
10 and borrowing requirements for both anticipated and unanticipated needs. Big Rivers expects to
11 be in the credit markets on a regular basis in the future, and it is imperative that Big Rivers
12 improve and maintain its credit profile.

13 16. Accordingly, Big Rivers has competitors in both the power and capital markets,
14 and its Confidential Information should be protected to prevent the imposition of an unfair
15 competitive advantage.

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

19 17. 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 18. The Confidential Information attached to the revised responses to AG 1-196, AG
23 1-202, AG 2-59, KIUC 1-21, and KIUC 1-22 includes projected operating and maintenance
24 ("O&M") expenses and capital costs.

1 19. The Confidential Information attached to the revised response to SC 2-9 is the
2 proprietary and confidential work product of IHS Global, and IHS Global has not given Big
3 Rivers permission to publicly release the information.

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

18 21. The proprietary information supplied to Big Rivers by industry groups of which it
19 is a member illuminates Big Rivers' long-term business strategy and is generally subject to
20 confidentiality agreements among the various parties involved. Additionally, Big Rivers
21 expends considerable resources to obtain this information, and Big Rivers would be
22 disadvantaged if its competitors were able to obtain free access through public disclosure. The
23 Commission has previously granted confidential treatment to similar information. *See, e.g.,*

1 April 25 Confidentiality Order, P.S.C. Case No. 2012-00535 (granting confidential treatment to
2 models and industry data provided by Big Rivers' consultants and to details of sensitive
3 commercial negotiations).

4 22. Finally, public disclosure of the Confidential Information would reveal details of
5 Big Rivers' fundamental financial data and projections. This type of information bears upon a
6 company's detailed inner workings and is generally recognized as confidential or proprietary.
7 *See, e.g., Hoy v. Kentucky Indus. Revitalization Authority*, 907 S.W.2d 766, 768 (Ky. 1995) ("It
8 does not take a degree in finance to recognize that such information concerning the inner
9 workings of a corporation is 'generally recognized as confidential or proprietary'").
10 Additionally, the Commission has previously granted confidential treatment to this type of
11 information. *See, e.g., April 25 Confidentiality Order, P.S.C. Case No. 2012-00535* (granting
12 confidential treatment to Big Rivers' Financial Model).

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

15
16 23. Disclosure of the Confidential Information would grant Big Rivers' competitors
17 an unfair commercial advantage. As discussed above in Section II.A., Big Rivers faces actual
18 competition in both the short- and long-term wholesale power markets and in the credit markets.
19 Big Rivers' ability to compete in these markets would be adversely affected if the Confidential
20 Information were publicly disclosed, and Big Rivers seeks protection from such competitive
21 injury.

22 24. The Confidential Information includes material such as Big Rivers' projections of
23 production costs. If that information is publicly disclosed, market participants would have
24 insight into the prices at which Big Rivers is willing to buy and sell power and could manipulate
25 the bidding process, impairing its ability to compete in the wholesale power markets.

1 Furthermore, any competitive pressure that adversely affects Big Rivers' revenue and margins
2 could make the company appear less creditworthy, thereby impairing its ability to compete in the
3 credit markets. These effects were recognized in P.S.C. Case No. 2003-00054, in which the
4 Commission granted confidential treatment to bids submitted to Union Light, Heat & Power
5 ("ULH&P"). ULH&P argued, and the Commission implicitly accepted, that if the bids it
6 received were publicly disclosed, contractors in the future could use the bids as a benchmark,
7 which would likely lead to the submission of higher bids. *In the Matter of: Application of the*
8 *Union Light, Heat and Power Company for Confidential Treatment*, Order, PSC Case No. 2003-
9 00054 (August 4, 2003); *accord An Examination of the Application of the Fuel Adjustment*
10 *Clause of East Kentucky Power Cooperative, Inc. From May 1, 2007 Through October 31, 2007*,
11 Letter, P.S.C. Case No. 2007-00523 (February 27, 2008). The Commission also implicitly
12 accepted ULH&P's further argument that the higher bids would lessen ULH&P's ability to
13 compete with other gas suppliers. *Id.* Similarly, potential power purchasers and suppliers
14 manipulating Big Rivers' bidding process would lead to higher costs or lower revenues to Big
15 Rivers and would place it at an unfair competitive disadvantage in the wholesale power market
16 and credit markets.

17 25. Public disclosure of the Confidential Information would give the power producers
18 and marketers with which Big Rivers competes in the wholesale power market insight into Big
19 Rivers' cost of producing power. Knowledge of this information would give those power
20 producers and marketers an unfair competitive advantage because they could use that
21 information to potentially underbid Big Rivers in wholesale transactions. It would also give
22 potential suppliers to Big Rivers a competitive advantage because they will be able to manipulate
23 the price of power bid to Big Rivers in order to maximize their revenues, thereby driving up Big

1 Rivers' costs and impairing Big Rivers' ability to compete in the wholesale power and credit
2 markets.

3 26. Finally, the Commission has consistently recognized that information related to a
4 company's economic status is entitled to confidential treatment. *See, e.g., Marina Management*
5 *Servs. v. Cabinet for Tourism, Dep't of Parks*, 906 S.W.2d 318, 319 (Ky. 1995) (unfair
6 commercial advantage arises simply from "the ability to ascertain the economic status of the
7 entities without the hurdles systemically associated with the acquisition of such information
8 about privately owned organizations").

9 27. Accordingly, the public disclosure of the information that Big Rivers seeks to
10 protect would provide Big Rivers' competitors with an unfair commercial advantage.

11 III. Time Period

12 28. Pursuant to 807 KAR 5:001 Section 13(2)(a)(2), Big Rivers requests that the
13 Confidential Information be afforded confidential period for the time periods explained below.

14 29. Big Rivers requests that the Confidential Information protected by 807 KAR
15 5:001 Section 13(4) remain confidential through the pendency of the September 3rd Petition for
16 Confidential Treatment and thereafter, if Big Rivers receives a favorable ruling on the petition,
17 for the time periods specified in the petition.

18 30. Big Rivers requests that the Confidential Information protected by KRS 61.878
19 (1)(c)(1) remain confidential for a period of five (5) years from the date of this petition, which
20 should allow sufficient time for the projected data to become historical and sufficiently outdated
21 that it could not be used to determine similar confidential information at that time or to
22 competitively disadvantage Big Rivers.

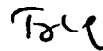
1 **IV. Conclusion**

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

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

9 On this the 18th day of October, 2013.

10 Respectfully submitted,

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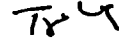
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37 *Counsel for Big Rivers Electric Corporation*

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Certificate of Service

I certify that a true and accurate copy of the foregoing was or will be served by Federal Express or by hand delivery 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 18th day of October, 2013,



Tyson Kamuf