

1 with its responses to Items 2 and 4 of the Commission Staff's First Request for
2 Information.

3 2. One (1) copy of the pages containing Confidential Information, with the
4 Confidential Information highlighted with transparent ink, printed on yellow paper,
5 or otherwise marked "CONFIDENTIAL," is being filed in hardcopy format with this
6 motion. 807 KAR 5:001 Section 13(2)(e).

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

11 4. As discussed below, the Confidential Information is entitled to
12 confidential protection based upon KRS 61.878(1)(c)(1), which protects "*records*
13 *confidentially disclosed to an agency or required by an agency to be disclosed to it,*
14 *generally recognized as confidential or proprietary, which if openly disclosed would*
15 *permit an unfair commercial advantage to competitors of the entity that disclosed the*
16 *records.*" 807 KAR 5:001 Section 13(2)(a)(1).

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

1 **I. Big Rivers Faces Actual Competition**

2 6. As a generation and transmission cooperative, Big Rivers competes in
3 the wholesale power market. This includes not only the short-term bilateral energy
4 market, the day-ahead and real time energy and ancillary services markets, and the
5 capacity market to which Big Rivers has access by virtue of its membership in
6 Midcontinent Independent System Operator, Inc. (“MISO”), but also forward
7 bilateral long-term agreements and wholesale agreements with utilities and
8 industrial customers. Big Rivers’ ability to successfully compete in the market is
9 dependent upon a combination of its ability to: 1) obtain the maximum price for the
10 power it sells, and 2) keep its cost of production as low as possible. Fundamentally,
11 if Big Rivers’ cost of producing a unit of power increases, its ability to sell that unit
12 in competition with other utilities is adversely affected.

13 7. Big Rivers also competes for reasonably priced credit in the credit
14 markets, and its ability to compete is directly impacted by its financial results. Lower
15 revenues and any events that adversely affect Big Rivers’ margins will adversely
16 affect its financial results and potentially impact the price it pays for credit. A
17 competitor armed with Big Rivers’ proprietary and confidential information will be
18 able to increase Big Rivers’ costs or decrease Big Rivers’ revenues, which could in
19 turn affect Big Rivers’ apparent creditworthiness. A utility the size of Big Rivers that
20 operates generation and transmission facilities will always have periodic cash and
21 borrowing requirements for both anticipated and unanticipated needs. Big Rivers

1 expects to be in the credit markets on a regular basis in the future, and it is
2 imperative that Big Rivers improve and maintain its credit profile.

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

7 **II. The Confidential Information is Generally**
8 **Recognized as Confidential or Proprietary**

9 9. The Confidential Information for which Big Rivers seeks confidential
10 treatment under KRS 61.878(1)(c)(1) is generally recognized as confidential or
11 proprietary under Kentucky law. As noted above, the Confidential Information is
12 part of confidential internal evaluations of the Nucor contract, and public disclosure
13 of the Confidential Information would provide insight into the terms under which Big
14 Rivers would borrow funds. The information is also indicative of the market
15 conditions Big Rivers expects to encounter and its ability to compete with
16 competitors. Information such as this which bears upon a company's detailed inner
17 workings is generally recognized as confidential or proprietary. See, e.g., Hoy v.
18 Kentucky Indus. Revitalization Authority, 907 S.W.2d 766, 768 (Ky. 1995) ("It does
19 not take a degree in finance to recognize that such information concerning the inner
20 workings of a corporation is 'generally recognized as confidential or proprietary');
21 Marina Management Servs. v. Cabinet for Tourism, Dep't of Parks, 906 S.W.2d 318,
22 319 (Ky. 1995) (unfair commercial advantage arises simply from "the ability to

1 ascertain the economic status of the entities without the hurdles systemically
2 associated with the acquisition of such information about privately owned
3 organizations”).

4 10. The Confidential Information is not publicly available, is not
5 disseminated within Big Rivers except to those employees and professionals with a
6 legitimate business need to know and act upon the information, and is not
7 disseminated to others without a legitimate need to know and act upon the
8 information. As such, the Confidential Information is generally recognized as
9 confidential and proprietary.

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

12 11. Big Rivers would likely suffer competitive injury if the Confidential
13 Information is publicly disclosed.

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

1 *turn, would place Cumberland Valley at a competitive disadvantage.” Id.; see also*
2 *In the Matter of: Application of the Union Light, Heat and Power Company for*
3 *Confidential Treatment, Order, P.S.C. Case No. 2003-00054 (August 4, 2003) (where*
4 *the Commission implicitly accepted, that if the bids the utility received were*
5 *publicly disclosed, contractors on future work could use the bids as a benchmark,*
6 *which would likely lead to the submission of higher bids).*

7 13. Here, Big Rivers is actively pursuing borrowing funds for a variety of
8 purposes, including in relation to the Nucor contract. If confidential treatment of
9 the Confidential Information is denied, potential lenders to Big Rivers would have
10 insight into Big Rivers anticipated interest rates. The potential lenders could use
11 this information as a benchmark or to gain an advantage in negotiations, leading to
12 higher costs or less favorable terms to Big Rivers, hurting Big Rivers’ ability to
13 compete in the wholesale power and credit markets. The Commission recognized
14 this competitive harm in Case No. 2003-00054 that the public disclosure of bids
15 could be used as a benchmark in future negotiation, which would lead to higher bids
16 in the future, which would, in turn, lessen the utility’s ability to compete with other
17 gas suppliers. *In the Matter of: Application of the Union Light, Heat and Power*
18 *Company for Confidential Treatment, Order, P.S.C. Case No. 2003-00054 (August 4,*
19 *2003).*

20 14. Further, any competitive pressure that adversely affects Big Rivers’
21 revenue and margins could make the company appear less creditworthy and thus
22 impair its ability to compete in the credit markets.

1 On this the 10th day of January, 2020.

2 Respectfully submitted,

3
4
5 

6 Tyson Kamuf, Esq.

7 **BIG RIVERS ELECTRIC**
8 **CORPORATION**

9 201 Third Street, P.O. Box 727

10 Henderson, Kentucky 42419-0024

11 Ph: (270)827-2561 Fax: (270)844-6417

12 tyson.kamuf@bigrivers.com

13
14 Michael L. Kurtz, Esq.

15 Kurt J. Boehm, Esq.

16 Jody Kyler Cohn, Esq.

17 **BOEHM, KURTZ & LOWRY**

18 36 East Seventh Street, Suite 1510

19 Cincinnati, Ohio 45202

20 Ph: (513)421-2255 Fax: (513)421-2764

21 E-Mail: mkurtz@BKLawfirm.com

22 kboehm@BKLawfirm.com

23 jkylercohn@BKLawfirm.com

24
25 *Counsel for Big Rivers Electric*
26 *Corporation*
27