

RECEIVED

JUL 26 2018

PUBLIC SERVICE
COMMISSION

1 COMMONWEALTH OF KENTUCKY
2 BEFORE THE PUBLIC SERVICE COMMISSION

3 In the matter of:

NOTICE OF TERMINATION OF)
CONTRACTS AND APPLICATION OF BIG)
RIVERS ELECTRIC CORPORATION FOR A) Case No.
DECLARATORY ORDER AND FOR) 2018-00146
AUTHORITY TO ESTABLISH A)
REGULATORY ASSET)

4 **PETITION FOR CONFIDENTIAL TREATMENT**

5 1. Big Rivers Electric Corporation (“Big Rivers”) hereby petitions the
6 Kentucky Public Service Commission (“Commission”), pursuant to 807 KAR 5:001
7 Section 13 and KRS 61.878, to grant confidential protection to the confidential
8 information contained in the attachments to Big Rivers’ responses to Items 7 and 10
9 of Kentucky Industrial Utility Customers, Inc.’s Second Request for Information
10 (“KIUC 2-7” and “KIUC 2-10,” respectively), in Big Rivers’ response to Item 5 of the
11 Commission Staff’s Supplemental Request for Information (“PSC 2-5”), and in Big
12 Rivers’ response to Items 16 of Kentucky Industrial Utility Customers, Inc.’s Second
13 Request for Information (“KIUC 2-16”).

14 2. The information Big Rivers seeks to protect as confidential is
15 hereinafter referred to as the “Confidential Information.” The attachments to Big
16 Rivers’ response to KIUC 2-7 consist of financial forecast model runs and an
17 analysis of the financial implications of Big Rivers exiting the Station Two
18 contracts. These model runs and analysis are sensitive internal, strategic planning
19 documents and contain projections of power market prices, purchases, and sales;

1 coal and other fuel prices and purchases; other fixed and variable operation and
2 maintenance (“O&M”) costs; capital project costs; and information such as totals,
3 margins, TIER, capital, cash, debt, equity, etc. that can be used in combination with
4 other information to calculate other Confidential Information. The Confidential
5 Information in Big Rivers’ response to PSC 2-5 and in the attachment to Big Rivers’
6 response to KIUC 2-10 consists of project TIER and margins, which can be used in
7 combination with other information to gain insight into Big Rivers’ cost of producing
8 power. The Confidential Information in Big Rivers’ response to KIUC 2-16 consists
9 of projected loan terms.

10 3. KIUC 2-7 requests that the documents provided in response to that
11 question be provided electronically as Excel spreadsheets. As such, the
12 attachments to Big Rivers’ response to KIUC 2-7 are being provided electronically
13 as Excel files and are confidential in their entirety. One (1) sealed, electronic copy
14 of these attachments are being filed on the CONFIDENTIAL CD accompanying this
15 petition. 807 KAR 5:001 Section 13(2)(a)(3). The accompanying motion for
16 deviation seeks a deviation from the requirement that Big Rivers file a paper
17 confidential copy of the electronic files.

18 4. One (1) sealed copy of the paper pages containing Confidential
19 Information, with the Confidential Information highlighted with transparent ink,
20 printed on yellow paper, or otherwise marked “CONFIDENTIAL,” is being filed
21 with this petition. Ten (10) copies of those pages with the Confidential Information
22 redacted are also being filed with this petition. 807 KAR 5:001 Section 13(2)(a)(3).

1 5. A copy of this petition and a copy of the redacted paper pages have
2 been served on all parties. 807 KAR 5:001 Section 13(2)(b). A copy of the
3 Confidential Information has been provided to all parties that have executed a
4 confidentiality agreement.

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

9 7. As discussed below, the Confidential Information is entitled to
10 confidential treatment based upon 807 KAR 5:001 Section 13(4) and (9) and/or KRS
11 61.878(1)(c)(1). *See* 807 KAR 5:001 Section 13(2)(a)(1).

12 **I. Information Exempted from Public Disclosure by 807 KAR 5:001**
13 **Section 13(4) and (9)**

14 8. The file named "KIUC 1-4 (PGS)(Att) – Finl Metrics – HMPL Exit 3-
15 24-2016 (Non-CPP) – CNF" (hereinafter, the "HMPL Exit Analysis") is an electronic
16 version of the paper attachment to Big Rivers' response to Item 4 of Kentucky
17 Industrial Utility Customers, Inc.'s Initial Request for Information. Big Rivers filed
18 that paper attachment with the Commission on July 6, 2018, along with a petition
19 for confidential treatment of the Confidential Information contained in that
20 attachment (the "July 6 Petition for Confidential Treatment").

21 9. The Confidential Information in Big Rivers' response to KIUC 2-16 is
22 taken from Big Rivers' financial model filed on July 6, 2018, pursuant to the July 6

1 Petition for Confidential Treatment, in response to Item 6 of Kentucky Industrial
2 Utility Customers, Inc.'s Initial Request for Information.

3 10. The July 6 Petition for Confidential Treatment is pending.

4 11. 807 KAR 5:001 Section 13(9) provides:

5 Use of confidential material. (a) A person who files any paper that contains
6 material that has previously been deemed confidential or for which a request
7 or motion for confidential treatment is pending shall submit one (1) copy of
8 the paper with the adjudged or alleged confidential material underscored or
9 highlighted, and ten (10) copies of the paper with those portions redacted;
10 and

11 1. If the confidential status of the material has been determined
12 previously, a written notice identifying the person who originally
13 submitted the material, the date on which a determination on the
14 materials confidentiality was made and, if applicable, the case number
15 in which the determination was made; or

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

19 12. 807 KAR 5:001 Section 13(4) provides, "Pending action by the
20 [C]ommission on a motion for confidential treatment or by its executive director on
21 a request for confidential treatment, the material specifically identified shall be
22 accorded confidential treatment." As such, the Confidential Information in the
23 HMPL Exit Analysis and in the response to KIUC 2-16 should be afforded
24 confidential treatment while Big Rivers' July 6 Petition for Confidential Treatment
25 is pending and thereafter for the reasons stated in that petition.

26 **II. Information Exempted from Public Disclosure by KRS 61.878(1)(c)(1)**

27 13. KRS 61.878(1)(c)(1) protects "records confidentially disclosed to an
28 agency or required by an agency to be disclosed to it, generally recognized as

1 confidential or proprietary, which if openly disclosed would permit an unfair
2 commercial advantage to competitors of the entity that disclosed the records.”

3 Section A below explains that Big Rivers operates in competitive environments in
4 the wholesale power market and in the credit market. Section B below shows that
5 the Confidential Information is generally recognized as confidential or proprietary.
6 Section C below demonstrates that public disclosure of the Confidential Information
7 would permit an unfair commercial advantage to Big Rivers’ competitors.

8 **A. Big Rivers Faces Actual Competition.**

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

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

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

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

13 **B. The Confidential Information is Generally Recognized as**
14 **Confidential or Proprietary.**

15 17. The Confidential Information for which Big Rivers seeks confidential
16 treatment under KRS 61.878(1)(c)(1) is generally recognized as confidential or
17 proprietary under Kentucky law.

18 18. The Confidential Information consists of financial forecast model runs,
19 a HMPL Exit Analysis, and projections of margins, TIER, and loan terms, which are
20 key internal strategic planning documents and resulting information. The
21 Commission has consistently recognized that such internal strategic planning
22 information and related materials are entitled to confidential treatment, as these
23 documents typically relate to the company's economic status and business

1 strategies. These documents also provide insight into Big Rivers' cost of producing
2 power; the prices at which Big Rivers is willing to buy or sell power, fuel, and other
3 items; the loan terms Big Rivers is willing to accept; and the market conditions Big
4 Rivers expects to encounter and its ability to compete with competitors.

5 19. Information such as this which bears upon a company's detailed inner
6 workings is generally recognized as confidential or proprietary. *See, e.g., Hoy v.*
7 *Kentucky Indus. Revitalization Authority*, 907 S.W.2d 766, 768 (Ky. 1995) ("It does
8 not take a degree in finance to recognize that such information concerning the inner
9 workings of a corporation is 'generally recognized as confidential or proprietary'");
10 *Marina Management Servs. v. Cabinet for Tourism, Dep't of Parks*, 906 S.W.2d 318,
11 319 (Ky. 1995) (unfair commercial advantage arises simply from "the ability to
12 ascertain the economic status of the entities without the hurdles systemically
13 associated with the acquisition of such information about privately owned
14 organizations"). Additionally, the Commission has previously granted confidential
15 treatment to similar information. *See, e.g., In the Matter of: 2014 Integrated*
16 *Resource Plan of Big Rivers Electric Corporation*, Order, P.S.C. Case No. 2014-
17 00166 (August 26, 2014) (the "2014 IRP Confidentiality Order") (granting
18 confidential treatment to fuel cost projections, power price projections, projected
19 environmental compliance-related capital and O&M costs, NPV results of
20 production cost model runs, and rate projections); *In the Matter of: Big Rivers*
21 *Electric Corporation Filing of Wholesale Contract Pursuant to KRS 278.180 and*
22 *KAR 5:011 Section 13*, Order, P.S.C. Case No. 2014-00134 (September 30, 2014)

1 (granting confidential treatment to projected energy and capacity prices; *id.*, Order
2 (October 9, 2014) (granting confidential treatment to financial forecast, projections
3 of capital expenditures, projects of revenues and expenses from off-system sale, and
4 commercial negotiations); *id.*, Order (November 21, 2014) (granting confidential
5 treatment to forecasted rates, revenues, and costs).

6 20. The Confidential Information is not publicly available, is not
7 disseminated within Big Rivers except to those employees and professionals with a
8 legitimate business need to know and act upon the information, and is not
9 disseminated to others without a legitimate need to know and act upon the
10 information.

11 21. Accordingly, the information for which Big Rivers seeks confidential
12 treatment is recognized as confidential or proprietary under Kentucky law and is
13 entitled to confidential protection as further discussed below.

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

16
17 22. Disclosure of the Confidential Information would permit an unfair
18 commercial advantage to Big Rivers' competitors. As discussed above, Big Rivers
19 faces actual competition in the wholesale power market and in the credit market. It
20 is likely that Big Rivers would suffer competitive injury if that Confidential
21 Information was publicly disclosed, and the information should therefore be subject
22 to confidential treatment.

23 23. The Confidential Information includes material such as Big Rivers'
24 projections of fuel and power prices, loan terms, capital project costs, energy and

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

1 24. Similarly, the Commission recently granted confidential treatment to
2 pricing information provided by Cumberland Valley Electric, Inc. (“Cumberland
3 Valley”) in P.S.C. Case No. 2018-00056. *In the Matter of: Application of*
4 *Cumberland Valley Electric, Inc. for Commission Approval for a Certificate of Public*
5 *Convenience and Necessity to Install an Advanced Metering Infrastructure (AMI)*
6 *System Pursuant to KRS 807 KAR 5:001 and KRS 278.020*, Order, P.S.C. Case No.
7 2018-00056 (May 9, 2018). In that case, the Commission recognized “that the
8 specific cost information may be used to the financial detriment of Cumberland
9 Valley and its ratepayers by allowing potential future vendors to bid just under the
10 cost of its current vendor, which, in turn, would place Cumberland Valley at a
11 competitive disadvantage.” *Id.*

12 25. The same competitive harm that the Commission recognized in P.S.C.
13 Case Nos. 2003-00054 and 2018-00056 would befall Big Rivers if the Confidential
14 Information in this case were publicly disclosed. Public disclosure of the
15 Confidential Information would provide potential purchasers of fuel, power, or other
16 items from Big Rivers; potential lenders; potential sellers of fuel, power, or other
17 items to Big Rivers; and other providers competing against Big Rivers for purchases
18 or sales of fuel, power, or other items with insight into the prices and the terms
19 under which Big Rivers is willing to transact. These market participants could use
20 this information as a benchmark, leading to higher costs, lower revenues, or less
21 favorable terms to Big Rivers, hurting Big Rivers’ ability to compete in the
22 wholesale power and credit markets.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37

Respectfully submitted,



Laura Chambliss
Tyson Kamuf
Big Rivers Electric Corporation
201 Third Street
P.O. Box 727
Henderson, Kentucky 42419-0024
Phone: (270) 827-2561
Facsimile: (270) 827-1201
laura.chambliss@bigrivers.com
tyson.kamuf@bigrivers.com

James M. Miller
SULLIVAN MOUNTJOY, PSC
100 St. Ann Street
P. O. Box 727
Owensboro, Kentucky 42302-0727
Phone: (270) 926-4000
Facsimile: (270) 683-6694
jmiller@smsmlaw.com

Norman T. Funk
Thomas J. Costakis
KRIEG DEVAULT LLP
One Indiana Square, Suite 2800
Indianapolis, Indiana 46204-2079
Phone: (317) 636-4341
Facsimile: (317) 636-1507
tfunk@kdlegal.com
tcostakis@kdlegal.com

Counsel for Big Rivers Electric Corporation