

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY

In the Matter of:

AN ELECTRONIC EXAMINATION OF THE)	
APPLICATION OF THE FUEL ADJUSTMENT)	
CLAUSE OF BIG RIVERS ELECTRIC)	Case No.
CORPORATION FROM MAY 1, 2021)	2022-00041
THROUGH OCTOBER 31, 2021)	

MOTION OF BIG RIVERS ELECTRIC CORPORATION FOR
CONFIDENTIAL TREATMENT

- 1. Big Rivers Electric Corporation (“*Big Rivers*”) hereby moves the Public Service Commission of Kentucky (the “*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’ responses to Items 4, 5, 12 and 13 of the information requested in the Appendix to the Commission’s March 31, 2022, Order in this matter.

- 2. The information for which Big Rivers seeks confidential treatment is hereinafter referred to as the “*Confidential Information.*” The Confidential Information consists of:
 - (a) information regarding confidential fuel supply bids to Big Rivers and its analysis of those bids, contained in Big Rivers’ response and the attachment to its response to Item 4 and Big Rivers’ response to Item 5;

- 1 (b) timing of planned maintenance outages for a Big Rivers’
2 generation station, contained in Big Rivers’ response to Item 4;
3 (c) terms of special contracts and other non-member sales and
4 purchases, contained in Big Rivers’ response to Item 12; and
5 (d) private usage data of individual retail customers and sales to
6 non-members, contained in the attachment Big Rivers’ response
7 to Item 13.

8 3. Pursuant to the Commission’s Emergency Orders in *In the Matter of:*
9 *Electronic Emergency Docket Related to the Novel Coronavirus Covid-19*, Case No.
10 2020-00085, one (1) copy of the Confidential Information highlighted in yellow or
11 otherwise marked “CONFIDENTIAL,” is being filed with this motion via
12 electronic mail sent to PSCED@ky.gov. One (1) copy of the documents with the
13 Confidential Information redacted is also being electronically filed with this
14 request. 807 KAR 5:001 Section 13(2)(a)(3).

15 4. A copy of this motion with the Confidential Information redacted has
16 been served on all parties to this proceeding through the use of electronic filing.
17 807 KAR 5:001 Section 13(2)(b).

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

1 6. Pursuant to 807 KAR 5:001 Section 13(2)(a)(1) as discussed below,
2 the Confidential Information is entitled to confidential treatment and is being
3 submitted confidentially under the purview of KRS 278.160(3), KRS 61.878(1)(a)
4 and KRS 61.878(1)(c)(1).

5 **I. The Confidential Information is entitled to confidential**
6 **treatment based upon KRS 278.160(3)**

7 7. Certain Confidential Information contained in Big Rivers’ response
8 to Item 12 is entitled to confidential protection based upon KRS 278.160(3), which
9 shields from disclosure “a provision of a special contract that contains rates and
10 conditions of service not filed in a utility’s general schedule if such provision
11 would otherwise be entitled to be excluded from the application of KRS 61.870 to
12 61.884 under the provisions of KRS 61.878(1)(c)(1).”

13 8. The special contracts in question relate to Big Rivers’ power sales
14 contracts with the Kentucky Municipal Energy Agency (“KyMEA”). The
15 Commission has already found that the confidential terms of the contracts are
16 entitled to confidential treatment under KRS 61.878(1)(c)(1),¹ and the confidential
17 terms of these special contracts should again be granted confidential treatment.

¹ See *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*, P.S.C. Case No. 2016-00306, Order (Jan. 2, 2019) (granting confidential treatment to the confidential terms of the KyMEA contract for an indefinite time period).

1 **II. The Confidential Information is also entitled to**
2 **confidential treatment based upon KRS 61.878(1)(a)**

3 9. Certain Confidential Information contained in Big Rivers’ response
4 to Item 12 and the attachment to its response to Item13 is entitled to confidential
5 treatment based upon KRS 61.878(1)(a), which explicitly protects “[p]ublic records
6 containing information of a personal nature where the public disclosure thereof
7 would constitute a clearly unwarranted invasion of personal privacy.”

8 10. The attachment to Big Rivers’ response to Item 13 reveals the power
9 usage of individual large industrial retail customers on the Big Rivers system and
10 sales to non-members. Big Rivers’ response to Item 12 reveals purchases and
11 sales to non-members. Because the individual customers and non-members
12 identified in the responses and attachment are not parties to this proceeding,
13 publicly revealing such information would constitute a clearly unwarranted
14 invasion of their privacy. Moreover, the Commission has previously granted
15 confidential treatment to similar retail information under the purview of KRS
16 61.878(1)(a).²

17 11. As such, Big Rivers requests confidential treatment for the identity
18 of these entities in order to protect their private information.

² See, e.g., *In the Matter of: Sanctuary Church v. Louisville Gas and Electric Company*, Order, P.S.C. Case No. 2018-00181 (Jan. 8, 2019) (granting confidential treatment pursuant to KRS 61.878(1)(a) for an indefinite period to a retail customer’s account and usage information); *In the Matter of: Application of Kentucky Utilities Company for an Adjustment of its Electric Rates*, Order, P.S.C. Case No. 2012-00221 (July 25, 2013) (holding customer names, account numbers and usage information exempt from disclosure under KRS 61.878(1)(a)); see also *In the Matter of: An Electronic Examination of the Application of the Fuel Adjustment Clause of Big Rivers Electric Corporation From May 1, 2019 Through October 31, 2019*, P.S.C. Case No. 2020-00009, Order (April 13, 2020).

1 **III. Certain Confidential Information is also entitled to**
2 **confidential treatment based upon KRS 61.878(1)(c)(1)**

3 12. Under the Kentucky Open Records Act, the Commission is entitled
4 to withhold from public disclosure “records confidentially disclosed to an agency
5 or required by an agency to be disclosed to it, generally recognized as confidential
6 or proprietary, which if openly disclosed would permit an unfair commercial
7 advantage to competitors of the entity that disclosed the records.” *See* KRS
8 61.878(1)(c)(1).

9 13. Subsection A below explains that Big Rivers operates in competitive
10 environments in the wholesale power market and in the credit market.
11 Subsection B below shows that the Confidential Information is generally
12 recognized as confidential or proprietary. Subsection C below demonstrates that
13 public disclosure of the Confidential Information would permit an unfair
14 commercial advantage to Big Rivers’ competitors. As such, the Commission
15 should grant confidential treatment to the Confidential Information.

16 ***A. Big Rivers Faces Actual Competition***

17 14. As a generation and transmission cooperative, Big Rivers competes
18 in the wholesale power market. This includes not only the short-term bilateral
19 energy market, the day-ahead and real time energy and ancillary services
20 markets, and the capacity market to which Big Rivers has access by virtue of its
21 membership in Midcontinent Independent System Operator, Inc. (“MISO”), but
22 also forward bilateral long-term agreements and wholesale agreements with

1 utilities and industrial customers. Big Rivers' ability to successfully compete in
2 the market is dependent upon a combination of its ability to: 1) obtain the
3 maximum price for the power it sells, and 2) keep its cost of production or
4 purchase as low as possible. Fundamentally, if Big Rivers' cost of producing or
5 purchasing a unit of power increases, its ability to sell that unit in competition
6 with other utilities is adversely affected.

7 15. Big Rivers also competes for reasonably-priced credit in the credit
8 markets, and its ability to compete is directly impacted by its financial results.
9 Lower revenues and any events that adversely affect Big Rivers' margins will
10 adversely affect its financial results and potentially impact the price it pays for
11 credit. A competitor armed with Big Rivers' proprietary and confidential
12 information will be able to increase Big Rivers' costs or decrease Big Rivers'
13 revenues, which could in turn affect Big Rivers' apparent creditworthiness. A
14 utility the size of Big Rivers that operates generation and transmission facilities
15 will always have periodic cash and borrowing requirements for both anticipated
16 and unanticipated needs. Big Rivers expects to be in the credit markets on a
17 regular basis in the future, and it is imperative that Big Rivers improve and
18 maintain its credit profile.

19 16. Accordingly, Big Rivers faces competition in the wholesale power and
20 capital markets, and the Confidential Information should be afforded confidential
21 treatment to prevent the imposition of an unfair competitive advantage to those
22 competitors.

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

3 17. The Confidential Information for which Big Rivers seeks confidential
4 treatment under KRS 61.878 is generally recognized as confidential or
5 proprietary under Kentucky law.

6 18. As noted above, the Confidential Information protected under KRS
7 61.878(1)(c)(1) consists of or reveals information about confidential fuel supply
8 bids to Big Rivers and Big Rivers’ analysis of those bids, the terms of special
9 contracts and other non-member sales, and the timing of planned maintenance
10 outages for a Big Rivers’ generating station. The Confidential Information is
11 precisely the sort of information meant to be protected by KRS 61.878(1)(c)(1).

12 19. The Commission has often found that information similar to the
13 Confidential Information contained in Big Rivers’ responses to Items 4 and 5,
14 relating to competitive bidding is generally recognized as confidential and
15 proprietary. *See, e.g., In the Matter of Application of Union Light, Heat and*
16 *Power Company for Confidential Treatment*, P.S.C. Case No. 2003-00054, Order
17 (August 4, 2003).³ In fact, the Commission has granted confidential treatment to

³ 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*, P.S.C. Case No. 2003-00054, Order (Aug. 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).

1 the bid tabulation sheets that Big Rivers filed in previous reviews of its fuel
2 adjustment clause. *See, e.g.*, letter from the Commission dated September 22,
3 2010, in P.S.C. Case No. 2010-00269 and more recently in P.S.C. Case No. 2019-
4 00231.⁴ While not presented in separate bid tabulation sheets, the Confidential
5 Information contained in Big Rivers' response to Item 5, represents the
6 confidential bid tabulation and evaluation related to oral solicitations. Thus, the
7 Confidential Information in the response and attachment to the response to Item
8 4 and the response to Item 5 is generally recognized as confidential or
9 proprietary.

10 20. Public disclosure of confidential terms of special contracts and other
11 non-members sales would also cause competitive harm to Big Rivers, giving Big
12 Rivers' suppliers, buyers and competitors insight into prices and other terms at
13 which it is willing to sell and buy power. The timing of planned maintenance
14 outages for Big Rivers' generating station would provide market participants,
15 suppliers and competitors insight into the timing of Big Rivers capacity needs.
16 Kentucky courts have held that information about a company's detailed inner
17 workings is generally recognized as confidential or proprietary. In *Hoy v.*
18 *Kentucky Industrial Revitalization Authority*, the Kentucky Supreme Court held
19 that financial information submitted by General Electric Company with its

⁴ *In the Matter of: An Electronic Examination of the Application of the Fuel Adjustment Clause of Big Rivers Electric Corporation from November 1, 2018 through April 30, 2019*, P.S.C. Case No. 2019-00231, Order (April 2, 2020) (granting confidential treatment for fuel supply bids and Big Rivers' analysis of the bids, terms of future off-system sales and private usage information of individual retail customers).

1 application for investment tax credits was not subject to disclosure simply
2 because it had been filed with a state agency. 907 S.W.2d 766, 4 (Ky. 1995). The
3 Court applied the plain meaning rule to KRS 61.878(1)(c)(1), and reasoned: “[i]t
4 does not take a degree in finance to recognize that such information concerning
5 the inner workings of a corporation is ‘generally recognized as confidential or
6 proprietary.’” *Id.* at 768. Similarly, in *Marina Management Services, Inc. v.*
7 *Commonwealth Cabinet for Tourism*, the Court held: “[t]hese are records of
8 privately owned marina operators, disclosure of which would unfairly advantage
9 competing operators. The most obvious disadvantage may be the ability to
10 ascertain the economic status of the entities without the hurdles systematically
11 associated with acquisition of such information about privately owned
12 organizations.” 906 S.W.2d 318, 319 (Ky. 1995).

13 21. In Big Rivers’ case, Big Rivers is currently in negotiations with
14 potential counterparties and expects to continue to engage in negotiations with
15 counterparties for power sales agreements. If confidential treatment of the
16 confidential terms of the special contracts and other non-member sales in Big
17 Rivers’ response to Item 12 is denied, potential counterparties would know that
18 the confidential terms of their contracts could be publicly disclosed, which could
19 reveal information to their competitors about their competitiveness. Because
20 many companies would be reluctant to have such information disclosed, public
21 disclosure of the Confidential Information would likely reduce the pool of
22 counterparties willing to negotiate with Big Rivers, reducing Big Rivers’ ability to

1 sell power and impairing its ability to compete in the wholesale power and credit
2 markets.

3 22. In sum, 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 details the “inner workings”
8 of Big Rivers’ and is generally recognized as confidential and proprietary.

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

11 23. Disclosure of the Confidential Information that is protected under
12 KRS 61.878(1)(c)(1) would permit an unfair commercial advantage to Big Rivers’
13 competitors. As discussed above, Big Rivers faces actual competition in the
14 wholesale power market and in the credit markets, and it is likely that Big Rivers
15 would suffer competitive injury if the Confidential Information were publicly
16 disclosed.

17 24. Given the nature of the Confidential Information, its disclosure
18 would provide other market participants, suppliers, buyers and competitors
19 insight into the prices and terms at which Big Rivers is willing to buy and sell
20 power, as well as the timing of Big Rivers’ capacity needs. In turn, the
21 Confidential Information could be used to manipulate the bidding process, leading
22 to higher costs and/or lower revenues for Big Rivers, thereby impairing its ability

1 to compete in the wholesale power markets. Furthermore, any competitive
2 pressure that adversely affects Big Rivers' revenue and/or margins could make
3 Big Rivers appear less creditworthy and impair its ability to compete in the credit
4 markets.

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

8 **IV. Time Period**

9 26. Big Rivers requests that the Confidential Information regarding the
10 timing of planned maintenance outage for Big Rivers' generating station remain
11 confidential for a period of two (2) years from the date of this motion, which will
12 allow sufficient time for the information to become sufficiently outdated to no
13 longer pose a competitive risk to Big Rivers. 807 KAR 5:001 Section 13(2)(a)(2).

14 27. Big Rivers requests that all other Confidential Information remain
15 confidential indefinitely for the reasons stated above. 807 KAR 5:001 Section
16 13(2)(a)(2).

17 **V. Conclusion**

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

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

3 WHEREFORE, Big Rivers respectfully requests that the Commission
4 classify and protect as confidential the Confidential Information.

5 On this the 14th day of April, 2022.

6 Respectfully submitted,

7
8 /s/ *Senthia Santana*

9
10 _____
11 Senthia Santana
12 Tyson Kamuf
13 Whitney Kegley
14 Big Rivers Electric Corporation
15 201 Third Street
16 P.O. Box 24
17 Henderson, Kentucky 42419-0024
18 Phone: (270) 827-2561
19 Facsimile: (270) 844-6417
20 senthia.santana@bigrivers.com
21 tyson.kamuf@bigrivers.com
22 whitney.kegley@bigrivers.com

23 Counsel for Big Rivers Electric
24 Corporation