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PUBLIC SERVICE COMMISSION

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY

In the Matter of:

AN EXAMINATION OF THE APPLICATION OF)	
THE FUEL ADJUSTMENT CLAUSE OF BIG)	CASE NO.
RIVERS ELECTRIC CORPORATION FROM)	2017-00006
NOVEMBER 1, 2014 THROUGH OCTOBER 31,)	
2016)	

PETITION OF BIG RIVERS ELECTRIC CORPORATION FOR CONFIDENTIAL PROTECTION

1. Big Rivers Electric Corporation ("Big Rivers") hereby petitions the Kentucky Public Service Commission ("Commission"), pursuant to 807 KAR 5:001 Section 13 and KRS 61.878, to grant confidential protection to certain information contained in Big Rivers' responses and/or the attachments to Big Rivers' responses to Items 5, 6, 9, 11, 26, and 44 of the information requested in Appendix B to the Commission's February 6, 2017, order in this matter (the "Confidential Information").

2. The Confidential Information consists of Big Rivers' projected fuel requirements in amounts and dollars (Item 5); projected off-system sales amounts and dollars (Item 6); planned outage schedule (Item 9); future off-system sales (Item 11); information about bids for fuel contracts (Item 26); and invoices and information taken from the invoices (Item 44).

3. One (1) copy of the pages containing Confidential Information, with the Confidential Information highlighted with transparent ink, printed on yellow paper, or otherwise marked "CONFIDENTIAL," is being filed with this petition. Ten (10) copies of the pages containing Confidential Information, with the Confidential Information redacted, or a sheet

1 noting the entirety of the attachment has been redacted, are also being filed with this petition.

2 807 KAR 5:001 Sections 13(2)(a)(3), 13(2)(b).

3 4. Please note that certain personal information has been redacted from the
4 attachment to Big Rivers' response to Item 12 pursuant to 807 KAR 5:001 Section 4(10), which
5 relates to privacy protection for filings.

6 5. There are no other parties to this proceeding on which a copy of this petition must
7 be served. 807 KAR 5:001 Section 13(2)(b).

8 6. If and to the extent the Confidential Information becomes generally available to
9 the public, whether through filings required by other agencies or otherwise, Big Rivers will
10 notify the Commission and have its confidential status removed. 807 KAR 5:001 Section
11 13(10)(b).

12 7. As discussed below, the Confidential Information is entitled to confidential
13 protection based upon KRS 61.878(1)(a) and/or KRS 61.878(1)(c)(1). *See* 807 KAR 5:001
14 Section 13(2)(a)(1).

15 **I. Information Protected by KRS 61.878(1)(a)**

16 8. KRS 61.878(1)(a) protects “[p]ublic records containing information of a personal
17 nature where the public disclosure thereof would constitute a clearly unwarranted invasion of
18 personal privacy.” The attachments to Big Rivers' response to Item 44 include two invoices Big
19 Rivers sent to the City of Henderson and reveal usage and related payment obligations. The
20 Confidential Information contained in the response to Item 44 and in the other attachments to the
21 response to Item 44 is information either taken from the confidential invoices or reveals other
22 detailed usage, price, and related information for the City of Henderson. Because public
23 disclosure of this Confidential Information would constitute an unwarranted invasion of privacy,

1 this Confidential Information should be granted confidential treatment. See Ky. Op. Atty. Gen.
2 96-ORD-176 (August 20, 1996) (holding Kroger Company’s utility bills exempt from disclosure
3 under KRS 61.878(1)(a)); *In the Matter of: Application of Kentucky Utilities Company for an*
4 *Adjustment of its Electric Rates*, Order, P.S.C. Case No. 2012-00221 (July 25, 2013) (holding
5 customer names, account numbers, and usage information exempt from disclosure under KRS
6 61.878(1)(a)). In fact, the Commission has granted confidential treatment to similar invoices and
7 information for the City of Henderson for previous months. See *In the Matter of: Application of*
8 *Big Rivers Electric Corporation for a Declaratory Order*, Order, P.S.C. Case No. 2016-00278
9 (January 9, 2017).

10 **II. Information Protected by KRS 61.878(1)(c)(1)**

11 9. KRS 61.878(1)(c)(1) protects “records confidentially disclosed to an agency or
12 required by an agency to be disclosed to it, generally recognized as confidential or proprietary,
13 which if openly disclosed would permit an unfair commercial advantage to competitors of the
14 entity that disclosed the records.” KRS 61.878(1)(c)(1); 807 KAR 5:001 Section 13(2)(a)(1).
15 Section A below explains that Big Rivers operates in competitive environments in the wholesale
16 power market and in the credit market. Section B below shows that the Confidential Information
17 is generally recognized as confidential or proprietary. Section C below demonstrates that public
18 disclosure of the Confidential Information would permit an unfair commercial advantage to Big
19 Rivers’ competitors.

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

21 10. As a generation and transmission cooperative, Big Rivers competes in the
22 wholesale power market. This includes not only the short-term bilateral energy market, the day-
23 ahead and real time energy and ancillary services markets, and the capacity market to which Big

1 Rivers has access by virtue of its membership in Midcontinent Independent System Operator,
2 Inc. (“MISO”), but also forward bilateral long-term agreements and wholesale agreements with
3 utilities and industrial customers. Big Rivers’ ability to successfully compete in the market is
4 dependent upon a combination of its ability to: 1) obtain the maximum price for the power it
5 sells, and 2) keep its cost of production as low as possible. Fundamentally, if Big Rivers’ cost of
6 producing a unit of power increases, its ability to sell that unit in competition with other utilities
7 is adversely affected.

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

18 12. Accordingly, Big Rivers has competitors in both the power and capital markets,
19 and its Confidential Information should be protected to prevent the imposition of an unfair
20 competitive advantage.

21

1 December 20, 2011, in *In the Matter of: Application of Big Rivers Electric Corporation for a*
2 *General Adjustment in Rates*, P.S.C. Case No. 2011-00036 (granting confidential treatment to
3 multi-year forecast); letter from the Commission dated December 21, 2010, in *In the Matter of:*
4 *The 2010 Integrated Resource Plan of Big Rivers Electric Corporation*, P.S.C. Case No. 2010-
5 00443 (granting confidential treatment to fuel cost projections, market price projections,
6 financial model outputs, etc.); letter from the Commission dated July 20, 2010, in Administrative
7 Case No. 387 (granting confidential treatment to a list of future scheduled outages, which can
8 give competitors insight into Big Rivers' wholesale power needs); two letters from the
9 Commission dated December 11, 2012, in *In the Matter of: Application of Big Rivers Electric*
10 *Corporation for Approval of its 2012 Environmental Compliance Plan, for Approval of its*
11 *Amended Environmental Cost Recovery Surcharge Tariff, for Certificates of Public Convenience*
12 *and Necessity, and for Authority to Establish a Regulatory Account*, P.S.C. Case No. 2012-00063
13 (granting confidential treatment to Big Rivers' off-system sales).

14 17. Big Rivers' response to Item 26 discusses an oral solicitation for petroleum coke
15 and contains confidential bids supplied by fuel suppliers. The Commission has often found that
16 similar information relating to competitive bidding is generally recognized as confidential and
17 proprietary. *See, e.g., In the Matter of: Application of the Union Light, Heat and Power*
18 *Company for Confidential Treatment*, Order, P.S.C. Case No. 2003-00054 (August 4, 2003)
19 (finding that bids submitted to a utility were confidential).

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

1 know and act upon the information. As such, the Confidential Information is generally
2 recognized as confidential and proprietary.

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

5 19. Public disclosure of the Confidential Information would permit an unfair
6 commercial advantage to Big Rivers' competitors. As discussed above, Big Rivers faces actual
7 competition in both the short- and long-term wholesale power markets and in the credit markets.
8 It is likely that Big Rivers' ability to compete in these markets would be adversely affected if the
9 Confidential Information was publicly disclosed, and Big Rivers seeks protection from such
10 competitive injury.

11 20. The Confidential Information includes material such as Big Rivers' projections of
12 fuel and market power prices and Big Rivers' future off-system sales. If that information is
13 publicly disclosed, potential fuel and power suppliers to Big Rivers and buyers of power from
14 Big Rivers would have insight into the prices Big Rivers is willing to buy and sell those items at
15 and could manipulate the bidding process, leading to higher prices or lower revenues for Big
16 Rivers and impairing its ability to compete in the wholesale power and credit markets. In P.S.C.
17 Case No. 2003-00054, the Commission granted confidential protection to bids submitted to
18 Union Light, Heat & Power ("ULH&P"). ULH&P argued, and the Commission implicitly
19 accepted, that if the bids it received were publicly disclosed, contractors on future work could
20 use the bids as a benchmark, which would likely lead to the submission of higher bids. *In the*
21 *Matter of: Application of the Union Light, Heat and Power Company for Confidential*
22 *Treatment*, Order, P.S.C. Case No. 2003-00054 (August 4, 2003). The Commission also
23 implicitly accepted ULH&P's further argument that the higher bids would lessen ULH&P's
24 ability to compete with other gas suppliers. *Id.* Similarly, potential fuel and power suppliers and

1 power purchasers manipulating Big Rivers' bidding process would lead to higher costs or lower
2 revenues to Big Rivers and would place it at an unfair competitive disadvantage in the wholesale
3 power market and credit markets.

4 21. Potential market power purchasers could use the information related to Big
5 Rivers' projected off-system sales amounts, fuel requirements, and planned outages to know
6 when and to the extent Big Rivers is long on power and could use that information to manipulate
7 their bids, leading to lower revenues to Big Rivers and placing it at an unfair competitive
8 disadvantage in the credit markets.

9 22. Additionally, public disclosure of the fuel prices and information about Big
10 Rivers' wholesale power needs would give the power producers and marketers with which Big
11 Rivers competes in the wholesale power market insight into Big Rivers' cost of producing power
12 and need for power and energy during the periods covered by the information. Knowledge of
13 this information would give those power producers and marketers an unfair competitive
14 advantage because they could use that information to potentially underbid Big Rivers in
15 wholesale transactions.

16 23. With regard to the bid information, in P.S.C. Case No. 2003-00054, the
17 Commission implicitly accepted ULH&P's argument that the bidding contractors would not
18 want their bid information publicly disclosed, and that disclosure would reduce the contractor
19 pool available to ULH&P, which would drive up ULH&P's costs, hurting its ability to compete
20 with other gas suppliers. *In the Matter of: Application of the Union Light, Heat and Power*
21 *Company for Confidential Treatment*, Order, P.S.C. Case No. 2003-00054 (August 4, 2003).
22 Similarly, in *Hoy v. Kentucky Indus. Revitalization Authority*, the Kentucky Supreme Court
23 found that without protection for confidential information provided to a public agency,

1 “companies would be reluctant to apply for investment tax credits for fear the confidentiality of
2 financial information would be compromised. *Hoy v. Kentucky Indus. Revitalization Authority*,
3 907 S.W.2d 766, 769 (Ky. 1995).

4 24. In Big Rivers’ case, if confidential treatment of the bid information is denied,
5 potential bidders would know that their bids would be publicly disclosed, which could reveal
6 information to their competitors about their competitiveness. Because many companies would
7 be reluctant to have such information disclosed, public disclosure of Big Rivers’ bid tabulation
8 sheets would likely suppress the competitive bidding process and reduce the pool of bidders
9 willing to bid to supply Big Rivers’ fuel needs, driving up Big Rivers’ fuel costs (which could
10 then drive up the cost of credit to Big Rivers) and impairing its ability to compete in the
11 wholesale power market.

12 25. Accordingly, the public disclosure of the information that Big Rivers seeks to
13 protect pursuant to KRS 61.878(1)(c)(1) would provide Big Rivers’ competitors with an unfair
14 commercial advantage.

15 III. Time Period

16 26. Big Rivers requests that the confidential bid information contained in the response
17 to Item 26 and the confidential invoices and related information contained in the response and
18 the attachments to the response to Item 44 remain confidential indefinitely for the reasons stated
19 above. Big Rivers requests that the remaining Confidential Information (which is contained in
20 the responses to Items 5, 6, 9, and 11) remain confidential for a period of five (5) years from the
21 date of this petition, which will allow sufficient time for the projected data to become sufficiently
22 outdated that it could not be used to determine similar confidential information at that time or to
23 competitively disadvantage Big Rivers. 807 KAR 5:001 Section 13(2)(a)(2).


1 **IV. Conclusion**

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

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

8 On this the 17th day of February, 2017.

9 Respectfully submitted,

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