

COMMONWEALTH OF KENTUCKY
BEFORE THE KENTUCKY PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC 2023 INTEGRATED RESOURCE) CASE NO.
PLAN OF BIG RIVERS ELECTRIC CORPORATION) 2023-00310

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

1. Big Rivers Electric Corporation (“*Big Rivers*” or the “*Company*”) 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’ concurrently-filed Supplemental Responses to the First Requests for Information of Joint Intervenors Kentuckians for the Commonwealth and Kentucky Resource Council. The information for which Big Rivers seeks confidential treatment is hereinafter referred to as the “*Confidential Information*.” The Confidential Information primarily consists of sensitive competitive information from bids submitted to Big Rivers by its current and potential vendors under non-disclosure agreements, and related information, as detailed herein.

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 in yellow, or otherwise marked “CONFIDENTIAL,” is being filed with this motion by electronic mail or posting to a secure fileshare site. A copy of those pages,

with the Confidential Information redacted, is being electronically filed into the public docket with the data request responses 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)(c)(1). *See* 807 KAR 5:001 Section 13(2)(a)(1); KRS 278.160(3).

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

6. 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.

7. 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.

8. 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.

9. 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. When Big Rivers' competitors have access to the Company's proprietary, non-public information, internal projections, and like data, the resulting imbalance of information is disadvantageous to Big Rivers and its Member-Owners.

10. 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, and potential new Members is fundamental to Big Rivers' continued success.

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

11. 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. The Confidential Information includes:

- a. Details related to cost, capacity, year of first availability, resource type, and location from current or potential vendors, supplied in response to Big Rivers' 2022 All Source Request for Proposals, attached to Big Rivers' Supplemental Response to KFTC and KRC 1-9.

12. The Confidential Information provides insight into Big Rivers' cost of producing and acquiring 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 or expecting 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.

13. As noted above, public disclosure of the Confidential Information would reveal detailed and competitively-sensitive information relating to and including Big Rivers' projected production costs, including production factors such as fuel and other O&M costs, Big Rivers' projected rates to its Members, Big Rivers' projected costs for buying power, Big Rivers' projections of energy and capacity market prices, and outputs of Big Rivers' production cost model runs. The information is 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 In the Matter of: 2020 Integrated Resource Plan of Big Rivers Electric Corporation*, Order, P.S.C. Case No. 2020-00299 (April 14, 2022) (granting confidential treatment to, *inter alia*, 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").

14. 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”).

15. 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.

16. 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.

17. The Confidential Information includes material such as Big Rivers' projected production costs, including production factors such as fuel and other O&M costs, Big Rivers' projected rates to its Members, Big Rivers' projected costs for buying power, Big Rivers' projections of energy and capacity market prices, and outputs of Big Rivers' production cost model runs. If that information is publicly disclosed, market participants would have insight into the prices at which Big Rivers is willing to buy fuel and secure other O&M related goods and services and could therefore manipulate the bidding processes, 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). 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).

18. 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.

19. 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.

20. Public disclosure of 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).

21. 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.

22. 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.

23. Pursuant to 807 KAR 5:001 Section 13(2)(a)(2), Big Rivers requests that the Confidential Information be afforded confidential treatment 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.

24. 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 21st day of February, 2024.

Respectfully submitted,

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Certification

I hereby certify that a copy of this Application and its exhibits has been served electronically on all parties of record through the use of the Commission's electronic filing system, and there are currently no parties that the Commission has excused from participation by electronic means. Pursuant to the Commission's July 22, 2021 Order in Case No. 2020-00085, a paper copy of this filing has not been transmitted to the Commission.

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