

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

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4
5 In the Matter of:

6
7 AN EXAMINATION OF THE APPLICATION OF)
8 THE FUEL ADJUSTMENT CLAUSE OF BIG)
9 RIVERS ELECTRIC CORPORATION FROM)
10 NOVEMBER 1, 2014 THROUGH APRIL 30,)
11 2015)
12)
13)
14)

CASE NO.
2015-00237

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 and/or attachments to Items 5, 19, and 24 of the information requested in the Appendix to the
22 Commission’s August 14, 2015, order in this matter (the “Confidential Information”).

23 2. The Confidential Information consists of information about Big Rivers’ ongoing
24 off-system sales (Item 5); information about the current heat rates of Big Rivers’ generating units
25 (Item 24); information about selected bids for fuel contracts (Item 19); and a bid tabulation sheet
26 (Item 19.b.iv attachment).

27 3. One (1) copy of the pages containing Confidential Information, with the
28 Confidential Information highlighted with transparent ink, printed on yellow paper, or otherwise
29 marked “CONFIDENTIAL,” is being filed with this petition. A copy of those pages, with the
30 Confidential Information redacted, or a sheet noting that the entirety of the pages have been
31 redacted, is being filed with the original and each of the ten (10) copies of Big Rivers’ responses

1 to the information requests filed with this petition. 807 KAR 5:001 Sections 13(2)(a)(3),
2 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 response to Items 5 shows future off-system
17 sales; the information in the response to Item 24 provides the current heat rates of Big Rivers'
18 generating units; the information in the response to Item 19 relates to selected bids for fuel
19 contracts; and the Confidential Information in the attachment to Item 19.b.iv is a bid tabulation
20 sheet.

21 12. Public disclosure of the heat rate and future off-system sales information will give
22 Big Rivers' suppliers, buyers, and competitors insight into Big Rivers' cost of producing power

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 and into when Big Rivers will have power available to sell into the market or when Big Rivers
2 needs power, and the amount of power Big Rivers has to sell or will need.

3 13. Information about a company's detailed inner workings is generally recognized as
4 confidential or proprietary. *See, e.g., Hoy v. Kentucky Indus. Revitalization Authority*, 907
5 S.W.2d 766, 768 (Ky. 1995) ("It does not take a degree in finance to recognize that such
6 information concerning the inner workings of a corporation is 'generally recognized as
7 confidential or proprietary'"). Moreover, the Commission has previously granted confidential
8 treatment to similar information. *See, e.g.,* letters from the Commission dated July 28, 2011, and
9 December 20, 2011, in *In the Matter of: Application of Big Rivers Electric Corporation for a*
10 *General Adjustment in Rates*, PSC Case No. 2011-00036 (granting confidential treatment to
11 multi-year forecast, including production cost information); letter from the Commission dated
12 December 21, 2010, in *In the Matter of: The 2010 Integrated Resource Plan of Big Rivers*
13 *Electric Corporation*, PSC Case No. 2010-00443 (granting confidential treatment to financial
14 model outputs, etc., including production cost information); letter from the Commission dated
15 July 20, 2010, in Administrative Case No. 387 (granting confidential treatment to a list of future
16 scheduled outages, which can give competitors insight into Big Rivers' wholesale power needs);
17 two letters from the Commission dated December 11, 2012, in *In the Matter of: Application of*
18 *Big Rivers Electric Corporation for Approval of its 2012 Environmental Compliance Plan, for*
19 *Approval of its Amended Environmental Cost Recovery Surcharge Tariff, for Certificates of*
20 *Public Convenience and Necessity, and for Authority to Establish a Regulatory Account*, PSC
21 Case No. 2012-00063 (granting confidential treatment to Big Rivers' off-system sales).

22 14. Big Rivers' response to Item 19 discusses a spot and term coal supply solicitation
23 issued by Big Rivers in April 2015. As discussed in that response, Big Rivers has selected the

1 vendors for the spot fuel supply. However, Big Rivers is still in the process of negotiating with
2 vendors to fulfill the term fuel supply. The Confidential Information contained in Item 19 also
3 reveals Big Rivers' thought processes related to the term fuel supply vendors, which those
4 vendors could use to their competitive advantage in the on-going negotiations.

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

8 16. The Commission has often found that similar information relating to competitive
9 bidding is generally recognized as confidential and proprietary. *See, e.g.*, Order dated August 4,
10 2003, in *In the Matter of: Application of the Union Light, Heat and Power Company for*
11 *Confidential Treatment*, PSC Case No. 2003-00054 (finding that bids submitted to a utility were
12 confidential). In fact, the Commission has granted confidential protection to the same type of
13 information that is presented in the bid tabulation sheets when provided by other utilities in cases
14 involving a review of their fuel adjustment clauses. *See, e.g.*, letter from the Commission dated
15 October 23, 2009, granting confidential protection to East Kentucky Power Cooperative, Inc.'s
16 bid tabulation sheet and related information in Case No. 2009-00286; letter from the
17 Commission dated December 11, 2009, granting confidential protection to Kentucky Utilities
18 Company's coal bid analysis procedure in Case No. 2009-00287. The Commission has also
19 granted confidential protection to the bid tabulation sheets that Big Rivers filed in previous
20 reviews of its fuel adjustment clause. *See, e.g.*, letter from the Commission dated May 10, 2010,
21 in Case No. 2009-00510; letter from the Commission dated September 22, 2010, in Case No.
22 2010-00269. Thus, both the information in the response to Item 19 and the information in the
23 attachment to the response to Item 19 are generally recognized as confidential or proprietary.

1 **III. Disclosure of the Confidential Information Would Permit an Unfair**
2 **Commercial Advantage to Big Rivers' Competitors**
3

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

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

24 19. Potential market power purchasers could use the information related to Big
25 Rivers' future off-system sales to know when and to the extent Big Rivers is long on power and

1 could use that information to manipulate their bids, leading to lower revenues to Big Rivers and
2 placing it at an unfair competitive disadvantage in the credit markets.

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

13 21. With regard to the bid tabulation sheets, in PSC Case No. 2003-00054, the
14 Commission implicitly accepted ULH&P's argument that the bidding contractors would not
15 want their bid information publicly disclosed, and that disclosure would reduce the contractor
16 pool available to ULH&P, which would drive up ULH&P's costs, hurting its ability to compete
17 with other gas suppliers. Order dated August 4, 2003, in *In the Matter of: Application of the*
18 *Union Light, Heat and Power Company for Confidential Treatment*, PSC Case No. 2003-00054.
19 Similarly, in *Hoy v. Kentucky Indus. Revitalization Authority*, the Kentucky Supreme Court
20 found that without protection for confidential information provided to a public agency,
21 "companies would be reluctant to apply for investment tax credits for fear the confidentiality of
22 financial information would be compromised. *Hoy v. Kentucky Indus. Revitalization Authority*,
23 907 S.W.2d 766, 769 (Ky. 1995).

1 indefinitely because until Big Rivers changes its bid selection methodology or unit heat rates
2 change significantly, the public disclosure of the information could be used to Big Rivers'
3 competitive disadvantage for the reasons stated above. Big Rivers requests that the Confidential
4 Information contained in the response to Item 5 remain confidential for a period of two (2) years
5 from the date of this petition, which will allow sufficient time for the information to become
6 historical. 807 KAR 5:001 Section 13(2)(a)(2).

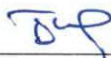
7 **V. Conclusion**

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

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

14 On this the 27th day of August, 2015.

15 Respectfully submitted,

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