

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC TARIFF FILING OF BIG RIVERS)	
ELECTRIC CORPORATION AND KENERGY)	CASE NO.
CORP. TO IMPLEMENT A NEW STANDBY)	2021-00289
SERVICE TARIFF)	

ORDER

On September 3, 2021, and October 1, 2021, Big Rivers Electric Corporation (BREC) filed motions pursuant to 807 KAR 5:001, Section 13, KRS 278.160(3), and KRS 61.878, requesting that the Commission grant confidential treatment for five years to certain information contained in BREC and Kenergy Corp.'s (Kenergy) joint responses to Commission Staff's First Request for Information (Staff's First Request), Commission Staff's Second Request for Information (Staff's Second Request), and Kimberly-Clark Corporation's (Kimberly Clark) First Request for Information. In addition, BREC seeks indefinite confidential treatment for certain other responses to the same requests.

SEPTEMBER 3, 2021 AND OCTOBER 1, 2021 MOTIONS

Specifically, BREC's September 3, 2021 motion seeks confidential treatment for five years for information in the attachment to its response to Staff's First Request, Item 2, which consists of BREC's projected bilateral sales or purchases and annual capacity position. The motion also requested confidential treatment for the attachment to its response to Kimberly Clark's First Request for Information, Item 1(a), which consists of projections of capacity prices, natural gas prices, and capacity forward curve information.

BREC's September 3, 2021 motion also seeks indefinite confidential treatment for information contained in the attachment to its response to Staff's First Request , Item 2, which consists of confidential terms of special contracts and specific customer usage data of existing large industrial customers and a future large industrial customer. Additionally, BREC's September 3, 2021 motion seeks indefinite confidential treatment for information in the attachments to its responses to Kimberly Clark's First Request for Information, Items 1 and 2, which consist of customer specific usage data and billing information and power purchases from sales to specific non-members.

BREC's October 1, 2021 motion seeks confidential treatment for five years for information in Attachment 4 to its response to Staff's Second Request, Item 3a, which consists of BREC's projected annual bilateral sales or purchases, and the quantity and price of future capacity purchases from, and sales to, individual non-members (the information is contained in columns 2021/2021 through 2023/2024 in the attachment). Additionally, BREC seeks confidential treatment for five years for information in Attachment 5 to its response to Staff's Second Request for Information 3a, which consists of the projected capacity price per kW-month of its Green Station units converted to burn natural gas. BREC's October 1, 2021 motion also seeks indefinite confidential treatment for portions of Attachment 4 to its response to Staff's Second Request, Item 3a, which contains the identity of non-members, counterparties to capacity purchases, and sales.

DISCUSSION

Information Previously Granted Confidential Treatment

In support of its September 3, 2021 motion, BREC argued that the information contained in the attachment to its response to Kimberly Clark's First Request for

Information, Item 1(a), was recently granted confidential treatment for five years in another proceeding before the Commission.¹ In its March 5, 2021 Order in Case No. 2021-00079, the Commission found that the projections of capacity process, natural gas prices, and capacity forward curve contained here in BREC's response to Kimberly Clark's First Request for Information, Item 1(a), met the requirements for confidential treatment for five years. The Commission finds that the information contained in the attachment to BREC's response to Kimberly Clark's First Request for Information, Item 1(a), shall remain confidential until March 5, 2026, as previously ordered by the Commission for the reasons explained in that Order.

Additionally, BREC stated in its September 3, 2021 motion that the Commission recently granted indefinite confidential treatment to the customer-specific usage data and billing information and power purchases from, and sales to, specific non-members contained in the attachments to its responses to Kimberly Clark's First Request, Items 1 and 2.² For the reasons discussed in the Commission's March 9, 2021 Order in Case No. 2021-00061, the Commission finds that the material in BREC's response to Kimberly Clark's First Request for Information, Items 1 and 2, that reference customer-specific usage and billing information, and power purchases involving non-members is entitled to

¹ Case No. 2021-00079, *Electronic Application of Big Rivers Electric Corporation for a Certificate of Public Convenience and Necessity Authorizing the Conversion of the Green Station Units to Natural Gas Fired Units and an Order Approving the Establishment of a Regulatory Asset* (Ky. PSC Mar. 5, 2021). The confidential information was provided in BREC's application, as Exhibit B, the Direct Testimony of Mark J. Eacret and Exhibit Eacret-3).

² Case No. 2021-00061, *Electronic Application of Big Rivers Electric Corporation for Review for Annual Report on MRSB Credit*, (Ky. PSC Mar. 9, 2021). The confidential information was provided in BREC's application as Exhibits Wolfram-6 and Wolfram-8 to the Direct Testimony of John Wolfram).

indefinite confidential treatment as provided in the Commission's March 9, 2021 Order in Case No. 2021-00061.³

Legal Standard for Confidentiality Under KRS 61.878(1)(a)

In its motions, BREC argued that certain information contained in the attachments to its response to Staff's First Request, Item 2, reveal the power usage of existing large industrial retail customers and a future customer on BREC's system and that the portions of Attachment 4 to BREC's response to Staff's Second Request, Item 3a, reveal capacity sales to, and purchases from, specific named non-members are entitled to confidential treatment pursuant to KRS 61.878(1)(a). BREC stated that the attachments to its response to Staff's First Request, Item 2 and Attachment 4 to its response to Staff's Second Request, Item 3a, are entitled to confidential treatment pursuant to KRS 61.878(1)(a).

The Commission is a public agency subject to Kentucky's Open Records Act,⁴ which requires that all public records "be open for inspection by any person, except as otherwise provided by KRS 61.870 to 61.884."⁵ The exceptions to the free and open examination of public records contained in KRS 61.878, should be strictly construed.⁶ The party requesting that materials be treated confidentially has the burden of establishing that one of the exceptions is applicable.⁷

³ *Id.*

⁴ KRS 61.870 through 61.884.

⁵ KRS 61.872(1).

⁶ KRS 61.878.

⁷ 807 KAR 5:001, Section 13(2)(c).

KRS 61.878(1)(a) exempts from public disclosure public records containing information of a personal nature where public disclosure of the records would constitute a clearly unwarranted invasion of personal privacy. Here the records for which BREC seeks confidential treatment pursuant to KRS 61.878(1)(a) contain the names of non-members as well as capacity sales made to or from these non-members. The non-members are not parties to this proceeding and have a right to privacy concerning their power capacity needs. Likewise, the large industrial customers and future customers on BREC's system have a right to privacy concerning their power usage and projected power needs. It would be a clearly unwarranted invasion of personal privacy to publicly disclose the names, capacity sales, capacity purchase history, power usage, and projected power usage of these customers. The provisions of a special contract between a public utility and a particular customer of that utility that contains rates and conditions of service not filed in a utility's general rate schedule are shielded from public disclosure pursuant to KRS 278.160(3) if the provisions would otherwise be entitled to confidential protection.

BREC argued that the attachments to its response to Staff's First Request, Item 2, consisting of confidential terms of special contracts and specific customer usage data of a large industrial customer, as well as that of a future customer on BREC's system is personal to those customers and public disclosure would constitute an unwarranted invasion of personal privacy. Additionally, BREC argued that the terms of a special contract need not be publicly disclosed if the information contained in the contract is

otherwise exempt from public disclosure.⁸ BREC requested that this material be granted confidential protection indefinitely.

Additionally, BREC argued that indefinite confidential treatment is appropriate for the portions of Attachment 4 to its response to Staff's Second Request, Item 3a, that consists of the identities of individual non-members and counterparties to capacity purchases and sales. BREC argued that these individuals are not parties to this proceeding and are not members of BREC, and therefore have a reasonable expectation of privacy in these transactions.

For the above-stated reasons, the Commission finds that the information contained in the attachments to BREC's response to Staff's First Request, Item 2, that consist of confidential terms of special contracts and specific customer usage data of existing large industrial customers and a future large industrial customer on the BREC system shall be confidential indefinitely, pursuant to 807 KAR 5:001, Section 13. This material meets the requirements of KRS 61.878(1)(a).

The Commission also finds that the portions of Attachment 4 to BREC's response to Staff's Second Request for Information, Item 3a consisting of the identity of individual non-members, counterparties to capacity purchases and sales, shall also remain confidential indefinitely, pursuant to 807 KAR 5:001, Section 13. This material meets the requirements of KRS 61.878(1)(a).

⁸ KRS 278.160(3) shields the provisions of special contracts from disclosure if the provision contains rates and conditions of service not filed in a utility's general schedule if such provisions would otherwise be entitled to confidential treatment under the provisions of KRS 61.878(1)(c)(1). See Motion (filed Sep. 3, 2021) at 3-4.

Legal Standard for Confidentiality Under KRS 61.878(1)(c)(1)

KRS 61.878(1)(c)(1) exempts from public disclosure records confidentially disclosed to an agency or required by an agency to be disclosed to it if the records are generally recognized as confidential or proprietary, and if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records. BREC maintained that it faces actual competition in the wholesale power market and that its ability to successfully compete in that market depends upon it obtaining the maximum price for the power that it sells and keeping its cost of production as low as possible. BREC also maintained that it competes for reasonably priced credit, and for economic development opportunities. The ability to negotiate competitive electric pricing structures with companies interested in expanding in Kentucky is fundamental to the success of BREC's economic development efforts.

BREC argued that the information contained in the attachments to its response to Staff's First Request, Item 2, that consists of BREC's projected annual bilateral capacity sales and purchases and annual capacity position if publicly disclosed could provide its competitors with an unfair advantage. Knowing the amount BREC anticipates paying for capacity or the price at which BREC is prepared to sell capacity would hinder BREC's ability to negotiate favorable terms for those transactions. BREC requests confidential treatment for this material for five years.

Additionally, BREC argued that confidential treatment for five years is appropriate for Attachment 4 to BREC's response to Staff's Second Request, Item 3a, which consists of BREC's projected bilateral sales or purchases, and the quantity and price of future capacity purchases from, and sales to individual non-members; and the information in

Attachment 5 to BREC's response to Staff's Second Request, Item 3a, consisting of projected capacity price per kilowatt-month of its Green Station units converted to burn natural gas. BREC argued that public disclosure of BREC's projected capacity sales and purchases could be used to manipulate the bidding process and lead to higher costs or lower revenue for BREC. BREC maintained that public disclosure of the projected capacity price per kilowatt-month of its Green Station units converted to burn natural gas and related information would likewise provide other market participants with insight into the price at which BREC is willing to buy and sell capacity.

The Commission finds that the information in Attachment 4 to BREC's response to Staff's Second Request, Item 3a, which consists of BREC's projected bilateral sales or purchases, and the quantity and price of future capacity purchases from, and sales to individual non-members; and the information in Attachment 5 to BREC's response to Staff's Second Request, Item 3a, consisting of projected capacity price per kilowatt-month of its Green Station units converted to burn natural gas and related information shall be confidential for five years, pursuant to 807 KAR 5:001, Section 13. This material meets the requirements found in KRS 61.878(1)(c)(1).

IT IS THEREFORE ORDERED that:

1. BREC's September 3, 2021 and October 1, 2021 motions for confidential treatment are granted.
2. The designated material granted confidential treatment by this Order shall not be placed in the public record or made available for public inspection for the designated period or until further Order of this Commission.

3. Use of the designated material granted confidential treatment by this Order in any Commission proceeding shall comply with 807 KAR 5:001, Section 13(9).

4. BREC shall inform the Commission if the designated material granted confidential treatment by this Order becomes publicly available or no longer qualifies for confidential treatment.

5. If a nonparty to this proceeding requests to inspect the material granted confidential treatment by this Order and the period during which the material has been granted confidential treatment has not expired, BREC shall have 30 days from receipt of written notice of the request to demonstrate that the material still falls within the exclusions from disclosure requirements established in KRS 61.878. If BREC is unable to make such a demonstration, the requested material shall be made available for inspection. Otherwise, the Commission shall deny the request for inspection.

6. The Commission shall not make the requested material available for inspection for 30 days from the date of service of an Order finding that the material no longer qualifies for confidential treatment in order to allow BREC to seek a remedy afforded by law.

By the Commission



ATTEST:

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