

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

3 In the Matter of:

ELECTRONIC APPLICATION OF BIG RIVERS)
ELECTRIC CORPORATION FOR APPROVAL OF ITS)
2020 ENVIRONMENTAL COMPLIANCE PLAN,)
AUTHORITY TO RECOVER COSTS THROUGH) Case No.
A REVISED ENVIRONMENTAL SURCHARGE) 2019-00435
AND TARIFF, THE ISSUANCE OF A CERTIFICATE)
OF PUBLIC CONVENIENCE AND NECESSITY)
FOR CERTAIN PROJECTS, AND APPROPRIATE)
ACCOUNTING AND OTHER RELIEF)

4 **MOTION OF BIG RIVERS ELECTRIC CORPORATION FOR**
5 **LIMITED REHEARING REGARDING ORDER ON CONFIDENTIALITY**

6 Big Rivers Electric Corporation (“Big Rivers”) hereby moves the Kentucky
7 Public Service Commission (the “Commission”), pursuant to KRS 278.400, for
8 rehearing of its Order entered in this matter on August 6, 2020 (the “Order”),
9 concerning Big Rivers’ request for confidential treatment of certain information
10 submitted as part of its Application in this matter. Specifically, Big Rivers asks the
11 Commission to reconsider its decision to require the immediate public disclosure of
12 the estimated capital and operations and maintenance (“O&M”) costs of the projects
13 which comprise the 2020 Environmental Compliance Plan (“Plan”). While Big Rivers
14 has no objection to the public disclosure of this information once competitive bidding
15 is complete and the projects are executed, Big Rivers and its members alike will
16 benefit from temporarily protecting these estimated costs from potential bidders until

1 after contracts for major project components have been awarded and fulfilled. In
2 support of this motion, Big Rivers respectfully states as follows.

3 The Commission's Order granted-in-part and denied-in-part Big Rivers'
4 request for confidential protection for various materials contained in its Application,
5 including financial model outputs, detailed facility and operational information,
6 proprietary third-party work product, and critical energy infrastructure information.
7 The Commission's Order denied confidential treatment to estimated capital and
8 O&M costs associated with Plan projects/alternatives. These estimated capital and
9 O&M costs reflect internal and external pricing data developed in consultation with
10 third-party experts and potential contractors/bidders. As reflected in the Order, the
11 Commission's decision to require the public release of Big Rivers' project cost
12 estimates was intended to promote transparency in connection with the
13 Commission's review and evaluation of the Plan.¹

14 By this motion, Big Rivers asks the Commission to revisit its Order because
15 premature disclosure of this information will undermine competitive bidding
16 incentives and likely result in increased costs to Big Rivers and its Member-Owners.
17 Simply put, arming potential bidders and vendors with information concerning
18 amounts budgeted by Big Rivers for project execution removes important incentives
19 for bidders to seek cost-saving opportunities when devising and submitting sensitive
20 commercial bids and quotations.

¹ See Order, at 4.

1 This is true with respect to each of the projects approved for construction
2 and/or cost recovery as part of the Plan, including Project 12 (Wilson Station
3 FGD/WWT system improvements), Project 13 (closure of ash ponds and other
4 compliance measures at the Green Station, Coleman Station, and HMP&L Station
5 II), Project 14 (Wilson Landfill Phase 1 Final Cover), and Project 15 (Green Landfill
6 Perimeter Drainage System).² If disclosed now, Big Rivers' proprietary cost
7 projections for these undertakings can be utilized by third parties to inflate proposed
8 pricing, thereby producing bids artificially tailored to a predetermined end-point that
9 should not exist and would not exist in a truly competitive bidding environment.
10 Additionally, many of these projects include just one major component (or a very
11 limited number of components) such that disclosure of the total estimated project cost
12 provides potential vendors even more valuable insight into the amount Big Rivers
13 expects to pay for a particular bid component.³ The consequent informational
14 imbalance then translates into increased costs and competitive harm for Big Rivers,
15 which subsequently flows through to its Member-Owners and the ultimate
16 consumers throughout Western Kentucky. For this reason, and under these limited

² Project 16 consists a series of compliance efforts undertaken by Big Rivers in the usual course of its business since 2015, a number of which were not yet complete at the time of filing Big Rivers' Application in this matter. As of this month, all projects have been completed and all costs related to Project 16 are now finalized. Consequently, Big Rivers believes the cost information contained in its Application with respect to Project 16 should now be made public.

³ For example, Project 14 consists primarily of the purchase and installation of a synthetic cover for Phase 1 of the Wilson Station landfill, which is expected to be performed by one vendor following a competitive bidding process. The disclosure of the project cost will therefore allow those bidding to tailor their bids to fit within Big Rivers' budget and consequently undermine competitive incentives that would otherwise exist in the free market.

1 circumstances, Big Rivers asks that its cost projections remain confidential until each
2 of the above projects is concluded such that future competitive bidding is not at risk
3 of unnecessary and potentially-harmful influence.⁴

4 Of course, Big Rivers appreciates the Commission's desire to provide
5 transparency in connection with its regulatory oversight, and Big Rivers shares a
6 desire to ensure that the public is informed of the costs incurred to comply with
7 applicable environmental mandates. To that end, Big Rivers publicly disclosed in its
8 Application the total anticipated capital cost (\$232.34 million) and total anticipated
9 annual O&M (\$8.676 million) associated with its 2020 Plan. Moreover, Big Rivers'
10 Board of Directors consists of two directors from each of its three Member-Owners,
11 and those directors were elected by their fellow retail ratepayers to the Boards of the
12 Member-Owners. Big Rivers' Board thus consists of the elected representatives of
13 the retail ratepayers on the Big Rivers' system, and those representatives reviewed
14 the detailed cost estimates and approved the Plan. And finally, and importantly, no
15 public comments were received in this matter, and the sole intervenor (Kentucky
16 Industrial Utility Customers, Inc.) received the subject confidential information
17 pursuant to a non-disclosure agreement. These facts undoubtedly weigh in favor of
18 temporarily protecting the confidential nature of the projected cost information,

⁴ To be clear, Big Rivers plans to notify the Commission and file the appropriate unredacted versions of documents on a project-by-project basis as each project is completed.

1 particularly as no person or party appears dissatisfied with the status quo of
2 temporary nondisclosure.⁵

3 Big Rivers acknowledges that Commission precedent has often generally
4 recognized projected capital and O&M costs as confidential and proprietary only
5 when submitted as part of an integrated resource plan, but not when submitted in
6 support of a request for a certificate of public convenience and necessity.⁶ This line
7 of cases reflects the generally-sensible belief that ratepayers “have the right to know
8 the costs of the assets [a utility] is proposing to purchase and they have a right to
9 know the evidence upon which the Commission relied in determining that such costs
10 are fair, just, and reasonable.”⁷ However, the limited relief Big Rivers seeks here
11 would not undermine that guiding principle, as ratepayers will still have access to

⁵ See, e.g., 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* (Ky. P.S.C. May 9, 2018) (“[T]he Commission does find 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. Importantly, no party has requested intervention in this matter, and no public comments have been received such it does not currently appear to be a matter of great public concern. Thus, in balancing the interests involved, the Commission finds that Cumberland Valley established that the redacted material meets the criteria for confidential treatment.”) (emphasis added).

⁶ See, e.g., Case No. 2014-00166, *2014 Integrated Resource Plan of Big Rivers Electric Corporation* (Ky. P.S.C. Aug. 26, 2014); Case No. 2014-00292, *Application of East Kentucky Power Cooperative, Inc. for an Order Declaring the Glasgow Landfill Gas to Energy Project to be an Ordinary Extension of Existing Systems in the Usual Course of Business and a Joint Application of Farmers Rural Electric Cooperative Corporation and East Kentucky Power Cooperative, Inc. for Approval to Enter into a Ten Year Purchased Power Agreement and Approval of a Special Contract* (Ky. P.S.C. Mar. 30, 2015).

⁷ Case No. 2016-00220, *Application of Clark Energy Cooperative, Inc. for a Certificate of Public Convenience and Necessity to Install an Advanced Metering Infrastructure (AMI) System* (Ky. P.S.C. Dec. 22, 2016).

1 that information once bids have been awarded and the projects have been executed.⁸
2 Moreover, the Commission’s precedent likewise recognizes the competing importance
3 of protecting ratepayers from avoidable cost inflation by limiting vendor access to
4 project budgets and estimated cost information that could influence future
5 commercial bids or project pricing.⁹ This sensible approach has often been espoused
6 by Kentucky courts, and it recognizes that Big Rivers must exist as both a highly-
7 regulated entity and a regular participant in the broader commercial marketplace.¹⁰

8 In this case and under these circumstances, Big Rivers asserts that—on
9 balance—the virtue in immediate public disclosure of the relevant project-level cost
10 information is more than offset by the economic harm likely to result from truly

⁸ While Big Rivers acknowledges that actual project cost data will eventually be filed as part of its ES form reporting obligations, the disclosure of those actual costs upon project completion will not pose the same competitive harm and economic injury that is likely to result from the premature disclosure of the estimated capital and O&M project costs that Big Rivers seeks to protect by this motion.

⁹ See, e.g., Case No. 2018-00056, *supra* n. 4; Case No. 2017-00376, *Application of East Kentucky Power Cooperative, Inc. for Approval to Amend its Environmental Compliance Plan and Recover Costs Pursuant to its Environmental Surcharge, Settlement of Certain Asset Retirement Obligations and Issuance of a Certificate of Public Convenience and Necessity and Other Relief* (Ky. P.S.C. May 21, 2018).

¹⁰ See, e.g., *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* (Ky. P.S.C. May 9, 2018) (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”); *In the Matter of” Application of Union Light, Heat & Power Company for Confidential Treatment* (Ky. P.S.C. Aug. 4, 2003) (Union Light, Heat & Power Company (“ULH&P”) argued, and the Commission implicitly accepted, that if the bids it received were publicly disclosed, contractors on future work could use the bids as a benchmark, which would likely lead to the submission of higher bids. The Commission also implicitly accepted ULH&P’s further argument that the higher bids would lessen ULH&P’s ability to compete with other gas suppliers, under the assumption that higher bids would lead to higher prices, and higher prices would lead to higher rates”). In the same way, public disclosure of Big Rivers’ projected project costs would allow bidders to use those projections as a benchmark, leading to higher bids, and higher costs for the projects.

1 competitive bidding by prospective contractors/vendors. Big Rivers therefore
2 respectfully requests that the Commission reconsider its decision to require the
3 immediate disclosure of the projected cost information.

4 WHEREFORE, Big Rivers respectfully requests that:

5 (i) the Commission grant rehearing of the Order;

6 (ii) the Commission temporarily protect as confidential the projected cost
7 information described herein; and

8 (iii) the Commission order that the projected cost information described
9 herein shall be filed in the record as public on a project-by-project basis as each
10 project is completed.

11 This 25th day of August, 2020.

12 Respectfully submitted,

13 **BIG RIVERS ELECTRIC**
14 **CORPORATION**

15 Tyson Kamuf
16 201 Third Street, P.O. Box 24
17 Henderson, Kentucky 42419-0024
18 Email: tyson.kamuf@bigrivers.com
19 Phone: (270) 827-2561 Fax: (270) 844-6417

20

1 **DINSMORE & SHOHL LLP**

2 /s/ Edward T. Depp
3 Edward T. Depp
4 R. Brooks Herrick
5 101 South Fifth Street, Suite 2500
6 Louisville, Kentucky 40202
7 E-mail: tip.depp@dinsmore.com
8 E-mail: brooks.herrick@dinsmore.com
9 Phone: (502) 581-8000 Fax: (502) 585-2207

10 M. Evan Buckley
11 100 West Main Street, Suite 900
12 Lexington, Kentucky 40507
13 E-mail: evan.buckley@dinsmore.com
14 Phone: (859) 425-1000 Fax: (859) 425-1099

15 *Counsel to Big Rivers Electric Corporation*

16 **CERTIFICATION**

17 I hereby certify that the electronic version of this filing made with the
18 Commission on August 25, 2020, is a true and accurate copy of the paper document
19 that will be submitted to the Commission within 30 days of the Governor lifting the
20 state of the emergency pursuant to the Commission's Orders in Case No. 2020-00085,
21 and the electronic version of the filing has been transmitted to the Commission. A
22 copy of this filing has been served electronically on all parties of record for whom an
23 email address is given in the online Service List for this proceeding, and there are
24 currently no parties that the Commission has excused from participation by
25 electronic means.

26 /s/ Edward T. Depp
Counsel to Big Rivers Electric Corporation