1 2 3	COMMONWEALTH OF KENTUCKY BEFORE THE PUBLIC SERVICE COMMISSION
4	IN THE MATTER OF:
5	
	ELECTRONIC APPLICATION OF BIG RIVERS ELECTRIC CORPORATION) Case No. FOR APPROVAL OF SOLAR POWER) 2019-00365 CONTRACTS
6	
7 8	MOTION OF BIG RIVERS ELECTRIC CORPORATION FOR CONFIDENTIAL PROTECTION
9 10	1. Big Rivers Electric Corporation ("Big Rivers") hereby moves the
11	Kentucky Public Service Commission ("Commission") pursuant to KRS 278.160(3),
12	KRS 61.878(1)(c)(1), and 807 KAR 5:001 Section 13 to grant confidential protection
13	to certain information contained in the joint responses of Big Rivers, Meade County
14	Rural Electric Cooperative Corporation ("Meade County RECC"), and Nucor
15	Corporation ("Nucor") to Commission Staff's Third Request for Information. The
16	information for which Big Rivers seeks confidential protection is hereinafter
17	referred to as the "Confidential Information." The Confidential Information
18	includes portions of the responses and/or attachments to the responses to: Items 2
19	and 3 of the Commission Staff's Third Request for Information ("PSC 3-2;" and
20	"PSC 3-3," respectively).
21	2. Pursuant to the Commission's March 24, 2020, Order in <i>In the Matter</i>
22	of Electronic Emergency Docket Related to the Novel Coronavirus COVID-19, Case
23	No. 2020-00085 ("Case No. 2020-00085"), one (1) copy of the Confidential
24	Information highlighted with transparent ink, printed on yellow paper, or otherwise

- 1 marked "CONFIDENTIAL," is being field with this motion by electronic mail. A
- 2 copy of those pages, with the Confidential Information redacted, is being
- 3 electronically filed with the information request responses accompanying this
- 4 motion.
- 5 3. A copy of this motion with the Confidential Information redacted has
- 6 been served on all parties to this proceeding through the use of electronic filing. 807
- 7 <u>KAR 5:001, Section 13(b)</u>.
- 8 4. If and to the extent the Confidential Information becomes generally
- 9 available to the public, whether through filings required by other agencies or
- otherwise, Big Rivers will notify the Commission and have its confidential status
- 11 removed. 807 KAR 5:001 Section 13(10)(b).
- 5. As discussed below, the Confidential Information is entitled to
- confidential protection based upon KRS 278.160(3), which shields from disclosure "a
- 14 provision of a special contract that contains rates and conditions of service not filed
- in a utility's general schedule if such provision would otherwise be entitled to be
- excluded from the application of KRS 61.870 to 61.884 under the provisions of KRS
- 17 61.878(1)(c)(1);" and KRS 61.878(1)(c)(1), which protects "records confidentially
- disclosed to an agency or required by an agency to be disclosed to it, generally
- 19 recognized as confidential or proprietary, which if openly disclosed would permit an
- 20 unfair commercial advantage to competitors of the entity that disclosed the records."
- 21 807 KAR 5:001 Section 13(2)(a)(1).

- 6. Section I below explains that Big Rivers operates in competitive
- 2 environments in the wholesale power market and in the credit market. Section II
- 3 below shows that the Confidential Information is generally recognized as
- 4 confidential or proprietary. Section III below demonstrates that public disclosure of
- 5 the Confidential Information would permit an unfair commercial advantage to Big
- 6 Rivers' competitors.

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7 <u>SECTION I</u>

Big Rivers Faces Actual Competition

- 9 7. As a generation and transmission cooperative, Big Rivers competes in
- the wholesale power market. This includes not only the short-term bilateral energy
- market, the day-ahead and real time energy and ancillary services markets, and the
- capacity market to which Big Rivers has access by virtue of its membership in the
- 13 Midcontinent Independent System Operator, Inc. ("MISO") system, but also forward
- bilateral long-term agreements and wholesale agreements with utilities and
- industrial customers. Big Rivers' ability to successfully compete in the market is
- dependent upon a combination of its ability to: 1) obtain the maximum price for the
- power it sells, and 2) keep its cost of production or purchase as low as possible.
- 18 Fundamentally, if Big Rivers' cost of producing or purchasing a unit of power
- increases, its ability to sell that unit in competition with other utilities is adversely
- 20 affected.
- 8. Big Rivers also competes for reasonably priced credit in the credit
- 22 markets, and its ability to compete is directly impacted by its financial results.
- Lower revenues and any events that adversely affect Big Rivers' margins will

- adversely affect its financial results and potentially impact the price it pays for
- 2 credit. A competitor armed with Big Rivers' proprietary and confidential
- 3 information will be able to increase Big Rivers' costs or decrease Big Rivers'
- 4 revenues, which could in turn affect Big Rivers' apparent creditworthiness. A
- 5 utility the size of Big Rivers that operates generation and transmission facilities
- 6 will always have periodic cash and borrowing requirements for both anticipated and
- 7 unanticipated needs. Big Rivers expects to be in the credit markets on a regular
- 8 basis in the future, and it is imperative that Big Rivers improve and maintain its
- 9 credit profile.

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- 9. Finally, Big Rivers competes for economic development opportunities
- both within the Commonwealth and throughout the nation. The ability to negotiate
- 12 competitive electric pricing structures with companies interested in expanding in
- 13 Kentucky is fundamental to the success of Big Rivers' economic development efforts.

14 SECTION II

The Confidential Information is Generally Recognized as Confidential or <u>Proprietary</u>

- 17 10. The Confidential Information for which Big Rivers seeks confidential
- treatment under KRS 278.160(3) and KRS 61.878(1(c)(1) is generally recognized as
- 19 confidential or proprietary under Kentucky law. As fully discussed below, the
- 20 Confidential Information in the responses to both PSC 3-2 and PSC 3-3 consists of
- 21 the confidential terms of the Nucor special contracts that are the subject of this
- 22 proceeding. The Confidential Information in the attachment to the responses to
- 23 PSC 3-2 consists of the confidential terms of certain contracts, including the Nucor

- 1 contracts and the contract between Big Rivers and Geronimo that is pending before
- the Commission in Case No. 2020-00183, and it reveals Big Rivers' confidential and
- 3 proprietary strategic business plan, containing sensitive projected information
- 4 regarding Big Rivers' plans to hedge the Nucor energy requirements.
- 5 11. The Confidential Information is not publicly available, is not
- 6 disseminated within Big Rivers except to those employees and professionals with a
- 7 legitimate business need to know and act upon the information, and is not
- 8 disseminated to others without a legitimate need to know and act upon the
- 9 information. As such, the Confidential Information is generally recognized as
- 10 confidential and proprietary.
- 11 12. Moreover, the Confidential Information includes information similar
- in nature to the Confidential Information contained in Big River's Application in
- this case, for which the Commission already granted confidential treatment. See
- 14 Case No. 2019-00365, Order (March 12, 2020) (granting confidential treatment to
- the information for an indefinite period).¹

See also In Th

¹ See also In The Matter of: Joint Application of Big Rivers Electric Corporation and Meade County Rural Electric Cooperative Cooperation for Approval of Contracts for Electric Service with Nucor Corporation, P.S.C. Case No. 2019-00365, Orders (January 22, 2020, January 27, 2020, and January 28, 2020) (granting confidential protection to information similar in nature to the subject Confidential Information regarding the terms and conditions of the Nucor Contracts); see also In the Matter of: Electronic Application of Big Rivers Electric Corporation for Approval to Modify its MRSM, Tariff, Cease Deferring Depreciation Expenses, Establish Regulatory Assets, Amortize Regulatory Assets, and other Appropriate Relief, P.S.C. Case No. 2020-00064, Order (March 17, 2020) (granting confidential treatment to, among other things, the confidential terms of the Nucor contracts).

SECTION III

2	Disclosure of the Confidential Information Would Permit an Unfair
3	Commercial Advantage to Big Rivers' Competitors

- 13. Public disclosure of the Confidential Information would allow Big
 Rivers' competitors to discover, and make use of, confidential contract terms and
 information concerning Big Rivers' business strategies, to the unfair competitive
 disadvantage of Big Rivers. Public disclosure of the Confidential Information will
- 8 adversely affect Big Rivers in several respects.

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First, public disclosure of confidential price or other significant 9 14. contract terms will place Big Rivers at a considerable disadvantage when 10 negotiating future contracts. Disclosure of the contract terms will provide insight 11 into Big Rivers' cost of producing power and indicate the prices at and terms on 12 which it is willing to sell and purchase power. Potential buyers of power from, or 13 sellers of power to, Big Rivers could thus use the Confidential Information as a 14 benchmark in negotiating the terms of a transaction. The Commission recognized 15 this danger in P.S.C. Case No. 2003-00054, where Union Light, Heat & Power 16 ("ULH&P") argued, and the Commission implicitly accepted, that if the bids it 17 received were publicly disclosed, contractors on future work could use the bids as a 18 benchmark, which would likely lead to the submission of higher bids. *In the Matter* 19 of: Application of the Union Light, Heat and Power Company for Confidential 20 21 Treatment, P.S.C. Case No. 2003-00054, Order (Aug. 4, 2003). The Commission also implicitly accepted ULH&P's further argument that the higher bids would lessen 22 ULH&P's ability to compete with other gas suppliers. Id. Likewise, in P.S.C. Case 23

- 1 No. 2018-00056, the Commission granted confidential treatment to the pricing
- 2 terms of a contract, recognizing "that the specific cost information may be used to
- 3 the financial detriment of Cumberland Valley and its ratepayers by allowing
- 4 potential future vendors to bid just under the cost of its current vendor, which, in
- 5 turn, would place Cumberland Valley at a competitive disadvantage." *In the Matter*
- 6 of: Application of Cumberland Valley Electric, Inc. for Commission Approval for a
- 7 Certificate of Public Convenience and Necessity to Install an Advanced Metering
- 8 Infrastructure (AMI) System Pursuant to KRS 807 KAR 5:001 and KRS 278.020,
- 9 P.S.C. Case No. 2018-00056, Order (May 9, 2018). Similarly, potential power
- suppliers or buyers manipulating Big Rivers' bidding process would lead to higher
- 11 costs or lower revenues to Big Rivers and would place it at an unfair competitive
- disadvantage in the wholesale power market and credit markets.
- 15. Further, if confidential treatment of confidential contract terms is
- denied, then other companies interested in buying or selling power in Kentucky
- would know that the confidential terms of their future contracts, plans, or bids may
- also be publicly disclosed. Many companies would be reluctant to have such
- 17 confidential and proprietary information disclosed because public disclosure would,
- 18 for example, allow their competitors to know how they offer and price their projects.
- 19 This would create precisely the kind of competitive harm KRS 61.878(1)c)(1) intends
- 20 to prevent.
- 21 16. Because companies would not want their confidential and proprietary
- 22 information disclosed to their competitors, public disclosure of the Confidential

- 1 Information in this case would likely reduce the pool of companies willing to
- 2 negotiate with Big Rivers, reducing Big Rivers' and other utilities' ability to secure
- 3 the best terms in power purchase agreements. Big Rivers' competition for future
- 4 renewable purchase contracts is not limited to its traditional regulated competitors.
- 5 Large industrial consumers, municipals, cities, and communities are reaching out to
- 6 solar developers as well.
- 7 The Commission has also recognized this real danger to utilities in
- 8 Kentucky. In P.S.C. Case No. 2003-00054, the Commission granted confidential
- 9 protection for bids submitted to ULH&P. ULH&P argued, and the Commission
- implicitly accepted, that the bidding contractors would not want their bid
- information publicly disclosed, and that disclosure would reduce the contractor pool
- available to ULH&P, which would drive up ULH&P's costs, hurting its ability to
- compete with other gas suppliers. In the Matter of: Application of the Union Light,
- 14 Heat and Power Company for Confidential Treatment, P.S.C. Case No. 2003-00054,
- 15 Order (August 4, 2003). Similarly, in *Hoy v. Kentucky Indus. Revitalization*
- 16 Authority, the Kentucky Supreme Court found that without protection for
- 17 confidential information provided to a public agency, "companies would be reluctant
- to apply for investment tax credits for fear the confidentiality of financial
- information would be compromised." *Hoy v. Kentucky Indus. Revitalization*
- 20 Authority, 907 S.W.2d 766, 769 (Ky. 1995).
- 21 18. Finally, public disclosure of the Confidential Information would
- 22 provide insight into the prices at which Big Rivers is willing to buy or sell energy

- and capacity, and Big Rivers' future needs for energy and capacity. The information
- 2 is also indicative of the market conditions Big Rivers expects to encounter and its
- 3 ability to compete with competitors. Information such as this which bears upon a
- 4 company's detailed inner workings is generally recognized as confidential or
- 5 proprietary. See, e.g., Hoy v. Kentucky Indus. Revitalization Authority, 907 S.W.2d
- 6 766, 768 (Ky. 1995) ("It does not take a degree in finance to recognize that such
- 7 information concerning the inner workings of a corporation is 'generally recognized
- 8 as confidential or proprietary"); Marina Management Servs. v. Cabinet for Tourism,
- 9 Dep't of Parks, 906 S.W.2d 318, 319 (Ky. 1995) (unfair commercial advantage arises
- simply from the ability to ascertain the economic status of the entities without the
- 11 hurdles systemically associated with the acquisition of such information about
- 12 privately owned organizations").
- 13 19. Accordingly, the public disclosure of the information that Big Rivers
- seeks to protect would provide Big Rivers' competitors with an unfair commercial
- 15 advantage.

16 SECTION IV

17 <u>Time Period</u>

- 18 20. Big Rivers requests that all of the Confidential Information remain
- confidential indefinitely because for so long as Big Rivers is in the wholesale power
- 20 market, the public disclosure of the Confidential Information can be used to Big
- 21 Rivers' competitive disadvantage for the reasons stated above. 807 KAR 5:001
- 22 Section 13(2)(a)(2).

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SECTION V

1	Conclusion		
2	21. Based on the foregoing, the Confidential Information is entitled to		
3	confidential protection. If the Commission disagrees, then the Commission should		
4	hold an evidential hearing to protect Big Rivers' due process rights and to supply		
5	the Commission with a complete record to enable it to reach a decision with regard		
6	to this matter. See Utility Regulatory Com'n v. Kentucky Water Service Co., Inc.,		
7	642 S.W.2d 591 (Ky. App. 1982).		
8	WHEREFORE, Big Rivers respectfully requests that the Commission classif		
9	and protect as confidential the Confidential Information.		
10	On this the 13th day of August, 2020.		
11	Respectfully submitted,		
12 13	/s/ Tyson Kamuf		
14			
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