

1 3. Pursuant to the Commission’s March 24, 2020, Order in *In the Matter*
2 *of Electronic Emergency Docket Related to the Novel Coronavirus COVID-19*, Case
3 No. 2020-00085 (“*Case No. 2020-00085*”), one (1) copy of the Confidential
4 Information marked “CONFIDENTIAL,” is being filed with this motion by posting
5 on a secure file share site. A copy of the filing, with the Confidential Information
6 redacted, is being electronically filed with this motion. 807 KAR 5:001 Section
7 13(2)(a)(3)(b).

8 4. A copy of the filing with the Confidential Information redacted has
9 been served on all parties to this proceeding through the use of electronic filing. See
10 807 KAR 5:001 Section 13(b).

11 5. The Confidential Information is not publicly available, is not
12 disseminated within Big Rivers except to those employees and professionals with a
13 legitimate business need to know and act upon the information, and is not
14 disseminated to others without a legitimate need to know and act upon the
15 information.

16 6. If and to the extent the Confidential Information becomes generally
17 available to the public, whether through filings required by other agencies or
18 otherwise, Big Rivers will notify the Commission and have the information’s
19 confidential status removed. 807 KAR 5:001 Section 13(10)(b).

20 7. As discussed below, the Confidential Information is entitled to
21 confidential protection based upon KRS 61.878(1)(c)(1), which protects “records
22 confidentially disclosed to an agency or required by an agency to be disclosed to it,

1 generally recognized as confidential or proprietary, which if openly disclosed would
2 permit an unfair commercial advantage to competitors of the entity that disclosed
3 the records.” KRS 61.878(1)(c)(1); 807 KAR 5:001 Section 13(2)(a)(1).

4 **I. The Confidential Information is entitled to confidential treatment**
5 **based upon KRS 61.878(1)(c)(1)**

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

20 **A. *Big Rivers’ Faces Actual Competition***

21 9. Big Rivers must successfully compete in the wholesale power market
22 in order to sell excess energy to meet its members’ needs, including competition in:
23 term bilateral energy markets, day-ahead and real-time energy and ancillary
24 services markets, the annual capacity market, and forward bilateral long-term

1 wholesale agreements with utilities and industrial customers. Big Rivers' ability
2 to successfully compete in these wholesale power markets is dependent upon a
3 combination of a) obtaining the maximum price for power it sells and the best
4 contract terms, and b) keeping its cost of production as low as possible.
5 Fundamentally, if Big Rivers' cost of producing a kilowatt hour of energy increases,
6 its ability to sell that kilowatt hour in competition with other utilities is adversely
7 affected.

8 10. Big Rivers also competes for reasonably-priced credit in the credit
9 markets, and its ability to compete is directly impacted by the financial results it
10 obtains and the business risks it assumes. Any event that adversely affects Big
11 Rivers' financial results or increases its business risks may adversely affect the
12 price it pays for credit. A competitor, including potential third-party vendors,
13 armed with Big Rivers' proprietary and confidential information will be able to
14 increase Big Rivers' costs or decrease Big Rivers' revenues, which could in turn
15 affect Big Rivers' apparent creditworthiness. Impediments to Big Rivers' obtaining
16 the best contract terms could likewise affect its apparent creditworthiness. A utility
17 the size of Big Rivers that operates generation and transmission facilities will
18 always have periodic cash and borrowing requirements for both anticipated and
19 unanticipated needs. Big Rivers expects to be in the credit markets on a regular
20 basis in the future, and it is imperative that Big Rivers improves and maintains its
21 credit profile.

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

5 ***B. The Confidential Information is Generally Recognized as***
6 ***Confidential or Proprietary.***

7 12. The Confidential Information for which Big Rivers seeks confidential
8 treatment under KRS 61.878(1)(c)(1) is generally recognized as confidential or
9 proprietary under Kentucky law. The Confidential Information consists of (i)
10 projected capacity purchases; (ii) a list of future scheduled outages; and (iii) a list of
11 planned transmission system additions.

12 13. Public disclosure of the Confidential Information will allow Big Rivers’
13 suppliers and competitors to know Big Rivers’ future maintenance plans and capital
14 improvements and potentially the timing of Big Rivers’ capacity needs or excess.
15 Information about a company’s detailed inner workings is generally recognized as
16 confidential or proprietary. *See, e.g., Hoy v. Kentucky Indus. Revitalization*
17 *Authority*, 907 S.W.2d 766, 768 (Ky. 1995) (“It does not take a degree in finance to
18 recognize that such information concerning the inner workings of a corporation is
19 ‘generally recognized as confidential or proprietary’”); *Marina Management Servs.*
20 *v. Cabinet for Tourism, Dep’t of Parks*, 906 S.W.2d 318, 319 (Ky. 1995) (unfair
21 commercial advantage arises simply from “the ability to ascertain the economic
22 status of the entities without the hurdles systemically associated with the
23 acquisition of such information about privately owned organizations”). Moreover,

1 the Commission previously granted confidential treatment to this type of
2 information. *See, e.g., In the Matter of: Electronic Application of Kentucky Power*
3 *Company for (1) a General Adjustment of its Rates for Electric Service; (2) an Order*
4 *Approving its 2017 Environmental Compliance Plan; (3) an Order Approving its*
5 *Tariffs and Riders’ (4) an Order Approving Accounting Practices to Establish*
6 *Regulatory Assets and Liabilities; and (5) an Order Granting all other Required*
7 *Approvals and Relief*, Order, P.S.C. Case No. 2017-00179 (June 19, 2018) (granting
8 confidential treatment to maintenance and budget information that could be used
9 to determine scope and timing of planned maintenance outages); letter from the
10 Commission dated August 13, 2019, in Administrative Case No. 387 (granting
11 confidential treatment to a list of future scheduled outages and planned
12 transmission system additions that Big Rivers filed as part of the supplement to its
13 annual report).

14 14. Accordingly, the information for which Big Rivers seeks confidential
15 treatment is recognized as confidential or proprietary under Kentucky law and is
16 entitled to confidential protection as further discussed below.

17 **C. Disclosure of the Confidential Information Would Permit an Unfair**
18 **Commercial Advantage to Big Rivers’ Competitors**

19 15. Disclosure of the Confidential Information could unreasonably and
20 unnecessarily harm Big Rivers by giving interested third parties an unfair
21 commercial advantage through insight into Big Rivers’ business operations and
22 financial strategies. As discussed above, Big Rivers faces actual competition in the
23 wholesale power market and in the credit market. It is likely that Big Rivers would

1 suffer competitive injury if that Confidential Information was publicly disclosed,
2 and the information should therefore be subject to confidential treatment.

3 16. If the Confidential Information is publicly disclosed, Big Rivers’
4 competitors would have insight into when Big Rivers’ generation levels will drop
5 due to maintenance and thus know a crucial input into Big Rivers’ need for power
6 and energy during those periods. Further the Confidential Information would
7 provide insight into when Big Rivers’ projects any capacity deficit or excess. With
8 that information, potential suppliers to Big Rivers will be able to manipulate the
9 price of power bid to Big Rivers in order to maximize their revenues, and potential
10 market power purchasers could use the information to know when and to the extent
11 Big Rivers is long on power and could use that information to manipulate their bids,
12 leading to lower revenues to Big Rivers. In P.S.C. Case No. 2003-00054, the
13 Commission granted confidential protection to bids submitted to Union Light, Heat
14 & Power (“ULH&P”). ULH&P argued, and the Commission implicitly accepted,
15 that if the bids it received were publicly disclosed, contractors on future work could
16 use the bids as a benchmark, which would likely lead to the submission of higher
17 bids. *In the Matter of: Application of the Union Light, Heat and Power Company for*
18 *Confidential Treatment*, Order, P.S.C. Case No. 2003-00054 (August 4, 2003). The
19 Commission also implicitly accepted ULH&P’s further argument that the higher
20 bids would lessen ULH&P’s ability to compete with other gas suppliers. *Id.*
21 Similarly, potential power suppliers or purchasers manipulating Big Rivers’
22 bidding process would lead to higher costs or lower revenues to Big Rivers and

1 would place it at an unfair competitive disadvantage in the wholesale power market
2 and credit markets. Likewise, knowledge of future capital projects would allow
3 contractors and suppliers of materials for those projects to manipulate their bids,
4 leading to higher costs to Big Rivers and placing it at an unfair competitive
5 disadvantage in the wholesale power and credit markets.

6 17. Thus, public disclosure of the Confidential Information would permit
7 an unfair competitive advantage to Big Rivers' competitors.

8 **II. Time Period**

9 18. Big Rivers requests the Confidential Information remain
10 confidential for a period of five (5) years from the date of this motion, at which time
11 the Confidential Information should be sufficiently outdated so that it could not be
12 used to competitively disadvantage Big Rivers. *See* 807 KAR 5:001 Section
13 13(2)(a)(2).

14 **III. Conclusion**

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

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