

1 COMMONWEALTH OF KENTUCKY
2 BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY
3
4

5 In the Matter of:
6

ELECTRONIC EXAMINATION OF THE)
APPLICATION OF THE FUEL)
ADJUSTMENT CLAUSE OF BIG RIVERS) Case No.
ELECTRIC CORPORATION FROM) 2019-00007
NOVEMBER 1, 2016 THROUGH OCTOBER)
31, 2018)

7
8
9 **PETITION OF BIG RIVERS ELECTRIC CORPORATION FOR**
10 **CONFIDENTIAL PROTECTION**
11

12 1. Big Rivers Electric Corporation ("*Big Rivers*") hereby petitions the
13 Kentucky Public Service Commission ("*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 3 of the Commission Staff's Second
16 Request for Information ("PSC 2-3"). The information for which Big Rivers seeks
17 confidential protection (the "*Confidential Information*") consists of the date for a
18 planned generator maintenance outage.

19 2. One (1) copy of the page 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 A
9 below explains that Big Rivers operates in competitive environments in the
10 wholesale power market and in the credit market. Section B below shows that the
11 Confidential Information is generally recognized as confidential or proprietary.
12 Section C below demonstrates that public disclosure of the Confidential Information
13 would permit an unfair commercial advantage to Big Rivers’ competitors.

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

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

1 if Big Rivers' cost of producing a unit of power increases, its ability to sell that unit
2 in competition with other utilities is adversely affected.

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

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

18 **B. The Confidential Information is Generally Recognized as**
19 **Confidential or Proprietary**

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

1 9. As noted above, the Confidential Information consists of information
2 about the timing of a planned maintenance outage. Public disclosure of this
3 information will give Big Rivers’ suppliers, buyers, and competitors insight into
4 when Big Rivers will have power available to sell into the market or when Big
5 Rivers needs power.

6 10. Information about a company’s detailed inner workings is generally
7 recognized as confidential or proprietary. *See, e.g., Hoy v. Kentucky Indus.*
8 *Revitalization Authority*, 907 S.W.2d 766, 768 (Ky. 1995) (“It does not take a degree
9 in finance to recognize that such information concerning the inner workings of a
10 corporation is ‘generally recognized as confidential or proprietary’”); *Marina*
11 *Management Servs. v. Cabinet for Tourism, Dep’t of Parks*, 906 S.W.2d 318, 319 (Ky.
12 1995) (unfair commercial advantage arises simply from “the ability to ascertain the
13 economic status of the entities without the hurdles systemically associated with the
14 acquisition of such information about privately owned organizations”). Moreover,
15 the Commission has previously granted confidential treatment to similar
16 information. *See, e.g., In the Matter of: An Examination of the Application of the*
17 *Fuel Adjustment Clause of Kentucky Power Company from November 1, 2012*
18 *through October 31, 2014*, Order, P.S.C. Case No. 2014-00450 (Jan. 24, 2019)
19 (granting confidential treatment to planned outage schedules).

20 11. The Confidential Information is not publicly available, is not
21 disseminated within Big Rivers except to those employees and professionals with a
22 legitimate business need to know and act upon the information, and is not

1 disseminated to others without a legitimate need to know and act upon the
2 information. As such, the Confidential Information is generally recognized as
3 confidential and proprietary.

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

6 12. Disclosure of the Confidential Information would permit an unfair
7 commercial advantage to Big Rivers' competitors. As discussed above, Big Rivers
8 faces actual competition in the wholesale power market and in the credit market. It
9 is likely that Big Rivers would suffer competitive injury if that Confidential
10 Information was publicly disclosed.

11 13. In P.S.C. Case No. 2003-00054, the Commission granted confidential
12 protection to bids submitted to Union Light, Heat & Power ("*ULH&P*"). *ULH&P*
13 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,
15 which would likely lead to the submission of higher bids. *In the Matter of:*
16 *Application of the Union Light, Heat and Power Company for Confidential*
17 *Treatment*, Order, P.S.C. Case No. 2003-00054 (Aug. 4, 2003). The Commission also
18 implicitly accepted *ULH&P's* further argument that the higher bids would lessen
19 *ULH&P's* ability to compete with other gas suppliers. *Id.* Similarly, potential
20 market power suppliers and purchasers could use the information related to Big
21 Rivers' planned outage schedule to know when and to the extent Big Rivers is short
22 or long on power and could use that information to manipulate their bids, leading to
23 higher costs or lower revenues to Big Rivers and placing it at an unfair competitive

1 disadvantage in the credit markets. Likewise, public disclosure of the Confidential
2 Information would give the power producers and marketers with which Big Rivers
3 competes in the wholesale power market insight into Big Rivers' need for power and
4 energy during the periods covered by the information. Knowledge of this
5 information would give those power producers and marketers an unfair competitive
6 advantage because they could use that information to potentially underbid Big
7 Rivers in wholesale transactions.

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

11 **D. Time Period**

12 15. Big Rivers requests that the Confidential Information remain
13 confidential for a period of (5) years from the date of this petition, which is
14 necessary so that the time period requested does not reveal the Confidential
15 Information, and which will allow sufficient time for the information to become
16 sufficiently outdated to no longer pose a competitive risk to Big Rivers. 807 KAR
17 5:001 Section 13(2)(a)(2).

18 **I. Conclusion**

19 16. Based on the foregoing, the Confidential Information is entitled to
20 confidential protection. If the Commission disagrees that Big Rivers is entitled to
21 confidential protection, the Commission should hold an evidential hearing to protect
22 Big Rivers' due process rights and to supply the Commission with a complete record

1 to enable it to reach a decision with regard to this matter. *See Utility Regulatory*
2 *Com'n v. Kentucky Water Service Co., Inc.*, 642 S.W.2d 591 (Ky. App. 1982).

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

5 On this the 25th day of March, 2019.

6 Respectfully submitted,
7

8 
9

10 Tyson Kamuf
11 Corporate Attorney,
12 Big Rivers Electric Corporation
13 201 Third Street
14 P.O. Box 727
15 Henderson, Kentucky 42419-0024
16 Phone: (270) 827-2561
17 Facsimile: (270) 844-6417
18 tyson.kamuf@bigrivers.com