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PUBLIC SERVICE COMMISSION

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF BIG RIVERS ELECTRIC CORPORATION FOR DECLARATORY ORDER	))	Case No. 2016-00278

PETITION OF BIG RIVERS ELECTRIC CORPORATION FOR CONFIDENTIAL PROTECTION

1. Big Rivers Electric Corporation ("Big Rivers") hereby petitions the Kentucky Public Service Commission ("Commission"), pursuant to 807 KAR 5:001 Section 13 and KRS 61.878, to grant confidential protection to certain information contained in the attachments to Big Rivers' responses to Items 1 and 3 of the Commission Staff's Second Request for Information ("PSC 2-1" and "PSC 2-3," respectively) and to Items 9, 15, 20, and 25 of the Second Request for Information from the City of Henderson, Kentucky, and Henderson Utility Commission, d/b/a Henderson Municipal Power & Light ("HMPL 2-9," "HMPL 2-15," "HMPL 2-20," and "HMPL 2-25," respectively). The information Big Rivers seeks to protect as confidential is hereinafter referred to as the "Confidential Information."

2. One (1) copy of the pages containing Confidential Information, with the Confidential Information underscored, highlighted with transparent ink, printed on yellow paper, or otherwise marked "CONFIDENTIAL," is being filed with this petition in a separate sealed envelope marked "CONFIDENTIAL." Ten (10) copies of the pages containing Confidential Information, with the Confidential Information redacted, or a sheet noting the entirety of the attachment has been redacted, are being filed with this petition. *See* 807 KAR 5:001 Section 13(2)(a)(3).

3. A copy of this petition with the Confidential Information redacted has been served on all parties to this proceeding. 807 KAR 5:001 Section 13(2)(b). A copy of the Confidential

Information has been served on all parties that have signed an applicable confidentiality agreement with Big Rivers.

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

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

I. <u>Information Submitted Pursuant to 807 KAR 5:001 Section 13(9)(a)</u>

6. 807 KAR 5:001 Section 13(9)(a) provides:

> A person who files any paper that contains material that has previously been deemed confidential or for which a request or motion for confidential treatment is pending shall submit one (1) copy of the paper with the adjudged or alleged confidential material underscored or highlighted, and ten (10) copies of the paper with those portions redacted; and
>
> > 1. If the confidential status of the material has been determined previously, a written notice identifying the person who originally submitted the material, the date on which a determination on the materials confidentiality was made and, if applicable, the case number in which the determination was made...

7. The attachment to Big Rivers' response to HMPL 2-25 is an Indemnification Agreement, which was filed May 18, 2009, in Case No. 2007-00455 by E.ON U.S. LLC, Western Kentucky Energy Corp., and LG&E Energy Marketing, Inc. pursuant to a petition for confidential treatment. That petition was granted by letter dated August 31, 2009, in that case, for an indefinite period of time.

II. Information Protected by KRS 61.878(1)(a)

8. KRS 61.878(1)(a) protects "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." The attachment to Big Rivers' response to PSC 2-1 is an invoice prepared by Big Rivers for the City of Henderson for sales to Big Rivers and the related payment obligation due the City of Henderson. The Confidential Information in the attachments to PSC 2-3 and HMPL 2-20, and in Attachment 2 to the letter attached to Big Rivers' response to HMPL 2-9 shows detailed usage and price information for the City of Henderson. Many customers would consider the public disclosure of such information to be an unwarranted invasion of privacy. Because public disclosure of this Confidential Information would constitute an unwarranted invasion of privacy, this Confidential Information should be granted confidential treatment. *See* Ky. Op. Atty. Gen. 96-ORD-176 (August 20, 1996) (holding Kroger Company's utility bills exempt from disclosure under KRS 61.878(1)(a)); *In the Matter of: Application of Kentucky Utilities* Company *for an Adjustment of its Electric Rates*, Order, P.S.C. Case No. 2012-00221 (July 25, 2013) (holding customer names, account numbers, and usage information exempt from disclosure under KRS 61.878(1)(a)).

III. Information Protected by KRS 61.878(1)(c)(1)

9. KRS 61.878(1)(c)(1) protects "records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records." KRS 61.878(1)(c)(1); 807 KAR 5:001 Section 13(2)(a)(1). Section A below explains that Big Rivers operates in competitive environments in the wholesale power market and in the credit market. Section B below shows that the Confidential Information

for which Big Rivers seeks confidential treatment under KRS 61.878(1)(c)(1) is generally recognized as confidential or proprietary. Section C below demonstrates that public disclosure of this Confidential Information would permit an unfair commercial advantage to Big Rivers' competitors.

A. Big Rivers' Faces Actual Competition

10. As a generation and transmission cooperative, Big Rivers competes in the wholesale power market. This includes not only the short-term bilateral energy market, the day-ahead and real time energy and ancillary services markets, and the capacity market to which Big Rivers has access by virtue of its membership in Midcontinent Independent System Operator, Inc. ("MISO"), but also forward bilateral long-term agreements and wholesale agreements with utilities and industrial customers. Big Rivers' ability to successfully compete in the market is dependent upon a combination of its ability to: 1) obtain the maximum price for the power it sells, and 2) keep its cost of production as low as possible. Fundamentally, if Big Rivers' cost of producing a unit of power increases, its ability to sell that unit in competition with other utilities is adversely affected.

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

be in the credit markets on a regular basis in the future, and it is imperative that Big Rivers improve and maintain its credit profile.

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

B. The Confidential Information is Generally Recognized as Confidential or Proprietary

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

14. The Confidential Information contained in the attachment to Big Rivers' response to PSC 2-3 reveals recent detail of the variable production costs of the Station Two generating plant. The Confidential Information contained in the attachments to Big Rivers' responses to HMPL 2-9, HMPL 2-15, and HMPL 2-20 reveals recent and projected detail relating to amounts and prices for energy purchased and sold by Big Rivers or that Big Rivers declined to purchase, the variable production costs of the Station Two generating plant and the amount of energy produced by Station Two, and other information which could be used to readily calculate the Confidential Information.

15. Such information provides significant insight into the energy that Big Rivers will have available, the prices at which Big Rivers is willing to buy or sell power, and Big Rivers' cost of producing power, which would further indicate the prices at which Big Rivers is willing to buy or sell power. The Commission has previously granted confidential treatment to similar recent information. *See, e.g.*, *In the Matter of: 2014 Integrated Resource Plan of Big Rivers Electric* Corporation, Order, P.S.C. Case No. 2014-00166 (August 26, 2014); *In the Matter of:*

Application of Big Rivers Electric Corporation for a General Adjustment in Rates, Order, P.S.C. Case No. 2012-00535 (April 25, 2013); *In the Matter of: Application of Big Rivers Electric Corporation for a General Adjustment in Rates*, Order, P.S.C. Case No. 2012-00535 (April 8, 2014); *In the Matter of: Application of Big Rivers Electric Corporation for a General Adjustment in Rates*, Order, P.S.C. Case No. 2012-00535 (August 14, 2013); *In the Matter of: Application of Big Rivers Electric Corporation for Approval of its 2012 Environmental Compliance Plan, for Approval of its Amended Environmental Cost Recovery Surcharge Tariff, for Certificates of Public Convenience and Necessity, and for Authority to Establish a Regulatory Account*, Letter, P.S.C. Case No. 2012-00063 (August 15, 2012); P.S.C. Administrative Case No. 387, Letter (July 20, 2010).

16. The Confidential Information is not publicly available, is not disseminated within Big Rivers except to those employees and professionals with a legitimate business need to know and act upon the information, and is not disseminated to others without a legitimate need to know and act upon the information. As such, the Confidential Information is generally recognized as confidential and proprietary.

C. Public Disclosure of the Confidential Information Would Permit an Unfair Commercial Advantage to Big Rivers' Competitors

17. Public disclosure of the Confidential Information for which Big Rivers seeks confidential treatment under KRS 61.878(1)(c)(1) would grant Big Rivers' competitors an unfair commercial advantage. As discussed above in Section A, Big Rivers faces actual competition in both the short- and long-term wholesale power markets and in the credit markets. It is likely that Big Rivers' ability to compete in these markets would be adversely affected if the Confidential Information was publicly disclosed, and Big Rivers seeks protection from such competitive injury.

18. The Confidential Information consists of commercially sensitive information such as recent and project amounts of energy available to Big Rivers from Station Two; the recent and projected variable production costs for the Station Two units; and recent and projected market sales prices and amounts. As noted above, this information, including the recent information, can be used to readily determine or estimate the current energy available to Big Rivers, Big Rivers' current cost of producing power, and the prices at which Big Rivers is currently willing to buy or sell power.

19. If such information is publicly disclosed, market participants would have insight into the prices at which Big Rivers is willing to buy and sell power and the amount of Big Rivers has available or needs, and they could manipulate the bidding process, impairing Big Rivers' ability to generate power at competitive rates or to sell power at competitive rates in the wholesale power markets. Furthermore, any competitive pressure that adversely affects Big Rivers' revenue and margins could make the company appear less creditworthy and thus impair its ability to compete in the credit markets. These effects were recognized in P.S.C. Case No. 2003-00054, in which the Commission granted confidential treatment to bids submitted to Union Light, Heat & Power ("ULH&P"). ULH&P argued, and the Commission implicitly accepted, that if the bids it received were publicly disclosed, contractors on future work could use the bids as a benchmark, which would likely lead to the submission of higher bids. *In the Matter of: Application of the Union Light, Heat and Power Company for Confidential Treatment*, Order, P.S.C. Case No. 2003-00054 (August 4, 2003). The Commission also implicitly accepted ULH&P's further argument that the higher bids would lessen ULH&P's ability to compete with other gas suppliers. *Id.* Similarly, potential power suppliers to, and purchasers from Big Rivers, could manipulate Big Rivers' bidding process, which would lead to higher costs or lower

revenues to Big Rivers and would place it at an unfair competitive disadvantage in the wholesale power market and credit markets.

20. Additionally, public disclosure of the Confidential Information would give the power producers and marketers with which Big Rivers competes in the wholesale power market insight into Big Rivers' cost of producing power and the amount of energy available to Big Rivers. Knowledge of this information would give those power producers and marketers an unfair competitive advantage because they could use that information to potentially underbid Big Rivers in wholesale transactions.

21. Accordingly, the public disclosure of the Confidential Information would provide Big Rivers' competitors with an unfair commercial advantage.

IV. Time Period

22. Big Rivers requests that the Confidential Information submitted pursuant to 807 KAR 5:001 Section 13(9)(a) remain confidential indefinitely pursuant to the Commission's previous grant of confidential treatment for that information, as noted in Part I, above. Big Rivers requests that the Confidential Information protected by KRS 61.878(1)(a) remain confidential indefinitely for the reasons stated in Part II, above. Big Rivers requests that the rest of the Confidential Information remain confidential for a period of five (5) years from the date of this petition, which should allow sufficient time for the data to become sufficiently outdated that it could not be used to determine similar confidential information at that time or to competitively disadvantage Big Rivers. *See* 807 KAR 5:001 Section 13(2)(a)(2).

V. Conclusion

23. Based on the foregoing, the Confidential Information is entitled to confidential protection. If the Commission disagrees that Big Rivers is entitled to confidential protection, due

process requires the Commission to hold an evidentiary hearing. *See Utility Regulatory Com'n v. Kentucky Water Service Co.*, Inc., 642 S.W.2d 591 (Ky. App. 1982).

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

On this the 7th day of October, 2016.

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