

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)	2024-00149
CORPORATION FROM MAY 1, 2023 THROUGH)	
OCTOBER 31, 2023)	

ORDER

This matter arises upon four motions for confidential treatment filed by Big Rivers Electric Corporation (BREC) in this matter.

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 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

In support of its motions, BREC argued for the application of KRS 61.878(1)(c)(1), which provides an exception to the requirement for public disclosure for records that are “generally recognized as confidential or proprietary, which if openly disclosed would

¹ KRS 61.872(1).

² See KRS 61.871.

³ 807 KAR 5:001, Section 13(2)(c).

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.”

AUGUST 26, 2024 MOTION

BREC’s response to Commission Staff’s First Request for Information (Staff’s First Request), Item 12, consists of off-system sales information and related usage data with the purchasing party identities redacted. BREC response to Staff’s First Request, Item 13, consists of off-system and member sales information and related usage data with the purchasing party identities redacted. BREC responses to Staff’s First Request, Items 22 and 23, include redacted special contract terms regarding a specific special contract customer. BREC argued that all this information should be protected from disclosure under KRS 61.878(1)(c)(1) because terms of special contracts, customer purchases, and usage data could be used by suppliers, buyers and competitors to gain insight into prices and other terms at which BREC is willing to sell and buy power, allowing competitors to unfairly compete. BREC also argued that the purchase and usage information is of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy under KRS 61.878(1)(a).

Having considered the motion and the material at issue, the Commission finds that BREC’s August 26, 2024 motion for confidential treatment should be granted, but not indefinitely. Special contract and off-system sales information and related usage data has been granted confidential treatment in the past on the basis that this information, if publicly disclosed, could disadvantage BREC with its competitors, who could use the

information in the energy market with knowledge of BREC's energy sales history.⁴ Furthermore, the Commission finds that publicly disclosing specific customer rate and usage data could prevent customers from entering into such contracts in the future, disadvantaging BREC compared to competitors.

In accordance with Commission precedent, confidential treatment for special contract terms and non-member sales should be limited to ten years, at which time this data will be obsolete because each purchaser's demand will have changed sufficiently.⁵ Therefore, the Commission finds that the designated material is generally recognized as confidential or proprietary; it therefore meets the criteria for confidential treatment and should be exempted from public disclosure for ten years pursuant to 807 KAR 5:001, Section 13, and KRS 61.878(1)(c)(1).

SEPTEMBER 23, 2024 MOTION

BREC's responses to Staff's Second Request, Items 5 and 6, include redacted information about special contract terms. BREC argued that this information should be protected from disclosure under KRS 61.878(1)(c)(1) because terms of special contracts could be used by other market participants, suppliers, buyers, and competitors to gain insight into prices and other terms at which BREC is willing to sell and buy power, allowing competitors to unfairly compete. BREC also argued that the information is of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy under KRS 61.878(1)(a).

⁴ 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; Case No 2023-00013, *An Electronic Examination of the Application of the Fuel Adjustment Clause of Big Rivers Electric Corporation from November 1, 2020 Through October 31, 2022* (Ky. PSC Jan. 29, 2024), Order at 4.

⁵ Case No 2023-00013, Jan. 29, 2024 Order at 4.

Having considered the motion and the material at issue, the Commission finds that BREC's September 23, 2024 motion for confidential treatment should be granted, but not indefinitely. Terms of special contracts should remain confidential because this information, if publicly disclosed, could disadvantage BREC with its competitors, who could use the information in the energy market with knowledge of BREC's energy sales history.⁶ In addition, public disclosure of this information could harm BREC in negotiating future special contracts. However, in accordance with Commission precedent, confidential treatment for special contract terms and non-member sales should be limited to ten years, at which time this data will be obsolete because each purchaser's demand will have changed sufficiently.⁷ Therefore, the Commission finds that the designated material is generally recognized as confidential or proprietary; it therefore meets the criteria for confidential treatment and should be exempted from public disclosure for ten years pursuant to 807 KAR 5:001, Section 13, and KRS 61.878(1)(c)(1).

OCTOBER 28, 2024 MOTION

BREC's response to Staff's Third Request, Item 1, includes special contract Fuel Adjustment Clause (FAC) billing information with only the customer's name redacted. BREC argued that this information should be protected from disclosure under KRS 61.878(1)(c)(1) because potential counterparties would know that the confidential terms of their contracts, agreements, and their private billing information could be publicly disclosed, which could reveal information to their competitors about their competitiveness. BREC also argued that the information is of a personal nature where the public disclosure

⁶ Case No. 2016-00117, Dec. 22, 2021 Order at 2; Case No 2023-00013, Jan. 29, 2024 Order at 4.

⁷ Case No 2023-00013, Jan. 29, 2024 Order at 4.

thereof would constitute a clearly unwarranted invasion of personal privacy under KRS 61.878(1)(a).

Having considered the motion and the material at issue, the Commission finds that BREC's October 28, 2024 motion for confidential treatment should be granted, but not indefinitely. Customer identities paired with special contract terms have been granted confidential treatment in the past on the basis that this information, if publicly disclosed, could disadvantage BREC with its competitors, who could use the information in the energy market with knowledge of BREC's energy sales history.⁸ Furthermore, the Commission finds that publicly disclosing specific customer rate and usage data could prevent customers from entering into such contracts in the future, disadvantaging BREC compared to competitors. Therefore, the Commission finds that the designated material is generally recognized as confidential or proprietary; it therefore meets the criteria for confidential treatment and should be exempted from public disclosure for ten years pursuant to 807 KAR 5:001, Section 13, and KRS 61.878(1)(c)(1).

NOVEMBER 20, 2024 MOTION

BREC's amended response to Staff's First Request, Item 23, includes redacted special contract terms regarding a specific special contract customer as discussed above.

Having considered the motion and the material at issue, the Commission finds that BREC's November 20, 2024 motion for confidential treatment should be granted, but not indefinitely. Terms of special contracts should remain confidential because this information, if publicly disclosed, could disadvantage BREC with its competitors, who could use the information in the energy market with knowledge of BREC's energy sales

⁸ Case No. 2016-00117, Dec. 22, 2021 Order at 2; Case No 2023-00013, Jan. 29, 2024 Order at 4.

history.⁹ In addition, public disclosure of this information could harm BREC in negotiating future special contracts. However, in accordance with Commission precedent, confidential treatment for special contract terms and non-member sales should be limited to ten years, at which time this data will be obsolete because each purchaser's demand will have changed sufficiently.¹⁰ Therefore, the Commission finds that the designated material is generally recognized as confidential or proprietary; it therefore meets the criteria for confidential treatment and should be exempted from public disclosure for ten years pursuant to 807 KAR 5:001, Section 13, and KRS 61.878(1)(c)(1).

IT IS THEREFORE ORDERED that:

1. BREC's August 26, 2024 motion for confidential treatment is granted, except that the designated material shall remain confidential for ten years.
2. BREC's September 23, 2024 motion for confidential treatment is granted, except that the designated material shall remain confidential for ten years.
3. BREC's October 28, 2024 motion for confidential treatment is granted, except that the designated material shall remain confidential for ten years.
4. BREC's November 20, 2024 motion for confidential treatment is granted, except that the designated material shall remain confidential for ten years.
5. 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.

⁹ Case No. 2016-00117, Dec. 22, 2021 Order at 2; Case No 2023-00013, Jan. 29, 2024 Order at 4.

¹⁰ Case No 2023-00013, Jan. 29, 2024 Order at 4.

6. 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).

7. 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.

8. 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.

9. 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.

PUBLIC SERVICE COMMISSION



Chairman



Commissioner



Commissioner

ATTEST:



Executive Director



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