

1 COMMONWEALTH OF KENTUCKY
2 BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY
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5 In the Matter of:

6
7 ELECTRONIC EXAMINATION OF THE)
8 APPLICATION OF THE FUEL ADJUSTMENT) Case No.
9 CLAUSE OF BIG RIVERS ELECTRIC CORPORATION) 2018-00023
10 FROM MAY 1, 2017 THROUGH OCTOBER 31, 2017)
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13 **PETITION OF BIG RIVERS ELECTRIC CORPORATION FOR CONFIDENTIAL**
14 **PROTECTION**
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16 1. Big Rivers Electric Corporation (“Big Rivers”) hereby petitions the Public
17 Service Commission of Kentucky (“Commission”), pursuant to 807 KAR 5:001 Section 13 and
18 KRS 61.878, to grant confidential protection to certain information contained in Big Rivers’
19 responses and/or the attachments to Big Rivers’ responses to Items 4 and 12 of the information
20 requested in the Appendix to the Commission’s February 16, 2018, order in this matter (the
21 “Confidential Information”).

22 2. The Confidential Information consists of information about bids for fuel contracts
23 (Item 4 response), a bid tabulation sheet (Item 4 attachment), and information about Big Rivers’
24 ongoing off-system sales (Item 12 response).

25 3. One (1) copy of the pages containing Confidential Information, with the
26 Confidential Information highlighted with transparent ink, printed on yellow paper, or otherwise
27 marked “CONFIDENTIAL,” is being filed in hardcopy format with this petition. 807 KAR
28 5:001 Section 13(2)(e).

29 4. If and to the extent the Confidential Information becomes generally available to
30 the public, whether through filings required by other agencies or otherwise, Big Rivers will

1 notify the Commission and have its confidential status removed. 807 KAR 5:001 Section
2 13(10)(b).

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

13 I. Big Rivers Faces Actual Competition

14 6. As a generation and transmission cooperative, Big Rivers competes in the
15 wholesale power market. This includes not only the short-term bilateral energy market, the day-
16 ahead and real time energy and ancillary services markets, and the capacity market to which Big
17 Rivers has access by virtue of its membership in Midcontinent Independent System Operator,
18 Inc. (“MISO”), but also forward bilateral long-term agreements and wholesale agreements with
19 utilities and industrial customers. Big Rivers’ ability to successfully compete in the market is
20 dependent upon a combination of its ability to: 1) obtain the maximum price for the power it
21 sells, and 2) keep its cost of production as low as possible. Fundamentally, if Big Rivers’ cost of
22 producing a unit of power increases, its ability to sell that unit in competition with other utilities
23 is adversely affected.

1 or will need. Information about a company's detailed inner workings is generally recognized as
2 confidential or proprietary. *See, e.g., Hoy v. Kentucky Indus. Revitalization Authority*, 907
3 S.W.2d 766, 768 (Ky. 1995) ("It does not take a degree in finance to recognize that such
4 information concerning the inner workings of a corporation is 'generally recognized as
5 confidential or proprietary'"). Moreover, the Commission has previously granted confidential
6 treatment to similar information. *See, e.g.,* letter from the Commission dated July 20, 2010, in
7 Administrative Case No. 387 (granting confidential treatment to a list of future scheduled
8 outages, which can give competitors insight into Big Rivers' wholesale power needs); two letters
9 from the Commission dated December 11, 2012, in *In the Matter of: Application of Big Rivers*
10 *Electric Corporation for Approval of its 2012 Environmental Compliance Plan, for Approval of*
11 *its Amended Environmental Cost Recovery Surcharge Tariff, for Certificates of Public*
12 *Convenience and Necessity, and for Authority to Establish a Regulatory Account*, P.S.C. Case
13 No. 2012-00063 (granting confidential treatment to Big Rivers' off-system sales).

14 12. The Confidential Information contained in Big Rivers' response to Item 4 and in
15 the attachment to that response relates to a spot and term coal supply solicitation issued by Big
16 Rivers, and it reveals confidential bids supplied by fuel suppliers and Big Rivers' ranking of
17 those bids, and it gives insight into the internal, confidential bid selection methodology that Big
18 Rivers uses.

19 13. The Commission has often found that similar information relating to competitive
20 bidding is generally recognized as confidential and proprietary. *See, e.g., In the Matter of:*
21 *Application of the Union Light, Heat and Power Company for Confidential Treatment*, Order,
22 P.S.C. Case No. 2003-00054 (August 4, 2003) (finding that bids submitted to a utility were
23 confidential). In fact, the Commission has granted confidential protection to the same type of

1 information that is presented in the bid tabulation sheets when provided by other utilities in cases
2 involving a review of their fuel adjustment clauses. *See, e.g.*, letter from the Commission dated
3 October 23, 2009, granting confidential protection to East Kentucky Power Cooperative, Inc.'s
4 bid tabulation sheet and related information in P.S.C. Case No. 2009-00286; letter from the
5 Commission dated December 11, 2009, granting confidential protection to Kentucky Utilities
6 Company's coal bid analysis procedure in P.S.C. Case No. 2009-00287. The Commission has
7 also granted confidential protection to the bid tabulation sheets that Big Rivers filed in previous
8 reviews of its fuel adjustment clause. *See, e.g.*, letter from the Commission dated May 10, 2010,
9 in P.S.C. Case No. 2009-00510; letter from the Commission dated September 22, 2010, in P.S.C.
10 Case No. 2010-00269. Thus, both the information in the response to Item 4 and the information
11 in the attachment to the response to Item 4 are generally recognized as confidential or
12 proprietary.

13 14. The Confidential Information is not publicly available, is not disseminated within
14 Big Rivers except to those employees and professionals with a legitimate business need to know
15 and act upon the information, and is not disseminated to others without a legitimate need to
16 know and act upon the information. As such, the Confidential Information is generally
17 recognized as confidential and proprietary.

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

20 15. Disclosure of the Confidential Information would permit an unfair commercial
21 advantage to Big Rivers' competitors. As discussed above, Big Rivers faces actual competition
22 in the wholesale power market and in the credit market. It is likely that Big Rivers would suffer
23 competitive injury if that Confidential Information was publicly disclosed.

1 16. In P.S.C. Case No. 2003-00054, the Commission implicitly accepted Union Light,
2 Heat & Power’s (“ULH&P”) argument that the bidding contractors would not want their bid
3 information publicly disclosed, and that disclosure would reduce the contractor pool available to
4 ULH&P, which would drive up ULH&P’s costs, hurting its ability to compete with other gas
5 suppliers. *In the Matter of: Application of the Union Light, Heat and Power Company for*
6 *Confidential Treatment*, Order, P.S.C. Case No. 2003-00054 (August 4, 2003). Similarly, in *Hoy*
7 *v. Kentucky Indus. Revitalization Authority*, the Kentucky Supreme Court found that without
8 protection for confidential information provided to a public agency, “companies would be
9 reluctant to apply for investment tax credits for fear the confidentiality of financial information
10 would be compromised. *Hoy v. Kentucky Indus. Revitalization Authority*, 907 S.W.2d 766, 769
11 (Ky. 1995).

12 17. In Big Rivers’ case, if confidential treatment of the bid-related information and
13 the bid tabulation sheets is denied, potential bidders would know that their bids would be
14 publicly disclosed, which could reveal information to their competitors about their
15 competitiveness. Because many companies would be reluctant to have such information
16 disclosed, public disclosure of the bid information would likely suppress the competitive bidding
17 process and reduce the pool of bidders willing to bid to supply Big Rivers’ fuel needs, driving up
18 Big Rivers’ fuel costs (which could then drive up the cost of credit to Big Rivers) and impairing
19 its ability to compete in the wholesale power market.

20 18. Additionally, in P.S.C. Case No. 2003-00054, ULH&P argued, and the
21 Commission implicitly accepted, that if the bids ULH&P received were publicly disclosed,
22 contractors on future work could use the bids as a benchmark, which would likely lead to the
23 submission of higher bids. *In the Matter of: Application of the Union Light, Heat and Power*

1 *Company for Confidential Treatment*, Order, P.S.C. Case No. 2003-00054 (August 4, 2003).

2 The Commission also implicitly accepted ULH&P's further argument that the higher bids would
3 lessen ULH&P's ability to compete with other gas suppliers. *Id.*

4 19. In Big Rivers' case, potential market power purchasers could use the information
5 related to Big Rivers' future off-system sales to know when and to the extent Big Rivers is long
6 on power and could use that information to manipulate their bids, leading to lower revenues to
7 Big Rivers and placing it at an unfair competitive disadvantage in the credit markets. Likewise,
8 knowledge of this information would give power producers and marketers with which Big
9 Rivers' competes in the wholesale power market an unfair competitive advantage because they
10 could use that information to potentially underbid Big Rivers in wholesale transactions. It would
11 also give potential suppliers to Big Rivers a competitive advantage because they will be able to
12 manipulate the price of power bid to Big Rivers in order to maximize their revenues, thereby
13 driving up Big Rivers' costs and impairing Big Rivers' ability to compete in the wholesale power
14 and credit markets.

15 20. Accordingly, the public disclosure of the information that Big Rivers seeks to
16 protect pursuant to KRS 61.878(1)(c)(1) would provide Big Rivers' competitors with an unfair
17 commercial advantage.

18 **IV. Time Period**

19 21. Big Rivers requests that the Confidential Information contained in the response to
20 Items 4 and in the attachment to the response to Item 4 remain confidential indefinitely because
21 until Big Rivers changes its bid selection methodology, the public disclosure of the information
22 could be used to Big Rivers' competitive disadvantage for the reasons stated above. Big Rivers
23 requests that the Confidential Information contained in the response to Item 12 remain

1 confidential for a period of five (5) years from the date of this petition, which will allow
2 sufficient time for the information to become sufficiently outdated to no longer pose a
3 competitive risk to Big Rivers. 807 KAR 5:001 Section 13(2)(a)(2).

4 **V. Conclusion**

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

9 WHEREFORE, Big Rivers respectfully requests that the Commission classify and protect
10 as confidential the Confidential Information.

11 On this the 1st day of March, 2018.

12 Respectfully submitted,

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