

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

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 Big Rivers’ responses to the Commission Staff’s First Request for Information and the City of Henderson and the City of Henderson Utility Commission’s (collectively “*HMPL*”) First Request for Information 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 includes:
 - a. Portions of the response and/or attachments for the response to:
Item 1 of the Commission Staff’s First Request for Information (“PSC 1-1”); and

1 b. Portions of the responses and/or attachments for the responses
2 to: Items 34, 36, and 58 of HMPL’s First Request for Information
3 (“HMPL 1-34,” “HMPL 1-36,” and “HMPL 1-58,” respectively).

4 3. Pursuant to the Commission’s March 24, 2020 Order in *In the Matter*
5 *of: Electronic Emergency Docket Related to the Novel Coronavirus COVID-19, Case*
6 No. 2020-00085, one (1) copy of the responses and/or attachments containing
7 Confidential Information, with the Confidential Information highlighted with
8 transparent ink, printed on yellow paper, or otherwise marked “CONFIDENTIAL,”
9 is being filed with this motion by electronic mail. A copy of those responses and/or
10 attachments, with the Confidential Information redacted, is being electronically
11 filed with Big Rivers’ responses to the information requests filed with this Motion.

12 4. A copy of this motion and a copy of the responses containing
13 Confidential Information, with the Confidential Information redacted, have been
14 served on all parties to this proceeding through the use of electronic filing. *See* 807
15 KAR 5:001, Section 13(b). A copy of the Confidential Information has been served
16 on all parties that have signed a confidentiality agreement.

17 5. If disclosed, the Confidential Information included herein would allow
18 Big Rivers’ competitors to discover, and make use of, confidential information
19 concerning Big Rivers’ financial condition and business strategies, to the unfair
20 competitive disadvantage of Big Rivers.

21 6. If and to the extent the Confidential Information becomes generally
22 available to the public, whether through filings required by other agencies or

1 otherwise, Big Rivers will notify the Commission in writing. *See* 807 KAR 5:001,
2 Section 13(10)(b).

3 7. As discussed below, the Confidential Information is entitled to
4 confidential treatment based upon KRS 61.878(1)(c)(1). *See* 807 KAR 5:001, Section
5 13(2)(a)(1), which protects “records confidentially disclosed to an agency or required
6 by an agency to be disclosed to it, generally recognized as confidential or
7 proprietary, which if openly disclosed would permit an unfair commercial advantage
8 to competitors of the entity that disclosed the records.”

9 **I. Big Rivers’ Faces Actual Competition**

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

21 9. Big Rivers also competes for reasonably priced credit in the credit
22 markets, and its ability to compete is directly impacted by its financial results.

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

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

14 **II. The Confidential Information is Generally Recognized as**
15 **Confidential or Proprietary**

16 11. The Confidential Information for which Big Rivers seeks confidential
17 treatment under KRS 61.878(1)(c)(1) is generally recognized as confidential or
18 proprietary under Kentucky law.

19 12. The Confidential Information consists of the projected costs of
20 decommissioning Station Two and the Station Two ash pond, the studies on which
21 those projections are based, the projected costs of future groundwater monitoring,
22 confidential bids from contractors, and a confidential purchase order for a
23 contractor. Public disclosure of the projected cost information and the related

1 studies would give potential bidders on those projects insight into Big Rivers’
2 valuation for Coleman and the costs of the projects. Information about a company’s
3 detailed inner workings is generally recognized as confidential or proprietary. *See,*
4 *e.g., Hoy v. Kentucky Indus. Revitalization Authority*, 907 S.W.2d 766, 768 (Ky.
5 1995) (“It does not take a degree in finance to recognize that such information
6 concerning the inner workings of a corporation is ‘generally recognized as
7 confidential or proprietary’”); *Marina Management Servs. v. Cabinet for Tourism,*
8 *Dep’t of Parks*, 906 S.W.2d 318, 319 (Ky. 1995) (unfair commercial advantage arises
9 simply from “the ability to ascertain the economic status of the entities without the
10 hurdles systemically associated with the acquisition of such information about
11 privately owned organizations”). Moreover, the Commission has previously granted
12 confidential treatment to similar information. *See, e.g., In the Matter of: An*
13 *Examination of the Application of the Fuel Adjustment Clause of Kentucky Power*
14 *Company from November 1, 2012 through October 31, 2014*, Order, P.S.C. Case No.
15 2014-00450 (Jan. 24, 2019) (granting confidential treatment to forecasted cost data).

16 13. The confidential bids and purchase order are also generally recognized
17 as confidential and proprietary, and the Commission has often found that similar
18 information relating to competitive bidding is generally recognized as confidential
19 and proprietary. *See, e.g., In the Matter of Application of the Union Light, Heat and*
20 *Power Company for Confidential Treatment*, Order, P.S.C. Case No. 2003-00054
21 (August 4, 2003) (finding that bids submitted to a utility were confidential); letter

1 from the Commission dated May 10, 2010, in P.S.C. Case No. 2009-00510 (granting
2 confidential treatment to bids provided by potential fuel suppliers).

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

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

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

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

1 of Cumberland Valley and its ratepayers by allowing potential future vendors to bid
2 just under the cost of its current vendor, which, in turn, would place Cumberland
3 Valley at a competitive disadvantage.” *Id.*

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

13 18. The same competitive harm that the Commission recognized in P.S.C.
14 Case Nos. 2003-00054 and 2018-00056 would befall Big Rivers if the Confidential
15 Information in this case were publicly disclosed. Public disclosure of the
16 Confidential Information would provide potential bidders on the projects and work
17 covered by the Confidential Information with insight into Big Rivers’ expected costs
18 of the projects. These counterparties could use this information as a benchmark,
19 leading to higher costs or lower revenues to Big Rivers, hurting Big Rivers’ ability to
20 compete in the wholesale power and credit markets.

21 19. Additionally, in P.S.C. Case No. 2003-00054, the Commission
22 implicitly accepted ULH&P’s argument that the bidding contractors would not want

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

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

1 **IV. Time Period**

2 21. Big Rivers requests that the bids and purchase order remain
3 confidential indefinitely for the reasons stated above. Big Rivers requests that the
4 remainder of the Confidential Information remain confidential for 5 years from the
5 date of this petition, after which the information will likely be sufficiently outdated
6 to no longer pose a competitive risk to Big Rivers. 807 KAR 5:001 Section
7 13(2)(a)(2).

8 **V. Conclusion**

9 22. Based on the foregoing, the Confidential Information is entitled to
10 confidential protection.

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

13 On this the 8th day of June, 2020.

14 Respectfully submitted,

15 /s/ Tyson Kamuf

16
17
18 Tyson Kamuf
19 Corporate Attorney,
20 Big Rivers Electric Corporation
21 201 Third Street
22 P.O. Box 727
23 Henderson, Kentucky 42419-0024
24 Phone: (270) 827-2561
25 Facsimile: (270) 844-6417
26 tyson.kamuf@bigrivers.com