

1 COMMONWEALTH OF KENTUCKY
2 BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY
3
4

RECEIVED

MAR 24 2016

PUBLIC SERVICE
COMMISSION

5 In the Matter of:

6
7 JOINT APPLICATION OF KENERGY)
8 CORP. AND BIG RIVERS ELECTRIC)
9 CORPORATION FOR APPROVAL)
10 OF CONTRACTS)

Case No. 2016-00117

11
12
13 **JOINT PETITION FOR CONFIDENTIAL PROTECTION**
14

15 1. Big Rivers Electric Corporation (“Big Rivers”) and Aleris Rolled Products, Inc.
16 (“Aleris”) (together, the “Joint Petitioners”) hereby jointly petition the Kentucky Public Service
17 Commission (“Commission”), pursuant to 807 KAR 5:001 Section 13 and KRS 61.878, to grant
18 confidential protection to certain information filed with the joint application in this matter. The
19 information for which the Joint Petitioners seek confidential treatment is hereinafter referred to
20 as the “Confidential Information.”

21 2. Big Rivers is one of the joint applicants in this matter. Aleris has filed a limited
22 motion to intervene concurrently with the filing of this petition for the limited purpose of seeking
23 to protect the confidentiality of certain portions of the Confidential Information.

24 3. The Confidential Information consists of information relating to (i) the increase in
25 load at the Aleris Lewisport facility under the Amended and Restated Agreement for Retail
26 Electric Service between Kenergy Corp. and Aleris filed with the application in this matter (the
27 “Retail Agreement”); and (ii) sensitive information about Big Rivers’ production and purchased
28 power costs and energy and capacity price forecasts. The confidential load information is
29 contained in Section 2.03 and Exhibit C of the Retail Agreement and in the testimony of Michael
30 Chambliss (the “Chambliss Testimony”). The confidential Big Rivers cost and forecast

1 information is contained in the Chambliss Testimony and in Exhibit Wolfram-2 to the testimony
2 of John Wolfram, which exhibit is a 2016 Marginal Cost Analysis performed on Big Rivers'
3 behalf.

4 4. One (1) copy of the pages from the Retail Agreement, the Chambliss Testimony,
5 and the 2016 Marginal Cost Analysis containing Confidential Information, with the Confidential
6 Information highlighted with transparent ink, printed on yellow paper, or otherwise marked
7 "CONFIDENTIAL," is being filed with this petition. A copy of those pages, with the
8 Confidential Information redacted, or a sheet noting that the entirety of the pages have been
9 redacted, is being filed with the original and each of the ten (10) copies of the application filed
10 with this petition. 807 KAR 5:001 Sections 13(2)(a)(3), 13(2)(b).

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

13 6. If and to the extent the Confidential Information becomes generally available to
14 the public, whether through filings required by other agencies or otherwise, the Joint Petitioners
15 will notify the Commission and have its confidential status removed. 807 KAR 5:001 Section
16 13(10)(b).

17 7. As discussed below, the Confidential Information is being submitted
18 confidentially pursuant to 807 KAR 5:001 Section 13(9)(a) and/or is entitled to confidential
19 protection based upon KRS 61.878(1)(a) and/or KRS 61.878(1)(c)(1). 807 KAR 5:001 Section
20 13(2)(a)(1).

21 **I. Information Submitted Pursuant to 807 KAR 5:001 Section 13(9)(a)**

22 8. 807 KAR 5:001 Section 13(9)(a) provides, in pertinent part:

23 A person who files any paper that contains material that has previously been
24 deemed confidential or for which a request or motion for confidential treatment is

1 pending shall submit one (1) copy of the paper with the adjudged or alleged
2 confidential material underscored or highlighted, and ten (10) copies of the paper
3 with those portions redacted; and
4

5 ...
6

7 2. If a request for confidential treatment of the material is pending,
8 a written notice identifying the person who made the request and
9 the date on which the request was submitted.
10

11 9. The Confidential Information related to Aleris contained in the Retail Agreement
12 and the Chambliss Testimony is an update of information contained in a schedule that Big Rivers
13 filed pursuant to a petition for confidential treatment on October 15, 2014. Big Rivers filed that
14 schedule in response to Item 7 of the Attorney General’s Second Request for Information in Case
15 No. 2014-00166, and that petition for confidential treatment is still pending.

16 10. 807 KAR 5:001 Section 13(4) provides, “Pending action by the [C]ommission on
17 a motion for confidential treatment or by its executive director on a request for confidential
18 treatment, the material specifically identified *shall* be accorded confidential treatment”
19 (emphasis added). As such, the Confidential Information related to Aleris contained in the Retail
20 Agreement and the Chambliss Testimony is entitled to confidential treatment while the petition
21 for confidential treatment Big Rivers filed in Case No. 2014-00166 remains pending.

22 **II. Information entitled to confidential protection based upon KRS 61.878(1)(a)**

23 11. KRS 61.878(1)(a) protects “[p]ublic records containing information of a personal
24 nature where the public disclosure thereof would constitute a clearly unwarranted invasion of
25 personal privacy.” The Confidential Information related to Aleris contained in the Retail
26 Agreement and the Chambliss Testimony is also entitled to confidential treatment under KRS
27 61.878(1)(a) because it consists of projections of an individual retail customer’s demand and
28 energy requirements and related payment obligations. As explained in more detail in Section III

1 below, the customer, Aleris, considers this information highly confidential and believes that
2 public disclosure of this information will cause it substantial competitive harm. Because public
3 disclosure of the Confidential Information would constitute an unwarranted invasion of this
4 customer's privacy, this Confidential Information should be granted confidential treatment. *See*
5 *Ky. Op. Atty. Gen. 96-ORD-176* (August 20, 1996) (holding Kroger Company's utility bills
6 exempt from disclosure under KRS 61.878(1)(a)); *In the Matter of: Application of Kentucky*
7 *Utilities Company for an Adjustment of its Electric Rates*, Order, P.S.C. Case No. 2012-00221
8 (July 25, 2013) (holding customer names, account numbers, and usage information exempt from
9 disclosure under KRS 61.878(1)(a)).

10 **III. Information entitled to confidential protection based upon KRS 61.878(1)(c)(1)**

11 12. As discussed below, all of the Confidential Information, including the
12 Confidential Information in the Retail Agreement, in the Chambliss Testimony, and in the 2016
13 Marginal Cost Analysis, is entitled to confidential protection based upon KRS 61.878(1)(c)(1),
14 which protects "records confidentially disclosed to an agency or required by an agency to be
15 disclosed to it, generally recognized as confidential or proprietary, which if openly disclosed
16 would permit an unfair commercial advantage to competitors of the entity that disclosed the
17 records." KRS 61.878(1)(c)(1); 807 KAR 5:001 Section 13(2)(a)(1). Subsection A below
18 explains that Aleris and Big Rivers operate in competitive environments; Subection B below
19 shows that the Confidential Information is generally recognized as confidential or proprietary;
20 and Subection C below demonstrates that public disclosure of the Confidential Information
21 would permit an unfair commercial advantage to competitors of Aleris and Big Rivers. As such,
22 the Commission should grant confidential treatment to the Confidential Information.

23

1 **A. Aleris and Big Rivers Face Actual Competition**

2 13. Aleris is a privately-held, global leader in aluminum rolled products, with global
3 headquarters in Cleveland, Ohio. Aleris owns and operates an aluminum rolling mill in
4 Lewisport, Kentucky, which has been in operation since 1964. The Lewisport mill operates in
5 highly competitive, cost sensitive, and increasingly global market to provide rolled aluminum
6 sheet to key industries in Kentucky and the United States including Distribution, Transportation,
7 Automotive, Building and Construction and Specialty Products. Although Aleris maintains a
8 positive outlook, competition in the U.S. flat-rolled aluminum industry has grown significantly
9 due to the introduction of foreign competitors that benefit from lower cost structures and rich
10 government incentives on power, tax adjustments, and other subsidies.

11 14. Aleris is making its largest investments in the company's history to build twin
12 Continuous Annealing Line with Pre-Treatment ("CALP") lines. This investment, and its related
13 timing, will allow Aleris to be one of the first few companies to market in the Unites States with
14 a state of the art auto body sheet production process. It is imperative for Aleris's success in this
15 endeavor, and in the marketplace more generally, that the timing and extent of its ramp up in
16 production be kept confidential. Otherwise, as explained further below, Aleris's direct
17 competitors could gain insight into the most sensitive competitive information, including Aleris's
18 capacity, pricing and customers.

19 15. Big Rivers competes in the wholesale power market to sell energy excess to its
20 members' needs. This includes short-term bilateral energy markets, day-ahead and real-time
21 energy and ancillary services markets, the annual capacity market, and forward bilateral long-
22 term wholesale agreements with utilities and industrial customers. Big Rivers' ability to
23 successfully compete in these wholesale power markets is dependent upon a combination of its

1 ability to: 1) obtain the maximum price for the power it sells and the best contract terms, and 2)
2 keep its cost of production as low as possible. Fundamentally, if Big Rivers' cost of producing a
3 kilowatt hour or its business risk increases, its ability to sell that kilowatt hour in competition
4 with other utilities is adversely affected.

5 16. Big Rivers also competes for reasonably-priced credit in the credit markets, and
6 its ability to compete is directly impacted by the financial results it obtains and the business risks
7 it assumes. Any event that adversely affects Big Rivers' financial results or increases its
8 business risks may adversely affect the price it pays for credit. A competitor armed with Big
9 Rivers' proprietary and confidential information will be able to increase Big Rivers' costs or
10 decrease Big Rivers' revenues, which could in turn affect Big Rivers' apparent creditworthiness.
11 Impediments to Big Rivers' obtaining the best contract terms could likewise affect its apparent
12 creditworthiness. A utility the size of Big Rivers that operates generation and transmission
13 facilities will always have periodic cash and borrowing requirements for both anticipated and
14 unanticipated needs. Big Rivers expects to be in the credit markets on a regular basis in the
15 future, and it is imperative that Big Rivers improve and maintain its credit profile.

16 17. Accordingly, Aleris has competitors in the aluminum market, Big Rivers has
17 competitors in the wholesale power and capital markets, and the Confidential Information should
18 be afforded confidential treatment to prevent the imposition of an unfair competitive advantage
19 to those competitors.

20 **B. The Confidential Information is Generally Recognized as Confidential or**
21 **Proprietary**
22

23 18. The Confidential Information for which the Joint Petitioners seek confidential
24 treatment under KRS 61.878(1)(c)(1) is generally recognized as confidential or proprietary under
25 Kentucky law.

1 19. The Confidential Information is not publicly available, is not disseminated within
2 the Joint Petitioners' organizations except to those employees and professionals with a legitimate
3 business need to know and act upon the information, and is not disseminated to others without a
4 legitimate need to know and act upon the information.

5 20. The Confidential Information related to Aleris in the Retail Agreement and the
6 Chambliss Testimony reveals the dates and the extent to which Aleris plans to ramp up its
7 production, or data from which that information could be calculated. Aleris has taken great
8 precaution to safeguard all technical and timing information related to this expansion
9 project. The only people that have access to this information are those who are already bound by
10 confidentiality agreements with Aleris. Information about a company's detailed inner workings
11 is generally recognized as confidential or proprietary. *See, e.g., Hoy v. Kentucky Indus.*
12 *Revitalization Authority*, 907 S.W.2d 766, 768 (Ky. 1995) ("It does not take a degree in finance
13 to recognize that such information concerning the inner workings of a corporation is 'generally
14 recognized as confidential or proprietary'"). Moreover, KRS 278.160(3) specifically recognizes
15 that terms of a special contract are not required to be publicly disclosed if such terms are entitled
16 to protection under KRS 61.878(1)(c)(1), and the Commission has previously granted
17 confidential treatment to similar information. *See, e.g., In the Matter of: Big Rivers Electric*
18 *Corporation Filing of Wholesale Contracts Pursuant to KRS 278.180 and 807 KAR 5:011*
19 *Section 13*, Order, P.S.C. Case No. 2014-00134 (September 10, 2014) (granting confidential
20 treatment to confidential contract terms); *In the Matter of: Big Rivers Electric Corporation*
21 *Filing of Wholesale Contracts Pursuant to KRS 278.180 and 807 KAR 5:011 Section 13*, Order,
22 P.S.C. Case No. 2014-00134 (October 9, 2014) (granting confidential treatment to confidential
23 contract terms).

1 21. The Confidential Information also implicates Aleris’s contractual obligations to
2 keep the identities of its customers confidential. If the dates and extent of Aleris’s ramp up of
3 production were to become public and combined with otherwise publicly-available information,
4 Aleris competitors might be able to discover the identities of Aleris customers. Aleris has
5 contractual confidentiality agreements with its customers that prevent it from revealing their
6 identities. Aleris has safeguarded the identities of its customers, which should be protected from
7 indirect disclosure here. *See id.*

8 22. The Confidential Information in the 2016 Marginal Cost Analysis consists of Big
9 Rivers’ marginal cost of production and related information, including details of Big Rivers’
10 operation and maintenance costs, and its purchased power costs. The Confidential Information
11 in the Chambliss Testimony contains confidential energy and capacity market price forecasts the
12 Big Rivers upon which Big Rivers relies as part of its budgeting and strategic planning activities.
13 Public disclosure of the Confidential Information will thus give Big Rivers’ suppliers, buyers,
14 and competitors insight into the prices at which Big Rivers is willing to buy or sell power and
15 capacity. The information is also indicative of the market conditions Big Rivers expects to
16 encounter and its ability to compete with competitors. The Commission has previously granted
17 confidential treatment to similar information. *See, e.g., In the Matter of: Application of Big*
18 *Rivers Electric Corporation for a General Adjustment in Rates*, P.S.C. Case No. 2011-00036
19 (letters from the Commission dated July 28, 2011, and December 20, 2011) (granting
20 confidential treatment to multi-year forecast, including price forecast, production cost, and
21 purchased power cost information); *In the Matter of: The 2010 Integrated Resource Plan of Big*
22 *Rivers Electric Corporation*, P.S.C. Case No. 2010-00443 (letter from the Commission dated
23 December 21, 2010) (granting confidential treatment to financial model outputs, etc., including

1 production cost and purchased power cost information). In fact, the Commission granted
2 confidential treatment to the same type of production and purchased power costs in earlier cost
3 of service studies. *See, e.g., In the Matter of: Application of Big Rivers Electric Corporation for*
4 *Approval of Its Environmental Compliance Plan*, Order, P.S.C. Case No. 2013-00199
5 (November 27, 2013).

6 23. Based on the foregoing, the Confidential Information is generally recognized as
7 confidential or proprietary under Kentucky law.

8 **C. Disclosure of the Confidential Information Would Permit an Unfair**
9 **Commercial Advantage to Competitors of Aleris and Big Rivers**

10 24. Disclosure of the Confidential Information would permit an unfair commercial
11 advantage to competitors of Aleris and Big Rivers. As discussed above, Aleris faces actual
12 competition in the aluminum market, and Big Rivers faces actual competition in the wholesale
13 power and credit markets. It is likely that both Aleris and Big Rivers would suffer competitive
14 injury if the Confidential Information was publicly disclosed.

15 25. Aleris, as explained above, is making its largest investments in the company's
16 history to build twin CALP lines. This investment, and its related timing, will allow Aleris to be
17 one of the first few companies to market in the United States with a state of the art auto body
18 sheet production process. Should the timing and extent of Aleris's ramp up of production not be
19 protected from disclosure, an Aleris competitor could gain access to that information. An Aleris
20 competitor could then combine the Confidential Information with otherwise publicly-available
21 information to estimate Aleris's capacity and pricing capabilities at specific points in time. And
22 competitors could use the information to try to identify and solicit confidential Aleris customers.
23 Thus, any disclosure of the timing and extent of the Aleris ramp up strategy to competitors could
24 result in competitors beating Aleris to market and seeking to coopt Aleris customers, thus greatly
25

1 reducing Aleris's return on its investment, potentially damaging critical customer relationships,
2 and causing Aleris substantial competitive harm.

3 26. Public disclosure of Big Rivers' market price forecasts and production and
4 purchased power costs would give potential competitors, suppliers, and buyers insight into the
5 prices at which Big Rivers is willing to buy and sell power and other commodities such as fuel.
6 In P.S.C. Case No. 2003-00054, the Commission granted confidential protection to bids
7 submitted to Union Light, Heat & Power ("ULH&P"). ULH&P argued, and the Commission
8 implicitly accepted, that if the bids it received were publicly disclosed, contractors on future
9 work could use the bids as a benchmark, which would likely lead to the submission of higher
10 bids. *In the Matter of: Application of the Union Light, Heat and Power Company for*
11 *Confidential Treatment*, Order, P.S.C. Case No. 2003-00054 (August 4, 2003). The Commission
12 also implicitly accepted ULH&P's further argument that the higher bids would lessen ULH&P's
13 ability to compete with other gas suppliers. *Id.* Similarly, if the Confidential Information was
14 publicly disclosed, potential fuel and power suppliers and purchasers could use the Confidential
15 Information as a benchmark to manipulate Big Rivers' bidding process, which would lead to
16 higher costs or lower revenues to Big Rivers and which would place it at an unfair competitive
17 disadvantage in the wholesale power and credit markets. Additionally, public disclosure of
18 information about Big Rivers' cost of producing power would give those power producers and
19 marketers with which Big Rivers' competes for wholesale power sales an unfair competitive
20 advantage because they could use that information to potentially underbid Big Rivers in
21 wholesale transactions, leading to lower revenues to Big Rivers and placing it at an unfair
22 competitive disadvantage in the wholesale power and credit markets.

1 27. Finally, in P.S.C. Case No. 2003-00054, ULH&P's further argued, and the
2 Commission implicitly accepted, that the bidding contractors would not want their bid
3 information publicly disclosed, and that disclosure would reduce the contractor pool available to
4 ULH&P, which would drive up ULH&P's costs, hurting its ability to compete with other gas
5 suppliers. *In the Matter of: Application of the Union Light, Heat and Power Company for*
6 *Confidential Treatment*, Order, P.S.C. Case No. 2003-00054 (August 4, 2003). Similarly, in *Hoy*
7 *v. Kentucky Indus. Revitalization Authority*, the Kentucky Supreme Court found that without
8 protection for confidential information provided to a public agency, "companies would be
9 reluctant to apply for investment tax credits for fear the confidentiality of financial information
10 would be compromised. *Hoy v. Kentucky Indus. Revitalization Authority*, 907 S.W.2d 766, 769
11 (Ky. 1995). In the present case, Aleris considers the Confidential Information in the Retail
12 Agreement and the Chambliss Testimony highly confidential. If Big Rivers is unable to obtain
13 confidential treatment for the contract terms a power contract counterparty, Aleris in this case,
14 considers confidential, potential counterparties dealing with Big Rivers on future transactions
15 would know that such information related to them could be publicly disclosed, which could
16 reveal information to their competitors about their competitiveness. Because many companies
17 would be reluctant to have such information disclosed, public disclosure of the Confidential
18 Information would likely reduce the pool of counterparties willing to negotiate with Big Rivers,
19 reducing Big Rivers' ability to sell power and impairing its ability to compete in the wholesale
20 power and credit markets. Aleris had choices about where it would make its CALP project
21 investment. If it had thought that extremely confidential project information that could endanger
22 the ultimate competitiveness of the company would be publicly disclosed in a proceeding before

1 the Commission, that fact would have had major significance in its decision about where the
2 project would be constructed.

3 28. Accordingly, the public disclosure of the Confidential Information would provide
4 competitors of Aleris and Big Rivers with an unfair commercial advantage.

5 **IV. Time Period**

6 29. The Joint Petitioners request that the Confidential Information related to Aleris in
7 the Retail Agreement and in the Chambliss Testimony remain confidential in perpetuity because
8 it reveals private customer data. If the Commission disagrees that that information is entitled to
9 confidential treatment pursuant to KRS 61.878(1)(a), the Joint Petitioners request that that
10 information remain confidential for a period of ten (10) years from the date of this petition, and
11 that the Confidential Information in the 2016 Marginal Cost Analysis and the confidential energy
12 and capacity price forecasts contained in the Chambliss Testimony remain confidential for a
13 period of five (5) years from the data of this petition. These time periods will provide sufficient
14 time for the information to become sufficiently outdated so as to no longer cause a risk of
15 competitive harm to Aleris and Big Rivers. 807 KAR 5:001 Section 13(2)(a)(2).

16 **V. Conclusion**

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

21 WHEREFORE, the Joint Petitioners respectfully request that the Commission classify
22 and protect as confidential the Confidential Information.

23 On this the 24th day of March, 2016.

Respectfully submitted,



James M. Miller
Tyson Kamuf
SULLIVAN, MOUNTJOY, STAINBACK
& MILLER, P.S.C.
100 St. Ann Street
P. O. Box 727
Owensboro, Kentucky 42302-0727
Phone: (270) 926-4000
Facsimile: (270) 683-6694
jmiller@smsmlaw.com
tkamuf@smsmlaw.com

Counsel for Big Rivers Electric Corporation



Cory J. Skolnick
FROST BROWN TODD, LLC
400 West Market Street, 32nd Floor
Louisville, KY 40202
(502) 589-5400
(502) 581-1087 (fax)
cskolnick@fbtlaw.com

Counsel for Aleris Rolled Products, Inc.