

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

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PUBLIC SERVICE  
COMMISSION

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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 **PETITION FOR CONFIDENTIAL PROTECTION**

14  
15 1. Big Rivers Electric Corporation (“Big Rivers”) hereby petitions the Kentucky  
16 Public Service Commission (“Commission”), pursuant to 807 KAR 5:001 Section 13 and KRS  
17 61.878, to grant confidential protection to certain information contained in the annual report Big  
18 Rivers is filing with this petition as required by the Commission’s June 30, 2016, order in this  
19 matter.

20 2. The information for which the Big Rivers seeks confidential treatment is  
21 hereinafter referred to as the “Confidential Information.” The Confidential Information consists  
22 of information relating to the increase in load at the Lewisport facility of Aleris Rolled Products,  
23 Inc. (“Aleris”) under the Amended and Restated Agreement for Retail Electric Service between  
24 Kenergy Corp. and Aleris that was the subject of this proceeding.

25 3. One (1) copy of the pages from the report that contain Confidential Information,  
26 with the Confidential Information highlighted with transparent ink, printed on yellow paper, or  
27 otherwise marked “CONFIDENTIAL,” is being filed with this petition. Ten copies of those  
28 pages, with the Confidential Information redacted, are also being filed with this petition. 807  
29 KAR 5:001 Sections 13(2)(a)(3).

1 4. One (1) copy of this petition and one (1) copy of the pages that contain  
2 Confidential Information with the Confidential Information redacted have been served on all  
3 parties to this proceeding. 807 KAR 5:001 Section 13(2)(b).

4 5. If and to the extent the Confidential Information becomes generally available to  
5 the public, whether through filings required by other agencies or otherwise, Big Rivers will  
6 notify the Commission and have its confidential status removed. 807 KAR 5:001 Section  
7 13(10)(b).

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

11 **I. The Confidential Information is entitled to confidential protection**  
12 **based upon KRS 61.878(1)(a)**

13 7. KRS 61.878(1)(a) protects “[p]ublic records containing information of a personal  
14 nature where the public disclosure thereof would constitute a clearly unwarranted invasion of  
15 personal privacy.” Aleris is undergoing a multi-phase expansion at its Lewisport facility. The  
16 Confidential Information reveals information about the timing and magnitude of the phases of  
17 expansion project. Big Rivers also sought confidential treatment for similar information relating  
18 to the timing and extent of the phases in the March 24, 2016, and April 21, 2016, petitions for  
19 confidential treatment it filed in this case.

20 8. As explained in more detail in Section II below, Aleris, a retail customer on the  
21 Big Rivers system, considers this information highly confidential and believes that public  
22 disclosure of this information will cause it substantial competitive harm. Because public  
23 disclosure of the Confidential Information would constitute an unwarranted invasion of this  
24 customer’s privacy, this Confidential Information should be granted confidential treatment. *See*

1 Ky. Op. Atty. Gen. 96-ORD-176 (August 20, 1996) (holding Kroger Company’s utility bills  
2 exempt from disclosure under KRS 61.878(1)(a)); *In the Matter of: Application of Kentucky*  
3 *Utilities Company for an Adjustment of its Electric Rates*, Order, P.S.C. Case No. 2012-00221  
4 (July 25, 2013) (holding customer names, account numbers, and usage information exempt from  
5 disclosure under KRS 61.878(1)(a)).

6 **II. The Confidential Information is also entitled to confidential**  
7 **protection based upon KRS 61.878(1)(c)(1)**

8 9. As discussed below, the Confidential Information is also entitled to confidential  
9 protection based upon KRS 61.878(1)(c)(1), which protects “records confidentially disclosed to  
10 an agency or required by an agency to be disclosed to it, generally recognized as confidential or  
11 proprietary, which if openly disclosed would permit an unfair commercial advantage to  
12 competitors of the entity that disclosed the records.” KRS 61.878(1)(c)(1); 807 KAR 5:001  
13 Section 13(2)(a)(1). Subsection A below explains that Big Rivers operates in competitive  
14 environments; Subection B below shows that the Confidential Information is generally  
15 recognized as confidential or proprietary; and Subection C below demonstrates that public  
16 disclosure of the Confidential Information would permit an unfair commercial advantage to Big  
17 Rivers’ competitors. As such, the Commission should grant confidential treatment to the  
18 Confidential Information.

19 **A. Big Rivers Faces Actual Competition**  
20

21 10. Big Rivers competes in the wholesale power market to sell energy excess to its  
22 members’ needs. This includes short-term bilateral energy markets, day-ahead and real-time  
23 energy and ancillary services markets, the annual capacity market, and forward bilateral long-  
24 term wholesale agreements with utilities and industrial customers. Big Rivers’ ability to  
25 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 11. 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 12. Accordingly, Big Rivers faces competition in the wholesale power and capital  
17 markets, and the Confidential Information should be afforded confidential treatment to prevent  
18 the imposition of an unfair competitive advantage to those competitors.

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

21  
22 13. The Confidential Information for which Big Rivers seeks confidential treatment  
23 under KRS 61.878(1)(c)(1) is generally recognized as confidential or proprietary under Kentucky  
24 law.

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

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

18           16.     As noted above, the Confidential Information reveals the timing and the extent to  
19     which Aleris plans to ramp up its production. Aleris has taken great precaution to safeguard all  
20     technical and timing information related to this expansion project. The only people that have  
21     access to this information are those who are already bound by confidentiality agreements with  
22     Aleris. Information about a company's detailed inner workings is generally recognized as  
23     confidential or proprietary. *See, e.g., Hoy v. Kentucky Indus. Revitalization Authority*, 907

1 S.W.2d 766, 768 (Ky. 1995) (“It does not take a degree in finance to recognize that such  
2 information concerning the inner workings of a corporation is ‘generally recognized as  
3 confidential or proprietary’”). Moreover, KRS 278.160(3) specifically recognizes that terms of a  
4 special contract are not required to be publicly disclosed if such terms are entitled to protection  
5 under KRS 61.878(1)(c)(1), and the Commission has previously granted confidential treatment  
6 to similar information. *See, e.g., In the Matter of: Big Rivers Electric Corporation Filing of*  
7 *Wholesale Contracts Pursuant to KRS 278.180 and 807 KAR 5:011 Section 13*, Order, P.S.C.  
8 Case No. 2014-00134 (September 10, 2014) (granting confidential treatment to confidential  
9 contract terms); *In the Matter of: Big Rivers Electric Corporation Filing of Wholesale Contracts*  
10 *Pursuant to KRS 278.180 and 807 KAR 5:011 Section 13*, Order, P.S.C. Case No. 2014-00134  
11 (October 9, 2014) (granting confidential treatment to confidential contract terms).

12 17. The Confidential Information also implicates Aleris’s contractual obligations to  
13 keep the identities of its customers confidential. If the dates and extent of Aleris’s ramp up of  
14 production were to become public and combined with otherwise publicly-available information,  
15 Aleris competitors might be able to discover the identities of Aleris customers. Aleris has  
16 contractual confidentiality agreements with its customers that prevent it from revealing their  
17 identities. Aleris has safeguarded the identities of its customers, which should be protected from  
18 indirect disclosure here.

19 18. The Confidential Information is not publicly available, is not disseminated within  
20 the Aleris or Big Rivers organizations except to those employees and professionals with a  
21 legitimate business need to know and act upon the information, and is not disseminated to others  
22 without a legitimate need to know and act upon the information.

1           19.     Based on the foregoing, the Confidential Information is generally recognized as  
2 confidential or proprietary under Kentucky law.

3                   **C. Disclosure of the Confidential Information Would Permit an Unfair**  
4                   **Commercial Advantage to Big Rivers' Competitors**  
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6           20.     Disclosure of the Confidential Information would permit an unfair commercial  
7 advantage to Big Rivers' competitors. As discussed above, Big Rivers faces actual competition  
8 in the wholesale power and credit markets. It is likely that Big Rivers would suffer competitive  
9 injury if the Confidential Information was publicly disclosed.

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

22           22.     Public disclosure of the Confidential Information would also cause competitive  
23 harm to Big Rivers. In P.S.C. Case No. 2003-00054, the Commission granted confidential  
24 protection to bids submitted to Union Light, Heat & Power ("ULH&P"). ULH&P's argued, and  
25 the Commission implicitly accepted, that the bidding contractors would not want their bid

1 information publicly disclosed, and that disclosure would reduce the contractor pool available to  
2 ULH&P, which would drive up ULH&P's costs, hurting its ability to compete with other gas  
3 suppliers. *In the Matter of: Application of the Union Light, Heat and Power Company for*  
4 *Confidential Treatment*, Order, P.S.C. Case No. 2003-00054 (August 4, 2003). Similarly, in *Hoy*  
5 *v. Kentucky Indus. Revitalization Authority*, the Kentucky Supreme Court found that without  
6 protection for confidential information provided to a public agency, "companies would be  
7 reluctant to apply for investment tax credits for fear the confidentiality of financial information  
8 would be compromised. *Hoy v. Kentucky Indus. Revitalization Authority*, 907 S.W.2d 766, 769  
9 (Ky. 1995). In the present case, Aleris considers the Confidential Information highly  
10 confidential. If Big Rivers is unable to obtain confidential treatment for the contract terms a  
11 power contract counterparty, Aleris in this case, considers confidential, potential counterparties  
12 dealing with Big Rivers on future transactions would know that such information related to them  
13 could be publicly disclosed, which could reveal information to their competitors about their  
14 competitiveness. Because many companies would be reluctant to have such information  
15 disclosed, public disclosure of the Confidential Information would likely reduce the pool of  
16 counterparties willing to deal with Big Rivers, reducing Big Rivers' ability to sell power and  
17 impairing its ability to compete in the wholesale power and credit markets. Aleris had choices  
18 about where it would make its CALP project investment. If it had thought that extremely  
19 confidential project information that could endanger the ultimate competitiveness of the  
20 company would be publicly disclosed in a proceeding before the Commission, that fact would  
21 have had major significance in its decision about where the project would be constructed.

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



1 **III. Time Period**

2 24. Big Rivers requests that the Confidential Information remain confidential in  
3 perpetuity because it reveals private customer data. If the Commission disagrees that that  
4 information is entitled to confidential treatment pursuant to KRS 61.878(1)(a), Big Rivers  
5 requests that that information remain confidential for a period of ten (10) years from March 24,  
6 2016, which is the same time period for which Big Rivers sought confidential treatment for  
7 information contained in its application in this matter that is similar to the Confidential  
8 Information. This time period should provide sufficient time for the information to become  
9 sufficiently outdated so as to no longer cause a risk of competitive harm to Aleris and Big  
10 Rivers. 807 KAR 5:001 Section 13(2)(a)(2).

11 **IV. Conclusion**

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

16 WHEREFORE, Big Rivers respectfully request that the Commission classify and protect  
17 as confidential the Confidential Information.  
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1 On this the 29<sup>th</sup> day of March, 2017.

2 Respectfully submitted,

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