



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

In the Matter of:

**ELECTRONIC APPLICATION OF BIG RIVERS)
ELECTRIC CORPORATION FOR A CERTIFICATE)
OF CONVENIENCE AND NECESSITY)
AUTHORIZING CONSTRUCTION OF A NEW)
HEADQUARTERS FACILITY AND AN ORDER)
AUTHORIZING BIG RIVERS TO SELL ITS)
EXISTING HEADQUARTERS FACILITY)**

**Case No.
2021-00314**

MOTION FOR CONFIDENTIAL TREATMENT

FILED: November 9, 2021

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

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11 1. Comes now Big Rivers Electric Corporation (“*Big Rivers*”), pursuant to
12 KRS 61.878, 807 KAR 5:001 Section 13, and other applicable law, and moves the
13 Kentucky Public Service Commission (“*Commission*”) to grant confidential
14 treatment to certain information Big Rivers is providing in its responses to the
15 Commission Staff’s Second Request for Information filed with this motion.

16 2. The information for which Big Rivers seeks confidential treatment is
17 hereinafter referred to as the “*Confidential Information*.” The Confidential
18 Information includes portions of the responses and/or attachments for the
19 responses to Items 2, 9, 13, 14, and 17 of the Commission Staff’s Second Request
20 for Information (“PSC 2-2,” “PSC 2-9,” “PSC 2-13,” “PSC 2-14,” and “PSC 2-17,”
21 respectively). The Confidential Information consists of:

- a) cost estimates for the construction of a new Transmission Operations Center (“TOC”) (found in the attachments to Big Rivers’ responses to PSC 2-2 and PSC 2-9);
- b) Big Rivers’ financial analysis comparing its existing headquarters to its proposed headquarters, which includes the projected construction costs for the proposed headquarters, and the assessed value and expected sales price for the existing headquarters (found in the attachment to Big Rivers’ response to PSC 2-13);
- c) the plant in service balance and accumulated depreciation for the existing headquarters (found in Big Rivers’ response to PSC 2-14); and
- d) the confidential terms of an agreement with Cooperative Building Solutions to provide a facility planning study for the new TOC (attached to Big Rivers’ response to PSC 2-17).

3. Pursuant to the Commission’s Emergency Orders 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 Information highlighted in yellow or otherwise marked “CONFIDENTIAL,” is being filed with this request via electronic mail sent to PSCED@ky.gov. One (1) copy of the documents with the Confidential Information redacted is also being electronically filed with this request. 807 KAR 5:001 Section 13(2)(a)(3).

1 4. A copy of this motion with the Confidential Information redacted has
2 been served on all parties to this proceeding through the use of electronic filing.
3 807 KAR 5:001 Section 13(2)(b).

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

8 6. Pursuant to 807 KAR 5:001 Section 13(2)(a)(1), as discussed *infra*,
9 the Confidential Information is entitled to confidential treatment and is being
10 submitted confidentially under the purview of KRS 61.878(1)(c)(1).

11 **I. The Confidential Information is Entitled to Confidential**
12 **Treatment Based upon KRS 61.878(1)(c)(1)**

13 7. KRS 61.878(1)(c)(1) protects “records confidentially disclosed to an
14 agency or required by an agency to be disclosed to it, generally recognized as
15 confidential or proprietary, which if openly disclosed would permit an unfair
16 commercial advantage to competitors of the entity that disclosed the records.”
17 Subsection A *infra* describes how Big Rivers operates in competitive
18 environments in the wholesale power market and in the credit market;
19 Subsection B *infra* explains that the Confidential Information is generally
20 recognized as confidential or proprietary; and Subsection C *infra* demonstrates
21 that public disclosure of the Confidential Information would permit an unfair
22 commercial advantage to Big Rivers’ competitors.

1 *A. Big Rivers Faces Actual Competition*

2 8. Big Rivers must successfully compete in the wholesale power
3 markets to sell energy it produces in excess of its members' needs. Big Rivers'
4 ability to successfully compete in these wholesale power markets is dependent
5 upon an effective combination of a) obtaining the maximum price for the power it
6 sells and the best contract terms, and b) keeping its cost of production as low as
7 possible. Fundamentally, if Big Rivers' cost of producing a kilowatt hour of
8 energy increases, its ability to sell that kilowatt hour in competition with other
9 utilities is adversely affected.

10 9. Big Rivers also competes for reasonably-priced credit in the credit
11 markets, and its ability to compete is directly impacted by the financial results it
12 obtains. Any events that adversely affect Big Rivers' financial results may
13 impact the price it pays for credit. Impediments to Big Rivers' negotiating the
14 best terms for the construction of the proposed headquarters facility or the sale of
15 its existing headquarters properties could likewise affect its apparent
16 creditworthiness. A utility the size of Big Rivers that operates generation and
17 transmission facilities will always have periodic cash and borrowing
18 requirements for both anticipated and unanticipated needs. Big Rivers expects to
19 be in the credit markets on a regular basis in the future, and it is imperative that
20 Big Rivers improve and maintain its credit profile.

21 10. Accordingly, Big Rivers faces competition in both the wholesale
22 power and credit markets, and its Confidential Information should be afforded

1 confidential treatment to prevent the imposition of an unfair competitive
2 advantage to those competitors.

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

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

8 12. As noted above, the Confidential Information consists of cost
9 estimates for the construction of a new TOC; the plant-in-service balance,
10 accumulated depreciation, assessed value, and expected sales price for the
11 existing headquarters, all of which provide insight into the price at which Big
12 Rivers would be willing to sell the existing headquarters; Big Rivers' financial
13 analysis comparing the existing and proposed headquarters; and the confidential
14 terms of a contract with a third party for services related to the design of the new
15 TOC. This Confidential Information is critical to the effective execution of Big
16 Rivers' business decisions and strategy.

17 13. Under Kentucky law, it is well recognized that information about a
18 company's detailed inner workings, such as the Confidential Information here, is
19 generally recognized as confidential or proprietary. *See, e.g., Hoy v. Kentucky*
20 *Indus. Revitalization Authority*, 907 S.W.2d 766, 768 (Ky. 1995) (“[it] does not
21 take a degree in finance to recognize that such information concerning the inner
22 workings of a corporation is ‘generally recognized as confidential or proprietary’”);
23 *Marina Management Servs. v. Cabinet for Tourism, Dep’t of Parks*, 906 S.W.2d

1 318, 319 (Ky. 1995) (unfair commercial advantage arises simply from “the ability
2 to ascertain the economic status of the entities without the hurdles systemically
3 associated with the acquisition of such information about privately owned
4 organizations”). Moreover, the Commission has recognized in previous cases the
5 confidentiality of capital project information similar to the Confidential
6 Information related to the construction of a new headquarters and a new TOC
7 and the sale of its existing headquarters properties. *See, e.g., In the Matter of:*
8 *Electronic Application of Jackson Purchase Energy Corporation for a Certificate of*
9 *Public Convenience and Necessity to Construct a New Headquarters Facility,*
10 P.S.C. Case No. 2019-00326, Order (Oct. 01, 2019) (granting confidential
11 treatment of the purchase price of the proposed headquarters, the anticipated
12 cost of construction, and the estimated net cost of the proposed headquarters,
13 until the construction costs became final); *id.* (granting confidential treatment of
14 the commercial appraisal report on existing headquarters facilities).

15 14. Finally, the Confidential Information is similar to or is derived from
16 the Confidential Information contained in Big Rivers’ Application, for which
17 confidentiality has been sought pursuant to the pending Motion for Confidential
18 Treatment filed with Big Rivers’ Application in this proceeding. Thus, the
19 Confidential Information should be granted confidential treatment pending
20 review of Big Rivers’ previously filed Motion for Confidential Treatment in this
21 proceeding, which was filed on August 26, 2021. *See* 807 KAR 5:001 Section 13(4)
22 (“Pending action by the commission on a motion for confidential treatment or by

1 its executive director on a request for confidential treatment, the material
2 specifically identified shall be accorded confidential treatment”).

3 15. The Confidential Information is not publicly available, is not
4 disseminated within Big Rivers except to those employees and professionals with
5 a 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 ***C. Disclosure of the Confidential Information Would Result in an***
10 ***Unfair Commercial Advantage to Big Rivers’ Competitors***

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12 16. Disclosure of the Confidential Information could unreasonably and
13 unnecessarily harm Big Rivers by giving interested third parties, potential
14 construction bidders, and potential counterparties in real estate sales
15 transactions, an unfair commercial advantage through insight into Big Rivers’
16 business operations and financial strategies. As discussed *supra*, Big Rivers
17 faces actual competition in the wholesale power market and in the credit market.
18 It is likely that Big Rivers would suffer competitive injury if that Confidential
19 Information was publicly disclosed, and Big Rivers seeks protection from such
20 competitive injury.

21 17. Public disclosure of the cost estimates for the construction of a new
22 headquarters and a new TOC would allow prospective construction bidders
23 potentially to use this sensitive information to submit construction bids higher
24 than what they might otherwise provide if the information were not publically

1 available and would set a benchmark that would not exist but for the disclosure
2 of this sensitive information. In this case, potential bidders would be competitors
3 to Big Rivers as contemplated by KRS 61.878(1)(c)(1), as Big Rivers and potential
4 bidders each have competing interests to secure the most favorable cost and
5 terms.¹ This could lead to higher costs or less favorable terms for Big Rivers and
6 impair its ability to compete in the wholesale power market and credit markets.
7 The Commission has often found that similar information relating to competitive
8 bidding is generally recognized as confidential and proprietary. *See, e.g., In the*
9 *Matter of Application of the Union Light, Heat and Power Company for*
10 *Confidential Treatment*, Order, P.S.C. Case No. 2003-00054 (Aug. 4, 2003)
11 (finding that bids submitted to a utility were confidential).

12 18. These effects were recognized in P.S.C. Case No. 2003-00054, in
13 which the Commission granted confidential treatment to bids submitted to Union
14 Light, Heat & Power (“*ULH&P*”). *ULH&P* argued, and the Commission
15 implicitly accepted, that if the bids it received were publicly disclosed, contractors
16 in the future could use the bids as a benchmark, which would likely lead to the
17 submission of higher bids. *In the Matter of Application of the Union Light, Heat*
18 *and Power Company for Confidential Treatment*, P.S.C. Case No. 2003-00054,
19 Order (Aug. 4, 2003); *see also In the Matter of An Examination of the Application*
20 *of the Fuel Adjustment Clause of East Kentucky Power Cooperative, Inc. from May*

¹ *See In the Matter of: Electronic Application of Jackson Purchase Energy Corporation for a Certificate of Public Convenience and Necessity to Construct a New Headquarters Facility*, Case No. 2019-00326, Order (Jan. 14, 2020).

1 *1, 2007 through October 31, 2007*, P.S.C. Case No. 2007-00523, Letter (Feb. 27,
2 2008).

3 19. Disclosure of the information related to the value of the existing
4 headquarters would likewise give potential counterparties and competitors
5 insight into Big Rivers' internal evaluation of the properties. The counterparties
6 and competitors would have a business advantage in the course of ongoing and
7 future negotiations, potentially affecting the ultimate purchase price obtained by
8 Big Rivers for the sale of its existing headquarters properties. Furthermore, any
9 competitive pressure that adversely affects Big Rivers' financial results and
10 contract terms could make the company appear less creditworthy and thus impair
11 its ability to compete in the credit market.

12 20. Public disclosure of the confidential terms of a third party contract
13 would cause competitive harm to Big Rivers by reducing the pool of companies
14 willing to bid on Big Rivers' projects. The Commission also recognized this kind
15 of competitive harm in Case No. 2003-00054 when it implicitly accepted ULH&P's
16 argument that the bidding contractors would not want their bid information
17 publicly disclosed, and that disclosure would reduce the contractor pool available
18 to ULH&P, which would drive up ULH&P's costs, hurting its ability to compete
19 with other gas suppliers. In the Matter of Application of the Union Light, Heat
20 and Power Company for Confidential Treatment, P.S.C. Case No. 2003-00054,
21 Order (Aug. 4, 2003). The Kentucky Supreme Court has similarly found that
22 without protection for confidential information provided to a public agency,

1 “companies would be reluctant to apply for investment tax credits for fear the
2 confidentiality of financial information would be compromised.” *Hoy v. Kentucky*
3 *Indus. Revitalization Authority*, 907 S.W.2d 766, 769 (Ky. 1995).

4 21. Accordingly, the public disclosure of the information that Big Rivers
5 seeks to protect pursuant to KRS 61.878 would provide Big Rivers’ competitors
6 with an unfair commercial advantage.

7 **II. TIME PERIOD**

8 1. Pursuant to 807 KAR 5:001 Section 13(3)(a)(2), Big Rivers requests
9 that the Confidential Information be granted confidential treatment for the time
10 periods explained below.

11 2. Big Rivers requests that the Confidential Information consisting of
12 the cost estimates for the construction of a new Transmission Operations Center
13 remain confidential for a period of five (5) years from the date of this motion, at
14 which time the Confidential Information should be sufficiently outdated so that it
15 could not be used to competitively disadvantage Big Rivers.

16 3. Big Rivers requests that the Confidential Information consisting of
17 the costs estimates of the new headquarters remain confidential until the
18 construction contract is awarded for that project.

19 4. Big Rivers requests that the Confidential Information relating to the
20 value of the existing headquarters remain confidential until the existing
21 headquarters properties are sold.

1 5. Big Rivers requests that the confidential terms of the Cooperative
2 Building Solutions contract remain confidential indefinitely for the reasons stated
3 above.

4 **III. CONCLUSION**

5 6. Based on the foregoing, the Confidential Information is entitled to
6 confidential treatment pursuant to KRS 61.878, 807 KAR 5:001 Section 13, and
7 related law. If the Commission disagrees that Big Rivers' Confidential
8 Information is entitled to confidential treatment, due process requires the
9 Commission to hold an evidentiary hearing. *See Utility Regulatory Comm'n v.*
10 *Kentucky Water Serv. Co., Inc.*, 642 S.W.2d 591 (Ky. App. 1982).

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

1 On this the 9th day of November, 2021.

2 Respectfully submitted,

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4 */s/ Tyson Kamuf*

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