

RECEIVED

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

FEB 3 2017

PUBLIC SERVICE  
COMMISSION

In the Matter of:

APPLICATION OF BIG RIVERS ELECTRIC ) Case No.  
CORPORATION FOR DECLARATORY ORDER ) 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 an exhibit that Big Rivers may introduce at the hearing in this matter (the "Hearing Exhibit"). The exhibit is an update of Exhibit RWB\_2, which was attached to the Direct Testimony of Robert W. Berry that was filed as Exhibit 10 to Big Rivers' application. 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.

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

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

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

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

10                   A person who files any paper that contains material that has previously  
11                   been deemed confidential or for which a request or motion for confidential  
12                   treatment is pending shall submit one (1) copy of the paper with the  
13                   adjudged or alleged confidential material underscored or highlighted, and  
14                   ten (10) copies of the paper with those portions redacted; and

15                                   1. If the confidential status of the material has been  
16                                   determined previously, a written notice identifying the  
17                                   person who originally submitted the material, the date on  
18                                   which a determination on the materials confidentiality was  
19                                   made and, if applicable, the case number in which the  
20                                   determination was made...

21  
22  
23           7.       The Confidential Information for the months January 2016 through May 2016 in  
24 the Hearing Exhibit also appears in Exhibit RWB\_2, which Big Rivers filed with its application  
25 in this matter under a petition for confidential treatment. The Commission granted that petition  
26 by order dated December 7, 2016.

27           **II.       Information Protected by KRS 61.878(1)(c)(1)**

28           8.       KRS 61.878(1)(c)(1) protects “records confidentially disclosed to an agency or  
29 required by an agency to be disclosed to it, generally recognized as confidential or proprietary,  
30 which if openly disclosed would permit an unfair commercial advantage to competitors of the

1 entity that disclosed the records.” KRS 61.878(1)(c)(1); 807 KAR 5:001 Section 13(2)(a)(1).  
2 Section A below explains that Big Rivers operates in competitive environments in the wholesale  
3 power market and in the credit market. Section B below shows that the Confidential Information  
4 for which Big Rivers seeks confidential treatment under KRS 61.878(1)(c)(1) is generally  
5 recognized as confidential or proprietary. Section C below demonstrates that public disclosure  
6 of this Confidential Information would permit an unfair commercial advantage to Big Rivers’  
7 competitors.

8 **A. Big Rivers’ Faces Actual Competition**

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

19 10. Big Rivers also competes for reasonably priced credit in the credit markets, and  
20 its ability to compete is directly impacted by its financial results. Lower revenues and any events  
21 that adversely affect Big Rivers’ margins will adversely affect its financial results and potentially  
22 impact the price it pays for credit. A competitor armed with Big Rivers’ proprietary and  
23 confidential information will be able to increase Big Rivers’ costs or decrease Big Rivers’

1 revenues, which could in turn affect Big Rivers' apparent creditworthiness. A utility the size of  
2 Big Rivers that operates generation and transmission facilities will always have periodic cash  
3 and borrowing requirements for both anticipated and unanticipated needs. Big Rivers expects to  
4 be in the credit markets on a regular basis in the future, and it is imperative that Big Rivers  
5 improve and maintain its credit profile.

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

9 **B. The Confidential Information is Generally Recognized as Confidential or**  
10 **Proprietary**

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

14 13. The Confidential Information consists of (i) variable production cost information  
15 for the Station Two generating plant operated by Big Rivers, and (ii) totals from which the  
16 variable production cost information could be readily calculated. The Confidential Information  
17 in the Hearing Exhibit consists of information for the entire 2016 calendar year, and includes the  
18 Confidential Information for January 2016 through May 2016 that appears in Exhibit RWB\_2.  
19 This information provides insight into Big Rivers' cost of producing power and would indicate  
20 the prices at which Big Rivers is willing to buy or sell power. The Commission has previously  
21 granted confidential treatment to similar information. *See, e.g., In the Matter of: Application of*  
22 *Big Rivers Electric Corporation for a General Adjustment in Rates*, Order, P.S.C. Case No.  
23 2012-00535 (April 25, 2013); *In the Matter of: Application of Big Rivers Electric Corporation*  
24 *for a General Adjustment in Rates*, Order, P.S.C. Case No. 2012-00535 (August 14, 2013); *In the*

1 *Matter of: Application of Big Rivers Electric Corporation for Approval of its 2012*  
2 *Environmental Compliance Plan, for Approval of its Amended Environmental Cost Recovery*  
3 *Surcharge Tariff, for Certificates of Public Convenience and Necessity, and for Authority to*  
4 *Establish a Regulatory Account*, Letter, P.S.C. Case No. 2012-00063 (August 15, 2012). In fact,  
5 as noted previously, the Commission already granted confidential treatment to the Confidential  
6 Information for January 2016 through May 2016 in its December 7, 2016, order in this  
7 proceeding.

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

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

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

22 16. The Confidential Information consists of or can be used to determine Big Rivers'  
23 2016 variable production costs for the Station Two units, and this recent variable production cost

1 information can be used to readily determine or estimate Big Rivers' current cost of producing  
2 power.

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

20 18. Additionally, public disclosure of the Confidential Information would give the  
21 power producers and marketers with which Big Rivers competes in the wholesale power market  
22 insight into Big Rivers' cost of producing power. Knowledge of this information would give  
23 those power producers and marketers an unfair competitive advantage because they could use

1 that information to potentially underbid Big Rivers in wholesale transactions. It would also give  
2 potential suppliers to Big Rivers a competitive advantage because they will be able to manipulate  
3 the price of power bid to Big Rivers in order to maximize their revenues, thereby driving up Big  
4 Rivers' costs and impairing Big Rivers' ability to compete in the wholesale power and credit  
5 markets.

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

### 8 **III. Time Period**

9 20. Big Rivers requests that the Confidential Information remain confidential for a  
10 period of five (5) years from December 7, 2016, the date the Commission granted confidential  
11 protection to the Confidential Information in Exhibit RWB\_2, which should allow sufficient time  
12 for the data to become sufficiently outdated that it could not be used to determine similar  
13 confidential information at that time or to competitively disadvantage Big Rivers. *See* 807 KAR  
14 5:001 Section 13(2)(a)(2).

### 15 **IV. Conclusion**

16 21. 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. *See 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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18

On this the 3<sup>rd</sup> day of February, 2017.



---

James M. Miller  
R. Michael Sullivan  
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  
jmillersmsmlaw.com  
tkamuf@smsmlaw.com

Counsel for Big Rivers Electric Corporation