

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

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PUBLIC SERVICE  
COMMISSION

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5 In the Matter of:

6  
7 JOINT APPLICATION OF KENERGY )  
8 CORP. AND BIG RIVERS ELECTRIC ) Case No. 2016-00117  
9 CORPORATION FOR APPROVAL )  
10 OF CONTRACTS )

11  
12  
13 **JOINT PETITION FOR CONFIDENTIAL PROTECTION**

14  
15 1. Big Rivers Electric Corporation (“Big Rivers”) and Aleris Rolled Products, Inc.  
16 (“Aleris”) (together, the “Joint Petitioners”) hereby jointly petition the Kentucky Public Service  
17 Commission (“Commission”), pursuant to 807 KAR 5:001 Section 13 and KRS 61.878, to grant  
18 confidential protection to certain information being filed with Big Rivers’ responses to the  
19 Commission Staff’s First Request for Information. The information for which the Joint  
20 Petitioners seek confidential treatment is hereinafter referred to as the “Confidential  
21 Information.” The Confidential Information includes portions of the responses and/or  
22 attachments for the responses to Items 1 and 5 of the Commission Staff’s First Request for  
23 Information (“PSC 1-1,” and “PSC 1-5,” respectively).

24 2. The response to PSC 1-1(d) and the attachment to the response to PSC 1-1(b)  
25 contain Confidential Information. One (1) paper copy of the pages from that response and  
26 attachment that contain Confidential Information, with the Confidential Information  
27 underscored, highlighted with transparent ink, printed on yellow paper, or otherwise marked  
28 “CONFIDENTIAL,” is being filed with this petition in a separate sealed envelope marked  
29 “CONFIDENTIAL.” Ten (10) paper copies of those pages, with the Confidential Information  
30 redacted, are also being filed with this petition. See 807 KAR 5:001 Section 13(2)(a)(3).

1           3.       The attachments to the responses to PSC 1-1(e) and PSC 1-5 also contain  
2 Confidential Information, but these attachments are being provided electronically as requested in  
3 the information requests. One (1) copy of these electronic spreadsheet attachments is contained  
4 in the confidential electronic files that accompany this petition. In the information requests, the  
5 Commission requested that these spreadsheet files be provided electronically with formulas  
6 intact and unprotected. The Confidential Information cannot be redacted from the electronic  
7 spreadsheet attachments without making other cells in the spreadsheets unusable or breaking the  
8 formulas contained therein, and so, the entirety of those attachments must be made confidential.  
9 As such, the entirety of these confidential files have been redacted from each of the  
10 public/redacted versions of the responses to the information requests filed with this petition and  
11 served on the parties to this proceeding. *See* 807 KAR 5:001 Section 13(2)(a)(3). However, one  
12 (1) paper copy of the attachment to the response to PSC 1-1(e) with the Confidential Information  
13 highlighted with transparent ink and ten (10) paper copies of that attachment with the  
14 Confidential Information redacted as required by 807 KAR 5:001 Section 13(2)(a)(3) were filed  
15 with the petition for confidential treatment filed on March 24, 2016, with the application in this  
16 matter. Also, one (1) paper copy of the attachment to the response to PSC 1-5 with the  
17 Confidential Information highlighted with transparent ink and ten (10) paper copies of that  
18 attachment with the Confidential Information redacted as required by 807 KAR 5:001 Section  
19 13(2)(a)(3) were filed with the petition for confidential treatment filed on April 21, 2016, in this  
20 matter.

21           4.       One (1) copy of this petition and one (1) copy of the redacted versions of the  
22 above paper responses and attachments have been served on all parties to this proceeding. 807  
23 KAR 5:001 Section 13(2)(b).

1           5.       If and to the extent the Confidential Information becomes generally available to  
2 the public, whether through filings required by other agencies or otherwise, the Joint Petitioners  
3 will notify the Commission and have its confidential status removed. 807 KAR 5:001 Section  
4 13(10)(b).

5           6.       As discussed below, the Confidential Information is being submitted  
6 confidentially pursuant to 807 KAR 5:001 Section 13(9)(a) and/or is entitled to confidential  
7 protection based upon KRS 61.878(1)(c)(1). 807 KAR 5:001 Section 13(2)(a)(1).

8           I.        **Information Submitted Pursuant to 807 KAR 5:001 Section 13(9)(a)**

9           7.       807 KAR 5:001 Section 13(9)(a) provides, in pertinent part:

10           A person who files any paper that contains material that has previously been  
11 deemed confidential or for which a request or motion for confidential treatment is  
12 pending shall submit one (1) copy of the paper with the adjudged or alleged  
13 confidential material underscored or highlighted, and ten (10) copies of the paper  
14 with those portions redacted; and

15           ...

16           2.       If a request for confidential treatment of the material is pending,  
17 a written notice identifying the person who made the request and  
18 the date on which the request was submitted.

19           8.       The Confidential Information provided in the electronic attachments to the  
20 responses to PSC 1-1(e) and PSC 1-5; the first confidential number in the response to PSC 1-  
21 1(d); and the years listed in the attachment to the response to PSC 1-1(b) is the same information  
22 that Big Rivers and Aleris filed under a joint petition for confidential with the application in this  
23 proceeding on March 24, 2016. That petition for confidential treatment is pending.

24           9.       The Confidential Information provided in the electronic attachments to the  
25 responses to PSC 1-1(e) and PSC 1-5 and the years listed in the attachment to the response to  
26 PSC 1-1(b) is also the same information that was contained in a handout presented at the April  
27

1 21, 2016, informal conference in this matter, which was subject to a joint petition for confidential  
2 treatment filed by Big Rivers and Aleris on April 21, 2016. That petition for confidential  
3 treatment is also pending.

4 10. The Confidential Information provided in the electronic attachments to the  
5 responses to PSC 1-1(e) and PSC 1-5 is also an update of information contained in a schedule  
6 that Big Rivers filed pursuant to a petition for confidential treatment on October 15, 2014 in  
7 P.S.C. Case No. 2014-00166. Big Rivers filed that schedule in response to Item 7 of the  
8 Attorney General's Second Request for Information in P.S.C. Case No. 2014-00166, and that  
9 petition for confidential treatment is also pending.

10 11. 807 KAR 5:001 Section 13(4) provides, "Pending action by the [C]ommission on  
11 a motion for confidential treatment or by its executive director on a request for confidential  
12 treatment, the material specifically identified *shall* be accorded confidential treatment"  
13 (emphasis added). As such, the Confidential Information being submitted confidentially  
14 pursuant to 807 KAR 5:001 Section 13(9)(a) is entitled to confidential treatment while the  
15 petitions for confidential treatment filed in this case and in P.S.C. Case No. 2014-00166 remain  
16 pending, and the Commission should grant confidential treatment to the Confidential Information  
17 for the reasons stated in those petitions.

18 **II. Information entitled to confidential protection based upon KRS 61.878(1)(c)(1)**

19 12. As discussed below, the remainder of the Confidential Information, which is  
20 contained in the response to PSC 1-1(d) and the attachment to the response to PSC 1-1(b), is  
21 entitled to confidential protection based upon KRS 61.878(1)(c)(1), which protects "records  
22 confidentially disclosed to an agency or required by an agency to be disclosed to it, generally  
23 recognized as confidential or proprietary, which if openly disclosed would permit an unfair

1 commercial advantage to competitors of the entity that disclosed the records.” KRS  
2 61.878(1)(c)(1); 807 KAR 5:001 Section 13(2)(a)(1). Subsection A below explains that Big  
3 Rivers operates in a competitive environment; Subection B below shows that the Confidential  
4 Information is generally recognized as confidential or proprietary; and Subection C below  
5 demonstrates that public disclosure of the Confidential Information would permit an unfair  
6 commercial advantage to competitors of Big Rivers. As such, the Commission should grant  
7 confidential treatment to the Confidential Information.

8 **A. Big Rivers Faces Actual Competition**  
9

10 13. Big Rivers competes in the wholesale power market to sell energy excess to its  
11 members’ needs. This includes short-term bilateral energy markets, day-ahead and real-time  
12 energy and ancillary services markets, the annual capacity market, and forward bilateral long-  
13 term wholesale agreements with utilities and industrial customers. Big Rivers’ ability to  
14 successfully compete in these wholesale power markets is dependent upon a combination of its  
15 ability to: 1) obtain the maximum price for the power it sells and the best contract terms, and 2)  
16 keep its cost of production as low as possible. Fundamentally, if Big Rivers’ cost of producing a  
17 kilowatt hour or its business risk increases, its ability to sell that kilowatt hour in competition  
18 with other utilities is adversely affected.

19 14. Big Rivers also competes for reasonably-priced credit in the credit markets, and  
20 its ability to compete is directly impacted by the financial results it obtains and the business risks  
21 it assumes. Any event that adversely affects Big Rivers’ financial results or increases its  
22 business risks may adversely affect the price it pays for credit. A competitor armed with Big  
23 Rivers’ proprietary and confidential information will be able to increase Big Rivers’ costs or  
24 decrease Big Rivers’ revenues, which could in turn affect Big Rivers’ apparent creditworthiness.

1 Impediments to Big Rivers' obtaining the best contract terms could likewise affect its apparent  
2 creditworthiness. A utility the size of Big Rivers that operates generation and transmission  
3 facilities will always have periodic cash and borrowing requirements for both anticipated and  
4 unanticipated needs. Big Rivers expects to be in the credit markets on a regular basis in the  
5 future, and it is imperative that Big Rivers improve and maintain its credit profile.

6 15. Accordingly, Big Rivers has competitors in the wholesale power and capital  
7 markets, and the Confidential Information for which the Joint Petitioners seek confidential  
8 treatment under KRS 61.878(1)(c)(1) should be afforded confidential treatment to prevent the  
9 imposition of an unfair competitive advantage to those competitors.

10 **B. The Confidential Information is Generally Recognized as Confidential**  
11 **or Proprietary**  
12

13 16. The Confidential Information for which the Joint Petitioners seek confidential  
14 treatment under KRS 61.878(1)(c)(1) is generally recognized as confidential or proprietary under  
15 Kentucky law.

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

20 18. The Confidential Information for which the Joint Petitioners seek confidential  
21 treatment under KRS 61.878(1)(c)(1) that is contained in the response to PSC 1-1(d) consists of  
22 Big Rivers' projected capacity prices and revenues, which revenues can be used to estimate Big  
23 Rivers' projected capacity prices. The Confidential Information for which the Joint Petitioners  
24 seek confidential treatment under KRS 61.878(1)(c)(1) that is contained in the attachment to the  
25 response to PSC 1-1(b) consists of Big Rivers' projections of its fuel costs, purchased power

1 costs, environmental costs, rates, and off-system sales. Public disclosure of the Confidential  
2 Information will thus reveal detailed information relating to Big Rivers' projected production  
3 costs and projections of energy and capacity prices and rates, which would give Big Rivers'  
4 suppliers, buyers, and competitors insight into Big Rivers' cost of producing power and the  
5 prices at which Big Rivers is willing to buy or sell power and fuel. The information is also  
6 indicative of the market conditions Big Rivers expects to encounter and its ability to compete  
7 with competitors. The Commission has previously granted confidential treatment to similar  
8 information. *See, e.g., In the Matter of: Application of Big Rivers Electric Corporation for a*  
9 *General Adjustment in Rates*, P.S.C. Case No. 2011-00036 (letters from the Commission dated  
10 July 28, 2011, and December 20, 2011) (granting confidential treatment to multi-year forecast,  
11 including price forecast, production cost and purchased power cost information, and off-system  
12 sales volumes and prices); *In the Matter of: The 2010 Integrated Resource Plan of Big Rivers*  
13 *Electric Corporation*, P.S.C. Case No. 2010-00443 (letter from the Commission dated December  
14 21, 2010) (granting confidential treatment to financial model outputs, including production cost,  
15 purchased power cost, rates, etc.); *In the Matter of: Application of Big Rivers Electric*  
16 *Corporation for Approval of Its Environmental Compliance Plan*, Order, P.S.C. Case No. 2013-  
17 00199 (November 27, 2013) (granting confidential treatment to production cost model, including  
18 projections of fuel and other production costs, purchased power costs, and off-system sales); *In*  
19 *the Matter of: 2014 Integrated Resource Plan of Big Rivers Electric Corporation*, Order, P.S.C.  
20 Case No. 2014-00166 (August 26, 2014) (granting confidential treatment to projected production  
21 costs, rates, market prices, etc.).

1           19.     Based on the foregoing, the Confidential Information for which the Joint  
2     Petitioners seek confidential treatment under KRS 61.878(1)(c)(1) is generally recognized as  
3     confidential or proprietary under Kentucky law.

4           **C.     Disclosure of the Confidential Information Would Permit an Unfair**  
5                   **Commercial Advantage to Competitors of Big Rivers**

6  
7           20.     Disclosure of the Confidential Information for which the Joint Petitioners seek  
8     confidential treatment under KRS 61.878(1)(c)(1) would permit an unfair commercial advantage  
9     to competitors of Big Rivers. As discussed above, Big Rivers faces actual competition in the  
10    wholesale power and credit markets. It is likely that Big Rivers would suffer competitive injury  
11    if the Confidential Information was publicly disclosed.

12          21.     The Confidential Information includes material such as Big Rivers' projections of  
13    fuel and environmental costs, capacity market prices and revenues, rates and revenues, off-  
14    system sales volumes and revenues, and purchased power costs. Public disclosure of that  
15    information would give potential competitors, suppliers, and buyers insight into Big Rivers' cost  
16    of producing power and into the prices at which Big Rivers is willing to buy and sell power and  
17    other commodities such as fuel. In P.S.C. Case No. 2003-00054, the Commission granted  
18    confidential protection to bids submitted to Union Light, Heat & Power ("ULH&P"). ULH&P  
19    argued, and the Commission implicitly accepted, that if the bids it received were publicly  
20    disclosed, contractors on future work could use the bids as a benchmark, which would likely lead  
21    to the submission of higher bids. *In the Matter of: Application of the Union Light, Heat and*  
22    *Power Company for Confidential Treatment*, Order, P.S.C. Case No. 2003-00054 (August 4,  
23    2003). The Commission also implicitly accepted ULH&P's further argument that the higher bids  
24    would lessen ULH&P's ability to compete with other gas suppliers. *Id.* Similarly, if the  
25    Confidential Information was publicly disclosed, potential fuel and power suppliers and



1 purchasers could use the Confidential Information as a benchmark to manipulate Big Rivers'  
2 bidding process, which would lead to higher costs or lower revenues to Big Rivers and which  
3 would place it at an unfair competitive disadvantage in the wholesale power and credit markets.

4 22. Additionally, public disclosure of information about Big Rivers' cost of  
5 producing power would give those power producers and marketers with which Big Rivers'  
6 competes for wholesale power sales an unfair competitive advantage because they could use that  
7 information to potentially underbid Big Rivers in wholesale transactions, leading to lower  
8 revenues to Big Rivers and placing it at an unfair competitive disadvantage in the wholesale  
9 power and credit markets.

10 23. Accordingly, the public disclosure of the Confidential Information for which the  
11 Joint Petitioners seek confidential treatment under KRS 61.878(1)(c)(1) would provide  
12 competitors of Big Rivers with an unfair commercial advantage.

### 13 III. Time Period

14 24. The Joint Petitioners request that the Confidential Information provided in the  
15 electronic attachments to the responses to PSC 1-1(e) and PSC 1-5; the first confidential number  
16 in the response to PSC 1-1(d); and the years listed in the attachment to the response to PSC 1-  
17 1(b) remain confidential for the periods requested in the March 24, 2016, and the April 21, 2016,  
18 petitions for confidential treatment filed in this proceeding and the October 15, 2014, petition for  
19 confidential treatment filed in P.S.C. Case No. 2014-00166.

20 25. The Joint Petitioners request the remainder of the Confidential Information  
21 remain confidential for a period of five (5) years from the date of this petition, which will  
22 provide sufficient time for the information to become sufficiently outdated so as to no longer  
23 cause a risk of competitive harm to Big Rivers. 807 KAR 5:001 Section 13(2)(a)(2).

1 **IV. Conclusion**

2 26. Based on the foregoing, the Confidential Information is entitled to confidential  
3 protection. If the Commission disagrees that the Confidential Information is entitled to  
4 confidential protection, due process requires the Commission to hold an evidentiary hearing. *See*  
5 *Utility Regulatory Com'n v. Kentucky Water Service Co., Inc.*, 642 S.W.2d 591 (Ky. App. 1982).

6 WHEREFORE, the Joint Petitioners respectfully request that the Commission classify  
7 and protect as confidential the Confidential Information.

8 On this the 9<sup>th</sup> day of May, 2016.

9 Respectfully submitted,

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**Certificate of Service**

This is to certify that a true and accurate copy of the foregoing was served by first class mail on the 9<sup>th</sup> day of May, 2016, upon the following:

Hon. Kent Chandler  
Assistant Attorney General  
1024 Capital Center Drive, Suite 200  
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