

1 COMMONWEALTH OF KENTUCKY
2 BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY
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5 In the Matter of:
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ELECTRONIC EXAMINATION OF THE)
APPLICATION OF THE FUEL)
ADJUSTMENT CLAUSE OF BIG RIVERS) Case No.
ELECTRIC CORPORATION FROM) 2018-00221
NOVEMBER 1, 2017 THROUGH APRIL 30,)
2018)

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9 **PETITION OF BIG RIVERS ELECTRIC CORPORATION FOR**
10 **CONFIDENTIAL PROTECTION**
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12 1. Big Rivers Electric Corporation (“Big Rivers”) hereby petitions the
13 Public Service Commission of Kentucky (“Commission”), pursuant to 807 KAR 5:001
14 Section 13 and KRS 61.878, to grant confidential protection to certain information
15 contained in Big Rivers’ response to Item 12 of the information requested in the
16 Appendix to the Commission’s August 10, 2018, order in this matter (the
17 “Confidential Information”). The Confidential Information consists of information
18 about Big Rivers’ ongoing off-system sales.

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

23 3. If and to the extent the Confidential Information becomes generally
24 available to the public, whether through filings required by other agencies or

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

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

15 I. Big Rivers Faces Actual Competition

16 5. As a generation and transmission cooperative, Big Rivers competes in
17 the wholesale power market. This includes not only the short-term bilateral energy
18 market, the day-ahead and real time energy and ancillary services markets, and the
19 capacity market to which Big Rivers has access by virtue of its membership in
20 Midcontinent Independent System Operator, Inc. (“MISO”), but also forward
21 bilateral long-term agreements and wholesale agreements with utilities and
22 industrial customers. Big Rivers’ ability to successfully compete in the market is

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

5 6. Big Rivers also competes for reasonably priced credit in the credit
6 markets, and its ability to compete is directly impacted by its financial results.
7 Lower revenues and any events that adversely affect Big Rivers' margins will
8 adversely affect its financial results and potentially impact the price it pays for
9 credit. A competitor armed with Big Rivers' proprietary and confidential
10 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
12 utility the size of Big Rivers that operates generation and transmission facilities
13 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
15 basis in the future, and it is imperative that Big Rivers improve and maintain its
16 credit profile.

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

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1 **II. The Confidential Information is Generally Recognized as**
2 **Confidential or Proprietary**

3 8. The Confidential Information for which Big Rivers seeks confidential
4 treatment under KRS 61.878(1)(c)(1) is generally recognized as confidential or
5 proprietary under Kentucky law.

6 9. Public disclosure of the future off-system sales information will give
7 Big Rivers' suppliers, buyers, and competitors insight into when Big Rivers will
8 have power available to sell into the market or when Big Rivers needs power, and
9 the amount of power Big Rivers has to sell or will need. Information about a
10 company's detailed inner workings is generally recognized as confidential or
11 proprietary. *See, e.g., Hoy v. Kentucky Indus. Revitalization Authority*, 907 S.W.2d
12 766, 768 (Ky. 1995) ("It does not take a degree in finance to recognize that such
13 information concerning the inner workings of a corporation is 'generally recognized
14 as confidential or proprietary'"); *Marina Management Servs. v. Cabinet for Tourism,*
15 *Dep't of Parks*, 906 S.W.2d 318, 319 (Ky. 1995) (unfair commercial advantage arises
16 simply from "the ability to ascertain the economic status of the entities without the
17 hurdles systemically associated with the acquisition of such information about
18 privately owned organizations"). Moreover, the Commission has previously granted
19 confidential treatment to similar information. *See, e.g.*, letter from the Commission
20 dated July 20, 2010, in Administrative Case No. 387 (granting confidential
21 treatment to a list of future scheduled outages, which can give competitors insight
22 into Big Rivers' wholesale power needs); two letters from the Commission dated
23 December 11, 2012, in *In the Matter of: Application of Big Rivers Electric*

1 *Corporation for Approval of its 2012 Environmental Compliance Plan, for Approval*
2 *of its Amended Environmental Cost Recovery Surcharge Tariff, for Certificates of*
3 *Public Convenience and Necessity, and for Authority to Establish a Regulatory*
4 *Account, P.S.C. Case No. 2012-00063 (granting confidential treatment to Big Rivers'*
5 *off-system sales). In fact, in previous reviews of Big Rivers' fuel adjustment clause,*
6 *the Commission has granted confidential treatment to the same type of information*
7 *as the Confidential Information in this case. See, e.g., In the Matter of: Electronic*
8 *Examination of the Application of the Fuel Adjustment Clause of Big Rivers Electric*
9 *Corporation from May 1, 2017 through October 31, 2017, Order, P.S.C. Case No.*
10 *2018-00023 (May 29, 2018).*

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

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

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

1 12. In P.S.C. Case No. 2003-00054, Union Light, Heat & Power (“ULH&P”)
2 argued, and the Commission implicitly accepted, that if the bids ULH&P received
3 were publicly disclosed, contractors on future work could use the bids as a
4 benchmark, which would likely lead to the submission of higher bids. *In the Matter*
5 *of: Application of the Union Light, Heat and Power Company for Confidential*
6 *Treatment*, Order, P.S.C. Case No. 2003-00054 (August 4, 2003). The Commission
7 also implicitly accepted ULH&P’s further argument that the higher bids would
8 lessen ULH&P’s ability to compete with other gas suppliers. *Id.*

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

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

4 **IV. Time Period**

5 15. Big Rivers requests that the Confidential Information remain
6 confidential for a period of five (5) years from the date of this petition, which will
7 allow sufficient time for the information to become sufficiently outdated to no longer
8 pose a competitive risk to Big Rivers. 807 KAR 5:001 Section 13(2)(a)(2).

9 **V. Conclusion**

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

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

17 On this the 24th day of August, 2018.

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Respectfully submitted,



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