

1 COMMONWEALTH OF KENTUCKY
2 BEFORE THE PUBLIC SERVICE COMMISSION
3

4 In the Matter of:
5

6 BIG RIVERS ELECTRIC CORPORATION FILING)
7 OF WHOLESALE CONTRACTS PURSUANT TO) CASE NO. 2016-_____
8 KRS 278.160, 278.180 AND 807 KAR 5:011 §13)
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11 **PETITION OF BIG RIVERS ELECTRIC CORPORATION FOR CONFIDENTIAL**
12 **PROTECTION**
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14 1. Big Rivers Electric Corporation ("Big Rivers") hereby petitions the Kentucky
15 Public Service Commission ("Commission"), pursuant to 807 KAR 5:001 Section 13, KRS
16 61.878(1)(c), and KRS 278.160(3), to grant confidential protection to the confidential terms of
17 the agreements between Big Rivers and NextEra Energy Power Marketing, LLC ("NextEra")
18 that Big Rivers is filing with this petition. Those agreements consist of a Master Power Purchase
19 and Sale Agreement (the "EEI Master Agreement") and a Master Power Purchase and Sale
20 Agreement Confirmation Letter (the "Confirmation Letter"). The information Big Rivers seeks
21 to protect as confidential is hereinafter referred to as the "Confidential Information." The
22 Confidential Information is contained in the Confirmation Letter, the EEI Master Agreement,
23 and in a Summary of Capacity Transaction with NextEra Energy Power Marketing, LLC
24 ("Summary"), which is also being filed with this petition.

25 2. Please note that certain personal information, such as bank account information,
26 has been redacted from page 1 of the Cover Sheet of the EEI Master Agreement for privacy
27 reasons pursuant to 807 KAR 5:001 Section 4(10).

28 3. One (1) sealed copy of the pages containing Confidential Information, with the
29 Confidential Information highlighted with transparent ink, printed on yellow paper, or otherwise
30 marked "CONFIDENTIAL," is being filed with this petition. Ten (10) copies of the pages

1 containing Confidential Information, with the Confidential Information redacted, are also being
2 filed with this petition. 807 KAR 5:001 Sections 13(2)(a)(3).

3 4. There are currently no other parties to this proceeding on whom Big Rivers is
4 required to serve copies of this petition. 807 KAR 5:001 Section 13(2)(b).

5 5. If and to the extent the Confidential Information becomes generally available to
6 the public, whether through filings required by other agencies or otherwise, Big Rivers will
7 notify the Commission and have its confidential status removed. 807 KAR 5:001 Section
8 13(10)(b).

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

19 **I. Big Rivers’ Faces Actual Competition**

20 7. As a generation and transmission cooperative, Big Rivers competes in the
21 wholesale power market. This includes not only the short-term bilateral energy market, the day-
22 ahead and real time energy and ancillary services markets, and the capacity market to which Big
23 Rivers has access by virtue of its membership in Midcontinent Independent System Operator,
24 Inc. (“MISO”), but also forward bilateral long-term agreements and wholesale agreements with

1 utilities and industrial customers. Big Rivers' ability to successfully compete in the market is
2 dependent upon a combination of its ability to: 1) obtain the maximum price for the power it
3 sells, and 2) keep its cost of production as low as possible. Fundamentally, if Big Rivers' cost of
4 producing a unit of power increases, its ability to sell that unit in competition with other utilities
5 is adversely affected.

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

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

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

21 10. The Confidential Information consists of the confidential terms of the agreements
22 between Big Rivers and NextEra, such as price, quantity, credit support, and other confidential
23 terms. KRS 278.160 specifically recognizes that terms of a special contract are not required to

1 be publicly disclosed if such terms are entitled to protection under KRS 61.878(1)(c)(1). KRS
2 278.160(3).

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

8 **III. Disclosure of the Confidential Information Would Permit an Unfair Commercial**
9 **Advantage to Big Rivers' Competitors**

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

1 13. In Big Rivers' case, Big Rivers is currently in negotiations with potential
2 counterparties for other purchase power agreements and expects to engage in negotiations with
3 other counterparties in the future. If confidential treatment of the confidential terms of the
4 agreements between Big Rivers and NextEra is denied, potential counterparties would know that
5 the confidential terms of their contracts would be publicly disclosed, which could reveal
6 information to their competitors about their competitiveness. Because many companies would
7 be reluctant to have such information disclosed, public disclosure of the Confidential
8 Information would likely reduce the pool of counterparties willing to negotiate with Big Rivers,
9 reducing Big Rivers' ability to sell power and impairing its ability to compete in the wholesale
10 power and credit markets.

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

