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1 COMMONWEALTH OF KENTUCKY  
2 BEFORE THE PUBLIC SERVICE COMMISSION  
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5 In the Matter of:

6  
7 BIG RIVERS ELECTRIC CORPORATION'S )  
8 FILING OF WHOLESALE CONTRACTS )  
9 AMENDMENTS PURSUANT TO KRS 278.160, )  
10 278.180, AND 807 KAR 5:011 Section 13 )  
11  
12

13 **PETITION OF BIG RIVERS ELECTRIC CORPORATION FOR CONFIDENTIAL**  
14 **PROTECTION**  
15

16 1. Big Rivers Electric Corporation ("*Big Rivers*") hereby petitions the Executive  
17 Director of the Kentucky Public Service Commission ("*Commission*"), pursuant to 807 KAR  
18 5:001 Section 13(3), KRS 61.878(1)(c), and KRS 278.160(3), to grant confidential protection to  
19 portions of two contract amendments (the "*2019 Amendments*") that Big Rivers is filing with this  
20 petition. The information Big Rivers seeks to protect as confidential is hereinafter referred to as  
21 the "*Confidential Information*."

22 2. The 2019 Amendments are the third amendments to certain power sales contracts  
23 between Big Rivers and the City of Wakefield, Nebraska, and between Big Rivers and the City  
24 of Wayne, Nebraska. Big Rivers is also filing with this petition a copy of those contracts and a  
25 copy of the second amendments to those contracts (the "*2017 Amendments*"). The 2017  
26 Amendments, as well as the Wakefield and Wayne contracts, contain information for which the  
27 Commission or the Executive Director has granted confidential treatment. Big Rivers filed the  
28 Wakefield and Wayne contracts in Case No. 2014-00134, and the Commission granted  
29 confidential treatment for an indefinite period of time to the confidential information in those  
30 contracts by Order dated September 10, 2014, in that case. Big Rivers filed the 2017  
31 Amendments with the Commission on June 14, 2017. The Executive Director granted

1 confidential treatment for an indefinite period of time to the confidential information in those  
2 amendments by letter dated September 28, 2017. Big Rivers is filing one (1) copy of the  
3 Wakefield and Wayne contracts and the 2017 Amendments with the confidential information  
4 highlighted in a sealed envelope marked "CONFIDENTIAL," and Big Rivers is filing ten (10)  
5 copies of those documents with the confidential information redacted. 807 KAR 5:001 Section  
6 13(9).

7 3. One (1) copy of the 2019 Amendments with the Confidential Information  
8 highlighted with transparent ink is also included in the sealed envelope marked  
9 "CONFIDENTIAL." One (1) copy of the 2019 Amendments with the Confidential Information  
10 redacted is also being filed with this petition. 807 KAR 5:001 Sections 13(3)(a)(3).

11 4. If and to the extent the Confidential Information becomes generally available to  
12 the public, whether through filings required by other agencies or otherwise, Big Rivers will  
13 notify the Commission and have its confidential status removed. 807 KAR 5:001 Section  
14 13(10)(b).

15 5. As discussed below, the Confidential Information is entitled to confidential  
16 protection based upon KRS 61.878(1)(c)(1), which protects "records confidentially disclosed to  
17 an agency or required by an agency to be disclosed to it, generally recognized as confidential or  
18 proprietary, which if openly disclosed would permit an unfair commercial advantage to  
19 competitors of the entity that disclosed the records." KRS 61.878(1)(c)(1); 807 KAR 5:001  
20 Section 13(3)(a)(1). Section I below explains that Big Rivers operates in competitive  
21 environments in the wholesale power market and in the credit market. Section II below shows  
22 that the Confidential Information is generally recognized as confidential or proprietary. Section

1 III below demonstrates that public disclosure of the Confidential Information would permit an  
2 unfair commercial advantage to Big Rivers' competitors.

3 **I. Big Rivers' Faces Actual Competition**

4 6. Big Rivers, as a participant in the credit markets and the wholesale power  
5 markets, faces economic competition from other entities.

6 7. Big Rivers competes in the wholesale power market to sell energy it produces in  
7 excess of its members' needs. Big Rivers' ability to successfully compete in the wholesale  
8 power market is dependent upon a combination of its ability to negotiate the maximum price for  
9 the power sold and its ability to keep its cost of production as low as possible. If Big Rivers'  
10 cost of producing a kilowatt-hour of energy increases, its ability to sell that kilowatt-hour in  
11 competition with other utilities is adversely affected.

12 8. Big Rivers also competes for reasonably priced credit in the credit markets, and  
13 its ability to compete is directly impacted by its financial results. Any event that adversely  
14 affects Big Rivers' margins will adversely affect its financial results and potentially impact the  
15 price it pays for credit. As was described in the proceeding before this Commission in the Big  
16 Rivers Unwind Transaction, Big Rivers expects to be in the credit markets on a regular basis in  
17 the future.<sup>1</sup>

18 9. As is evidenced by these economic pressures, Big Rivers faces actual competition  
19 from other market participants in the wholesale power and credit markets.

20 **II. The Confidential Information is Generally Recognized as Confidential or**  
21 **Proprietary**

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<sup>1</sup> See *In the Matter of: Joint Application of Big Rivers, E.ON, LG&E Energy Marketing, Inc., and Western Kentucky Energy Corporation for Approval to Unwind Lease and Power Purchase Transactions*, Order, P.S.C. Case No. 2007-00455 (March 6, 2009), pages 27-30 and 37-39.

1           10.     The Confidential Information for which Big Rivers seeks confidential treatment  
2 under KRS 61.878(1)(c)(1) is generally recognized as confidential or proprietary under Kentucky  
3 law.

4           11.     The Confidential Information consists of the confidential, negotiated terms of the  
5 2019 Amendments. KRS 278.160(3) specifically recognizes that terms of a special contract are  
6 not required to be publicly disclosed if such terms are entitled to protection under KRS  
7 61.878(1)(c)(1), and the Commission has previously granted confidential treatment to similar  
8 information. *See, e.g., In the Matter of: Application of Big Rivers Electric Corporation for a*  
9 *General Adjustment in Rates*, Order, P.S.C. Case No. 2012-0535 (April 25, 2013) (granting  
10 confidential treatment to details of sensitive commercial negotiations). In fact, the Confidential  
11 Information in the 2019 Amendments amend confidential terms from the Wakefield and Wayne  
12 contracts for which the Commission granted confidential treatment by Order dated September  
13 10, 2014, in P.S.C. Case No. 2014-00134, and they amend confidential terms from the 2017  
14 Amendments for which the Executive Director granted confidential treatment by letter dated  
15 September 28, 2017.

16           12.     The Confidential Information is not publicly available, is not disseminated within  
17 Big Rivers except to those employees and professionals with a legitimate business need to know  
18 and act upon the information, and is not disseminated to others without a legitimate need to  
19 know and act upon the information. As such, the Confidential Information is generally  
20 recognized as confidential and proprietary.

21           **III. Disclosure of the Confidential Information Would Permit an Unfair Commercial**  
22   **Advantage to Big Rivers' Competitors**

23           13.     Public disclosure of the Confidential Information would permit an unfair  
24 commercial advantage to Big Rivers' competitors. As discussed above, Big Rivers faces actual

1 competition in both the short- and long-term wholesale power markets and in the credit markets.  
2 It is likely that Big Rivers' ability to compete in these markets would be adversely affected if the  
3 Confidential Information was publicly disclosed, and Big Rivers seeks protection from such  
4 competitive injury.

5 14. In P.S.C. Case No. 2003-00054, the Commission granted confidential protection  
6 for bids submitted to Union Light Heat & Power ("ULH&P"). ULH&P's argued, and the  
7 Commission implicitly accepted, that the bidding contractors would not want their bid  
8 information publicly disclosed, and that disclosure would reduce the contractor pool available to  
9 ULH&P, which would drive up ULH&P's costs, hurting its ability to compete with other gas  
10 suppliers. *In the Matter of: Application of the Union Light, Heat and Power Company for*  
11 *Confidential Treatment*, Order, P.S.C. Case No. 2003-00054 (August 4, 2003). Similarly, in *Hoy*  
12 *v. Kentucky Indus. Revitalization Authority*, the Kentucky Supreme Court found that without  
13 protection for confidential information provided to a public agency, "companies would be  
14 reluctant to apply for investment tax credits for fear the confidentiality of financial information  
15 would be compromised. *Hoy v. Kentucky Indus. Revitalization Authority*, 907 S.W.2d 766, 769  
16 (Ky. 1995).

17 15. In Big Rivers' case, Big Rivers is currently in negotiations with potential  
18 counterparties interested in purchasing wholesale power from Big Rivers, and Big Rivers expects  
19 to engage in negotiations with other counterparties in the future. If confidential treatment of the  
20 confidential terms of the 2019 Amendments is denied, potential counterparties would know that  
21 the confidential terms of their contracts would be publicly disclosed, which could reveal  
22 information to their competitors about their competitiveness. Because many companies would  
23 be reluctant to have such information disclosed, public disclosure of the Confidential

1 Information in this case would likely reduce the pool of counterparties willing to negotiate with  
2 Big Rivers, reducing Big Rivers' ability to sell power and impairing its ability to compete in the  
3 wholesale power and credit markets.

4 16. Additionally, in P.S.C. Case No. 2003-00054, the Commission granted  
5 confidential protection to bids submitted to ULH&P. In addition to the other arguments  
6 discussed above, ULH&P argued, and the Commission implicitly accepted, that if the bids it  
7 received were publicly disclosed, contractors on future work could use the bids as a benchmark,  
8 which would likely lead to the submission of higher bids. *In the Matter of: Application of the*  
9 *Union Light, Heat and Power Company for Confidential Treatment*, Order, P.S.C. Case No.  
10 2003-00054 (August 4, 2003). The Commission also implicitly accepted ULH&P's further  
11 argument that the higher bids would lessen ULH&P's ability to compete with other gas  
12 suppliers. *Id.* Similarly, public disclosure of the confidential terms of the 2019 Amendments  
13 would allow potential counterparties to future agreements with Big Rivers to use the terms as a  
14 benchmark for negotiations, leading to less favorable prices and terms for power sales for Big  
15 Rivers and placing Big Rivers at an unfair competitive disadvantage in the wholesale power and  
16 credit markets.

17 17. Public disclosure of the Confidential Information will also impair Big Rivers'  
18 ability to enter into future wholesale power sales because other wholesale suppliers, who are  
19 competitors to Big Rivers, will have detailed knowledge of the terms upon which Big Rivers has  
20 previously entered into wholesale power sales agreements. These competitors would then be  
21 able to tailor their bids or proposals, which will give them an unfair competitive advantage in  
22 competing with Big Rivers to be the wholesale supplier.

1 18. Thus, Big Rivers' competitiveness will be adversely affected if other suppliers are  
2 given such an unfair competitive advantage or if potential counterparties are given a negotiating  
3 advantage. Accordingly, the public disclosure of the information that Big Rivers seeks to protect  
4 pursuant to KRS 61.878(1)(c)(1) would provide Big Rivers' competitors with an unfair  
5 commercial advantage.

6 **IV. Time Period**

7 19. Big Rivers requests that the Confidential Information remain confidential  
8 indefinitely because so long as Big Rivers is in the wholesale power market, the public  
9 disclosure of the confidential terms of the 2019 Amendments that it has agreed to could be used  
10 to Big Rivers' competitive disadvantage for the reasons stated above. 807 KAR 5:001 Section  
11 13(3)(a)(2).

12 **V. Conclusion**

13 20. Based on the foregoing, the Confidential Information is entitled to confidential  
14 protection.

15 WHEREFORE, Big Rivers respectfully requests that the Executive Director classify and  
16 protect as confidential the Confidential Information.

17 On this the 28<sup>th</sup> day of February, 2019.

18 Respectfully submitted,

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