

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AN ELECTRONIC EXAMINATION OF THE)	
APPLICATION OF THE FUEL ADJUSTMENT)	CASE NO.
CLAUSE OF BIG RIVERS ELECTRIC)	2022-00268
CORPORATION FROM NOVEMBER 1, 2021)	
THROUGH APRIL 30, 2022)	

ORDER

This matter arises on two motions filed by Big Rivers Electric Corporation (BREC). On September 30, 2022, BREC filed a motion, pursuant to 807 KAR 5:001E, Section 13, and KRS 61.878, requesting that the Commission grant confidential treatment for five years for redactions from the direct testimony of Natalie R. Hankins and for an indefinite period for information provided in response to Commission Staff's First Request for Information (Staff's First Request), Items 12 and 13.

On October 28, 2022, BREC filed a motion, pursuant to 807 KAR 5:001E, Section 13, and KRS 61.878, requesting that the Commission grant confidential treatment for five years for redactions from its responses to Commission Staff's Second Request for Information (Staff's Second Request), Item 5.

The Commission is a public agency subject to Kentucky's Open Records Act, which requires that all public records "be open for inspection by any person, except as otherwise provided by KRS 61.870 to 61.884."¹ In support of its motions, BREC argued for the application of KRS 61.878(1)(c)(1), which exempts from disclosure "[r]ecords

¹ KRS 61.872(1).

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,” and KRS 61.878(1)(a), which exempts “[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.” Exceptions to the free and open examination of public records contained in KRS 61.878 should be strictly construed.² The party requesting that materials be treated confidentially has the burden of establishing that one of the exceptions is applicable.³

SEPTEMBER 30, 2022 MOTION

The redacted portions of the direct testimony of Natalie R. Hankins included BREC’s projected capacity position. BREC’s response to Staff’s First Request, Item 12 consisted of terms of special contracts and other non-member sales. BREC’s response to Staff’s First Request, Item 13, included identities of individual commercial retail customers paired with their unredacted usage data. BREC argued that parties to special contracts and other non-member sales would be reluctant to have sales information disclosed, and disclosure would likely reduce the pool of parties willing to negotiate. BREC also argued that these parties and individual retail customers are entitled to protect their private information pursuant to KRS 61.878(1)(a).

Having considered the motion and the material at issue, the Commission finds that BREC’s motion should be granted. Projected capacity position, if disclosed, would aid

² See KRS 61.871.

³ 807 KAR 5:001, Section 13(2)(c).

BREC's competitors in the energy market.⁴ The terms of special contracts and other non-member sales should be granted confidential treatment because public disclosure of this information could harm BREC in negotiating future special contracts.⁵ In accordance with Commission precedent, confidential treatment for special contract terms and non-member sales shall be limited to ten years, at which time this data will be obsolete because each purchaser's demand will have changed sufficiently.⁶ Regarding individual member usage data, the identified commercial customers participate in a competitive environment and disclosure of cost and consumption information puts them at a disadvantage, which in turn could disadvantage BREC by discouraging companies from locating or expanding in BREC's territory.⁷ The Commission finds that the designated materials, are records that meet the criteria for confidential treatment and are exempted from public disclosure for ten years pursuant to KRS 61.878(1)(c)(1) and 807 KAR 5:001E, Section 13.

OCTOBER 28, 2022 MOTION

BREC's response to Staff's Second Request, Item 5, included redacted fuel bid strategy. BREC argued that this information should remain confidential because competitors or suppliers could use this information to manipulate bids or unfairly compete in energy markets.

⁴ See Case No. 2020-00299, *Electronic 2020 Integrated Resource Plan of Big Rivers Electric Corporation* (Ky. PSC Apr. 14, 2022), Order at 7-8.

⁵ See Case No. 2016-00117, *Joint Application of Kenergy Corp. and Big Rivers Electric Corporation for Approval of Contracts* (Ky. PSC Dec. 22, 2021), Order at 2.

⁶ See Case No. 2016-00117, (Ky. PSC Dec. 22, 2021), Order at 2.

⁷ See Case No. 2022-00041, *An Electronic Examination of The Application of The Fuel Adjustment Clause of Big Rivers Electric Corporation from May 1, 2021 Through October 31, 2021* (Ky. PSC Jan. 10, 2023), Order at 4.

Having considered the motion and the material at issue, the Commission finds that BREC's motion should be granted. Disclosure of coal solicitation information could affect future bidding, allowing competitors to gain an unfair advantage by having access to BREC's coal procurement strategy.⁸ The Commission finds that the designated materials, are records that meet the criteria for confidential treatment and are exempted from public disclosure for ten years pursuant to KRS 61.878(1)(c)(1) and 807 KAR 5:001E, Section 13.

IT IS THEREFORE ORDERED that:

1. BREC's motions for confidential treatment are granted.
2. The designated material granted confidential treatment by this Order shall not be placed in the public record or made available for public inspection for ten years or until further Order of this Commission.
3. Use of the designated material granted confidential treatment by this Order in any Commission proceeding shall comply with 807 KAR 5:001E, Section 13(9).
4. BREC shall inform the Commission if the designated material granted confidential treatment by this Order becomes publicly available or no longer qualifies for confidential treatment.
5. If a nonparty to this proceeding requests to inspect the material granted confidential treatment by this Order and the period during which the material has been granted confidential treatment has not expired, BREC shall have 30 days from receipt of written notice of the request to demonstrate that the material still falls within the exclusions

⁸ See Case No. 2018-00019, *Electronic Examination of the Application of the Fuel Adjustment Clause of East BREC Cooperative, Inc. from May 1, 2017 Through October 31, 2017* (Ky. PSC May 29, 2018), Order at 2.

from disclosure requirements established in KRS 61.878. If BREC is unable to make such demonstration, the requested material shall be made available for inspection. Otherwise, the Commission shall deny the request for inspection.


6. The Commission shall not make the requested material available for inspection for 30 days from the date of service of an Order finding that the material no longer qualifies for confidential treatment in order to allow BREC to seek a remedy afforded by law.

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PUBLIC SERVICE COMMISSION


Chairman

Vice Chairman


Commissioner



ATTEST:


Executive Director

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