

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

ORDER

On January 5, 2024, Big Rivers Electric Corporation (BREC) filed a motion, pursuant to 807 KAR 5:001, Section 13, and KRS 61.878, requesting that the Commission grant confidential protection for five years for certain responses to BREC’s responses to Commission Staff’s First Request for Information (Staff’s First Request), Attorney General’s First Request for Information (Attorney General’s First Request), and Joint Intervenors’ First Request for Information (Joint Intervenor’s First Request). For information related to vulnerabilities in BREC’s transmission system¹ BREC asked for confidential treatment for an indefinite period.

LEGAL STANDARD

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.”² Exceptions to the free and open examination of public records contained in KRS 61.878 should be strictly construed.³ The

¹ BREC’s Response to Staff’s First Request, Item 5.

² KRS 61.872(1).

³ See KRS 61.871.

party requesting that materials be treated confidentially has the burden of establishing that one of the exceptions is applicable.⁴ KRS 61.878(1)(a) exempts from disclosure “[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.”⁵ KRS 61.878(1)(c)(1) provides an exception to the requirement for public disclosure of records that are “generally recognized as confidential and proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records.”⁶ KRS 61.878(1)(m) permits an exception for records that if disclosed would have a reasonable likelihood of threatening the public safety by exposing a vulnerability in preventing, protecting against, mitigating, or responding to a terrorist act.⁷ The exemption is limited to certain types of records, including:

(f) Infrastructure records that expose a vulnerability referred to in this subparagraph through the disclosure of the location, configuration, or security of critical systems, including public utility critical systems. These critical systems shall include but not be limited to information technology, communication, electrical, fire suppression, ventilation, water, wastewater, sewage, and gas systems.⁸

(g) the following records when their disclosure will expose a vulnerability referred to in this subparagraph: detailed drawings, schematics, maps or specifications of structural elements . . . of any building or facility owned, occupied, leased, or maintained by a public agency.⁹

⁴ 807 KAR 5:001, Section 12(2)(c).

⁵ KRS 61.878(1)(a).

⁶ KRS 61.878(1)(c)(1).

⁷ KRS 61.878(1)(m)(1).

⁸ KRS 61.878(1)(m)(1)(f).

⁹ KRS 61.878(1)(m)(1)(g).

A terrorist act is defined as including a criminal act intended to “[d]isrupt a system” identified in the above.¹⁰

DISCUSSION

In support of its motion, BREC argued that information related to vulnerabilities in its transmission system,¹¹ should be afforded indefinite confidential treatment pursuant to KRS 61.878(1)(m).¹² BREC argued that disclosure of this information would provide the public with a tool to analyze, discover, or create vulnerabilities in BREC’s transmission system, thereby threatening public safety.¹³ BREC noted that the Commission has previously granted confidential treatment to similar information.¹⁴

BREC also argued that the following information should be confidential pursuant to KRS 61.878(1)(c)(1): a descriptor for a commercial pricing node¹⁵; information derived from a 2022 primary research survey of BREC’s residential members, including appliances¹⁶; terms of the Owensboro Municipal Utility (OMU) and Kentucky Municipal Energy Agency (KYMEA) Contracts and Contract End Date¹⁷; MISO seasonal accredited

¹⁰ KRS 61.878(1)(m)(2)(b).

¹¹ BREC’s Response to Staff’s First Request, Item 5.

¹² BREC’s Motion for Confidential Treatment (filed Jan. 5, 2024) at 2.

¹³ BREC’s Motion for Confidential Treatment at 2–3.

¹⁴ BREC’s Motion for Confidential Treatment at 3, citing Case No. 2022-00433 *Electronic Application of Big Rivers Electric Corporation for a Certificate of Public Convenience and Necessity Authorizing Construction of a New Transmission Operations Center and an Order Authorizing Big Rivers to Dispose of Property* (Ky. PSC September 7, 2023), Order.

¹⁵ BREC’s Response to Staff’s First Request, Item 8.

¹⁶ BREC’s Response to Staff’s First Request, Item 12.

¹⁷ BREC’s Response to Staff’s First Request, Items 21 and 24, including Attachments.

capacity values and associated planning reserve margin requirements¹⁸; updated capacity position information¹⁹; projected system capacity, peak load plus planning reserve margin, and surplus/deficient capacity²⁰; capacity forecasts including capacity surplus/deficient and firm capacity by fuel type²¹; information related to the Unbridled Solar, LLC contract and the projected completion date of the contract²²; data containing modeling input and output files and operational data²³; Machinery Risk and Property Risk Assessments²⁴; historical annual data by unit from 2018 to present²⁵; projected annual data by unit or plant from 2023 through 2037²⁶; portions of the Letters of Interest concerning federal loans and funding, a description of the carbon capture and storage system, cost effectiveness tests, and project timeline²⁷; projected new customer and energy sales- customer names²⁸; gross marginal analyses and historical and projected

¹⁸ BREC's Response to Staff's First Request, Item 24.

¹⁹ BREC's Response to Staff's First Request, Item 24, Exhibit.

²⁰ BREC's Response to Staff's First Request, Item 37, Exhibit.

²¹ BREC's Response to Staff's First Request, Items 46 and 51.

²² BREC's Response to the Attorney General's First Request, Item 3.

²³ BREC's Response to Joint Intervenors' First Request, Item 1.

²⁴ BREC's Response to Joint Intervenors' First Request, Item 8.

²⁵ BREC's Response to Joint Intervenors' First Request, Item 10.

²⁶ BREC's Response to Joint Intervenors' First Request, Item 11.

²⁷ BREC's Response to Joint Intervenors' First Request, Item 13.

²⁸ BREC's Response to Joint Intervenors' First Request, Item 19.

for customer contracts²⁹; Block Mining maximum demand and firm capacity³⁰; and BREC's projected avoided cost values from the DSM study.³¹

BREC argued that it competes in the wholesale power market, including short-term bilateral energy market, day-ahead, real-time energy, and ancillary services market, and capacity markets, which is dependent on its ability to obtain the maximum price for the items it sells and keeping its cost of production or purchase as low as possible.³² BREC stated that it also competes in credit markets; consequently, a competitor armed with BREC's propriety and confidential information would be able to increase BREC's costs or decrease BREC's revenues, which, in turn, affect BREC's creditworthiness.³³ BREC argued that if the information is disclosed, it could give market participants insight into the prices at which BREC is willing to buy fuel and secure other operations and maintenance related goods and services and therefore could manipulate the bidding processes.³⁴ BREC stated that disclosure of this information would provide insight into cost of producing and acquiring power, indicate the market conditions BREC expects to encounter, and the inner workings of the company.³⁵

BREC stated that this information should be protected to prevent the imposition of an unfair competitive advantage, and competitors having access to information would be

²⁹ BREC's Response to Joint Intervenors' First Request, Item 23.

³⁰ BREC's Response to Joint Intervenors' First Request, Item 28.

³¹ BREC's Response to Joint Intervenors' First Request, Item 31(b)(i).

³² BREC's Motion for Confidential Treatment at 3.

³³ BREC's Motion for Confidential Treatment at 4.

³⁴ BREC's Motion for Confidential Treatment at 4.

³⁵ BREC's Motion for Confidential Treatment at 7–9.

disadvantageous to BREC and its Member-Owners.³⁶ BREC also argued that the ability to negotiate the most advantageous power purchases agreements and then offer competitive prices to BREC's members, companies interested in expanding in Kentucky, and potential new members is fundamental to BREC's continued success.³⁷ BREC cited that the Commission has previously granted confidential treatment to similar information.³⁸

Having considered the motion and the material at issue, the Commission finds that BREC's motion should be granted, in part, and denied, in part. The Commission finds that the information related to vulnerabilities in its transmission system³⁹ are records that meet the criteria for confidential treatment and should be exempted from public disclosure pursuant to KRS 61.878(1)(m) and 807 KAR 5:001, Section 13. Disclosure of this information would give the public an indication of potential vulnerabilities within BREC's system and would have a reasonable likelihood of threatening public safety. The Commission previously granted confidential treatment for similar information as cited to by BREC.⁴⁰

³⁶ BREC's Motion for Confidential Treatment at 4–5.

³⁷ BREC's Motion for Confidential Treatment at 5.

³⁸ BREC's Motion for Confidential Treatment (filed Jan. 5, 2024) at 8–10, citing Case No. 2020-00299, *Electronic 2020 Integrated Resource Plan of Big Rivers Electric Corporation* (Ky. PSC Apr. 14, 2022) (note that BREC cited this case as precedent, despite the Order explicitly stating that it shall not be used as precedent in subsequent proceedings); Case No. 2018-00195, *Electronic 2018 Integrated Resource Plan of Duke Kentucky Inc.* (Ky. PSC. Sept. 3, 2019), Order; Case No. 2003-00054, *Application of the Union Light, Heat and Power Company for Confidential Treatment* (Ky PSC Aug. 4, 2003), Order.

³⁹ BREC's Response to Staff's First Request, Item 5.

⁴⁰ See Case. No. 2022-00433, *Electronic Application of Big Rivers Electric Corporation for a Certificate of Public Convenience and Necessity Authorizing Construction of a New Transmission Operations Center and an Order Authorizing Big Rivers to Dispose of Property* (Ky. PSC Sept. 7, 2023), Order at 3.

The Commission finds that the designated material contained in BREC's responses to Staff's First Request, Attorney General's First Request, and Joint Intervenors' First Request, except for the commercial pricing node descriptor contained in BREC's response to Staff's First Request, Item 8, are records that meet the criteria for confidential treatment and should be exempted from public disclosure pursuant to KRS 61.878(1)(c)(1) and 807 KAR 5:001, Section 13. The Commission finds that disclosure of these items would provide a competitive disadvantage for BREC by hindering BREC's ability to compete in the wholesale marketplace and would reveal inner workings of BREC. The Commission has previously found confidential treatment was warranted for similar information.⁴¹

⁴¹ See Case No. 2016-00306, *Filing for the Purchase and Sale of Firm Capacity and Energy Between Big Rivers Electric Corporation and the Kentucky Municipal Energy Agency* (Ky. PSC Jan. 02, 2019), Order (granting confidential treatment to KYMEA contract terms); Case No. 2023-00045, *Electronic Tariff Filing of Big Rivers Electric Corporation and Kenergy Corp. For Approval of a Special Contract with Economic Development Rates with Pratt Paper (KY), LLC* (Ky. PSC Feb. 23, 2023), Order (granting confidential treatment to internal projections such as annual capacity positions); Case No. 2023-00312, *Electronic Tariff Filing of Big Rivers Electric Corporation and Kenergy Corp. to Revise the Large Industrial Customer Standby Service Tariff* (Ky. PSC Feb. 29, 2024), Order at 2-3 (granting confidential treatment to MISO's seasonal accredited capacity); Case No. 2022-00181, *Electronic Application of Kentucky Power Company for an Order Approving the Company's Amended Tariff E.D.R. to Increase Capacity Available to be Serviced Under the Tariff and for Required Deviations from the Commission's September 24, 1990 Order in Administrative Case No. 327* (Ky. PSC Dec. 13, 2023), Order (granting confidential treatment to forecasted capacity information); Case No. 2022-00296, *Electronic Application of Big Rivers Electronic Corporation for Approval of Amendment to Power Purchase Agreement* (Ky. PSC Nov. 7, 2022), Order (granting confidential treatment for specific terms of BREC's agreement with Unbridled Solar, including the start date of the contract); Case No. 2018-00195, *Electronic 2018 Integrated Resource Plan of Duke Energy Kentucky, Inc* (Ky. PSC September 3, 2019) Order (granting confidential treatment to supply-side screening, resource evaluations, and third party owned and licensed modeling tools); Case No. 2019-00096, *Electronic 2019 Integrated Resource Plan of East Kentucky Power Cooperative, Inc* (Ky. PSC Jul. 30, 2020), Order (granting confidential treatment to presentation that included modeling process and data input sources); Case No. 2018-00146, *Application of Big Rivers Electric Corporation for Termination of Contracts and a Declaratory Order and for Authority to Establish a Regulatory Asset* (Ky. PSC Jan. 11, 2019), Order (granting confidential treatment to BREC's projected energy and capacity sales); Case No. 2016-00306, *Filing for the Purchase and Sale of Firm Capacity and Energy Between Big Rivers Electric Corporation and the Kentucky Municipal Energy Agency* (Ky. PSC Jan. 02, 2019), Order granting confidential treatment to KYMEA contract terms, including pricing information). See Case No. 2022-00372, *Electronic Application of Duke Energy Kentucky, Inc. for (1) an Adjustment of Electric Rates; (2) Approval of New Tariffs; (3) Approval of Acct. Practices to Establish Regulatory Assets & Liabilities; & (4) All Other Required Approvals & Relief*, (Ky. PSC Oct. 30, 2023), Order (granting confidential treatment to firm capacity contract information); Case No. 2022-00251, *Electronic Application of Duke Energy Kentucky, INC*

The Commission further finds that the request for confidential treatment should be denied for the commercial price descriptor for the delivery point.⁴² The redaction is as follows: “KYMEA or its scheduling agent notifies of the amount to be delivered to the [[redacted]] commercial pricing node, up to the full contract amount, and the hours of delivery for the next operating day.”⁴³ BREC does not meet its burden of proof pursuant to 807 KAR 5:001, Section 13(1)(c), by explaining how disclosure of the redacted information would result to a commercial disadvantage to customers or provide the necessary specific grounds for why this information should be confidential. Instead, BREC makes a general argument for all the items contained in the motion it is asking confidential treatment for under KRS 61.878(1)(c)(1). Therefore, the designated material does not meet the criteria for confidential treatment and should not be exempted from public disclosure pursuant to KRS 61.878(1)(c)(1) and 807 KAR 5:001, Section 13.

IT IS THEREFORE ORDERED that:

1. BREC’s January 5, 2024 motion for confidential treatment for designated material contained in BREC’s responses to Staff’s First Request, Attorney General’s First Request, and Joint Intervenors’ First Request is granted, in part, and denied, in part.
2. BREC’s January 5, 2024 motion for confidential treatment for the designated material contained in BREC’s responses to Staff’s First Request, Attorney General’s First Request, and Joint Intervenors’ First Request, except for the commercial

to Amend its Demand Side Management Programs (Ky. PSC September 21, 2023), Order (granting confidential treatment to DSM modeling inputs and projected avoided costs).

⁴² BREC’s Response to Staff’s First Request, Item 8.

⁴³ BREC’s Response to Staff’s First Request, Item 8.

pricing node descriptor contained in BREC's response to Staff's First Request, Item 8, is granted.

3. BREC's January 5, 2024 motion for confidential treatment for commercial pricing node descriptor contained in BREC's response to Staff's First Request, Item 8, is denied.

4. The designated material granted confidential treatment by this Order shall not be placed in the public record or made available for public inspection for five years except for information related to vulnerabilities in BREC's transmission system which is granted confidential treatment indefinitely or until further order of this Commission.

5. Use of the designated material granted confidential treatment by this Order in any Commission proceeding shall comply with 807 KAR 5:001, Section 13(9).

6. If the designated material granted confidential treatment by this Order becomes publicly available or no longer qualifies for confidential treatment, BREC shall inform the Commission and file with the Commission an unredacted copy of the designated material.

7. 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, shall have 30 days from receipt of written notice of the request to demonstrate that the material still falls within the exclusions 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.

8. The Commission shall not make the requested material for which confidential treatment was granted 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.

9. The designated material denied confidential treatment by this Order is not exempt from public disclosure and shall be placed in the public record and made available for public inspection.

10. If BREC objects to the Commission's determination that the requested material not be granted confidential treatment, it must seek either rehearing pursuant to KRS 278.400 or judicial review of this Order pursuant to KRS 278.410. Failure to exercise either of these statutory rights will be deemed as agreement with the Commission's determination of which materials shall be granted confidential treatment.

11. Within 30 days of the date of service of this Order, BREC shall file a revised version of the designated material for which confidential treatment was denied, reflecting as unredacted the information that has been denied confidential treatment.

12. The designated material for which BREC's request for confidential treatment has been denied shall neither be placed in the public record nor made available for inspection for 30 days from the date of service of this Order to allow BREC to seek a remedy afforded by law.

PUBLIC SERVICE COMMISSION



Chairman



Vice Chairman



Commissioner



ATTEST:



Executive Director

*Angela M Goad
Assistant Attorney General
Office of the Attorney General Office of Rate
700 Capitol Avenue
Suite 20
Frankfort, KENTUCKY 40601-8204

*Jody M Kyler Cohn
Boehm, Kurtz & Lowry
36 East Seventh Street
Suite 1510
Cincinnati, OHIO 45202

*J. Michael West
Office of the Attorney General Office of Rate
700 Capitol Avenue
Suite 20
Frankfort, KENTUCKY 40601-8204

*Ashley Wilmes
Kentucky Resources Council, Inc.
Post Office Box 1070
Frankfort, KENTUCKY 40602

*Joe F. Childers
Childers & Baxter PLLC
300 Lexington Building, 201 West Sho
Lexington, KENTUCKY 40507

*Honorable Michael L Kurtz
Attorney at Law
Boehm, Kurtz & Lowry
36 East Seventh Street
Suite 1510
Cincinnati, OHIO 45202

*Byron Gary
Kentucky Resources Council, Inc.
Post Office Box 1070
Frankfort, KENTUCKY 40602

*John Horne
Office of the Attorney General Office of Rate
700 Capitol Avenue
Suite 20
Frankfort, KENTUCKY 40601-8204

*Big Rivers Electric Corporation
710 West 2nd Street
P. O. Box 20015
Owensboro, KY 42304

*Evan Buckley
Dinsmore & Shohl, LLP
101 South Fifth Street
Suite 2500
Louisville, KENTUCKY 40202

*John Lavanga
Dinsmore & Shohl, LLP
City Center, 100 W. Main Street
Suite 900
Lexington, KENTUCKY 40507

*Senthia Santana
Big Rivers Electric Corporation
710 West 2nd Street
P. O. Box 20015
Owensboro, KY 42304

*Tom Fitzgerald
Kentucky Resources Council, Inc.
Post Office Box 1070
Frankfort, KENTUCKY 40602

*Kate Huddleston
Sierra Club Environmental Law Program
2101 Webster Street
Suite 1300
Oakland, CALIFORNIA 94612

*Edward T Depp
Dinsmore & Shohl, LLP
101 South Fifth Street
Suite 2500
Louisville, KENTUCKY 40202

*Gregory B Ladd
Office of the Attorney General Office of Rate
700 Capitol Avenue
Suite 20
Frankfort, KENTUCKY 40601-8204

*Honorable Kerry E Ingle
Attorney at Law
Dinsmore & Shohl, LLP
1400 PNC Plaza
500 West Jefferson Street
Louisville, KENTUCKY 40202

*Tyson Kamuf
Corporate Attorney
Big Rivers Electric Corporation
710 West 2nd Street
P. O. Box 20015
Owensboro, KY 42304

*Jody Kyler Cohn
Boehm, Kurtz & Lowry
36 East Seventh Street
Suite 1510
Cincinnati, OHIO 45202

*Larry Cook
Assistant Attorney General
Office of the Attorney General Office of Rate
700 Capitol Avenue
Suite 20
Frankfort, KENTUCKY 40601-8204