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BEFORE THE PUBLIC SERVICE COMMISSION

SEP 12 2016

PUBLIC SERVICE
COMMISSION

In the Matter of:

Application of Big Rivers Electric Corporation for) Case No.
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 the attachments to Big Rivers' responses to Items 4 and 6 of the Commission Staff's First Request for Information ("PSC 1-4" and "PSC 1-6," respectively) and Attachment 1 to Big Rivers' response to Item 12 of the First Request for Information from the City of Henderson, Kentucky, and Henderson Utility Commission, d/b/a Henderson Municipal Power & Light ("HMPL 1-12"). The information Big Rivers seeks to protect as confidential is hereinafter referred to as the "Confidential Information."

2. One (1) copy of the paper attachment(s) 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 Sections 13(2)(a)(3).

3. One (1) copy of the electronic attachment(s) containing Confidential Information is contained on the confidential electronic media that accompanies this petition. The confidential attachment to Big Rivers' response to HMPL 1-12 is an Excel spreadsheet. Because the

1 Confidential Information is inextricably intertwined with non-confidential information in the
2 electronic spreadsheet attachment, Big Rivers cannot redact only the Confidential Information
3 from the electronic spreadsheet attachment without making other cells in the spreadsheet
4 unusable or breaking the formulas contained therein, and so, the entirety of that attachment must
5 be made confidential. As such, the entirety of the confidential attachment to HMPL 1-12 has
6 been redacted from the original and each of the ten (10) copies of the responses to the
7 information requests filed with this petition. *See* 807 KAR 5:001 Sections 13(2)(a)(3). A
8 motion for deviation from the requirement that Big Rivers file a paper copy of the confidential
9 electronic attachment accompanies this petition.

10 4. A copy of this petition with the Confidential Information redacted has been served
11 on all parties to this proceeding. 807 KAR 5:001 Section 13(2)(b).

12 5. If and to the extent the Confidential Information becomes generally available to
13 the public, whether through filings required by other agencies or otherwise, Big Rivers will
14 notify the Commission and have its confidential status removed. 807 KAR 5:001 Section
15 13(10)(b).

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

19 **I. Information Protected by KRS 61.878(1)(a)**

20 7. KRS 61.878(1)(a) protects “[p]ublic records containing information of a personal
21 nature where the public disclosure thereof would constitute a clearly unwarranted invasion of
22 personal privacy.” The attachments to Big Rivers’ response to PSC 1-6 consist of invoices Big
23 Rivers sent to the City of Henderson and reveal detailed hourly usage and related payment

1 obligations. Because public disclosure of this Confidential Information would constitute an
2 unwarranted invasion of privacy, this Confidential Information should be granted confidential
3 treatment. See Ky. Op. Atty. Gen. 96-ORD-176 (August 20, 1996) (holding Kroger Company’s
4 utility bills exempt from disclosure under KRS 61.878(1)(a)); *In the Matter of: Application of*
5 *Kentucky Utilities Company for an Adjustment of its Electric Rates*, Order, P.S.C. Case No.
6 2012-00221 (July 25, 2013) (holding customer names, account numbers, and usage information
7 exempt from disclosure under KRS 61.878(1)(a)).

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

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

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

19 9. As a generation and transmission cooperative, Big Rivers competes in the
20 wholesale power market. This includes not only the short-term bilateral energy market, the day-
21 ahead and real time energy and ancillary services markets, and the capacity market to which Big
22 Rivers has access by virtue of its membership in Midcontinent Independent System Operator,
23 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 10. 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 11. 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 **B. The Confidential Information is Generally Recognized as Confidential or**
20 **Proprietary**

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

1 13. The Confidential Information contained in the attachment to Big Rivers' response
2 to PSC 1-4 reveals recent detail of energy purchased and sold by Big Rivers, market prices and
3 revenues from the sale of that energy, the variable cost of producing that energy, and other
4 information which could be used to readily calculate the Confidential Information.

5 14. The Confidential Information contained in the attachments to Big Rivers'
6 response to PSC 1-6 includes recent hourly generation detail from generating units operated by
7 Big Rivers, hourly detail of energy purchased by Big Rivers, hourly energy market prices, and
8 other information which could be used to readily calculate the Confidential Information.

9 15. The Confidential Information contained in the attachment to Big Rivers' response
10 to HMPL1-12 reveals recent (2015 and 2016) hourly generation detail from generating units
11 operated by Big Rivers, hourly detail of energy purchased and sold by Big Rivers, hourly market
12 prices and revenues from the sale of that energy, the hourly variable cost of producing that
13 energy, and other information which could be used to readily calculate the Confidential
14 Information.

15 16. Such information provides significant insight into the energy that Big Rivers will
16 have available on an hourly basis, the prices at which Big Rivers is willing to buy or sell power,
17 and Big Rivers' cost of producing power on an hourly basis, which would further indicate the
18 prices at which Big Rivers is willing to buy or sell power. The Commission has previously
19 granted confidential treatment to similar recent information. *See, e.g., In the Matter of: 2014*
20 *Integrated Resource Plan of Big Rivers Electric Corporation*, Order, P.S.C. Case No. 2014-
21 00166 (August 26, 2014); *In the Matter of: Application of Big Rivers Electric Corporation for a*
22 *General Adjustment in Rates*, Order, P.S.C. Case No. 2012-00535 (April 25, 2013); *In the Matter*
23 *of: Application of Big Rivers Electric Corporation for a General Adjustment in Rates*, Order,

1 P.S.C. Case No. 2012-00535 (April 8, 2014); *In the Matter of: Application of Big Rivers Electric*
2 *Corporation for a General Adjustment in Rates*, Order, P.S.C. Case No. 2012-00535 (August 14,
3 2013); *In the Matter of: Application of Big Rivers Electric Corporation for Approval of its 2012*
4 *Environmental Compliance Plan, for Approval of its Amended Environmental Cost Recovery*
5 *Surcharge Tariff, for Certificates of Public Convenience and Necessity, and for Authority to*
6 *Establish a Regulatory Account*, Letter, P.S.C. Case No. 2012-00063 (August 15, 2012); P.S.C.
7 Administrative Case No. 387, Letter (July 20, 2010).

8 17. 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 18. Public disclosure of the Confidential Information would grant Big Rivers'
16 competitors an unfair commercial advantage. As discussed above in Section A, Big Rivers faces
17 actual competition in both the short- and long-term wholesale power markets and in the credit
18 markets. It is likely that Big Rivers' ability to compete in these markets would be adversely
19 affected if the Confidential Information was publicly disclosed, and Big Rivers seeks protection
20 from such competitive injury.

21 19. The Confidential Information consists of commercially sensitive information such
22 as the energy available to Big Rivers on an hourly basis from Station Two in 2015 and 2016; Big
23 Rivers' 2015 and 2016 variable production costs for the Station Two units; and market sales
24 prices achieved by Big Rivers in 2015 and 2016 on an hourly basis. This recent information can

1 be used to readily determine or estimate the current energy available to Big Rivers, Big Rivers'
2 current cost of producing power, and the prices at which Big Rivers is currently willing to buy or
3 sell power.

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

21 21. Additionally, public disclosure of the variable cost information and information
22 about the amounts of energy generated, purchased, and sold would give the power producers and
23 marketers with which Big Rivers competes in the wholesale power market insight into Big

1 Rivers' cost of producing power and the amount of energy available to Big Rivers. Knowledge
2 of this information would give those power producers and marketers an unfair competitive
3 advantage because they could use that information to potentially underbid Big Rivers in
4 wholesale transactions. It would also give potential suppliers to Big Rivers a competitive
5 advantage because they will be able to manipulate the price of power bid to Big Rivers in order
6 to maximize their revenues, thereby driving up Big Rivers' costs and impairing Big Rivers'
7 ability to compete in the wholesale power and credit markets.

8 22. Finally, potential market power purchasers could use the information related to
9 the amounts of energy available to Big Rivers to know when Big Rivers will have excess power
10 to sell into the wholesale market and could use that information to manipulate their bids, leading
11 to lower revenues to Big Rivers and placing it at an unfair competitive disadvantage in the credit
12 markets.

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

15 **III. Time Period**

16 24. Big Rivers requests that the Confidential Information protected by KRS
17 61.878(1)(a) remain confidential indefinitely for the reasons stated in Part I, above. Big Rivers
18 requests that the rest of the Confidential Information remain confidential for a period of five (5)
19 years from the date of this petition, which should allow sufficient time for the data to become
20 sufficiently outdated that it could not be used to determine similar confidential information at
21 that time or to competitively disadvantage Big Rivers. *See* 807 KAR 5:001 Section 13(2)(a)(2).

1 **IV. Conclusion**

2 25. 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. *See 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 9th day of September, 2016.

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