

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

This matter arises on two motions for confidential treatment filed by Big Rivers Electric Corporation (BREC). On February 21, 2024 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 Item 9 of BREC’s response to Kentucky Industrial Utility Customers, Inc. (KIUC), Kentuckians for the Commonwealth (KFC), and the Kentucky Resource Council’s (KRC) (jointly, Joint Intervenors) First Request for Information (Joint Intervenor’s First Request). On June 21, 2024, BREC filed an additional motion requesting confidential protection for Item 1 of BREC’s response to Commission Staff’s Post-Hearing Requests for Information (Staff’s Post-Hearing Request) and Item 4 of BREC’s response to Joint Intervenor’s Post-Hearing Request for Information (Joint Intervenor’s Post-Hearing Request).

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.”¹ Exceptions to the free and open

¹ KRS 61.872(1).

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 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.”⁴ 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.”⁵

FEBRUARY 21, 2024 MOTION

In support of its February 21, 2024 motion, BREC requested that confidential treatment be afforded to BREC’s response to Joint Intervenor’s First Request, Item 9, pursuant to KRS 61.878(1)(c)(1). Item 9 contained response information for all-source request for proposals (ASRFP) bids submitted to BREC. BREC argued that the information in the table provides insight into BREC’s cost of producing and acquiring power; the price at which BREC is willing to buy or sell fuel, power, and other products; and the price BREC is willing or expecting to pay for capital projects.⁶ Additionally, BREC argued that the coal and energy price projections are obtained from third parties, and

² See KRS 61.871.

³ 807 KAR 5:001, Section 12(2)(c).

⁴ KRS 61.878(1)(a).

⁵ KRS 61.878(1)(c)(1).

⁶ Motion of BREC for Confidential Treatment (filed Feb. 21, 2024) at 4–5.

those projections are proprietary products of those third parties, which BREC does not have the authority to publicly disclose.⁷

BREC contended that public disclosure of its projections of production costs and power market prices would give the power producers and marketers with which BREC competes in the wholesale power market insight into BREC's cost of producing power and view of energy and capacity prices.⁸ Additionally, BREC argued that public disclosure of third-party proprietary information would also cause competitive harm to BREC.⁹ BREC cited that the Commission has previously granted confidential treatment to similar information.¹⁰

Having considered the motion and the material at issue, the Commission finds that BREC did not meet the criteria for confidential treatment in its motion, and the material should not be exempt from public disclosure pursuant to 807 KAR 5:001 Section 13, and KRS 61.878(1)(c)(1). Administrative regulation 807 KAR 5:001 Section 13 sets forth the requirements for materials to be given consideration for confidential treatment. Item 9 Joint Intervenor's First Request for Information does not set out current or potential vendors nor does it distinguish between winning versus losing bids. Winning bids are generally not deemed confidential, as they are part of the revenue requirement and are public information.

⁷ Motion of BREC for Confidential Treatment at 8.

⁸ Motion of BREC for Confidential Treatment at 8.

⁹ Motion of BREC for Confidential Treatment at 5 and 7–8.

¹⁰ Motion of BREC for Confidential Treatment at 5 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.

The Commission finds it appropriate to grant BREC leave for to amend the motion to establish the specific grounds, pursuant to KRS 61.878, for classifying the material as confidential by citing to a specific statute and providing a reason that the material is covered by the statute.

JUNE 21, 2024 MOTION

In support of its June 21, 2024 motion, BREC requested that confidential treatment be afforded to Responses to the Post-Hearing Requests for Information, Item 1, propounded by Commission Staff.¹¹ BREC made the same arguments for Staff's Post-Hearing Request, Item 1 as it did for Joint Intervenor's First Request, Item 9. The documents were almost identical in format and information. As to the response to Joint Intervenor's Post-Hearing Request, Item 4, BREC argued that O&M expense were confidential pursuant to KRS 61.878(1)(c)(1). Disclosure of the O&M expenses could result in other parties bidding lower than BREC was able to on the wholesale market.

Having considered the motion and the material at issue relevant to BREC's response to Post-Hearing Requests for Information, Item 1, the Commission similarly finds that BREC did not meet the criteria for confidential treatment in its motion, and the material should not be exempt from public disclosure pursuant to 807 KAR 5:001 Section 13, and KRS 61.878. Consequently, the Commission also finds it appropriate to grant BREC leave for to amend the motion to establish the specific grounds, pursuant to KRS 61.878, for classifying the material as confidential by citing to a specific statute and providing a reason that the material is covered by the statute.

¹¹ Item 1 is essentially the same document submitted in response to Joint Intervenor's First Request, Item 9 with some revised figures.

BREC requested that confidential treatment, be afforded to the annual fixed and variable O&M costs for the D.B. Wilson Plant's Selective Catalytic Reduction (SCR) system, included in BREC's response to Joint Intervenor's Post-Hearing Request, Item 4 pursuant to KRS 61.878(1)(c)(1). BREC argued that the information in question is generally recognized as confidential and proprietary and that disclosure to the public will create an unfair commercial advantage.¹²

Having considered the motion and the material at issue, the Commission finds that the annual fixed and variable O&M costs for the D.B. Wilson Plant's SCR system were confidentially disclosed, are generally recognized as confidential and proprietary, and would permit an unfair commercial advantage to competitors if disclosed. The Commission has held that projected capital costs and O&M costs are generally recognized as confidential or proprietary when submitted as part of an integrated resource plan.¹³

IT IS THEREFORE ORDERED that:

1. BREC's February 21, 2024 motion for confidential treatment of Item 9 of the response to Joint Intervenor's First Request denied.
2. BREC is granted leave to amend the motion and establish the specific ground pursuant to KRS 61.878 and 807 KAR 5:001 Section 13 for classifying the material as confidential by citing to a specific statutory exemption, and providing reasons that the material is exempt.

¹² Motion of BREC for Confidential Treatment (filed June. 21, 2024) at 6.

¹³ See Case No 2014-00166, *2014 Integrated Resource Plan of Big Rivers Electric Corporation*, (Ky. PSC August. 26, 2014).

3. BREC's June 21, 2024 motion for confidential treatment is denied in part and granted in part.

4. BREC's motion for confidential treatment of Item 9 response to Staff's Post-Hearing Request for Information is denied.

5. BREC is granted leave to amend the motion and establish the specific ground pursuant to KRS 61.878 and 807 KAR 5:001 Section 13 for classifying the material as confidential by citing to a specific statutory exemption, and providing reasons that the material is exempt.

6. BREC's motion for confidential treatment of the annual fixed and variable O&M costs for the D.B. Wilson Plant's SCR system, Item 4 response to Joint Intervenor's Post-Hearing Request is granted.

7. 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 or until further order of this Commission.

8. 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).

9. 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.

10. 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 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.


11. 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.

12. 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.

13. 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 should be granted confidential treatment.


14. 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.

PUBLIC SERVICE COMMISSION



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ATTEST:



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