

1 COMMONWEALTH OF KENTUCKY
2 BEFORE THE KENTUCKY PUBLIC SERVICE COMMISSION

3 RECEIVED

4
5 In the Matter of:

JAN 24 2014

6
7 Application of Big Rivers Electric)
8 Corporation for a General)
9 Adjustment In Rates)

PUBLIC SERVICE
Case No. 2013-0010 COMMISSION

10
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
18 responses to the requests for information from the hearing in this matter. The information for
19 which Big Rivers seeks confidential treatment is hereinafter referred to as the "Confidential
20 Information."

21 2. The Confidential Information includes portions of the responses and/or
22 attachments for the responses to Items 4, 5, 6, 7, 16, 17, and 20 of the post-hearing requests for
23 information;

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

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

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)(c)(1). *See* 807 KAR 5:001 Section 13(2)(a)(1).

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

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

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

18 11. 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’ apparent creditworthiness. A utility the size of

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

5 12. 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 or**
9 **Proprietary.**

10
11 13. 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 14. The Confidential Information contained in the response to Item 4 includes Big
15 Rivers' Load Concentration Analysis and Mitigation Plan (the "Mitigation Plan") and an update
16 of Big Rivers' mitigation efforts.

17 15. The Confidential Information contained in the response to Item 5 is a portion of
18 Big Rivers' Corrective Action Plan, which provides details of Big Rivers' mitigation efforts.

19 16. The Confidential Information contained in the responses to Item 6, 7, 16, 17, and
20 20 includes information such as forecasts of Big Rivers' projected off-system sales volumes and
21 prices, forecasts of Big Rivers' production costs, including fuel costs and operating and
22 maintenance ("O&M") expenses, and forecasted generation levels.

23 17. Public disclosure of the Confidential Information would reveal detailed
24 information relating to Big Rivers' projected variable O&M costs for production factors such as
25 fuel, reagent, disposal, and emission allowances; projected margins; and projected off-system

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

14 18. Public disclosure of information relating to Big Rivers' projected capital
15 expenditures and generation levels would reveal when Big Rivers will have excess power
16 available to sell into the market, or when Big Rivers' generation levels will drop due to
17 maintenance and construction and will have to resort to purchased power to meet its native load.
18 The Commission has previously granted confidential treatment to similar information. *See, e.g.,*
19 *April 25 Confidentiality Order, P.S.C. Case No. 2012-00535; P.S.C. Administrative Case No.*
20 *387, Letter (July 20, 2010).*

21 19. Information related to Big Rivers' mitigation activities involve sensitive
22 negotiations between Big Rivers and other entities and is generally subject to confidentiality
23 agreements among the various parties involved. The Commission has previously granted

1 confidential treatment to similar information. *See, e.g.*, April 25 Confidentiality Order, P.S.C.
2 Case No. 2012-00535 (granting confidential treatment to details of sensitive commercial
3 negotiations).

4 20. Finally, public disclosure of the Confidential Information would reveal details of
5 Big Rivers' fundamental financial data. This type of information bears upon a company's
6 detailed inner workings and is generally recognized as confidential or proprietary. *See, e.g., Hoy*
7 *v. Kentucky Indus. Revitalization Authority*, 907 S.W.2d 766, 768 (Ky. 1995) ("It does not take a
8 degree in finance to recognize that such information concerning the inner workings of a
9 corporation is 'generally recognized as confidential or proprietary'"). Additionally, the
10 Commission has previously granted confidential treatment to this type of information. *See, e.g.*,
11 April 25 Confidentiality Order, P.S.C. Case No. 2012-00535 (granting confidential treatment to
12 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 21. Disclosure of the Confidential Information would grant Big Rivers' competitors
17 an unfair commercial advantage. As discussed above in Section 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 22. The Confidential Information includes material such as Big Rivers' projections of
23 fuel costs and power prices. If that information is publicly disclosed, market participants would
24 have insight into the prices at which Big Rivers is willing to buy and sell fuel and could
25 manipulate the bidding process, impairing its ability to generate power at competitive rates and

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

17 23. Potential market power purchasers could use the information related to Big
18 Rivers' projected off-system sales and revenues and generation levels to know when Big Rivers
19 will have excess power to sell into the wholesale market and could use that information to
20 manipulate their bids, leading to lower revenues to Big Rivers. This would place Big Rivers at
21 an unfair competitive disadvantage in the credit markets.

22 24. Public disclosure of the prices of fuel, reagent, disposal, emission allowance, and
23 other variable cost information, and information about Big Rivers' wholesale power needs would

1 give the power producers and marketers with which Big Rivers competes in the wholesale power
2 market insight into Big Rivers' cost of producing power and need for power and energy during
3 the periods covered by the information. Knowledge of this information would give those power
4 producers and marketers an unfair competitive advantage because they could use that
5 information to potentially underbid Big Rivers in wholesale transactions. It would also give
6 potential suppliers to Big Rivers a competitive advantage because they will be able to manipulate
7 the price of power bid to Big Rivers in order to maximize their revenues, thereby driving up Big
8 Rivers' costs and impairing Big Rivers' ability to compete in the wholesale power and credit
9 markets.

10 25. Finally, the Commission has consistently recognized that internal strategic
11 planning information and related materials are entitled to confidential treatment, as these
12 documents typically relate to the company's economic status and business strategies. *See, e.g.,*
13 *Marina Management Servs. v. Cabinet for Tourism, Dep't of Parks*, 906 S.W.2d 318, 319 (Ky.
14 1995) (unfair commercial advantage arises simply from "the ability to ascertain the economic
15 status of the entities without the hurdles systemically associated with the acquisition of such
16 information about privately owned organizations"); *In the Matter of: The Joint Application of*
17 *Duke Energy Corp., Cinergy Corp., Duke Energy Ohio, Inc., Duke Energy Kentucky, Inc.,*
18 *Diamond Acquisition Corp., and Progress Energy, Inc., for Approval of the Indirect Transfer of*
19 *Control of Duke Energy Kentucky, Inc.*, P.S.C. Case No. 2011-00124 (Dec. 5, 2011); *In the*
20 *Matter of: The Joint Petition of Kentucky-American Water Co., Thames Water Aqua Holdings*
21 *GmbH, RWE Aktiengesellschaft, Thames Water Aqua U.S. Holdings, Inc., and Am. Water Works*
22 *Co., Inc. for Approval of a Change in Control of Kentucky-American Water Co.*, P.S.C. Case No.
23 2006-00197 (Aug. 29, 2006) (holding that reports from the joint applicants' financial advisors

1 and all board of director minutes and information is confidential because competitors could use it
2 to gain unfair competitive advantage).

3 26. Accordingly, the public disclosure of the information that Big Rivers seeks to
4 protect would provide Big Rivers' competitors with an unfair commercial advantage.

5 **D. Time Period**

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

8 28. Big Rivers requests that the Confidential Information remain confidential for a
9 period of five (5) years from the date of this petition, which should allow sufficient time for the
10 projected data to become historical and sufficiently outdated that it could not be used to
11 determine similar confidential information at that time or to competitively disadvantage Big
12 Rivers.

13 **E. Conclusion**

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

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

21 On this the 23rd day of January, 2014.

22 Respectfully submitted,
23
24
25



1 James M. Miller
2 Tyson Kamuf
3 SULLIVAN, MOUNTJOY, STAINBACK
4 & MILLER, P.S.C.
5 100 St. Ann Street
6 P. O. Box 727
7 Owensboro, Kentucky 42302-0727
8 Phone: (270) 926-4000
9 Facsimile: (270) 683-6694
10 jmillersmsmlaw.com
11 tkamuf@smsmlaw.com
12

13
14 Edward T. Depp
15 DINSMORE & SHOHL LLP
16 101 South Fifth Street
17 Suite 2500
18 Louisville, KY 40202
19 Phone: (502) 540-2347
20 Facsimile: (502) 585-2207
21 tip.depp@dinsmore.com
22

23
24 *Counsel for Big Rivers Electric Corporation*
25

26 **Certificate of Service**
27

28 I certify that a true and accurate copy of the foregoing was served by Federal Express or
29 by first class mail upon the persons listed on the accompanying service list, on or before the date
30 this petition is filed with the Kentucky Public Service Commission.
31

32 On this the 23rd day of January, 2014.
33

34 
35 _____
36 Tyson Kamuf