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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF BIG RIVERS ELECTRIC CORPORATION FOR ENFORCEMENT OF RATE AND SERVICE STANDARDS) Case No. 2019-00269

MOTION OF BIG RIVERS ELECTRIC CORPORATION FOR CONFIDENTIAL TREATMENT

1. Big Rivers Electric Corporation (“*Big Rivers*”) hereby requests that the Kentucky Public Service Commission (“*Commission*”), pursuant to 807 KAR 5:001 Section 13 and KRS 61.878, grant confidential protection to the confidential information contained in two attachments to Big Rivers’ response to Item 9 of the City of Henderson and the City of Henderson Utility Commission’s Second Request for Information (“*HMPL 2-9*”) filed with this motion. The information Big Rivers seeks to protect as confidential is hereinafter referred to as the “*Confidential Information.*”

2. The Confidential Information consists two bids related to Big Rivers’ Coleman generating stations.

3. Pursuant to the Commission’s March 24, 2020 Order in *In the Matter of: Electronic Emergency Docket Related to the Novel Coronavirus COVID-19*, Case No. 2020-00085, one (1) copy of the confidential attachments to Big Rivers’ response to HMPL 2-9, with the confidential attachments marked “CONFIDENTIAL,” is

1 being filed with the Commission by electronic mail. A copy of Big Rivers' response
2 to HMPL 2-9 with the confidential attachments redacted is being electronically filed
3 with this Motion.

4 4. A copy of this motion and a copy of the response to HMPL 2-9 with the
5 Confidential Information redacted, have been served on all parties to this
6 proceeding through the use of electronic filing. *See* 807 KAR 5:001 Section 13(2)(b).
7 A copy of the Confidential Information has been served on all parties that have
8 signed a confidentiality agreement.

9 5. If and to the extent the Confidential Information becomes generally
10 available to the public, whether through filings required by other agencies or
11 otherwise, Big Rivers will notify the Commission in writing. *See* 807 KAR 5:001
12 Section 13(10)(b).

13 6. As discussed below, and pursuant to 807 KAR 5:001 Section
14 13(2)(a)(1), the Confidential Information is entitled to confidential treatment based
15 upon KRS 61.878(1)(c)(1), which protects "records confidentially disclosed to an
16 agency or required by an agency to be disclosed to it, generally recognized as
17 confidential or proprietary, which if openly disclosed would permit an unfair
18 commercial advantage to competitors of the entity that disclosed the records."

19 **I. Big Rivers' Faces Actual Competition**

20 7. 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

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

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

1 9. Accordingly, Big Rivers has competitors in both the power and capital
2 markets, and its Confidential Information should be protected to prevent the
3 imposition of an unfair competitive advantage.

4 **II. The Confidential Information is Generally Recognized as**
5 **Confidential or Proprietary**

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

9 11. The Confidential Information consists of confidential proposals
10 relating to the decommissioning and/or disposition of Big Rivers' Coleman
11 generating station bids from contractors, and a confidential purchase order for a
12 contractor. Information about a company's detailed inner workings is generally
13 recognized as confidential or proprietary. *See, e.g., Hoy v. Kentucky Indus.*
14 *Revitalization Authority*, 907 S.W.2d 766, 768 (Ky. 1995) ("It does not take a degree
15 in finance to recognize that such information concerning the inner workings of a
16 corporation is 'generally recognized as confidential or proprietary'"). Moreover, the
17 Commission has often found that similar information relating to bids is generally
18 recognized as confidential and proprietary. *See, e.g., In the Matter of Application of*
19 *the Union Light, Heat and Power Company for Confidential Treatment*, P.S.C. Case
20 No. 2003-00054, Order (August 4, 2003) (finding that bids submitted to a utility
21 were confidential); letter from the Commission dated May 10, 2010, in P.S.C. Case
22 No. 2009-00510 (granting confidential treatment to bids provided by potential fuel
23 suppliers).

1 12. The Confidential Information is not publicly available, is not
2 disseminated within Big Rivers except to those employees and professionals with a
3 legitimate business need to know and act upon the information, and is not
4 disseminated to others without a legitimate need to know and act upon the
5 information. As such, the Confidential Information is generally recognized as
6 confidential and proprietary.

7 **III. Disclosure of the Confidential Information Would Permit an Unfair**
8 **Commercial Advantage to Big Rivers’ Competitors**

9 13. Public disclosure of the Confidential Information would permit an
10 unfair commercial advantage to Big Rivers’ competitors. As discussed above, Big
11 Rivers faces actual competition in both the short- and long-term wholesale power
12 markets and in the credit markets. It is likely that Big Rivers’ ability to compete in
13 these markets would be adversely affected if the Confidential Information was
14 publicly disclosed, and Big Rivers seeks protection from such competitive injury.

15 14. In P.S.C. Case No. 2018-00056, the Commission granted confidential
16 treatment to pricing information provided by Cumberland Valley. *See In the Matter*
17 *of: Application of Cumberland Valley Electric, Inc. for Commission Approval for a*
18 *Certificate of Public Convenience and Necessity to Install an Advanced Metering*
19 *Infrastructure (AMI) System Pursuant to KRS 807 KAR 5:001 and KRS 278.020,*
20 P.S.C. Case No. 2018-00056, Order (May 9, 2018). In that case, the Commission
21 recognized “that the specific cost information may be used to the financial detriment
22 of Cumberland Valley and its ratepayers by allowing potential future vendors to bid

1 just under the cost of its current vendor, which, in turn, would place Cumberland
2 Valley at a competitive disadvantage.” *Id.*

3 15. The Commission also recognized these effects in P.S.C. Case No. 2003-
4 00054. In that case, Union Light Heat & Power (“*ULH&P*”) argued, and the
5 Commission implicitly accepted, that if the bids it received were publicly disclosed,
6 contractors on future work could use the bids as a benchmark, which would likely
7 lead to the submission of higher bids. *In the Matter of: Application of the Union*
8 *Light, Heat and Power Company for Confidential Treatment*, P.S.C. Case No. 2003-
9 00054, Order (Aug. 4, 2003). The Commission also implicitly accepted ULH&P’s
10 further argument that the higher bids would lessen ULH&P’s ability to compete
11 with other gas suppliers. *Id.*

12 16. 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 bidders on the projects and work
16 covered by the Confidential Information with insight into Big Rivers’ expected costs
17 of the projects. These counterparties could use this information as a benchmark,
18 leading to higher costs or lower revenues to Big Rivers, hurting Big Rivers’ ability to
19 compete in the wholesale power and credit markets.

20 17. Additionally, in P.S.C. Case No. 2003-00054, the Commission
21 implicitly accepted ULH&P’s argument that the bidding contractors would not want
22 their bid information publicly disclosed, and that disclosure would reduce the

1 contractor pool available to ULH&P, which would drive up ULH&P's costs, hurting
2 its ability to compete with other gas suppliers. *In the Matter of Application of the*
3 *Union Light, Heat and Power Company for Confidential Treatment*, P.S.C. Case No.
4 2003-00054, Order (August 4, 2003). Similarly, in *Hoy v. Kentucky Indus.*
5 *Revitalization Authority*, the Kentucky Supreme Court found that without
6 protection for confidential information provided to a public agency, "companies
7 would be reluctant to apply for investment tax credits for fear the confidentiality of
8 financial information would be compromised. *Hoy v. Kentucky Indus. Revitalization*
9 *Authority*, 907 S.W.2d 766, 769 (Ky. 1995). In Big Rivers' case, if confidential
10 treatment of the confidential bids and purchase order is denied, potential bidders on
11 such work would know that their bids would be publicly disclosed, which could
12 reveal information to their competitors about their competitiveness. Because many
13 companies would be reluctant to have such information disclosed, public disclosure
14 of the bids and purchase order would likely suppress the competitive bidding
15 process and reduce the pool of bidders willing to bid on Big Rivers' projects, driving
16 up Big Rivers' costs (which could then drive up the cost of credit to Big Rivers) and
17 impairing its ability to compete in the wholesale power market.

18 18. Thus, Big Rivers' competitiveness will be adversely affected if potential
19 counterparties are given such an unfair advantage. Accordingly, the public
20 disclosure of the Confidential Information would provide Big Rivers' competitors
21 with an unfair commercial advantage.

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IV. Time Period

19. Big Rivers requests that the confidential proposals remain confidential indefinitely for the reasons stated above. 807 KAR 5:001 Section 13(2)(a)(2).

V. Conclusion

20. Based on the foregoing, the Confidential Information is entitled to confidential protection.

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

On this the 29th day of June, 2020.

Respectfully submitted,

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