

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

BIG RIVERS ELECTRIC CORPORATION)	
FILING OF WHOLESALE CONTRACTS)	CASE NO.
PURSUANT TO KRS 278.180 AND KAR)	2014-00134
5:011 §13)	

ORDER

On April 4, 2014, Big Rivers Electric Corporation (“Movant” or “Big Rivers”) filed a petition, pursuant to 807 KAR 5:001, Section 13, KRS 61.878(1)(c), and KRS 278.160(3), requesting that the Commission grant confidential protection indefinitely to portions of three Market Based Rate Partial and Full Requirements Agreements (collectively “PPAs”), which contain identical terms and were entered into between Movant and, respectively, Northeast Nebraska Public Power District; the city of Wayne, Nebraska; and the city of Wakefield, Nebraska (collectively “Nebraska Parties”). Movant also requests confidential protection indefinitely to portions of the Summary of Nebraska PPAs (“Summary”), which summarizes the terms of the PPAs. The PPAs and the Summary were filed by Movant along with the petition for confidentiality. The portions of the PPAs and Summary at issue in this petition include the rates to be paid by the Nebraska Parties.

In support of its petition, Movant argues that the designated information would permit an unfair commercial advantage to Movant’s competitors if it were publicly disclosed, thus is generally recognized as confidential and is exempt from public disclosure pursuant to KRS 61.878(1)(c) and KRS 278.160(3).

Movant asserts that its ability to compete successfully in the wholesale power market depends on getting the maximum price and most advantageous terms for the power it sells into the wholesale market. Movant maintains that public disclosure of the information sought to be protected would impair its ability to successfully negotiate future PPAs. If the designated information is publicly disclosed, Movant argues, its competitors could tailor their bids on future PPAs based upon the disclosed information, thus gaining an unfair competitive advantage to the detriment of the Movant. Movant further argues that future counterparties could use the information at issue as a benchmark in future negotiations, resulting in less favorable wholesale power prices and sales terms for Movant. Additionally, Movant claims that the pool of potential counterparties for future PPAs could be reduced because potential counterparties would be reluctant to enter into agreements with Movant if Movant must publicly disclose commercially sensitive contract terms that potential counterparties wish to be kept confidential.

Movant asserts that the information at issue is highly confidential, and states that it is not publicly available and is not disclosed to persons within the company who do not have a need for the information. Movant further states that counsel for the Nebraska Parties advises that the terms and provisions of the PPAs at issue are not subject to disclosure under applicable open records laws of the State of Nebraska.

Kentucky Industrial Utility Customers, Inc. ("KIUC"), an intervenor in this matter, filed a response objecting to Movant's request for confidential treatment of the designated portions of the PPAs and Summary. KIUC notes that Movant bears the burden of producing tangible evidence demonstrating unfair competitive advantage to

justify an exemption from the public disclosure requirements. KIUC argues that Movant fails to meet this burden because the information that Movant deems confidential is either publicly available elsewhere or consists of minor contract terms that are not competitively sensitive.

Citing to 807 KAR 5:001, Section 13, and a previous Commission decision,¹ KIUC argues that information that is publicly available does not qualify for confidential protection under KRS 61.878(1)(c) and KRS 278.160(3). KIUC contends that the major terms of the PPAs were publicly disclosed elsewhere, thus Movant is not entitled to confidential treatment of the major contract terms. KIUC further argues that Movant seeks confidential treatment for minor contract terms that are not generally considered confidential, including payment due dates, events for default, and an agreement for future negotiations.

In its reply, Movant reiterates that all of the designated information is entitled to confidential protection and disputes KIUC's allegations that certain contract terms had already been publicly disclosed. Movant notes that the information cited by KIUC consists of five paragraphs from only one of the three PPAs. Movant argues that any information disclosed elsewhere was not information generally considered confidential, but instead consisted of (1) offers put forth during negotiations that were not the final agreed-upon terms; (2) partial disclosures that provided no meaningful information and, without the full disclosure, were misleading; or (3) general descriptions that did not disclose specific details that are entitled to confidential treatment. Movant asserts that, even if KIUC is correct that some of the confidential contract terms were publicly

¹ Case 2002-00018, *Application for Approval of the Transfer of Control of Kentucky-American Water Company to Rwe Aktiengesellschaft and Thames Water Aqua Holdings GmbH* (Ky. PSC Apr. 12, 2002).

disclosed, the remaining terms are entitled to confidential protection. Movant also argues that no statutory or regulatory law requires the Commission to consider the relative weight of information when determining whether information is entitled to confidential treatment. Movant declares that the information that KIUC claims is “minor” is actually commercially sensitive terms that the signatories to the PPAs consider important and confidential.

Having carefully considered the petition and the materials at issue, the Commission finds that:

1. The materials for which Movant seeks confidential treatment that are contained in the Summary filed by Movant, with the exception of the materials designated in Appendix C to this Order, are records that are generally recognized as confidential or proprietary, and which if openly disclosed would permit an unfair commercial advantage to competitors, and therefore meet the criteria for confidential treatment and are exempted from public disclosure pursuant to 807 KAR 5:001, Section 13, KRS 61.878(1)(c), and KRS 278.160(3).

2. The materials contained in the Summary that are designated in Appendix C to this Order do not meet the criteria for confidential treatment under 807 KAR 5:001, Section 13, KRS 61.878(1)(c), and KRS 278.160(3). The Commission finds that disclosure of the materials designated in Appendix C to this Order would not impose upon Movant any unfair competitive disadvantage in future negotiations involving wholesale power purchase agreements. This is particularly so given the Commission’s need to be able to fully and specifically address the cost impact in its final determination of this matter, and given that Movant’s members and retail customers have a right to

know the evidence upon which the Commission relied in determining that the costs of the PPAs are fair, just, and reasonable. Big Rivers' request for confidential treatment should be denied for the materials contained in Appendix C to this Order.

3. The materials for which Movant seeks confidential treatment that are contained in the PPAs filed by Movant, with the exception of the materials designated in Appendix C to the PPAs and in Appendix D to this Order, are records that are generally recognized as confidential or proprietary, and which if openly disclosed would permit an unfair commercial advantage to competitors, and therefore meet the criteria for confidential treatment and are exempted from public disclosure pursuant to 807 KAR 5:001, Section 13, KRS 61.878(1)(c), and KRS 278.160(3).

4. The materials contained in the PPAs that are designated in Appendix D to this Order do not meet the criteria for confidential treatment under 807 KAR 5:001, Section 13, KRS 61.878(1)(c), and KRS 278.160(3). The Commission finds that disclosure of the materials designated in Appendix D to this Order would not impose upon Movant any unfair competitive disadvantage in future negotiations involving wholesale power purchase agreements. This is particularly so given the Commission's need to be able to fully and specifically address the cost impact in its final determination of this matter, and given that Movant's members and retail customers have a right to know the evidence upon which the Commission relied in determining that the costs of the PPAs are fair, just, and reasonable. Movant's request for confidential treatment should be denied for the materials contained in Appendix D to this Order.

5. The Letter of Agency, attached as Appendix C to the respective PPAs between Movant and the city of Wakefield, Nebraska, and between Movant and the city

of Wayne, Nebraska, does not meet the criteria for confidential treatment under 807 KAR 5:001, Section 13, KRS 61.878(1)(c), and KRS 278.160(3). The information, which contains terms and cost allocation if Movant serves as designated agent for the cities of Wayne and Wakefield, Nebraska, is identical to the terms and conditions set forth in Appendix C to the PPA between Movant and Northeast Nebraska Public Power District. Movant does not seek confidential treatment for Appendix C to that PPA. Therefore, Big Rivers' request for confidential treatment for the information contained in Appendix C attached to the respective PPAs between Movant and the city of Wakefield, Nebraska, and between Movant and the city of Wayne, Nebraska, should be denied.

IT IS THEREFORE ORDERED that:

1. Movant's motion for confidential protection is hereby granted in part and denied in part.
2. Movant's request for confidential treatment of information set forth in Appendices A and B to this order are granted.
3. Movant's request for confidential treatment of information set forth in Appendices C and D to this order are denied.
4. The materials for which Movant's request for confidential treatment has been granted shall neither be placed in the public record nor made available for public inspection for an indefinite period of time.
5. The materials for which Movant's request for confidential treatment has been denied shall neither be placed in the public record nor made available for inspection for 20 days from the date of this Order in order to allow Movant to seek a remedy afforded by law.

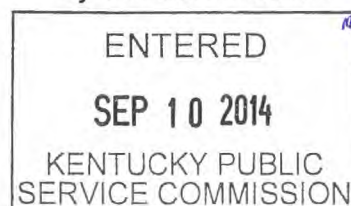
6. Use of the materials that were granted confidential treatment in any Commission proceeding shall be in compliance with 807 KAR 5:001, Section 13(9).

7. Movant shall inform the Commission if the materials granted confidential protection become publicly available or no longer qualify for confidential treatment.

8. If a non-party to this proceeding requests to inspect materials granted confidential treatment by this Order and the period during which the materials have been granted confidential treatment has not run, the Movant shall have 20 days from receipt of written notice of the request to demonstrate that the materials still fall within the exclusions from disclosure requirements established in KRS 61.878. If Movant is unable to make such demonstration, the requested materials shall be made available for inspection. Otherwise, the Commission shall deny the request for inspection.

9. The Commission shall not make the materials available for inspection for 20 days following an Order finding that the materials no longer qualify for confidential treatment in order to allow Movant to seek a remedy afforded by law.

By the Commission



ATTEST:



Executive Director

APPENDIX A

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE
COMMISSION IN CASE NO. 2014-00134 DATED **SEP 10 2014**

MATERIALS FROM SUMMARY OF NEBRASKA PPAS
GRANTED CONFIDENTIAL TREATMENT

1. Section B. Term and Delivery Period, portions of the third sentence and the last three sentences in the second paragraph;
2. Section D. Nature of Service, the last three sentences in first paragraph;
3. Section F., the entire section with the exception of the last sentence;
4. Section H. Rates, the first paragraph;
5. Section H. Rates, portions of the fourth sentence in the third paragraph;
6. Section I. Charges, portions of the fourth sentence in the first paragraph, and the entire second and third paragraphs;
7. Section J., the first paragraph;
8. Section K. Events of Default; Remedies, the last sentence of the second paragraph;
9. Section M., the entire section;
10. Section P. Other, the second and fourth paragraphs.

APPENDIX B

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE
COMMISSION IN CASE NO. 2014-00134 DATED **SEP 10 2014**

MATERIALS FROM PPAS GRANTED CONFIDENTIAL TREATMENT

1. Article 2.1(b) Term, the entire Article subsection;
2. Article 2.3, the first paragraph and second paragraph;
3. Article 2.4 the entire Article subsection;
4. Article 2.6, the entire Article subsection;
5. Article 3.1(a)-(b), the entire Article subsections;
6. Article 3.3, the entire Article subsection;
7. Article 3.4, the entire Article subsection;
8. Article 3.5, the entire Article subsection;
9. Article 3.6, the entire Article subsection;
10. Article 3.7, the entire Article subsection;
11. Article 3.8, the entire Article subsection;
12. Article 3.9, the entire Article subsection;
13. Article 3.13, the entire Article subsection;
14. Article 3.14, the entire Article subsection;
15. Article 3.15, the entire Article subsection;
16. Article 4.2, the entire Article subsection;
17. Article 4.3, the entire Article subsection;

18. Article 4.6 Payment Netting, the second sentence;
19. Article 4.8, the entire Article subsection;
20. Article 4.9, the entire Article subsection;
21. Article 5.1 (a), the entire Article subsection;
22. Article 5.1 (d), the entire Article subsection;
23. Article 5.2, the entire Article subsection;
24. Article 6.2, the entire Article subsection;
25. Article 6.3, the entire Article subsection;
26. Article 6.4, the entire Article subsections;
27. Article 7.5 Disputes with Respect to Termination Payment, portions of the last sentence in the Article subsection;
28. Article 7.6, the entire Article subsection;
29. Article 8.4 Force Majeure Exceptions, the entire Article subsection;
30. Article 12.2 Exceptions to Prohibition Against Assignments, portions of the last sentence in the Article subsection;
31. Article 15.2(c) Dispute Resolution, the entire Article subsection;
32. Appendix A List of Physical Delivery Point(s) and Interconnection Point, the interconnection point name;
33. Appendix B Responsibility for ISO/RTO Charges and Credits, the entire appendix.

APPENDIX C

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE
COMMISSION IN CASE NO. 2014-00134 DATED **SEP 10 2014**

MATERIALS FROM SUMMARY OF NEBRASKA PPAS DENIED CONFIDENTIAL TREATMENT

1. Section B. Term and Delivery Period, the second sentence in the first paragraph;
2. Section B. Term and Delivery Period, the second sentence in the second paragraph;
3. Section D. Nature of Service, the first sentence in the first paragraph;
4. Section E., the section heading;
5. Section E., the entire section;
6. Section F., the section heading;
7. Section F., the last sentence in this section;
8. Section G. Required Equipment, the entire section;
9. Section H. Rates, the second paragraph;
10. Section H. Rates, the fourth paragraph;
11. Section J., the section heading;
12. Section J., the second paragraph;
13. Section K. Events of Default; Remedies, Section (ii) in the first paragraph;
14. Section L. Additional Termination Rights, the second paragraph;
15. Section M., the section heading;
16. Section P. Other, the fifth paragraph.

APPENDIX D

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE
COMMISSION IN CASE NO. 2014-00134 DATED **SEP 10 2014**

MATERIALS FROM PPAS DENIED CONFIDENTIAL TREATMENT

1. The Headings for each Article subsection in the Table of Contents and the corresponding headings for each Article subsection in the body of the document, which identify the general topic for each Article subsection;
2. Article 1.47 NPPD Contract Reduction Period, the last sentence;
3. Article 1.50, the Article subsection heading and the entire Article subsection;
4. Article 1.52, the Article subsection heading and the entire Article subsection;
5. Article 2.1(a) Term, the last four sentences;
6. Article 2.3, the Article subsection heading;
7. Article 2.3, the third paragraph;
8. Article 2.5, the Article subsection heading and the entire Article subsection;
9. Article 3.2, the Article subsection heading and the entire Article subsection;
10. Article 3.11, the Article subsection heading and the entire Article subsection;
11. Article 3.12, the Article subsection heading and the entire Article subsection;

12. Article 4.5(a) Invoice and Payment Date, the entire Article subsection;
13. Article 5.1(b) Market Participant (MP), the entire Article subsection, which contains the parties' risks and cost allocation regarding market participant services;
14. Article 5.1(c), the Article subsection heading and the entire Article subsection;
15. Article 7.1(c) Events of Default, the Article subsection;
16. Article 7.2 Declaration of an Early Termination Date and Calculation of Termination Payment, Section (iv);
17. Appendix C to the PPA between Big Rivers and the city of Wakefield, Nebraska;
18. Appendix C to the PPA between Big Rivers and the city of Wayne, Nebraska.

Lawrence W Cook
Assistant Attorney General
Office of the Attorney General Utility & Rate
1024 Capital Center Drive
Suite 200
Frankfort, KENTUCKY 40601-8204

Honorable Michael L Kurtz
Attorney at Law
Boehm, Kurtz & Lowry
36 East Seventh Street
Suite 1510
Cincinnati, OHIO 45202

Honorable James M Miller
Attorney at Law
Sullivan, Mountjoy, Stainback & Miller, PSC
100 St. Ann Street
P.O. Box 727
Owensboro, KENTUCKY 42302-0727