

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

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5 In the Matter of:

PUBLIC SERVICE
COMMISSION

6
7 AN EXAMINATION OF THE APPLICATION OF)
8 THE FUEL ADJUSTMENT CLAUSE OF BIG)
9 RIVERS ELECTRIC CORPORATION FROM)
10 NOVEMBER 1, 2012 THROUGH OCTOBER 31,)
11 2014)

CASE NO.
2014-00455

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15 **PETITION OF BIG RIVERS ELECTRIC CORPORATION FOR CONFIDENTIAL**
16 **PROTECTION**

17
18 1. Big Rivers Electric Corporation ("Big Rivers") hereby petitions the Kentucky
19 Public Service Commission ("Commission"), pursuant to 807 KAR 5:001 Section 13 and KRS
20 61.878, to grant confidential protection to certain information contained in Big Rivers' responses
21 to Items 5, 6, 9, 11, and 25 and the attachment to Item 25.b.iv of the information requested in
22 Appendix B to the Commission's February 5, 2015, order in this matter (the "Confidential
23 Information").

24 2. The Confidential Information consists of Big Rivers' projected fuel requirements
25 in tons and dollars (Item 5); projected off-system sales kWh and dollars (Item 6); planned outage
26 schedule (Item 9); future off-system sales (Item 11); information about selected bids for fuel
27 contracts (Item 25); and a bid tabulation sheet (Item 25.b.iv attachment).

28 3. One (1) copy of the pages containing Confidential Information, with the
29 Confidential Information highlighted with transparent ink, printed on yellow paper, or otherwise
30 marked "CONFIDENTIAL," is being filed with this petition. A copy of those pages, with the
31 Confidential Information redacted, is being filed with the original and each of the ten (10) copies

1 of Big Rivers' responses to the information requests filed with this petition. 807 KAR 5:001
2 Sections 13(2)(a)(3), 13(2)(b).

3 4. There are no other parties to this proceeding on which to serve a copy of this
4 petition. 807 KAR 5:001 Section 13(2)(c).

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

9 6. If and to the extent the Confidential Information becomes generally available to
10 the public, whether through filings required by other agencies or otherwise, Big Rivers will
11 notify the Commission and have its confidential status removed. 807 KAR 5:001 Section
12 13(10)(a).

13 7. As discussed below, the Confidential Information is entitled to confidential
14 protection based upon KRS 61.878(1)(c)(1), which protects "records confidentially disclosed to
15 an agency or required by an agency to be disclosed to it, generally recognized as confidential or
16 proprietary, which if openly disclosed would permit an unfair commercial advantage to
17 competitors of the entity that disclosed the records." KRS 61.878(1)(c)(1); 807 KAR 5:001
18 Section 13(2)(a)(1).

19 I. Big Rivers Faces Actual Competition

20 8. Big Rivers competes in the wholesale power market to sell energy excess to its
21 members' needs. Big Rivers' ability to successfully compete in the wholesale power market is
22 dependent upon a combination of its ability to get the maximum price for the power sold, and
23 keeping the cost of producing that power as low as possible. Fundamentally, if Big Rivers' cost

1 of producing a kilowatt hour increases, its ability to sell that kilowatt hour in competition with
2 other utilities is adversely affected. As is well documented in multiple proceedings before this
3 Commission, Big Rivers' margins are derived almost exclusively from its off-system sales.

4 9. Big Rivers also competes for reasonably priced credit in the credit markets, and
5 its ability to compete is directly impacted by its financial results. Any event that adversely
6 affects Big Rivers' margins will adversely affect its financial results and potentially impact the
7 price it pays for credit. As was described in the proceeding before this Commission in the Big
8 Rivers unwind transaction case, Big Rivers expects to be in the credit markets on a regular basis
9 in the future.¹

10 **II. The Confidential Information is Generally Recognized as Confidential or**
11 **Proprietary**
12

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

16 11. The Confidential Information in the responses to Items 5 and 6 shows Big Rivers'
17 projections of fuel requirements amounts, fuel prices, and off-system sales amounts and prices;
18 the Confidential Information in the response to Item 9 is a planned outage schedule; the
19 Confidential Information in the response to Item 11 shows future off-system sales; the
20 information in the response to Item 25 relates to selected bids for fuel contracts; and the
21 Confidential Information in the attachment to Item 25.b.ib is a bid tabulation sheet.

22 12. Public disclosure of projected fuel prices and off-system sales prices and the
23 future off-system sales will give Big Rivers' suppliers, buyers, and competitors insight into Big

¹ See Order dated March 6, 2009, in *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 Rivers' view of future fuel prices and market power prices, which would indicate the prices at
2 which Big Rivers is willing to buy or sell such items. Public disclosure of the projected fuel
3 requirements amounts, off-system sales amounts, and planned outage schedule would help Big
4 Rivers' suppliers, buyers, and competitors to determine when Big Rivers will have power
5 available to sell into the market or when Big Rivers needs power, and the amount of power Big
6 Rivers has to sell.

7 13. Information about a company's detailed inner workings is generally recognized as
8 confidential or proprietary. *See, e.g., Hoy v. Kentucky Indus. Revitalization Authority*, 907
9 S.W.2d 766, 768 (Ky. 1995) ("It does not take a degree in finance to recognize that such
10 information concerning the inner workings of a corporation is 'generally recognized as
11 confidential or proprietary'"). Moreover, the Commission has previously granted confidential
12 treatment to similar information. *See, e.g.,* letters from the Commission dated July 28, 2011, and
13 December 20, 2011, in *In the Matter of: Application of Big Rivers Electric Corporation for a*
14 *General Adjustment in Rates*, PSC Case No. 2011-00036 (granting confidential treatment to
15 multi-year forecast); letter from the Commission dated December 21, 2010, in *In the Matter of:*
16 *The 2010 Integrated Resource Plan of Big Rivers Electric Corporation*, PSC Case No. 2010-
17 00443 (granting confidential treatment to fuel cost projections, market price projections,
18 financial model outputs, etc.); letter from the Commission dated July 20, 2010, in Administrative
19 Case No. 387 (granting confidential treatment to a list of future scheduled outages, which can
20 give competitors insight into Big Rivers' wholesale power needs); two letters from the
21 Commission dated December 11, 2012, in *In the Matter of: Application of Big Rivers Electric*
22 *Corporation for Approval of its 2012 Environmental Compliance Plan, for Approval of its*
23 *Amended Environmental Cost Recovery Surcharge Tariff, for Certificates of Public Convenience*

1 *and Necessity, and for Authority to Establish a Regulatory Account*, PSC Case No. 2012-00063
2 (granting confidential treatment to Big Rivers' off-system sales).

3 14. Big Rivers' response to Item 25 discusses a spot and term coal supply solicitation
4 issued by Big Rivers in September 2014. As discussed in that response, Big Rivers has selected
5 the vendors for the spot fuel supply. However, Big Rivers is still in the process of negotiating
6 with vendors to fulfill the term fuel supply. The Confidential Information contained in Item 25
7 reveals Big Rivers' thought processes related to the term fuel supply vendors, which those
8 vendors could use to their competitive advantage in the on-going negotiations.

9 15. The bid tabulation sheet contains confidential bids supplied by fuel suppliers and
10 Big Rivers' ranking of those bids, and it gives insight into the internal, confidential bid selection
11 methodology that Big Rivers uses.

12 16. The Commission has often found that similar information relating to competitive
13 bidding is generally recognized as confidential and proprietary. *See, e.g.*, Order dated August 4,
14 2003, in *In the Matter of: Application of the Union Light, Heat and Power Company for*
15 *Confidential Treatment*, PSC Case No. 2003-00054 (finding that bids submitted to a utility were
16 confidential). In fact, the Commission has granted confidential protection to the same type of
17 information that is presented in the bid tabulation sheets when provided by other utilities in cases
18 involving a review of their fuel adjustment clauses. *See, e.g.*, letter from the Commission dated
19 October 23, 2009, granting confidential protection to East Kentucky Power Cooperative, Inc.'s
20 bid tabulation sheet and related information in Case No. 2009-00286; letter from the
21 Commission dated December 11, 2009, granting confidential protection to Kentucky Utilities
22 Company's coal bid analysis procedure in Case No. 2009-00287. The Commission has also
23 granted confidential protection to the bid tabulation sheets that Big Rivers filed in previous

1 reviews of its fuel adjustment clause. *See, e.g.*, letter from the Commission dated May 10, 2010,
2 in Case No. 2009-00510; letter from the Commission dated September 22, 2010, in Case No.
3 2010-00269. Thus, both the information in the response to Item 25 and the information in the
4 attachment to the response to Item 25 are generally recognized as confidential or proprietary.

5 **III. Disclosure of the Confidential Information Would Permit an Unfair**
6 **Commercial Advantage to Big Rivers' Competitors**
7

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

12 18. The Confidential Information includes material such as Big Rivers' projections of
13 fuel and market power prices and Big Rivers' future off-system sales. If that information is
14 publicly disclosed, potential fuel and power suppliers and buyers of fuel and power would have
15 insight into the prices Big Rivers is willing to buy and sell those items at and could manipulate
16 the bidding process, leading to higher prices or lower revenues for Big Rivers and impairing its
17 ability to compete in the wholesale power and credit markets. In PSC Case No. 2003-00054, the
18 Commission granted confidential protection to bids submitted to Union Light, Heat & Power
19 ("ULH&P"). ULH&P argued, and the Commission implicitly accepted, that if the bids it
20 received were publicly disclosed, contractors on future work could use the bids as a benchmark,
21 which would likely lead to the submission of higher bids. Order dated August 4, 2003, in *In the*
22 *Matter of: Application of the Union Light, Heat and Power Company for Confidential*
23 *Treatment*, PSC Case No. 2003-00054. The Commission also implicitly accepted ULH&P's
24 further argument that the higher bids would lessen ULH&P's ability to compete with other gas
25 suppliers. *Id.* Similarly, potential fuel and power suppliers manipulating Big Rivers' bidding

1 process would lead to higher costs or lower revenues to Big Rivers and would place it at an
2 unfair competitive disadvantage in the wholesale power market and credit markets.

3 19. Potential market power purchasers could use the information related to Big
4 Rivers' projected off-system sales amounts, fuel requirements, and planned outages to know
5 when and to the extent Big Rivers is long on power and could use that information to manipulate
6 their bids, leading to lower revenues to Big Rivers and placing it at an unfair competitive
7 disadvantage in the credit markets.

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

18 21. With regard to the bid tabulation sheets, in PSC Case No. 2003-00054, the
19 Commission implicitly accepted ULH&P's argument that the bidding contractors would not
20 want their bid information publicly disclosed, and that disclosure would reduce the contractor
21 pool available to ULH&P, which would drive up ULH&P's costs, hurting its ability to compete
22 with other gas suppliers. Order dated August 4, 2003, in *In the Matter of: Application of the*
23 *Union Light, Heat and Power Company for Confidential Treatment*, PSC Case No. 2003-00054.

1 Similarly, in *Hoy v. Kentucky Indus. Revitalization Authority*, the Kentucky Supreme Court
2 found that without protection for confidential information provided to a public agency,
3 “companies would be reluctant to apply for investment tax credits for fear the confidentiality of
4 financial information would be compromised. *Hoy v. Kentucky Indus. Revitalization Authority*,
5 907 S.W.2d 766, 769 (Ky. 1995).

6 22. In Big Rivers’ case, if confidential treatment of the bid tabulation sheets is denied,
7 potential bidders would know that their bids would be publicly disclosed, which could reveal
8 information to their competitors about their competitiveness. Because many companies would
9 be reluctant to have such information disclosed, public disclosure of Big Rivers’ bid tabulation
10 sheets would likely suppress the competitive bidding process and reduce the pool of bidders
11 willing to bid to supply Big Rivers’ fuel needs, driving up Big Rivers’ fuel costs (which could
12 then drive up the cost of credit to Big Rivers) and impairing its ability to compete in the
13 wholesale power market.

14 23. Finally, the information contained in the response to Item 25 and in the bid
15 tabulation sheets reveals the procedure and strategies Big Rivers follows and the factors and
16 inputs it considers in evaluating bids for fuel supply and in negotiating fuel contracts. If the
17 documents are publicly disclosed, potential bidders could manipulate the bid solicitation process
18 to the detriment of Big Rivers and its members by tailoring bids to correspond to and comport
19 with Big Rivers’ bidding criteria and process, and selected bidders would have an unfair
20 advantage in negotiating the fuel contracts. As in the ULH&P case, potential bidders
21 manipulating Big Rivers’ bidding process would lead to higher fuel costs to Big Rivers and
22 would place it at an unfair competitive disadvantage in the wholesale power market. Similarly,
23 selected bidders with an unfair advantage in the negotiating process would also lead to higher

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

3 **IV. Time Period**

4 24. Big Rivers requests that the Confidential Information contained in the attachment
5 to the response to Item 25.b.iv remain confidential indefinitely because until Big Rivers changes
6 its bid selection methodology, the public disclosure of the bid tabulation sheet could be used to
7 Big Rivers' competitive disadvantage for the reasons stated above. Big Rivers requests that the
8 Confidential Information contained in the responses to Items 5, 6, 9, and 11 remain confidential
9 for a period of two (2) years from the date of this petition, which will allow sufficient time for
10 the projected data to become historical. Big Rivers requests that the Confidential Information
11 contained in the response to Item 25 remain confidential for a period of one (1) year from the
12 date of this petition, which will allow sufficient time for conclusion of the selection and
13 negotiation of the fuel contracts arising out of the solicitation referenced in that response. 807
14 KAR 5:001 Section 13(2)(a)(2).

15 **V. Conclusion**

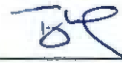
16 25. Based on the foregoing, the Confidential Information is entitled to confidential
17 protection. If the Commission disagrees that Big Rivers is entitled to confidential protection, due
18 process requires the Commission to hold an evidentiary hearing. *Utility Regulatory Com'n v.*
19 *Kentucky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

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

22 On this the 19th day of February, 2015.

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Respectfully submitted,



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