

COMMONWEALTH OF KENTUCKY
BEFORE THE KENTUCKY PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC 2020 INTEGRATED RESOURCE)	CASE NO.
PLAN OF BIG RIVERS ELECTRIC CORPORATION)	2020-00299

**MOTION OF BIG RIVERS ELECTRIC CORPORATION FOR
CONFIDENTIAL TREATMENT**

1. Big Rivers Electric Corporation (“*Big Rivers*”) hereby petitions the Kentucky Public Service Commission (“*Commission*”), pursuant to 807 KAR 5:001 Section 13, KRS 61.878 and KRS 278.160(3), to grant confidential treatment to certain information contained in Big Rivers’ 2020 Integrated Resource Plan (“*IRP*”) filed with this petition. The information for which Big Rivers seeks confidential treatment is hereinafter referred to as the “*Confidential Information.*” The Confidential Information primarily consists of transmission system maps; terms of special contracts; projections of fuel and other operating and maintenance costs, rates, and energy and capacity prices; and related information.

2. 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 (“*Case No. 2020-00085*”), one (1) copy of the Confidential Information highlighted with transparent ink, printed on yellow paper, or otherwise marked “CONFIDENTIAL,” is being filed with this motion by electronic mail or posting on a secure file share site. A copy of those pages, with the Confidential

Information redacted, is being electronically filed with the Integrated Resource Plan accompanying this motion.

3. A copy of this motion with the Confidential Information redacted has been served on all parties to this proceeding through the use of electronic filing. 807 KAR 5:001 Section 13(b).

4. 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. *See* 807 KAR 5:001 Section 13(10)(b).

5. As discussed below, the Confidential Information is entitled to confidential treatment under KRS 61.878(1)(m), KRS 278.160(3) or KRS 61.878(1)(c)(1). *See* 807 KAR 5:001 Section 13(2)(a)(1).

I. Information Exempted from Public Disclosure by KRS 61.878(1)(m)

6. KRS 61.878(1)(m)(1) protects “[p]ublic records the disclosure of which would have a reasonable likelihood of threatening the public safety by exposing a vulnerability in preventing protecting against, mitigating, or responding to a terrorist act. . . .”

7. Figure 1.5 and Appendix E of the IRP are transmission system maps, which could be used to analyze vulnerable locations in Big Rivers’ transmission system, which is a public utility critical system, and which could therefore threaten public safety. As disclosure of this information would provide the public with a tool to analyze the vulnerabilities in Big Rivers’ transmission system, this information

should be granted confidential treatment. In fact, the Commission granted confidential treatment on these grounds for an indefinite period to similar maps contained in Big Rivers' 2014 IRP and 2017 IRP. *See In the Matter of: 2014 Integrated Resource Plan of Big Rivers Electric Corporation*, Order, P.S.C. Case No. 2014-00166 (August 26, 2014); *In the Matter of 2017 Integrated Resource Plan of Big Rivers Electric Corporation*, Order, P.S.C. Case No. 2017-00384 (April 25, 2019) (the "2017 IRP Confidentiality Order").

**II. Information Exempted from Public Closure by
807 KAR 5:001 Section 13(4) and KRS 278.160(3)**

8. As discussed below, the Confidential Information contained in Sections 8.1.1 and 3.2 and Table 8.4 of the IRP 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)."

9. On August 5, 2016, Big Rivers originally filed a special contract with the Commission, along with a motion for confidential treatment. *See* TFS 2016-00472.¹ The Commission granted confidential protection of the contract terms for an indefinite period.² The Confidential Information contained in Section 8.1.1 of Big Rivers' 2020 IRP consists of a confidential term of that special contract. The

¹ *See* TFS 2016-00710 (filing of the Commission-approved special contract on December 13, 2016).

² *See* Case No. 2016-00306, *In the Matter of: Filing of Agreement for the Purchase and Sale of Firm Capacity and Energy Between Big Rivers Electric Corporation and the Kentucky Municipal Energy Agency*, (Ky. P.S.C. Jan. 2, 2019).

confidential terms of this special contract within Section 8.1.1 of the IRP should remain confidential.

10. The Confidential Information contained in Section 3.2 of the IRP includes a confidential term of the special contract for which the Commission previously granted confidential treatment . *See In the Matter of: Joint Application of Big Rivers Electric Corporation and Meade County Rural Electric Cooperative Cooperation for Approval of Contracts for Electric Service with Nucor Corporation*, Order, P.S.C. Case No. 2019-00365 (March 12, 2020) (granting confidential treatment to the information for an indefinite period).³ The Confidential Information within Section 3.2 of the IRP should again be granted confidential treatment. *See* KRS 278.160(3)

11. The Confidential Information contained in Table 8.4 consists of the negotiated, confidential terms of certain contracts between Big Rivers and solar developers, which are the subject of proceedings pending before the Commission, *See In the Matter of: Electronic Application of Big Rivers Electric Corporation for Approval of Solar Power Contracts*, P.S.C. Case No. 2020-00183. Motions for confidential treatment of these contract terms, filed on June 24, 2020, August 14,

³ *See also In the Matter of: Joint Application of Big Rivers Electric Corporation and Meade County Rural Electric Cooperative Cooperation for Approval of Contracts for Electric Service with Nucor Corporation*, P.S.C. Case No. 2019-00365, Orders (January 22, 2020, January 27, 2020, and January 28, 2020) (granting confidential protection to information similar in nature to the subject Confidential Information regarding the terms and conditions of the Nucor Contracts); *see also In the Matter of: Electronic Application of Big Rivers Electric Corporation for Approval to Modify its MRSMS, Tariff, Cease Deferring Depreciation Expenses, Establish Regulatory Assets, Amortize Regulatory Assets, and other Appropriate Relief*, P.S.C. Case No. 2020-00064, Order (March 17, 2020) (granting confidential treatment to, among other things, the confidential terms of the Nucor contracts).

2020, and September 10, 2020, are pending. As full discussed in these pending motions, public disclosure of the negotiated confidential terms would create precisely the kind of competitive harm to Big Rivers and the solar developers that KRS 61.878(1)(c)(1) is intended to prevent.

12. 807 KAR 5:001 Section 13(4) provides, “Pending action by the Commission on a motion for confidential treatment or by its executive director on a request for confidential treatment, the materially specifically identified shall be accorded confidential treatment.” As such, the Confidential Information in Table 8.4 should be granted confidential treatment.

III. Information Exempted from Public Disclosure by KRS 61.878(1)(c)

13. 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.” Section A below explains that Big Rivers operates in competitive environments in the wholesale power market and in the credit market. Section B below shows that the Confidential Information is generally recognized as confidential or proprietary. Section C below demonstrates that public disclosure of the Confidential Information would permit an unfair commercial advantage to Big Rivers’ competitors.

A. Big Rivers Faces Actual Competition

14. 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 the Midcontinent Independent System Operator, Inc. (“MISO”) system, 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 or purchase as low as possible. Fundamentally, if Big Rivers’ cost of producing or purchasing a unit of power increases, its ability to sell that unit in competition with other utilities is adversely affected.

15. 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.

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

17. Finally, the ability to negotiate the most advantageous power purchase agreements and then offer competitive prices to Big Rivers' Members, companies interested in expanding in Kentucky, such as Nucor Corporation ("*Nucor*"), and potential new Members is fundamental to Big Rivers' continued success.

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

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

19. The Confidential Information in Section 3.7 of the IRP; in Table 8.16 of the IRP; and in Section 7.2 of the 2020 Load Forecast (which is in Appendix A to the IRP), consists of Big Rivers' projected rates to its Members, which provides insight into Big Rivers' cost of producing power.

20. As discussed above, the Confidential Information in Sections 8.1.1 and 3.2 of the IRP and in Table 8.4 of the IRP consists of confidential terms of special contracts. KRS 278.160 specifically recognizes that terms of a special contract are not required to be publicly disclosed if such terms are entitled to protection under KRS 61.878(1)(c)(1). *See* KRS 278.160(3).

21. The Confidential Information in Table 8.3 consists of the price at which Big Rivers projects to purchase power from SEPA.

22. The Confidential Information in Sections 3.7, 8.2.2, and 8.2.3; Figures 8.2, 8.3, and 8.4; Tables 8.2, 8.5, 8.8, 8.9, 8.11, 8.12, 8.14, and 8.15; and Appendices F and G consists of projected operating and maintenance (“O&M”), coal, energy, capacity, and natural gas prices and costs; projected inflation and discount rates; projected production factors such as heat rates and fuel usage; projected costs for capital projects; and modeling inputs and the net present value (“NPV”) results, all of which provide insight into Big Rivers’ cost of producing power; the price at which Big Rivers is willing to buy or sell fuel, power, and other products; and the price Big Rivers is willing to pay for capital projects. Additionally, the coal and energy price projections are obtained from third parties and those projections are proprietary products of those third parties, which Big Rivers does not have the authority to publicly disclose.

23. The Confidential Information in Table 6.2 consists of planned transmission system additions. The Commission has previously granted confidential treatment to similar information. *See, e.g., 2017 IRP Confidentiality Order.*

24. As noted above, public disclosure of the Confidential Information would reveal detailed information relating to Big Rivers’ projected production costs for production factors such as fuel and other O&M costs, Big Rivers’ projected rates to its Members, Big Rivers’ projected costs for buying SEPA power, Big Rivers’ projection of energy and capacity market prices, and outputs of Big Rivers’ production cost model runs. This information provides insight into Big Rivers’ cost

of producing power and would indicate the prices at which Big Rivers is willing to buy or sell power, coal, natural gas, and other commodities. The information is also indicative of the market conditions Big Rivers expects to encounter and its ability to compete with competitors. The Commission has previously granted confidential treatment to similar information. *See* 2017 IRP Confidentiality Order (granting confidential treatment to fuel cost projections, power price projections, projected capital and O&M costs, NPV results of production cost model runs, and rate projections); *In the Matter of: Duke Energy Kentucky, Inc.’s Integrated Resource Plan*, Order, P.S.C. Case No. 2018-00195 (Sept. 3, 2019) (granting confidential treatment to “operations and management costs, projected fuel and environmental compliance forecasted costs, power market prices and projected capacity, and resource alternative capital costs, along with supply-side screen curves and resource evaluations, and third party owned and licensed modeling tool”).

25. Information about 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”).

26. 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.

C. Disclosure of the Confidential Information Would Result in an Unfair Commercial Advantage to Big Rivers' Competitors

27. Disclosure of the Confidential Information would permit an unfair commercial advantage to Big Rivers' competitors. As discussed above, Big Rivers faces actual competition in the wholesale power market and in the credit market. It is likely that Big Rivers would suffer competitive injury if that Confidential Information was publicly disclosed.

28. The Confidential Information includes material such as Big Rivers' projections of fuel. If that information is publicly disclosed, market participants would have insight into the prices at which Big Rivers is willing to buy fuel and could manipulate the bidding process, impairing Big Rivers' ability to generate power at competitive rates and thus to compete in the wholesale power markets. Furthermore, 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 market. These effects were recognized in P.S.C. Case No. 2003-00054, in which the Commission granted confidential treatment to bids submitted to Union Light, Heat & Power ("*ULH&P*"). *ULH&P* argued, and the

Commission implicitly accepted, that if the bids it received were publicly disclosed, contractors in the future could use the bids as a benchmark, which would likely lead to the submission of higher bids. *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); *see also In the Matter of An Examination of the Application of the Fuel Adjustment Clause of East Kentucky Power Cooperative, Inc. from May 1, 2007 through October 31, 2007*, Letter, P.S.C. Case No. 2007-00523 (February 27, 2008).

29. 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. *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).

30. Similarly, potential fuel and power suppliers manipulating Big Rivers' bidding process would lead to higher costs to Big Rivers and would place it at an unfair competitive disadvantage in the wholesale power and credit markets. Potential market power purchasers could likewise use the information to manipulate their bids to Big Rivers, leading to lower revenues to Big Rivers and placing it at an unfair competitive is advantage in the wholesale power and credit markets.

31. Public disclosure of Big Rivers' projections of its production costs and power market prices would give the power producers and marketers with which Big

Rivers competes in the wholesale power market insight into Big Rivers' cost of producing power and view of energy and capacity prices. Knowledge of this information would give those power producers and marketers an unfair competitive advantage because they could use that information to potentially underbid Big Rivers in wholesale transactions.

32. Public disclosure of the confidential terms of special contracts and third party proprietary information would also cause competitive harm to Big Rivers. In P.S.C. Case No. 2003-00054, the Commission additionally implicitly accepted ULH&P's argument 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).

33. In Big Rivers' case, Big Rivers is currently in negotiations with potential counterparties for purchase power agreements and expects to engage in negotiations with other counterparties in the future. If confidential treatment of

the confidential terms of the special contract in Sections 8.1.1 and 3.2; and Table 8.4 of the IRP is denied, potential counterparties would know that the confidential terms of their contracts could 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 would likely reduce the pool of counterparties willing to negotiate with Big Rivers, reducing Big Rivers' ability to sell power and impairing its ability to compete in the wholesale power and credit markets.

34. Third party companies that provide their proprietary and confidential fuel and power market price projections to Big Rivers would also not want their proprietary information publicly disclosed. Public disclosure of that information would limit the number of third parties willing to provide such information to Big Rivers, which would prevent Big Rivers from having access to valuable tools upon which it relies in negotiating power sales and determining whether to engage in wholesale market transactions. Not having access to such tools would impair Big Rivers' ability to compete in the wholesale power market.

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

IV. Time Period

36. Pursuant to 807 KAR 5:001 Section 13(2)(a)(2), Big Rivers requests that the Confidential Information be afforded confidential treatment for the time periods explained below.

37. Big Rivers requests that the Confidential Information protected by KRS 61.878(1)(m) remain confidential indefinitely because as long as the transmission system remains in place, the information should be confidential for the reasons stated above.

38. Big Rivers requests that the Confidential Information in Sections 8.1.1 and 3.2, and Table 8.4 of the IRP, which is the confidential special contract terms, remain confidential indefinitely for the above-stated reasons.

39. Big Rivers requests that the Confidential Information protected by KRS 61.878 (1)(c)(1), except for the confidential special contract terms, remain confidential for a period of five (5) years from the date of this motion, which should allow sufficient time for the projected data to become historical and sufficiently outdated that it could not be used to determine similar confidential information at that time or to competitively disadvantage Big Rivers.

V. Conclusion

40. Based on the foregoing, the Confidential Information is entitled to confidential treatment pursuant to 807 KAR 5:001 Section 13, KRS 61.878, and KRS 278.160(3). If the Commission disagrees that Big Rivers' Confidential Information is entitled to confidential treatment, due process requires the

Commission to hold an evidentiary hearing. *See Utility Regulatory Comm'n v. Kentucky Water Serv. Co., Inc.*, 642 S.W.2d 591 (Ky. App. 1982).

WHEREFORE, Big Rivers respectfully requests that the Commission grant this motion and classify and treat as confidential the Confidential Information.

On this the 21st day of September, 2020.

Respectfully submitted,

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