

1 Confidential Information highlighted with transparent ink, printed on yellow
2 paper, or otherwise marked “CONFIDENTIAL,” is being filed with this request
3 via electronic mail sent to PSCED@ky.gov. One (1) copy of the documents with
4 the Confidential Information redacted is also being electronically filed with this
5 request. 807 KAR 5:001 Section 13(3)(a)(3).

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

10 5. Pursuant to 807 KAR 5:001 Section 13(3)(a)(1), as discussed *infra*,
11 the Confidential Information is entitled to confidential protection and is being
12 submitted confidentially under the purview of KRS 278.160(3), KRS 61.878(1)(a),
13 and KRS 61.878(1)(c)(1).

14 **I. The Confidential Information is entitled to**
15 **confidential protection based upon KRS 61.878(1)(a)**

16 6. KRS 61.878(1)(a) explicitly grants confidential protection to “[p]ublic
17 records containing information of a personal nature where the public disclosure
18 thereof would constitute a clearly unwarranted invasion of personal privacy.”
19 Here, Pratt operates an energy-intensive commercial facility in Henderson
20 County, Kentucky and the Confidential Information reveals proprietary,
21 business-sensitive, and otherwise private information.

22 7. Pratt considers this information highly confidential and believes
23 that public disclosure of this information will cause it substantial competitive

1 harm. Because public disclosure of the Confidential Information consisting of
2 Pratt’s energy usage and demand reduction capability would constitute an
3 unwarranted invasion of this customer’s privacy, this Confidential Information
4 should be granted confidential treatment. *See* Ky. Op. Atty. Gen. 96-ORD-176
5 (August 20, 1996) (holding Kroger Company’s utility bills exempt from disclosure
6 under KRS 61.878(1)(a)); *In the Matter of: Application of Kentucky Utilities*
7 *Company for an Adjustment of its Electric Rates*, Order, P.S.C. Case No. 2012-
8 00221 (July 25, 2013) (holding customer names, account numbers, and usage
9 information exempt from disclosure under KRS 61.878(1)(a)).

10 **II. The Confidential Information is also entitled to**
11 **confidential protection based upon KRS 61.878(1)(c)(1)**

12 8. The Confidential Information is also entitled to confidential
13 protection based upon KRS 61.878(1)(c)(1), which protects “records confidentially
14 disclosed to an agency or required by an agency to be disclosed to it, generally
15 recognized as confidential or proprietary, which if openly disclosed would permit
16 an unfair commercial advantage to competitors of the entity that disclosed the
17 records.” *See* 807 KAR 5:001 Section 13(3)(a)(1). In support for this ground of
18 granting confidential protection, Subsection A *infra* describes how Big Rivers
19 operates in competitive environments; Subsection B *infra* explains that the
20 Confidential Information is generally recognized as confidential or proprietary;
21 and Subsection C *infra* demonstrates that public disclosure of the Confidential
22 Information would permit an unfair commercial advantage to Big Rivers’

1 competitors. As such, the Commission should grant confidential treatment to the
2 Confidential Information.

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

4
5 9. Big Rivers must successfully compete in the wholesale power
6 market in order to sell excess energy to meet its members' needs, including
7 competition in term bilateral energy markets, day-ahead and real-time energy
8 and ancillary services markets, the annual capacity market, and forward
9 bilateral long-term wholesale agreements with utilities and industrial customers.
10 Big Rivers' ability to successfully compete in these wholesale power markets is
11 dependent upon an effective combination of a) obtaining the maximum price for
12 the power it sells and the best contract terms, and b) keeping its cost of
13 production as low as possible. Fundamentally, if Big Rivers' cost of producing a
14 kilowatt hour or its business risk increases, its ability to sell that kilowatt hour
15 in competition with other utilities is adversely affected.

16 10. Big Rivers also competes for reasonably-priced credit in the credit
17 markets, and its ability to compete is directly impacted by the financial results it
18 obtains and the business risks it assumes. Any event that adversely affects Big
19 Rivers' financial results or increases its business risks may adversely affect the
20 price it pays for credit. A competitor armed with Big Rivers' proprietary and
21 confidential information will be able to increase Big Rivers' costs or decrease Big
22 Rivers' revenues, which could in turn affect Big Rivers' apparent
23 creditworthiness. Impediments to Big Rivers' obtaining the best contract terms

1 could likewise affect its apparent creditworthiness. A utility the size of Big
2 Rivers that operates generation and transmission facilities will always have
3 periodic cash and borrowing requirements for both anticipated and unanticipated
4 needs. Big Rivers expects to be in the credit markets on a regular basis in the
5 future, and it is imperative that Big Rivers improve and maintain its credit
6 profile.

7 11. Accordingly, Big Rivers faces competition in the wholesale power
8 and capital markets, and the Confidential Information should be afforded
9 confidential treatment to prevent the imposition of an unfair competitive
10 advantage to those competitors.

11 ***B. The Confidential Information is Generally Recognized***
12 ***as Confidential or Proprietary***
13

14 12. The Confidential Information for which Big Rivers seeks
15 confidential treatment under KRS 61.878 is generally recognized as confidential
16 or proprietary under Kentucky law.

17 13. As noted above, a portion of the Confidential Information consists of
18 confidential, negotiated terms of the LMR Agreement. KRS 278.160(3)
19 specifically recognizes that terms of a special contract are not required to be
20 publicly disclosed if such terms are entitled to protection under KRS
21 61.878(1)(c)(1).

22 14. The Confidential Information is not publicly available, nor is such
23 information known or disseminated within the Kenergy, Pratt, or Big Rivers
24 organizations except to those employees and professionals with a legitimate

1 business need to know and act upon the information. Under Kentucky law, it is
2 well recognized that the information about a company’s detailed inner workings,
3 such as the Confidential Information, is generally recognized as confidential or
4 proprietary. *See, e.g., Hoy v. Kentucky Indus. Revitalization Authority*, 907
5 S.W.2d 766, 768 (Ky. 1995) (“[i]t does not take a degree in finance to recognize
6 that such information concerning the inner workings of a corporation is
7 ‘generally recognized as confidential or proprietary’”).

8 15. Based on the foregoing, the Confidential Information is generally
9 recognized as confidential or proprietary under Kentucky law.

10 ***C. Disclosure of the Confidential Information Would***
11 ***Permit an Unfair Commercial Advantage to Big Rivers’***
12 ***Competitors***
13

14 16. Disclosure of the Confidential Information would permit an unfair
15 commercial advantage to Big Rivers’ competitors. As discussed *supra*, Big Rivers
16 faces actual competition in the wholesale power and credit markets. It is likely
17 that Big Rivers’ ability to compete in these markets would be adversely affected
18 if the Confidential Information was publicly disclosed, and Big Rivers seeks
19 protection from such competitive injury.

20 17. Here, Pratt considers the Confidential Information consisting of
21 material terms of the LMR Agreement which disclose Pratt’s projected energy
22 usage and demand reduction capability highly confidential. In Big Rivers’ case,
23 Big Rivers is actively engaged in buying and selling power in the wholesale
24 power markets, and Big Rivers expects to engage in negotiations with

1 counterparties in the future. If confidential treatment of the Confidential
2 Information is denied, potential counterparties would know that similar
3 confidential terms of their contracts would be publicly disclosed, which could
4 reveal information to their competitors about their competitiveness. Because
5 many companies would be reluctant to have such information disclosed, public
6 disclosure of the Confidential Information in this case would likely reduce the
7 pool of counterparties willing to negotiate with Big Rivers, reducing Big Rivers'
8 ability to buy and sell power at favorable prices. Further, any competitive
9 pressure that adversely affects Big Rivers' revenue and margins could make the
10 company appear less creditworthy and thus impair its ability to compete in the
11 credit markets.

12 **III. Time Period**

13 18. For the reasons stated above, Big Rivers requests that Confidential
14 Information remain confidential indefinitely. 807 KAR 5:001 Section 13(3)(a)(2).

15 **IV. Conclusion**

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

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