

1 COMMONWEALTH OF KENTUCKY
2 BEFORE THE PUBLIC SERVICE COMMISSION

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4 In the matter of:
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APPLICATION OF BIG RIVERS ELECTRIC)
CORPORATION FOR AUTHORITY TO)
ESTABLISH REGULATORY ASSETS FOR) Case No.
EXPENSES RELATED TO THE COAL) 2015-00333
COMBUSTION RESIDUALS RULE)

6
7 **BIG RIVERS ELECTRIC CORPORATION'S PETITION FOR CONFIDENTIAL**
8 **TREATMENT**

9
10 1. Big Rivers Electric Corporation ("Big Rivers") hereby petitions the Kentucky
11 Public Service Commission ("Commission"), pursuant to 807 KAR 5:001 Section 13 and KRS
12 61.878, to grant confidential treatment to certain information Big Rivers is filing with its
13 responses to the Commission Staff's Second Request for Information in the above referenced
14 matter. The information for which Big Rivers seeks confidential treatment is hereinafter referred
15 to as the "Confidential Information."

16 2. Specifically, the Confidential Information consists of a report for an
17 environmental compliance study performed by Burns & McDonnell for Big Rivers (the "2015
18 Environmental Compliance Study"), which is attached to Big Rivers' response to Item 6 of the
19 Commission Staff's Second Request for Information ("PSC 2-6").

20 3. One (1) copy of the 2015 Environmental Compliance Study is being filed with
21 this petition in a separate sealed envelope marked "CONFIDENTIAL." A sheet noting the entire
22 study has been redacted is being filed with each of the original and the ten (10) copies of Big
23 Rivers' response to PSC 2-6 filed with this petition. 807 KAR 5:001 Section 13(2)(a)(3).

1 4. There are no other parties to this proceeding upon whom Big Rivers is required to
2 serve a copy of this petition and a copy of the pages containing Confidential Information, with
3 the Confidential Information redacted. *See* 807 KAR 5:001 Section 13(2)(b).

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

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

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

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

18 8. As a generation and transmission cooperative, Big Rivers competes in the
19 wholesale power market. This includes not only the short-term bilateral energy market, the day-
20 ahead and real time energy and ancillary services markets, and the annual capacity market to
21 which Big Rivers has access by virtue of its membership in Midcontinent Independent System
22 Operator, Inc. (“MISO”), but also forward bilateral long-term agreements and wholesale
23 agreements with utilities and industrial customers. Big Rivers’ ability to successfully compete in

1 the market is dependent upon a combination of its ability to: 1) obtain the maximum price for the
2 power it sells, and 2) keep its cost of production as low as possible. Fundamentally, if Big
3 Rivers' cost of producing a unit of power increases, its ability to sell that unit in competition with
4 other utilities is adversely affected.

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

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

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

20
21 11. The Confidential Information for which Big Rivers seeks confidential treatment
22 under KRS 61.878(1)(c)(1) is generally recognized as confidential or proprietary under Kentucky
23 law.

24 12. The 2015 Environmental Compliance Study is a strategic planning document.
25 Big Rivers retained Burns & McDonnell to perform the study to assist Big Rivers in developing

1 various environmental compliance options and evaluating alternative compliance options. The
2 report discusses and evaluates compliance actions and potential costs well beyond the actions
3 and costs that are the subject of this proceeding, and Big Rivers is still reviewing and assessing
4 the other actions discussed in the report.

5 13. Additionally, the 2015 Environmental Compliance Study contains projections of
6 emissions, emission allowances, operating and maintenance (“O&M”) costs, capital costs, and
7 cash flow timelines. Big Rivers has publicly filed a handful of the capital cost projections from
8 the study in this proceeding in support of its request for regulatory assets related to those costs.
9 Specifically, those costs were publicly disclosed in Paragraphs 9, 10, and 12 of Big Rivers’
10 application and in Big Rivers’ responses to Items 2 through 4 of the Commission Staff’s Initial
11 Request for Information and Items 2 and 3 of the Commission Staff’s Second Request for
12 Information. While the amounts publicly disclosed are not confidential, the entire study is still a
13 strategic planning document for which Big Rivers is seeking confidential treatment.

14 14. Public disclosure of the Confidential Information would reveal detailed
15 information relating to Big Rivers’ projected O&M and capital costs for the environmental
16 compliance projects discussed in the study, as well as its projected emissions and available
17 emission allowances. This information indicates the prices at which Big Rivers is willing to pay
18 contractors and suppliers of the materials for the capital projects and provides insight into Big
19 Rivers’ cost of producing power and the prices at which Big Rivers is will to buy or sell power.
20 The information is also indicative of the market conditions Big Rivers expects to encounter and
21 its ability to compete with competitors. The Commission has previously granted confidential
22 treatment to similar information. *See, e.g., In the Matter of: 2014 Integrated Resource Plan of*
23 *Big Rivers Electric Corporation*, Order, P.S.C. Case No. 2014-00166 (August 26, 2014)

1 (granting confidential treatment to projected O&M costs, rates, revenues, capital costs, and
2 market prices, and stating “projected capital costs and O&M costs are generally recognized as
3 confidential or proprietary when submitted as part of an integrated resource plan”); *In the Matter*
4 *of: Application of Big Rivers Electric Corporation for a General Adjustment in Rates*, Order,
5 P.S.C. Case No. 2012-00535 (April 25, 2013); *In the Matter of: Application of Big Rivers*
6 *Electric Corporation for a General Adjustment in Rates*, Order, P.S.C. Case No. 2012-00535
7 (August 14, 2013); *In the Matter of: Application of Big Rivers Electric Corporation for Approval*
8 *of its 2012 Environmental Compliance Plan, for Approval of its Amended Environmental Cost*
9 *Recovery Surcharge Tariff, for Certificates of Public Convenience and Necessity, and for*
10 *Authority to Establish a Regulatory Account*, Letter, P.S.C. Case No. 2012-00063 (August 15,
11 2012).

12 15. Public disclosure of information relating to Big Rivers’ projected capital
13 expenditures and cash flows would reveal when Big Rivers will have excess power available to
14 sell into the market, or when Big Rivers’ generation levels will drop due to maintenance and
15 construction and will have to resort to purchased power to meet its native load. The Commission
16 has previously granted confidential treatment to similar information. *See, e.g., In the Matter of:*
17 *2014 Integrated Resource Plan of Big Rivers Electric Corporation*, Order, P.S.C. Case No. 2014-
18 00166 (August 26, 2014); *In the Matter of: Application of Big Rivers Electric Corporation for a*
19 *General Adjustment in Rates*, Order, P.S.C. Case No. 2012-00535 (April 25, 2013); P.S.C.
20 Administrative Case No. 387, Letter (July 20, 2010).

21 16. Finally, public disclosure of the Confidential Information would reveal
22 fundamental information about Big Rivers’ business strategies. Information such as this which
23 bears upon a company’s detailed inner workings is generally recognized as confidential or

1 proprietary. *See, e.g., Hoy v. Kentucky Indus. Revitalization Authority*, 907 S.W.2d 766, 768
2 (Ky. 1995) (“It does not take a degree in finance to recognize that such information concerning
3 the inner workings of a corporation is ‘generally recognized as confidential or proprietary’”).
4 Additionally, the Commission has previously granted confidential treatment to this type of
5 information. *See, e.g., In the Matter of: Application of Big Rivers Electric Corporation for a*
6 *General Adjustment in Rates*, Order, P.S.C. Case No. 2012-00535 (April 25, 2013) (granting
7 confidential treatment to minutes of the Big Rivers Board of Directors and Internal Risk
8 Management Committee, Big Rivers’ Financial Model, and Big Rivers’ load forecast); *In the*
9 *Matter of: An Examination of the Application of the Fuel Adjustment Clause of East Kentucky*
10 *Power Cooperative, Inc. From November 1, 2011 Through April 30, 2012*, Order, P.S.C. Case
11 No. 2012-00319 (February 21, 2013).

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

14
15 17. Disclosure of the Confidential Information would grant Big Rivers’ competitors
16 an unfair commercial advantage. As discussed above in Section A, Big Rivers faces actual
17 competition in both the short- and long-term wholesale power markets and in the credit markets.
18 It is likely that Big Rivers’ ability to compete in these markets would be adversely affected if the
19 Confidential Information were publicly disclosed, and Big Rivers seeks protection from such
20 competitive injury.

21 18. The Confidential Information includes material such as Big Rivers’ projections of
22 O&M and capital costs for environmental projects. If that information is publicly disclosed,
23 market participants would have insight into the prices at which Big Rivers is willing to buy and
24 sell power and the prices Big Rivers is willing to pay contractors and suppliers of materials for
25 the environmental projects. The market participants could manipulate the bidding process,

1 impairing Big Rivers' ability to generate power at competitive rates and thus to compete in the
2 wholesale power markets. Furthermore, any competitive pressure that adversely affects Big
3 Rivers' revenue and margins could make the company appear less creditworthy and thus impair
4 its ability to compete in the credit markets. These effects were recognized in P.S.C. Case No.
5 2003-00054, in which the Commission granted confidential treatment to bids submitted to Union
6 Light, Heat & Power ("ULH&P"). ULH&P argued, and the Commission implicitly accepted,
7 that if the bids it received were publicly disclosed, contractors on future work could use the bids
8 as a benchmark, which would likely lead to the submission of higher bids. *In the Matter of:*
9 *Application of the Union Light, Heat and Power Company for Confidential Treatment*, Order,
10 P.S.C. Case No. 2003-00054 (August 4, 2003). The Commission also implicitly accepted
11 ULH&P's further argument that the higher bids would lessen ULH&P's ability to compete with
12 other gas suppliers. *Id.* Similarly, potential power suppliers, and contractors and suppliers of
13 materials for the environmental projects manipulating Big Rivers' bidding process would lead to
14 higher costs or lower revenues to Big Rivers and would place it at an unfair competitive
15 disadvantage in the wholesale power market and credit markets.

16 19. Potential market power purchasers could use information related to Big Rivers'
17 projected cash flow schedules to know when and the extent to which Big Rivers will have excess
18 power to sell into the wholesale market and could use that information to manipulate their bids,
19 leading to lower revenues to Big Rivers and placing it at an unfair competitive disadvantage in
20 the credit markets.

21 20. Additionally, public disclosure of projected costs, emissions, emission
22 allowances, and cash flow schedules for the environmental projects would give the power
23 producers and marketers with which Big Rivers competes in the wholesale power market insight

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

8 21. The Commission has previously granted confidential treatment to similar recent
9 and projected information. *See, e.g., In the Matter of: 2014 Integrated Resource Plan of Big*
10 *Rivers Electric Corporation*, Order, P.S.C. Case No. 2014-00166 (August 26, 2014) ("Big Rivers
11 has treated the environmental compliance costs projections provided in the 2014 IRP as
12 confidential, and public disclosure of that information would provide other participants in the
13 wholesale power market insight into Big Rivers' cost of producing power, putting Big Rivers at a
14 competitive disadvantage for the reasons stated in Big Rivers' May 15, 2014, petition for
15 confidential treatment. Potential contractors or suppliers of materials for the environmental
16 control equipment and potential power suppliers could use the information to manipulate their
17 bids to Big Rivers, which would also put Big Rivers at a competitive disadvantage for the
18 reasons stated in the May 15 petition for confidential treatment The Commission finds that
19 Big Rivers' capital cost and O&M cost projections on Table 8.3 would permit an unfair
20 commercial advantage to competitors if openly disclosed"); *In the Matter of: Application of Big*
21 *Rivers Electric Corporation for a General Adjustment in Rates*, Order, P.S.C. Case No. 2012-
22 00535 (April 25, 2013); *In the Matter of: Application of Big Rivers Electric Corporation for a*
23 *General Adjustment in Rates*, Order, P.S.C. Case No. 2012-00535 (April 8, 2014); *In the Matter*

1 of: *Application of Big Rivers Electric Corporation for a General Adjustment in Rates*, Order,
2 P.S.C. Case No. 2012-00535 (August 14, 2013); *In the Matter of: Application of Big Rivers*
3 *Electric Corporation for Approval of its 2012 Environmental Compliance Plan, for Approval of*
4 *its Amended Environmental Cost Recovery Surcharge Tariff, for Certificates of Public*
5 *Convenience and Necessity, and for Authority to Establish a Regulatory Account*, Letter, P.S.C.
6 Case No. 2012-00063 (August 15, 2012); P.S.C. Administrative Case No. 387, Letter (July 20,
7 2010).

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

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

1 **D. Time Period**

2 24. Big Rivers requests that the Confidential Information remain confidential
3 indefinitely because the 2015 Environmental Compliance Study is an internal strategic
4 document. 807 KAR 5:001 Section 13(2)(a)(2).

5 **E. Conclusion**

6 25. Based on the foregoing, the Confidential Information is entitled to confidential
7 treatment pursuant to 807 KAR 5:001 Section 13 and KRS 61.878. If the Commission disagrees
8 that Big Rivers' Confidential Information is entitled to confidential treatment, due process
9 requires the Commission to hold an evidentiary hearing.

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

12 On this the 30th day of November, 2015.

13 Respectfully submitted,

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