

1 COMMONWEALTH OF KENTUCKY
2 BEFORE THE PUBLIC SERVICE COMMISSION

3 In the Matter of:

4
5 BIG RIVERS ELECTRIC CORPORATION)
6 FILING OF POWER SALES AGREEMENT)
7 WITH KYMEA PURSUANT TO KRS 278.160,)
8 KRS 278.180, 807 KAR 5:001 SECTION 13(3),)
9 AND 807 KAR 5:011 SECTIONS 13-14)

10 **REQUEST OF BIG RIVERS ELECTRIC CORPORATION FOR**
11 **CONFIDENTIAL TREATMENT**

12 1. Pursuant to KRS 61.878(1)(c) and 807 KAR 5:001 § 13, Big Rivers
13 Electric Corporation (“*Big Rivers*”) hereby requests that the Executive Director of
14 the Kentucky Public Service Commission (the “*Commission*”) grant confidential
15 protection to the confidential terms of a power sales confirmation letter agreement
16 (the “*Confirmation*”) entered into between Big Rivers and the Kentucky Municipal
17 Energy Agency (“*KyMEA*”) dated November 18, 2019, as well as certain confidential
18 terms contained in the Collateral Annex to the underlying Master Purchase
19 Agreement between the parties (the information seeking protection as the
20 “*Confidential Information*”).

21 2. One (1) copy of the Confirmation and one (1) copy of the Collateral
22 Annex, with the Confidential Information highlighted with transparent ink, are
23 being filed with this request in a separate, sealed envelope marked
24 “CONFIDENTIAL.” One (1) copy of each of the documents with the Confidential
25 Information redacted is also being filed with this request. 807 KAR 5:001 Section
26 13(3)(a)(3).

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

5 4. KRS 61.878(1)(c)(1) protects “records confidentially disclosed to an
6 agency or required by an agency to be disclosed to it, generally recognized as
7 confidential or proprietary, which if openly disclosed would permit an unfair
8 commercial advantage to competitors of the entity that disclosed the records.” KRS
9 61.878(1)(c)(1); 807 KAR 5:001 Section 13(3)(a)(1). As discussed in Section 1 *infra*,
10 Big Rivers operates in competitive environments in the wholesale power market
11 and in the credit market. Section II *infra* shows that the Confidential Information
12 is generally recognized as confidential or proprietary. And, Section III *infra*
13 demonstrates that public disclosure of the Confidential Information would permit
14 an unfair commercial advantage to Big Rivers’ competitors.

15 **I. Big Rivers’ Faces Actual Competition**

16 5. As a generation and transmission cooperative, Big Rivers competes in
17 the wholesale power market. This includes not only the short-term bilateral energy
18 market, the day-ahead and real-time energy and ancillary services markets, and the
19 capacity market to which Big Rivers has access by virtue of its membership in
20 Midcontinent Independent System Operator, Inc. (“MISO”), but also forward
21 bilateral long-term agreements and wholesale agreements with utilities and
22 industrial customers. Big Rivers’ ability to successfully compete in the market is

1 dependent upon a combination of its ability to: (i) obtain the maximum price for the
2 power it sells, and (ii) keep its cost of production as low as possible. Fundamentally,
3 if Big Rivers' cost of producing a unit of power increases, its ability to sell that unit
4 in competition with other utilities is adversely affected.

5 6. Big Rivers also competes for reasonably priced credit in the credit
6 markets, and its ability to compete is directly impacted by its financial results.
7 Lower revenues and any events that adversely affect Big Rivers' margins will
8 adversely affect its financial results and potentially impact the price it pays for
9 credit. A competitor armed with Big Rivers' proprietary and confidential
10 information will be able to increase Big Rivers' costs or decrease Big Rivers'
11 revenues, which could in turn affect Big Rivers' apparent creditworthiness. A
12 utility the size of Big Rivers that operates generation and transmission facilities
13 will always have periodic cash and borrowing requirements for both anticipated and
14 unanticipated needs. Big Rivers expects to be in the credit markets on a regular
15 basis in the future, and it is imperative that Big Rivers improve and maintain its
16 credit profile.

17 7. Accordingly, Big Rivers has competitors in both the power and capital
18 markets, and its Confidential Information should be protected to prevent the
19 imposition of an unfair competitive advantage.

1 II. The Confidential Information is Generally Recognized as being
2 Confidential and Proprietary

3 8. The Confidential Information for which Big Rivers seeks confidential
4 treatment under KRS 61.878(1)(c)(1) is generally recognized as confidential and/or
5 proprietary under Kentucky law.

6 9. The Confidential Information consists of the confidential, negotiated
7 terms of a power sales contract. KRS 278.160(3) specifically recognizes that terms
8 of a special contract are not required to be publicly disclosed if such terms are
9 entitled to protection under KRS 61.878(1)(c)(1), and the Commission has
10 previously granted confidential treatment to similar information. *See, e.g., In the*
11 *Matter of: Application of Big Rivers Electric Corporation for a General Adjustment*
12 *in Rates*, Order, P.S.C. Case No. 2012-0535 (April 25, 2013) (granting confidential
13 treatment to details of sensitive commercial negotiations); *In the Matter of: Big*
14 *Rivers Electric Corporation Filing of Wholesale Contracts Pursuant to KRS 278.180*
15 *and 807 KAR 5:011 § 13*, Order, P.S.C. Case No. 2014-00134 (September 10, 2014)
16 (granting confidential treatment to confidential terms of power purchase
17 agreements).

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

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

3 11. Public disclosure of the Confidential Information would permit an
4 unfair commercial advantage to Big Rivers' competitors. As discussed *supra*, Big
5 Rivers faces actual competition in both the short- and long-term wholesale power
6 markets and in the credit markets. It is likely that Big Rivers' ability to compete in
7 these markets would be adversely affected if the Confidential Information was
8 publicly disclosed, and Big Rivers seeks protection from such competitive injury.

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

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

13 14. Applicably, the Commission recently granted confidential treatment to
14 pricing information provided by Cumberland Valley in P.S.C. Case No. 2018-00056.
15 *See In the Matter of: Application of Cumberland Valley Electric, Inc. for Commission*
16 *Approval for a Certificate of Public Convenience and Necessity to Install an*
17 *Advanced Metering Infrastructure (AMI) System Pursuant to KRS 807 KAR 5:001*
18 *and KRS 278.020, Order, P.S.C. Case No. 2018-00056 (May 9, 2018). In that case,*
19 *the Commission recognized "that the specific cost information may be used to the*
20 *financial detriment of Cumberland Valley and its ratepayers by allowing potential*
21 *future vendors to bid just under the cost of its current vendor, which, in turn, would*
22 *place Cumberland Valley at a competitive disadvantage." Id.*

1 15. The Commission also recognized the effects of disclosing pricing
2 information in P.S.C. Case No. 2003-00054, wherein ULH&P argued, and the
3 Commission implicitly accepted, that if the bids it received were publicly disclosed,
4 contractors on future work could use the bids as a benchmark, which would likely
5 lead to the submission of higher bids. *In the Matter of: Application of the Union*
6 *Light, Heat and Power Company for Confidential Treatment*, Order, P.S.C. Case No.
7 2003-00054 (Aug. 4, 2003). The Commission further implicitly accepted ULH&P's
8 additional argument that the higher bids would lessen ULH&P's ability to compete
9 with other gas suppliers. *Id.*

10 16. The same competitive harm that the Commission recognized in P.S.C.
11 Case Nos. 2003-00054 and 2018-00056 would befall Big Rivers if the Confidential
12 Information in this case were publicly disclosed. Public disclosure of the
13 Confidential Information would provide potential purchasers of power from Big
14 Rivers, potential sellers of power to Big Rivers, and other providers competing
15 against Big Rivers for purchases or sales of power with insight into the prices and
16 the terms under which Big Rivers is willing to buy and sell power. These market
17 participants could use this information as a benchmark, leading to higher costs,
18 lower revenues, or less favorable terms to Big Rivers, thereby harming Big Rivers'
19 ability to compete in the wholesale power and credit markets.

20 17. Thus, Big Rivers' competitiveness will be adversely affected if other
21 suppliers are given such an unfair competitive advantage or if potential
22 counterparties are given a negotiating advantage. Accordingly, the public

1 disclosure of the information that Big Rivers seeks to protect pursuant to KRS
2 61.878(1)(c)(1) would provide Big Rivers' competitors with an unfair commercial
3 advantage.

4 **IV. Time Period**

5 18. Big Rivers requests that the Confidential Information remain
6 confidential indefinitely because for so long as Big Rivers is in the wholesale power
7 market, it will need to protect the confidential terms of the power contracts it enters
8 into with third parties for the reasons stated in Paragraphs 12-16 *supra*. 807 KAR
9 5:001 Section 13(3)(a)(2).

10 **V. Conclusion**

11 19. Based on the foregoing, the Confidential Information is entitled to
12 confidential protection.

13 20. WHEREFORE, Big Rivers respectfully requests that the Executive
14 Director classify and protect as confidential the Confidential Information.

15 On this the 17th day of March, 2020.

16 Respectfully submitted,

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