

1
2 COMMONWEALTH OF KENTUCKY
3 BEFORE THE PUBLIC SERVICE COMMISSION

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4 In the Matter of:

PUBLIC SERVICE
COMMISSION

5
6 FILING OF AGREEMENT FOR THE)
7 PURCHASE AND SALE OF FIRM CAPACITY)
8 AND ENERGY BETWEEN BIG RIVERS)
9 ELECTRIC CORPORATION AND THE)
10 KENTUCKY MUNICIPAL ENERGY AGENCY)

CASE NO. 2016-00306

11
12
13 **PETITION OF BIG RIVERS ELECTRIC CORPORATION FOR CONFIDENTIAL**
14 **PROTECTION**

15
16 1. Big Rivers Electric Corporation ("Big Rivers") hereby petitions the Kentucky
17 Public Service Commission ("Commission"), pursuant to 807 KAR 5:001 Section 13, KRS
18 61.878, and KRS 278.160(3), to grant confidential protection to portions of the questions for,
19 and/or Big Rivers' responses to, Item 1 of the Commission Staff's First Request for Information
20 ("PSC 1-1") and Items 2, 3, and 5 of Kentucky Industrial Utility Customers, Inc.'s First Request
21 for Information ("KIUC 1-2," "KIUC 1-3," and "KIUC 1-5," respectively) filed with this
22 petition. The information Big Rivers seeks to protect as confidential is hereinafter referred to as
23 the "Confidential Information."

24 2. One (1) sealed copy of the pages containing Confidential Information, with the
25 Confidential Information highlighted with transparent ink, printed on yellow paper, or otherwise
26 marked "CONFIDENTIAL," is being filed with this petition. Ten (10) copies of the pages
27 containing Confidential Information, with the Confidential Information redacted, are also being
28 filed with this petition. 807 KAR 5:001 Sections 13(2)(a)(3); 907 KAR 5:001 Section 9(a).

29 3. A copy of this petition and a copy of the responses with the Confidential
30 Information redacted have been served on all parties to this proceeding. See 807 KAR 5:001

1 Section 13(2)(b). A copy of the Confidential Information has been served on all parties that have
2 signed a confidentiality agreement.

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

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

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

11 6. 807 KAR 5:001 Section 13(9)(a) provides:

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

17 ...

18 2. If a request for confidential treatment of the material is pending,
19 a written notice identifying the person who made the request and
20 the date on which the request was submitted.

21
22 7. The Confidential Information contained in the questions for KIUC 1-3 and 1-5
23 and Big Rivers' response to PSC 1-1 and KIUC 1-2 consists of material for which Big Rivers
24 sought confidential protection in its petition for confidential treatment filed in this matter on
25 August 5, 2016, which petition is pending.

26 **II. Information Protected By KRS 61.878(1)(c)(1)**

27 8. All of the Confidential Information, including the Confidential Information
28 addressed in Part I, above, is entitled to confidential protection based upon KRS 61.878(1)(c)(1),

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

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

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

21 10. Big Rivers also competes for reasonably priced credit in the credit markets, and
22 its ability to compete is directly impacted by its financial results. Lower revenues and any events
23 that adversely affect Big Rivers’ margins will adversely affect its financial results and potentially

1 impact the price it pays for credit. A competitor armed with Big Rivers' proprietary and
2 confidential information will be able to increase Big Rivers' costs or decrease Big Rivers'
3 revenues, which could in turn affect Big Rivers' apparent creditworthiness. A utility the size of
4 Big Rivers that operates generation and transmission facilities will always have periodic cash
5 and borrowing requirements for both anticipated and unanticipated needs. Big Rivers expects to
6 be in the credit markets on a regular basis in the future, and it is imperative that Big Rivers
7 improve and maintain its credit profile.

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

11 **B. The Confidential Information is Generally Recognized as Confidential or**
12 **Proprietary**

13 12. The Confidential Information consists of the confidential terms of the Agreement
14 for the Purchase and Sale of Firm Capacity and Energy (the "Agreement") between Big Rivers
15 and the Kentucky Municipal Energy Agency ("KyMEA") that is the subject of this proceeding,
16 and discussions about those confidential terms. KRS 278.160 specifically recognizes that terms
17 of a special contract are not required to be publicly disclosed if such terms are entitled to
18 protection under KRS 61.878(1)(c)(1). KRS 278.160(3).

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

24

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

3 14. Disclosure of the Confidential Information would permit an unfair commercial
4 advantage to Big Rivers' competitors. As discussed above, Big Rivers faces actual competition
5 in the wholesale power market and in the credit market. It is likely that Big Rivers would suffer
6 competitive injury if the Confidential Information was publicly disclosed. In PSC Case No.
7 2003-00054, the Commission granted confidential protection for bids submitted to Union Light
8 Heat & Power ("ULH&P"). ULH&P's argued, and the Commission implicitly accepted, that the
9 bidding contractors would not want their bid information publicly disclosed, and that disclosure
10 would reduce the contractor pool available to ULH&P, which would drive up ULH&P's costs,
11 hurting its ability to compete with other gas suppliers. Order dated August 4, 2003, in *In the*
12 *Matter of: Application of the Union Light, Heat and Power Company for Confidential*
13 *Treatment*, PSC Case No. 2003-00054. Similarly, in *Hoy v. Kentucky Indus. Revitalization*
14 *Authority*, the Kentucky Supreme Court found that without protection for confidential
15 information provided to a public agency, "companies would be reluctant to apply for investment
16 tax credits for fear the confidentiality of financial information would be compromised. *Hoy v.*
17 *Kentucky Indus. Revitalization Authority*, 907 S.W.2d 766, 769 (Ky. 1995).

18 15. In Big Rivers' case, Big Rivers is currently in negotiations with potential
19 counterparties for other purchase power agreements and expects to engage in negotiations with
20 other counterparties in the future. If confidential treatment of the confidential terms of the
21 Agreement is denied, potential counterparties would know that the confidential terms of their
22 contracts would be publicly disclosed, which could reveal information to their competitors about
23 their competitiveness. Because many companies would be reluctant to have such information
24 disclosed, public disclosure of the Confidential Information would likely reduce the pool of

1 counterparties willing to negotiate with Big Rivers, reducing Big Rivers' ability to sell power
2 and impairing its ability to compete in the wholesale power and credit markets.

3 16. Additionally, in PSC Case No. 2003-00054, the Commission granted confidential
4 protection to bids submitted to ULH&P. In addition to the other arguments discussed above,
5 ULH&P argued, and the Commission implicitly accepted, that if the bids it received were
6 publicly disclosed, contractors on future work could use the bids as a benchmark, which would
7 likely lead to the submission of higher bids. Order dated August 4, 2003, in *In the Matter of:*
8 *Application of the Union Light, Heat and Power Company for Confidential Treatment*, PSC Case
9 No. 2003-00054. The Commission also implicitly accepted ULH&P's further argument that the
10 higher bids would lessen ULH&P's ability to compete with other gas suppliers. *Id.* Similarly,
11 public disclosure of the confidential terms of the Agreement would allow potential counterparties
12 to future purchase power agreements with Big Rivers to use the terms as a benchmark for
13 negotiations, leading to less favorable prices and terms for power sales for Big Rivers and
14 placing Big Rivers at an unfair competitive disadvantage in the wholesale power and credit
15 markets.

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

18 III. Time Period

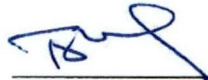
19 18. Big Rivers requests that the Confidential Information remain confidential
20 indefinitely because so long as Big Rivers is in the wholesale power market, the public
21 disclosure of the confidential terms of the Agreement that it has agreed to could be used to Big
22 Rivers' competitive disadvantage for the reasons stated above. 807 KAR 5:001 Section
23 13(2)(a)(2).

1 **IV. Conclusion**

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

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

8 On this the 5th day of October, 2016.

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