

**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

IN THE MATTER OF:

JOINT APPLICATION OF BIG RIVERS)
ELECTRIC CORPORATION AND MEADE)
COUNTY RURAL ELECTRIC COOPERATIVE)
CORPORATION FOR APPROVAL OF)
CONTRACTS FOR ELECTRIC SERVICE WITH)
NUCOR CORPORATION)

CaseNo.2019-00365

AND)

APPLICATION OF BIG RIVERS ELECTRIC)
CORPORATION FOR APPROVAL OF TARIFF.)

**MOTION OF BIG RIVERS ELECTRIC CORPORATION AND MEADE
COUNTY RURAL ELECTRIC COOPERATIVE CORPORATION FOR
CONFIDENTIAL PROTECTION**

1. Big Rivers Electric Corporation and Meade County Rural Electric Cooperative Corporation (“Joint Applicants”) hereby move the Kentucky Public Service Commission (“Commission”) pursuant to KRS 278.160(3), KRS 61.878(1)(c)(1), and 807 KAR 5:001 Section 13 to grant confidential protection to certain information contained in the Joint Application and Direct Testimony filed in this matter (the “Confidential Information”). The Confidential Information pertains to the terms of a special contract between Meade and Nucor Corporation executed on September 9, 2019, which Big Rivers concurred with in a letter agreement with Meade signed on September 18, 2019.

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

3. If and to the extent the Confidential Information becomes generally available to the public, whether through filings required by other agencies or otherwise, Big Rivers will notify the Commission and have its confidential status removed. 807 KAR 5:001 Section 13(10)(b).

4. As discussed below, the Confidential Information is entitled to confidential protection based upon KRS 278.160(3), which shields from disclosure “*a provision of a special contract that contains rates and conditions of service not filed in a utility's general schedule if such provision would otherwise be entitled to be excluded from the application of KRS 61.870 to 61.884 under the provisions of KRS 61.878(1)(c)(1).*” KRS 61.878(1)(c)(1) protects “*records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records.*” 807 KAR 5:001 Section 13(2)(a)(1).

5. Section I below explains that Big Rivers operates in competitive environments in the wholesale power market and in the credit market. Section II below shows that the Confidential Information is generally recognized as confidential or proprietary. Section III below demonstrates that public disclosure of the

Confidential Information would permit an unfair commercial advantage to Big Rivers' competitors.

I. Big Rivers Faces Actual Competition

6. As a generation and transmission cooperative, Big Rivers competes in the wholesale power market. This includes not only the short-term bilateral energy market, the day-ahead and real time energy and ancillary services markets, and the capacity market to which Big Rivers has access by virtue of its membership in Midcontinent Independent System Operator, Inc. ("MISO"), but also forward bilateral long-term agreements and wholesale agreements with utilities and industrial customers. Big Rivers' ability to successfully compete in the market is dependent upon a combination of its ability to: 1) obtain the maximum price for the power it sells, and 2) keep its cost of production as low as possible. Fundamentally, if Big Rivers' cost of producing a unit of power increases, its ability to sell that unit in competition with other utilities is adversely affected.

7. Big Rivers also competes for reasonably priced credit in the credit markets, and its ability to compete is directly impacted by its financial results. Lower revenues and any events that adversely affect Big Rivers' margins will adversely affect its financial results and potentially impact the price it pays for credit. A competitor armed with Big Rivers' proprietary and confidential information will be able to increase Big Rivers' costs or decrease Big Rivers' revenues, which could in turn affect Big Rivers' apparent creditworthiness. A utility the size of Big Rivers that operates generation and transmission facilities will always have periodic cash and

borrowing requirements for both anticipated and unanticipated needs. Big Rivers expects to be in the credit markets on a regular basis in the future, and it is imperative that Big Rivers improve and maintain its credit profile.

8. Finally, Big Rivers competes for economic development opportunities both within the Commonwealth and throughout the nation. The ability to negotiate competitive electric pricing structures with companies interested in expanding in Kentucky is fundamental to the success of Big Rivers' economic development efforts.

II. The Confidential Information is Generally Recognized as Confidential or Proprietary

9. The Confidential Information for which Big Rivers seeks confidential treatment under KRS 278.160(3) and KRS 61.878(1)(c)(1) is generally recognized as confidential or proprietary under Kentucky law. As noted above, the Confidential Information consists of the negotiated terms of a special contract with a large energy-intensive, trade-exposed customer. KRS 278.160(3) specifically recognizes that rates and conditions of service set forth in a special contract are not required to be publicly disclosed if such terms are entitled to protection under KRS 61.878(1)(c)(1).

10. Public disclosure of the Confidential Information would provide insight into the prices at which Big Rivers is willing to buy or sell energy and capacity. The information is also indicative of the market conditions Big Rivers expects to encounter and its ability to compete with competitors. Information such as this which bears upon a company's detailed inner workings is generally recognized as confidential or proprietary. *See, e.g., Hoy v. Kentucky Indus. Revitalization Authority,*

907 S.W.2d 766, 768 (Ky. 1995) (“It does not take a degree in finance to recognize that such information concerning the inner workings of a corporation is ‘generally recognized as confidential or proprietary’”); *Marina Management Servs. v. Cabinet for Tourism, Dep’t of Parks*, 906 S.W.2d 318, 319 (Ky. 1995) (unfair commercial advantage arises simply from “the ability to ascertain the economic status of the entities without the hurdles systemically associated with the acquisition of such information about privately owned organizations”). Moreover, the Commission previously granted confidential treatment to this type of information. *See, e.g., In the Matter of Electronic Application of Kentucky Power Company for Approval of a Contract for Electric Service with Braidy Industries Inc.*, P.S.C. Case No. 2018-00418 (August 20, 2019); *In the Matter of: Application of Big Rivers Electric Corporation for a General Adjustment in Rates*, Order, P.S.C. Case No. 2012-0535 (April 25, 2013) (granting confidential treatment to details of sensitive commercial negotiations).

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

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

12. Big Rivers would likely suffer competitive injury if the Confidential Information is publicly disclosed.

13. In P.S.C. Case No. 2003-00054, the Commission granted confidential protection for bids submitted to Union Light Heat & Power ("ULH&P"). ULH&P argued, and the Commission implicitly accepted, that the bidding contractors would not want their bid information publicly disclosed, and that disclosure would reduce the contractor pool available to ULH&P, which would drive up ULH&P's costs, hurting its ability to compete with other gas suppliers. *In the Matter of: Application of the Union Light, Heat and Power Company for Confidential Treatment*, Order, P.S.C. Case No. 2003-00054 (August 4, 2003). Similarly, in *Hoy v. Kentucky Indus. Revitalization Authority*, the Kentucky Supreme Court found that without protection for confidential information provided to a public agency, "companies would be reluctant to apply for investment tax credits for fear the confidentiality of financial information would be compromised. *Hoy v. Kentucky Indus. Revitalization Authority*, 907 S.W.2d 766, 769 (Ky. 1995).

14. Additionally, the Commission recently granted confidential treatment to pricing information provided by Cumberland Valley Electric, Inc. ("Cumberland Valley") in P.S.C. Case No. 2018-00056. *In the Matter of: Application of Cumberland Valley Electric, Inc. for Commission Approval for a Certificate of Public Convenience and Necessity to Install an Advanced Metering Infrastructure (AMI) System Pursuant*

to KRS 807 KAR 5:001 and KRS 278.020, Order, P.S.C. Case No. 2018-00056 (May 9, 2018). In that case, the Commission recognized “*that the specific cost information may be used to the financial detriment of Cumberland Valley and its ratepayers by allowing potential future vendors to bid just under the cost of its current vendor, which, in turn, would place Cumberland Valley at a competitive disadvantage.*” *Id.*

15. Here, Big Rivers is actively pursuing additional economic development opportunities in its service territory. If confidential treatment of the rates and terms of service set forth in the Nucor special contract is denied, companies interested in locating in Big Rivers’ service territory would know that the confidential terms of their contracts may also be publicly disclosed, which could reveal information to their competitors about their competitiveness. Because many companies would be reluctant to have such information disclosed, public disclosure of the Confidential Information in this case would likely reduce the pool of companies willing to negotiate with Big Rivers, reducing Big Rivers’ ability to promote economic development in its territory.

16. Big Rivers is also actively engaged in buying and selling power in the wholesale power markets, and Big Rivers expects to engage in negotiations with counterparties in the future. Public disclosure of the Confidential Information would provide potential purchasers of energy or capacity from Big Rivers; potential sellers of energy or capacity to Big Rivers; and other providers competing against Big Rivers for purchases or sales of energy or capacity with insight into the prices and the terms under which Big Rivers is willing to buy and sell energy and capacity. These market

participants could use this information as a benchmark, leading to higher costs, lower revenues, or less favorable terms to Big Rivers, hurting Big Rivers' ability to compete in the wholesale power and credit markets. Further, any competitive pressure that adversely affects Big Rivers' revenue and margins could make the company appear less creditworthy and thus impair its ability to compete in the credit markets.

17. Thus, Big Rivers' competitiveness will be adversely affected if other suppliers are given such an unfair competitive advantage or if potential counterparties are given a negotiating advantage. Accordingly, the public disclosure of the information that Big Rivers seeks to protect pursuant to KRS 278.160(3) and KRS 61.878(1)(c)(1) would provide Big Rivers' competitors with an unfair commercial advantage.

IV. Time Period

18. Joint Applicants request that all of the Confidential Information remain confidential indefinitely because for so long as Big Rivers is in the wholesale power market, the public disclosure of the confidential terms of the Agreement could be used to Big Rivers' competitive disadvantage for the reasons stated above. 807 KAR 5:001 Section 13(2)(a)(2).

V. Conclusion

19. Based on the foregoing, the Confidential Information is entitled to confidential protection. If the Commission disagrees, then the Commission should hold an evidential hearing to protect Joint Applicant's due process rights and to

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

WHEREFORE, Joint Applicants respectfully request that the Commission classify and protect as confidential the Confidential Information.

On this the 18th day of October, 2019.

Respectfully submitted,

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