



1           Communications containing contract negotiations provide substantial  
2 insight into a company’s business strategies and the value it places on specific  
3 contract terms. Such communications reflect “the give and take of arm’s length  
4 negotiations... [which] amounts to commercial information not ordinarily made  
5 public.”<sup>1</sup>

6           The Commission has long recognized that communications involving  
7 contract negotiations are confidential and proprietary.<sup>2</sup> For example, in Case No.  
8 2020-00354, the Commission granted confidential treatment for an affidavit  
9 containing confidential contract negotiations, finding that “the affidavit they  
10 provided is recognized as confidential or proprietary as it contains internal details  
11 regarding decisions over cellular tower leasing.”<sup>3</sup> In that same case, the  
12 Commission also granted confidential treatment to information in an email  
13 between SBA Properties, LLC (“SBA”) and a third party “regarding details of  
14 contract negotiations.”<sup>4</sup> The Commission explained that “proposed contract terms  
15 in contract negotiations are generally recognized as confidential or proprietary

---

<sup>1</sup> *Providence J. Co. v. Convention Ctr. Auth.*, 774 A.2d 40, 45 (R.I. 2001).

<sup>2</sup> See, e.g., *In the Matter of: Electronic Application of New Cingular Wireless PCS, LLC d/b/a AT&T Mobility for Issuance of a Certificate of Public Convenience and Necessity to Construct a Wireless Communications Facility in the Commonwealth of Kentucky in the County of Russell*, Case No. 2022-00010, Order (Aug. 30, 2022) (granting confidential treatment to an affidavit containing “a description of the negotiations of rental terms”); *In the Matter of: Application of Big Rivers Electric Corporation for a General Adjustment in Rates*, Case No. 2013-00199, Order (Nov. 25, 2013) (granting confidential treatment to contract negotiations attached to Big Rivers’ response to Item 41 of the Attorney General’s Initial Request for Information).

<sup>3</sup> *In the Matter of: Electronic Application of New Cingular Wireless PCS, LLC d/b/a AT&T Mobility for Issuance of a Certificate of Public Convenience and Necessity to Construct a Wireless Communications Facility in the Commonwealth of Kentucky in the County of Wayne*, Case No. 2020-00354, Order (Dec. 10, 2021), at p. 2.

<sup>4</sup> *Id.* at p. 1.

1 and SBA would be harmed if its competitors had access to this information.”<sup>5</sup> The  
2 Commission further noted that it previously granted confidential treatment to  
3 similar information describing contract negotiations.<sup>6</sup>

4 With the exception two emails containing the final version of the First  
5 Amendment to Power Purchase Agreement (“*Amendment No. 1*”), the emails  
6 attached to Big Rivers’ response to AG 1-1 contain draft versions of Amendment  
7 No.1 and PowerPoint presentations disclosed during confidential contract  
8 negotiations. These documents contain various proposals, discussions, redlines,  
9 comments, and NGR’s analysis of its agreement with Big Rivers and need for  
10 Amendment No. 1. Public disclosure of such information reveals business  
11 strategies of both Big Rivers and NGR with respect to contract terms and internal  
12 analyses. As the Kentucky Supreme Court has noted, “It does not take a degree  
13 in finance to recognize that such information concerning the inner workings of a  
14 corporation is ‘generally recognized as confidential or proprietary.’”<sup>7</sup>

15 If confidential treatment of contract negotiations between Big Rivers and a  
16 contract counterparty are publicly disclosed, other companies interested in buying  
17 or selling power in Kentucky and economic development prospects would know  
18 that such information related to their business strategies, negotiations, and  
19 internal analyses with respect to future proposals may also be publicly disclosed.

---

<sup>5</sup> *Id.* at p. 2.

<sup>6</sup> *Id.* at pp 2-3.

<sup>7</sup> *Hoy v. Kentucky Indus. Revitalization Authority*, 907 S.W.2d 10 766, 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’”).

1 Many companies would be reluctant to have such sensitive information publicly  
2 disclosed, and would be less willing to negotiate freely with Big Rivers, if at all.  
3 This harm has been recognized by both the Commission and the Kentucky  
4 Supreme Court. For example, in Case No. 2003-00054, the Commission granted  
5 confidential protection for bids submitted to Union Light, Heat & Power  
6 (“*ULH&P*”). *ULH&P* argued, and the Commission implicitly accepted, that the  
7 bidding contractors would not want their bid information publicly disclosed, and  
8 that disclosure would reduce the contractor pool available to *ULH&P*, which  
9 would drive up *ULH&P*’s costs, hurting its ability to compete with other gas  
10 suppliers.<sup>8</sup> Similarly, in *Hoy v. Kentucky Indus. Revitalization Authority*, the  
11 Kentucky Supreme Court found that without protection for confidential  
12 information provided to a public agency, “companies would be reluctant to apply  
13 for investment tax credits for fear the confidentiality of financial information  
14 would be compromised.”<sup>9</sup> In Big Rivers’ case, public disclosure of its and/or a  
15 counterparty’s sensitive business strategies, internal analyses, proposals, and  
16 negotiations contained in the attachment to Big Rivers’ response to AG 1-1 would  
17 drive down the pool of counterparties willing to deal with Big Rivers, driving up  
18 Big Rivers’ costs, and hurting its ability to compete in the wholesale power  
19 markets and to compete for economic development prospects.

---

<sup>8</sup> *In the Matter of: Application of the Union Light, Heat and Power Company for Confidential Treatment*, Case No. 2003-00054, Order (Aug. 4, 2003).

<sup>9</sup> *Hoy v. Kentucky Indus. Revitalization Authority*, 907 S.W.2d at 769.

1 For the foregoing reasons, denial of confidential treatment for the  
2 attachment to Big Rivers’ response to AG 1-1 would create precisely the kind of  
3 competitive harm to Big Rivers and other Commission-regulated utilities that  
4 KRS 61.878(1)(c)(1) is intended to prevent, it would be a deviation from  
5 Commission precedent, and it would be arbitrary and capricious. As such, the  
6 Commission erred in denying confidential treatment to the attachment to Big  
7 Rivers’ response to AG 1-1, and the Commission should therefore grant rehearing  
8 of the August 3 Order and grant confidential treatment to the attachment.

9 B. The Commission erred in denying confidential treatment based on KRS  
10 61.878(1)(a).

11 In the August 3 Order, the Commission incorrectly ruled:

12 The Commission further finds BREC’s argument that the designated  
13 material is exempt from public disclosure under KRS 61.878(1)(a)  
14 was based on a description of the information as proprietary and  
15 confidential, which the Commission notes is applicable to a finding  
16 under KRS 61.878(1)(c)(1) not KRS 61.878(1)(a). Additionally, BREC  
17 did not identify any information of a personal nature that if publicly  
18 disclosed, would result in an unwarranted invasion of personal  
19 privacy. Because confidential treatment is granted under KRS  
20 61.878(1)(c)(1), the finding that confidential treatment should not be  
21 granted under KRS 61.878(1)(a) does not change the Commission’s  
22 determination that BREC’s motion for confidential treatment for the  
23 designated materials should be granted.<sup>10</sup>

24 In its February 10, 2023, Motion for Confidential Treatment, Big Rivers  
25 described the materials entitled to confidential protection under KRS 61.878(1)(a)  
26 as “proprietary and otherwise private information of third parties,” specifically  
27 including “not only the negotiated terms of Amendment No. 1, but also NGR’s

---

<sup>10</sup> August 3 Order at p. 6.

1 internal market projections, as well as its analysis of the Unbridled Project and  
2 the Unbridled PPA.”<sup>11</sup> Even though the same information is entitled to  
3 confidential protection based on both KRS 61.878(1)(a) and KRS 61.878(1)(c)(1),  
4 the arguments are distinct. KRS 61.878(1)(c)(1) protects “[r]ecords confidentially  
5 disclosed to an agency or required by an agency to be disclosed to it, generally  
6 recognized as confidential or proprietary, which if openly disclosed would permit  
7 an unfair commercial advantage to competitors *of the entity that disclosed the*  
8 *records*.”<sup>12</sup> As discussed above and in Big Rivers’ February 10, 2023, Motion for  
9 Confidential Treatment, the attachment to Big Rivers’ response to AG 1-1 is  
10 entitled to confidential treatment under KRS 61.878(1)(c)(1) because public  
11 disclosure of the attached would cause competitive harm *to Big Rivers*.

12 On the other, KRS 61.878(1)(a) protects “[p]ublic records containing  
13 information of a personal nature where the public disclosure thereof would  
14 constitute a clearly unwarranted invasion of personal privacy.”<sup>13</sup> Because the  
15 attachment to Big Rivers’ response to AG 1-1 contains sensitive and proprietary  
16 information *of a third party*, including NGR’s internal projections and analyses,  
17 public disclosure of the attachment would be an unwarranted invasion of personal

---

<sup>11</sup> Big Rivers’ February 10, 2023, Motion for Confidential Treatment, at ¶ 23 (footnote omitted).

<sup>12</sup> KRS 61.878(1)(c)(1) (emphasis added).

<sup>13</sup> KRS 61.878(1)(a).

1 privacy *of NGR*. Both the Attorney General and the Commission have held that  
2 KRS 61.878(1)(a) protects such sensitive third party commercial information.<sup>14</sup>

3 Because the August 3 Order misconstrues Big Rivers February 10, 2023,  
4 Motion for Confidential Treatment, misapplies KRS 61.878(1)(a), and deviates  
5 from Commission precedent, it is arbitrary and capricious, and the Commission  
6 should grant rehearing of the August 3 Order and grant confidential protection to  
7 the attachment to Big Rivers' response to AG 1-1.

8 C. With the exception of the two partially-confidential emails containing the  
9 final Amendment No. 1, the entirety of the attachment to Big Rivers'  
10 Response to AG 1-1 is entitled to confidential treatment.

11 In the August 3 Order, the Commission stated, "In AG 1-1, BREC did not  
12 highlight or identify any specific portion of the information that it was requesting  
13 to be held confidential."<sup>15</sup> However, in its February 10, 2023, Motion for  
14 Confidential Treatment, Big Rivers sought confidential treatment for the entire  
15 attachment to its response to AG 1-1, as is expressly permitted by 807 KAR 5:001  
16 Section 13(2)(a)(3)(b), which provides, "If confidential treatment is sought for an  
17 entire document, written notification that the entire document is confidential  
18 treatment may be filed with the document in lieu of the required highlighting."<sup>16</sup>  
19 Both the public version of Big Rivers' response to AG 1-1 and the confidential

---

<sup>14</sup> See, e.g., Ky. Op. Atty. Gen. 96-ORD-176 (Aug. 20, 1996) (holding Kroger Company's utility bills exempt from disclosure under KRS 61.878(1)(a)); *In the Matter of: Application of Kentucky Utilities Company for an Adjustment of its Electric Rates*, Case No. 2012-00221, Order (July 25, 2013) (holding customer names, account numbers, and usage information exempt from disclosure under KRS 61.878(1)(a)).

<sup>15</sup> August 3 Order at p. 6.

<sup>16</sup> 807 KRS 5:001 Section 13(2)(a)(3)(b).

1 version of the attachment to Big Rivers’ response to AG 1-1 contain a sheet noting  
2 that the entire attachment was being filed pursuant to a motion for confidential  
3 treatment. Big Rivers filed the entire attachment confidentially, with each sheet  
4 of the attachment marked “CONFIDENTIAL” in red font.

5       After reconsideration, Big Rivers believes, with the exception of the two  
6 partially-confidential emails containing the final Amendment No. 1,<sup>17</sup> the entirety  
7 of the attachment to Big Rivers’ response to AG 1-1 is entitled to confidential  
8 protection. Even though some of the terms contained in the drafts of Amendment  
9 No. 1 made it into the final agreement, public disclosure of those drafts would  
10 reveal which terms were originally proposed, which terms were removed, and  
11 which terms were added. Because public disclosure of the drafts, email  
12 discussions, and the PowerPoint proposals will reveal the parties’ analyses,  
13 proposals, negotiations, give-and-take, and other strategic decisions, the entirety  
14 of those documents is entitled to confidential protection under KRS 61.878(1)(a)  
15 and 61.878(1)(c)(1).

16       With respect to the two emails containing the final Amendment No. 1, the  
17 Commission has already granted confidential treatment to certain terms  
18 contained in Amendment No. 1,<sup>18</sup> and those confidential terms should continue to  
19 be afforded confidential protection. Big Rivers will refile the attachment to its  
20 response to AG 1-1 with a new motion for confidential treatment pursuant to the

---

<sup>17</sup> These emails are pages 2-12 and 30-40 of the attachment.

<sup>18</sup> See Order dated November 7, 2022.



1 Commission’s invitation in the August 3 Order that “BREC may refile a petition  
2 for confidential protection for AG 1-1 with the appropriate request and  
3 redactions.”<sup>19</sup>

4 WHEREFORE, Big Rivers respectfully requests that the Commission grant  
5 rehearing of the August 3 Order and grant confidential treatment indefinitely to  
6 the attachment to Big Rivers’ response to AG 1-1, including the terms of the final  
7 Amendment No. 1 afforded confidential protection by the Commission’s November  
8 7, 2022, Order, and the entirety of the remainder of the attachment.

9 On this the 26<sup>th</sup> day of August, 2023.

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

Respectfully submitted,  
  
*/s/ Tyson Kamuf*  
Tyson Kamuf  
Senthia Santana  
Whitney Kegley  
Big Rivers Electric Corporation  
710 W. 2<sup>nd</sup> Street  
P.O. Box 20015  
Henderson, Kentucky 42302  
Phone: (270) 827-2561  
Facsimile: (270) 844-6417  
[tyson.kamuf@bigrivers.com](mailto:tyson.kamuf@bigrivers.com)  
[senthia.santana@bigrivers.com](mailto:senthia.santana@bigrivers.com)  
[whitney.kegley@bigrivers.com](mailto:whitney.kegley@bigrivers.com)  
  
*Counsel for Big Rivers Electric  
Corporation*

---

<sup>19</sup> August 3 Order at p. 7.