

1 COMMONWEALTH OF KENTUCKY
2 BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY
3
4

5 In the Matter of:

6
7 Application of Big Rivers Electric)
8 Corporation for a General) Case No. 2012-00535
9 Adjustment in Rates)

RECEIVED

APR 25 2013

PUBLIC SERVICE
COMMISSION

10
11
12 **PETITION OF BIG RIVERS ELECTRIC CORPORATION FOR CONFIDENTIAL**
13 **PROTECTION**
14

15 1. Big Rivers Electric Corporation (“Big Rivers”) hereby petitions the Kentucky
16 Public Service Commission (“Commission”), pursuant to 807 KAR 5:001 Section 13 and KRS
17 61.878, to grant confidential protection to certain information Big Rivers is filing with its
18 responses to the February 14, 2013 Initial Requests for Information from Ben Taylor and the
19 Sierra Club (collectively, “Sierra Club” or “SC”). The information Big Rivers seeks to protect as
20 confidential is hereinafter referred to as the “Confidential Information.”

21 2. The Confidential Information includes portions of the responses and/or
22 attachments for the responses to Items 7, 10, 11, 17, 19, 22, 25, and 29 of Sierra Club’s Initial
23 Requests for Information (“SC 1-7,” “SC 1-10,” “SC 1-11,” “SC 1-17,” “SC 1-19,” “SC 1-22,”
24 “SC 1-25,” and SC 1-29,” respectively);

25 3. One (1) copy of the hardcopy pages containing Confidential Information, with the
26 Confidential Information highlighted with transparent ink, printed on yellow paper, or otherwise
27 marked “CONFIDENTIAL,” is being filed with this petition. A copy of those pages with the
28 Confidential Information redacted is being filed with the original and each of the ten (10) copies
29 of the responses to the information requests filed with this petition. 807 KAR 5:001 Sections
30 13(2)(a)(3) and 13(2)(b).

1 4. One (1) copy of the electronic attachments containing Confidential Information is
2 contained on the CDs marked “CONFIDENTIAL” that accompany this petition. Because the
3 Confidential Information is inextricably intertwined with non-confidential information in the
4 electronic spreadsheet attachments in response to certain requests, Big Rivers cannot redact only
5 the Confidential Information from the electronic spreadsheet attachments without making other
6 cells in the spreadsheets unusable. Consequently, the entirety of the attachments must be made
7 confidential. The entirety of the CONFIDENTIAL CDs has, therefore, been redacted from the
8 original and each of the ten (10) copies of the responses to the information requests filed with
9 this petition. 807 KAR 5:001 Sections 13(2)(a)(3), 13(2)(b). A motion for deviation from the
10 requirement that Big Rivers file paper copies of the attachments accompanies this petition.

11 5. A copy of this petition with the Confidential Information redacted has been served
12 on all parties to this proceeding. 807 KAR 5:001 Section 13(2)(c). A copy of the Confidential
13 Information has been served on all parties that have signed a confidentiality agreement.

14 6. The Confidential Information is not publicly available, is not disseminated within
15 Big Rivers except to those employees and professionals with a legitimate business need to know
16 and act upon the information, and is not disseminated to others without a legitimate need to
17 know and act upon the information.

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

22 8. As discussed below, the Confidential Information is entitled to confidential
23 protection based upon KRS 61.878(1)(c)(1), which protects “records confidentially disclosed to

1 an agency or required by an agency to be disclosed to it, generally recognized as confidential or
2 proprietary, which if openly disclosed would permit an unfair commercial advantage to
3 competitors of the entity that disclosed the records.” KRS 61.878(1)(c)(1); 807 KAR 5:001
4 Section 13(2)(a)(1).

5 **I. Big Rivers Faces Actual Competition.**

6 9. Big Rivers, as a participant in the credit markets and the wholesale power
7 markets, faces economic competition from other entities.

8 10. Big Rivers competes in the wholesale power market to sell energy it produces in
9 excess of its members’ needs. Big Rivers’ ability to successfully compete in the wholesale
10 power market is dependent upon a combination of its ability to negotiate the maximum price for
11 the power sold and its ability to keep its cost of production as low as possible. If Big Rivers’
12 cost of producing a kilowatt-hour of energy increases, its ability to sell that kilowatt-hour in
13 competition with other utilities is adversely affected.

14 11. Big Rivers also competes for reasonably priced credit in the credit markets, and
15 its ability to compete is directly impacted by its financial results. Any event that adversely
16 affects Big Rivers’ margins will adversely affect its financial results and potentially impact the
17 price it pays for credit. As was described in the proceeding before this Commission in the Big
18 Rivers Unwind Transaction, P.S.C. Case No. 2007-00455, Big Rivers expects to be in the credit
19 markets on a regular basis in the future.¹

20 12. As is evidenced by these economic pressures, Big Rivers has “competitors” as
21 contemplated under KRS 61.878(1)(c)(1) and faces actual competition from other market
22 participants.

¹ See Order dated March 6, 2009, in *In the Matter of: Joint Application of Big Rivers, E.ON, LG&E Energy Marketing, Inc., and Western Kentucky Energy Corporation for Approval to Unwind Lease and Power Purchase Transactions*, P.S.C. Case No. 2007-00455, pages 27-30 and 37-39.

1 **II. The Confidential Information is Generally Recognized as Confidential**
2 **or Proprietary.**
3

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

7 14. The Confidential Information contained in the response to SC 1-7 includes data
8 about Big Rivers' projected off-system sales of excess energy.

9 15. The Confidential Information contained in the attachments to the responses for
10 SC 1-10 and SC 1-11 include proprietary and confidential modeling provided by a third party,
11 and that third party has not given Big Rivers permission to publicly release the information.
12 These attachments are being produced electronically on a CONFIDENTIAL CD pursuant to a
13 motion for deviation.

14 16. The Confidential Information contained in the response to SC 1-17 includes data
15 about Big Rivers' projected off-system sales of excess energy.

16 17. The Confidential Information contained in the attachments for the response to SC
17 1-19 consists of information about Big Rivers' capital construction budget, including detailed
18 information about planned and uncompleted construction projects, budgeted costs for each
19 project, as well as detailed supporting information, reports, and sensitive testing data. It also
20 reveals the content of material previously submitted pursuant to a petition for confidential
21 treatment. These attachments are being produced electronically on a CONFIDENTIAL CD
22 pursuant to a motion for deviation.

23 18. The Confidential Information contained in the response to SC 1-22 includes
24 projected production operating and maintenance ("O&M") and capital costs.

1 19. The Confidential Information contained in the attachment for the response to SC
2 1-25 includes Big Rivers' projected capital expenditures, O&M costs, fuel costs, heat rates,
3 capacity factors, and equivalent forced outage rates.

4 20. The Confidential Information contained in the attachments for the response to SC
5 1-29 includes proprietary and confidential modeling from a third party and related information,
6 and that third party has not given Big Rivers permission to publicly disclose the information.
7 These attachments are being produced electronically on a CONFIDENTIAL CD pursuant to a
8 motion for deviation.

9 21. Information about a company's detailed inner workings is generally recognized as
10 confidential or proprietary. *See, e.g., Hoy v. Kentucky Indus. Revitalization Authority,*
11 907 S.W.2d 766, 768 (Ky. 1995) ("It does not take a degree in finance to recognize that such
12 information concerning the inner workings of a corporation is 'generally recognized as
13 confidential or proprietary'"); *Marina Management Servs. v. Cabinet for Tourism, Dep't of*
14 *Parks,* 906 S.W.2d 318, 319 (Ky. 1995) (unfair commercial advantage arises simply from "the
15 ability to ascertain the economic status of the entities without the hurdles systemically associated
16 with the acquisition of such information about privately owned organizations").

17 22. Additionally, the Commission has consistently recognized that internal strategic
18 planning information is entitled to confidential treatment, as these documents typically relate to
19 the company's economic status and business strategies. *See, e.g., In the Matter of: The Joint*
20 *Application of Duke Energy Corp., Cinergy Corp., Duke Energy Ohio, Inc., Duke Energy*
21 *Kentucky, Inc., Diamond Acquisition Corp., and Progress Energy, Inc., for Approval of the*
22 *Indirect Transfer of Control of Duke Energy Kentucky, Inc.,* P.S.C Case No. 2011-00124 (Dec. 5,
23 2011); *In the Matter of: The Joint Petition of Kentucky-American Water Co., Thames Water*

1 *Aqua Holdings GmbH, RWE Aktiengesellschaft, Thames Water Aqua U.S. Holdings, Inc., and*
2 *Am. Water Works Co., Inc. for Approval of a Change in Control of Kentucky-American Water*
3 *Co., P.S.C. Case No. 2006-00197 (Aug. 29, 2006) (holding that reports from the joint applicants’*
4 *financial advisors and all board of directors minutes and information is confidential because*
5 *competitors could use it to gain unfair competitive advantage).*

6 23. Moreover, the Commission has previously granted confidential protection to
7 information similar to the Confidential Information. *See, e.g.,* letters from the Commission dated
8 July 28, 2011, and December 20, 2011, in *In the Matter of: Application of Big Rivers Electric*
9 *Corporation for a General Adjustment in Rates, P.S.C. Case No. 2011-00036 (granting*
10 *confidential treatment to multi-year forecast);* letter from the Commission dated December 21,
11 2010, in *In the Matter of: The 2010 Integrated Resource Plan of Big Rivers Electric*
12 *Corporation, P.S.C. Case No. 2010-00443 (granting confidential treatment to fuel cost*
13 *projections, revenue projections, market price projections, financial model outputs, etc.);* two
14 letters from the Commission dated December 11, 2012, in *In the Matter of: Application of Big*
15 *Rivers Electric Corporation for Approval of its 2012 Environmental Compliance Plan, for*
16 *Approval of its Amended Environmental Cost Recovery Surcharge Tariff, for Certificates of*
17 *Public Convenience and Necessity, and for Authority to Establish a Regulatory Account, P.S.C.*
18 *Case No. 2012-00063 (granting confidential treatment to Big Rivers’ O&M expenses, and off-*
19 *system sales and revenues).*

20 24. Accordingly, the information for which Big Rivers seeks confidential treatment is
21 recognized as confidential or proprietary under Kentucky law and is entitled to confidential
22 protection as further discussed below.

1 **III. Disclosure of the Confidential Information Would Permit an Unfair**
2 **Commercial Advantage to Big Rivers' Competitors.**

3
4 25. Disclosure of the Confidential Information would permit an unfair commercial
5 advantage to Big Rivers' competitors. As discussed above, Big Rivers faces actual competition
6 in the wholesale power market and in the credit market. It is likely that Big Rivers would suffer
7 competitive injury if that Confidential Information was publicly disclosed, and the information
8 should therefore be subject to confidential treatment.

9 26. Public disclosure of the Confidential Information would reveal detailed
10 information relating to Big Rivers' projected cost of producing power (including projected fuel
11 and other O&M costs); projected off-system sales volumes and prices; and Big Rivers' future
12 need for power or availability of excess power to sell into the market. Access to this information
13 would grant competitors and suppliers an unfair competitive advantage, allowing them to adjust
14 their prices in response to the prices at which Big Rivers is willing to buy or sell power,
15 production inputs and similar commodities.

16 27. Some Confidential Information includes material such as Big Rivers' projections
17 of fuel and material costs. If that information is publicly disclosed, market participants would
18 have insight into the prices at which Big Rivers is willing to buy fuel and other materials. They
19 could then manipulate the bidding process, leading to higher prices for Big Rivers and impairing
20 its ability to compete in the wholesale power and credit markets.

21 28. Potential market power purchasers could use the information related to Big
22 Rivers' projected off-system sales and revenues, generator availability, capital construction
23 budgets, heat rates, and forced outage rates to know when Big Rivers is long on power and could
24 use that information to manipulate their bids, leading to lower revenues to Big Rivers and
25 placing it at an unfair competitive disadvantage in the credit markets.

1 29. Additionally, public disclosure of the fuel prices, other variable cost information,
2 and information about Big Rivers' wholesale power needs would give the power producers and
3 marketers with which Big Rivers competes in the wholesale power market insight into Big
4 Rivers' cost of producing power and need for power and energy during the periods covered by
5 the information. Knowledge of this information would give those power producers and
6 marketers an unfair competitive advantage because they could use that information to potentially
7 underbid Big Rivers in wholesale transactions. It would also give potential suppliers to Big
8 Rivers a competitive advantage because they will be able to manipulate the price of power bid to
9 Big Rivers in order to maximize their revenues, thereby driving up Big Rivers' costs and
10 impairing Big Rivers' ability to compete in the wholesale power and credit markets.

11 30. Public disclosure of the proprietary modeling information from third parties
12 without their consent will also cause competitive harm to Big Rivers. In Case No. 2003-00054,
13 the Commission granted confidential protection for bids submitted to Union Light, Heat &
14 Power ("ULH&P"). ULH&P argued, and the Commission implicitly accepted, that the bidding
15 contractors would not want their bid information publicly disclosed, and that disclosure would
16 reduce the contractor pool available to ULH&P, which would drive up ULH&P's costs, hurting
17 its ability to compete with other gas suppliers. Order dated August 4, 2003, in *In the Matter of:*
18 *Application of the Union Light, Heat and Power Company for Confidential Treatment*, P.S.C.
19 Case No. 2003-00054. Similarly, in *Hoy v. Kentucky Indus. Revitalization Authority*, the
20 Kentucky Supreme Court found that without protection for confidential information provided to
21 a public agency, "companies would be reluctant to apply for investment tax credits for fear the
22 confidentiality of financial information would be compromised. *Hoy*, 907 S.W.2d at 769.

1 31. In Big Rivers' case, the third parties have not given Big Rivers permission to
2 release their proprietary information publicly. Suppliers such as these rely on the confidentiality
3 of their information, and if they believed that the Commission would deny confidential treatment
4 for the confidential information they provide to Big Rivers, it is likely that fewer suppliers would
5 offer their services to Big Rivers. As such, public disclosure of the Confidential Information
6 would likely reduce the pool of suppliers willing to enter into agreements with Big Rivers,
7 resulting in increased prices for Big Rivers and impairing its ability to compete in the wholesale
8 power and credit markets.

9 32. In light of the above, the Confidential Information claimed by Big Rivers should
10 be granted confidential protection.

11 **IV. Time Period**

12 33. Big Rivers requests that the Confidential Information remain confidential for a
13 period of five (5) years from the date of this petition, which should allow sufficient time for the
14 projected data to become historical and sufficiently outdated that it could not be used to
15 determine similar confidential information at that time. 807 KAR 5:001 Section 13(2)(a)(2).

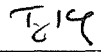
16 **V. Conclusion**

17 34. Based on the foregoing, the Confidential Information is entitled to confidential
18 protection. If the Commission disagrees that Big Rivers is entitled to confidential protection, due
19 process requires the Commission to hold an evidentiary hearing. *Utility Regulatory Comm'n v.*
20 *Kentucky Water Serv. Co., Inc.*, 642 S.W.2d 591 (Ky. App. 1982).

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

3 On this the 25th day of April, 2013.

4 Respectfully submitted,

5
6
7 
8
9 _____
10 James M. Miller
11 Tyson A. Kamuf
12 SULLIVAN, MOUNTJOY, STAINBACK
13 & MILLER, P.S.C.
14 100 St. Ann Street
15 P. O. Box 727
16 Owensboro, Kentucky 42302-0727
17 Phone: (270) 926-4000
18 Facsimile: (270) 683-6694
19 jmilller@smsmlaw.com
20 tkamuf@smsmlaw.com

21 and

22 Edward T. Depp
23 Dinsmore & Shohl LLP
24 101 South Fifth Street
25 Suite 2500
26 Louisville, KY 40202
27 Phone: (502) 540-2347
28 Facsimile: (502) 585-2207
29 tip.depp@dinsmore.com

30
31 *Counsel for Big Rivers Electric Corporation*
32

1
2
3
4
5
6
7
8
9
10
11
12
13

Certificate of Service

I certify that, on the date this petition was filed with the Kentucky Public Service Commission, a true and accurate copy of the foregoing was served by Federal Express or by hand delivery upon the persons listed on the attached service list.

On this the 25th day of April, 2013.

T. J. [Signature]
Counsel for Big Rivers Electric Corporation