

1 COMMONWEALTH OF KENTUCKY  
2 BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY  
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5 In the Matter of:  
6

ELECTRONIC EXAMINATION OF THE )  
APPLICATION OF THE FUEL ADJUSTMENT ) Case No.  
CLAUSE OF BIG RIVERS ELECTRIC ) 2019-00231  
CORPORATION FROM NOVEMBER 1, 2018 )  
THROUGH APRIL 30, 2019 )

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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

14 5:001 Section 13 and KRS 61.878, to grant confidential protection to certain

15 information contained in Big Rivers’ responses to Items 4, 12, and 13 of the

16 information requested in the Appendix to the Commission’s August 12, 2019, order

17 in this matter (the “*Confidential Information*”).

18 2. The Confidential Information consists of information about

19 confidential fuel supply bids to Big Rivers and Big Rivers’ analysis of those bids

20 (Big Rivers’ response and the attachment to the response to Item 4); the terms of

21 future off-system sales (Big Rivers’ response to Item 12); and private usage

22 information of individual retail customers (the attachment to Big Rivers’ response

23 to Item 13).

24 3. The attachment to Big Rivers’ response to Item 4 is confidential in its

25 entirety. 807 KAR 5:001 Section 13(2)(a)(3)(b). One (1) copy of all other pages

1 containing Confidential Information, with the Confidential Information highlighted  
2 with transparent ink, printed on yellow paper, or otherwise marked  
3 “CONFIDENTIAL,” is being filed in hardcopy format with this petition. 807 KAR  
4 5:001 Section 13(2)(e).

5 4. 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 its confidential status  
8 removed. 807 KAR 5:001 Section 13(10)(b).

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

12 **I. Information Protected under KRS 61.878(1)(a)**

13 6. KRS 61.878(1)(a) protects “[p]ublic records containing information of a  
14 personal nature where the public disclosure thereof would constitute a clearly  
15 unwarranted invasion of personal privacy.”

16 7. The attachment to Big Rivers’ response to Item 13 reveals the power  
17 usage of individual large industrial retail customers on the Big Rivers system.  
18 Because these customers are not parties to this proceeding, publicly revealing such  
19 information would constitute a clearly unwarranted invasion of personal privacy.  
20 Moreover, the Commission has previously granted confidential treatment to similar  
21 retail customer usage information. *See, e.g., In the Matter of: Sanctuary Church v.*  
22 *Louisville Gas and Electric Company*, Order, P.S.C. Case No. 2018-00181 (Jan. 8,

1 2019) (granting confidential treatment pursuant to KRS 61.878(1)(a) for an  
2 indefinite period to a retail customer’s account and usage information); *In the*  
3 *Matter of: Application of Kentucky Utilities Company for an Adjustment of its*  
4 *Electric Rates*, Order, P.S.C. Case No. 2012-00221 (July 25, 2013) (holding customer  
5 names, account numbers, and usage information exempt from disclosure under KRS  
6 61.878(1)(a)). As such, Big Rivers requests confidential treatment for the identity of  
7 these customers in order to protect their private usage information.

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

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

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

20 9. As a generation and transmission cooperative, Big Rivers competes in  
21 the wholesale power market. This includes not only the short-term bilateral energy  
22 market, the day-ahead and real time energy and ancillary services markets, and the  
23 capacity market to which Big Rivers has access by virtue of its membership in

1 Midcontinent Independent System Operator, Inc. (“MISO”), but also forward  
2 bilateral long-term agreements and wholesale agreements with utilities and  
3 industrial customers. Big Rivers’ ability to successfully compete in the market is  
4 dependent upon a combination of its ability to: 1) obtain the maximum price for the  
5 power it sells, and 2) keep its cost of production as low as possible. Fundamentally,  
6 if Big Rivers’ cost of producing a unit of power increases, its ability to sell that unit  
7 in competition with other utilities is adversely affected.

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

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

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

3           12.    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           13.    As noted above, the Confidential Information protected under KRS  
7 61.878(1)(c)(1) consists of or reveals information about confidential fuel supply bids  
8 to Big Rivers and Big Rivers’ analysis of those bids and the terms of future off-  
9 system sales.

10          14.    The Confidential Information in the response and the attached to the  
11 response to Item 4 consists of confidential bid information and Big Rivers’ analysis  
12 of those bids. The Commission has often found that similar information relating to  
13 competitive bidding is generally recognized as confidential and proprietary. *See,*  
14 *e.g., In the Matter of Application of the Union Light, Heat and Power Company for*  
15 *Confidential Treatment*, Order, P.S.C. Case No. 2003-00054 (August 4, 2003)  
16 (finding that bids submitted to a utility were confidential). In fact, the Commission  
17 has granted confidential protection to the same type of information that is  
18 presented in the bid tabulation sheets when provided by other utilities in cases  
19 involving a review of their fuel adjustment clauses. *See, e.g.,* letter from the  
20 Commission dated October 23, 2009, granting confidential protection to East  
21 Kentucky Power Cooperative, Inc.’s bid tabulation sheet and related information in  
22 P.S.C. Case No. 2009-00286; letter from the Commission dated December 11, 2009,  
23 granting confidential protection to Kentucky Utilities Company’s coal bid analysis

1 procedure in P.S.C. Case No. 2009-00287. The Commission has also granted  
2 confidential protection to the bid tabulation sheets that Big Rivers filed in previous  
3 reviews of its fuel adjustment clause. *See, e.g.*, letter from the Commission dated  
4 May 10, 2010, in P.S.C. Case No. 2009-00510; letter from the Commission dated  
5 September 22, 2010, in P.S.C. Case No. 2010-00269. Thus, the Confidential  
6 Information in the response and the attachment to the response to Item 4 is  
7 generally recognized as confidential or proprietary.

8       15. Public disclosure of the terms of future off-system sales will give Big  
9 Rivers' suppliers, buyers, and competitors insight into when Big Rivers will have  
10 power available to sell into the market or when Big Rivers needs power, and the  
11 amount of power Big Rivers has to sell or will need. Information about a company's  
12 detailed inner workings is generally recognized as confidential or proprietary. *See,*  
13 *e.g., Hoy v. Kentucky Indus. Revitalization Authority*, 907 S.W.2d 766, 768 (Ky.  
14 1995) ("It does not take a degree in finance to recognize that such information  
15 concerning the inner workings of a corporation is 'generally recognized as  
16 confidential or proprietary'"). Moreover, the Commission has previously granted  
17 confidential treatment to similar information. *See, e.g., In the Matter of: An*  
18 *Examination of the Application of the Fuel Adjustment Clause of Kentucky Power*  
19 *Company from November 1, 2012 through October 31, 2014*, Order, P.S.C. Case No.  
20 2014-00450 (Jan. 24, 2019) (granting confidential treatment to planned outage  
21 schedules, coal bid analysis information, and forecasted fuel cost and sales data); *In*  
22 *the Matter of: Electronic Examination of the Application of the Fuel Adjustment*

1 *Clause of Big Rivers Electric Corporation from November 1, 2017 through April 30,*  
2 *2018, Order, P.S.C. Case No. 2018-00221 (Oct. 16, 2018) (granting confidential*  
3 *treatment to the terms of future off-system sales). In fact, in previous reviews of*  
4 *Big Rivers’ fuel adjustment clause, the Commission has granted confidential*  
5 *treatment to the same type of information as the Confidential Information in this*  
6 *case. See, e.g., In the Matter of: Electronic Examination of the Application of the*  
7 *Fuel Adjustment Clause of Big Rivers Electric Corporation from May 1, 2017*  
8 *through October 31, 2017, Order, P.S.C. Case No. 2018-00023 (May 29, 2018).*

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

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

17       17.    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.

22       18.    In P.S.C. Case No. 2003-00054, the Commission implicitly accepted  
23 Union Light, Heat & Power’s (“ULH&P”) argument that the bidding contractors

1 would not want their bid information publicly disclosed, and that disclosure would  
2 reduce the contractor pool available to ULH&P, which would drive up ULH&P's  
3 costs, hurting its ability to compete with other gas suppliers. *In the Matter of*  
4 *Application of the Union Light, Heat and Power Company for Confidential*  
5 *Treatment*, Order, P.S.C. Case No. 2003-00054 (August 4, 2003). Similarly, in *Hoy*  
6 *v. Kentucky Indus. Revitalization Authority*, the Kentucky Supreme Court found  
7 that without protection for confidential information provided to a public agency,  
8 "companies would be reluctant to apply for investment tax credits for fear the  
9 confidentiality of financial information would be compromised. *Hoy v. Kentucky*  
10 *Indus. Revitalization Authority*, 907 S.W.2d 766, 769 (Ky. 1995). In Big Rivers'  
11 case, if confidential treatment of the bid-related information and the bid tabulation  
12 sheets is denied, potential bidders would know that their bids would be publicly  
13 disclosed, which could reveal information to their competitors about their  
14 competitiveness. Because many companies would be reluctant to have such  
15 information disclosed, public disclosure of the bid information would likely suppress  
16 the competitive bidding process and reduce the pool of bidders willing to bid to  
17 supply Big Rivers' fuel needs, driving up Big Rivers' fuel costs (which could then  
18 drive up the cost of credit to Big Rivers) and impairing its ability to compete in the  
19 wholesale power market.

20 19. Additionally, in P.S.C. Case No. 2003-00054, ULH&P argued, and the  
21 Commission implicitly accepted, that if the bids it received were publicly disclosed,  
22 contractors on future work could use the bids as a benchmark, which would likely



1 lead to the submission of higher bids. *In the Matter of: Application of the Union*  
2 *Light, Heat and Power Company for Confidential Treatment*, Order, P.S.C. Case No.  
3 2003-00054 (Aug. 4, 2003). The Commission also implicitly accepted ULH&P's  
4 further argument that the higher bids would lessen ULH&P's ability to compete  
5 with other gas suppliers. *Id.* Similarly, potential fuel suppliers manipulating Big  
6 Rivers' bidding process would lead to higher costs to Big Rivers and would place it  
7 at an unfair competitive disadvantage in the wholesale power market and credit  
8 markets.

9       20. Similarly, potential market power suppliers and purchasers could use  
10 the information related to Big Rivers' future off-system sales to know when and to  
11 the extent Big Rivers is long on power and could use that information to manipulate  
12 their bids, leading to higher costs or lower revenues to Big Rivers and placing it at  
13 an unfair competitive disadvantage in the credit markets. Likewise, knowledge of  
14 this information would give the power producers and marketers with whom Big  
15 Rivers' competes in the wholesale power market an unfair competitive advantage  
16 because they could use that information to potentially underbid Big Rivers in  
17 wholesale transactions.

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

1 **III. Time Period**

2 22. Big Rivers requests that the Confidential Information in the  
3 attachment to its response to Item 13 remain confidentiality indefinitely so as to  
4 protect private customer usage information. Big Rivers requests that all other  
5 Confidential Information remain confidential for a period of five (5) years from the  
6 date of this petition, which will allow sufficient time for the information to become  
7 sufficiently outdated to no longer pose a competitive risk to Big Rivers. 807 KAR  
8 5:001 Section 13(2)(a)(2).

9 **IV. Conclusion**

10 23. 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, the Commission should hold an evidential hearing to protect  
13 Big Rivers' due process rights and to supply the Commission with a complete record  
14 to enable it to reach a decision with regard to this matter. *See Utility Regulatory*  
15 *Com'n v. Kentucky Water Service Co., Inc.*, 642 S.W.2d 591 (Ky. App. 1982).

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

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1            On this the 26<sup>th</sup> day of August, 2019.

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Respectfully submitted,



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