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**COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of:

JOINT APPLICATION OF BIG RIVERS	)	
ELECTRIC CORPORATION AND MEADE	)	
COUNTY RURAL ELECTRIC COOPERATIVE	)	
CORPORATION FOR APPROVAL OF	)	
CONTRACTS FOR ELECTRIC SERVICE WITH	)	Case No.
NUCOR CORPORATION	)	2019-00365
AND	)	
APPLICATION OF BIG RIVERS ELECTRIC	)	
CORPORATION FOR APPROVAL OF TARIFF.	)	

**MOTION OF BIG RIVERS ELECTRIC CORPORATION FOR  
CONFIDENTIAL PROTECTION**

1. Big Rivers Electric Corporation (“Big Rivers”) hereby moves the Kentucky Public Service Commission (“Commission”) pursuant to KRS 278.160(3), KRS 61.878(1)(c)(1), and 807 KAR 5:001 Section 13 to grant confidential protection to certain information contained in Big Rivers’ responses and/or the attachments to Big Rivers’ responses to Items 2, 3, 4, 5, 7, 8, 10, and 13 the Commission Staff’s Initial Request for Information (“PSC 1-2,” “PSC 1-3,” “PSC 1-4,” “PSC 1-5,” “PSC 1-7,” “PSC 1-8,” “PSC 1-10,” and “PSC 1-13,” respectively). The information for which Big Rivers seeks confidential protection is hereinafter referred to as the “Confidential Information.” The Confidential Information pertains to the terms of the special contract for Nucor Corporation that is the subject of this case and the negotiation of those terms (PSC 1-2, PSC 1-3, PSC 1-7, and PSC 1-10); Big Rivers’ internal

1 evaluations relating to that agreement, including energy and capacity projections and  
2 needs, hedging strategies, an analysis of the rates for Nucor, a cost-benefit analysis,  
3 and proprietary reports and projections from third party vendors such as ACES and  
4 S&P Global Market Intelligence (PSC 1-2 and PSC 1-4); discussions with other  
5 economic development prospects (PSC 1-5 and PSC 1-13); and information that would  
6 reveal the confidential price terms of the special contracts Big Rivers has with entities  
7 in Nebraska, the Kentucky Municipal Energy Agency, and others (PSC 1-2 and PSC  
8 1-8).

9           2.       Except for the confidential analysis of the Nucor rates that is attached  
10 to the response to PSC 1-2 (which is being provided electronically subject to the  
11 accompanying motion for deviation), one (1) copy of the pages containing Confidential  
12 Information, with the Confidential Information highlighted with transparent ink,  
13 printed on yellow paper, or otherwise marked “CONFIDENTIAL,” is being filed in  
14 hardcopy format with this motion. 807 KAR 5:001 Section 13(2)(e).

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

19           4.       As discussed below, the Confidential Information is entitled to  
20 confidential protection based upon KRS 278.160(3), which shields from disclosure “*a*  
21 *provision of a special contract that contains rates and conditions of service not filed in*  
22 *a utility's general schedule if such provision would otherwise be entitled to be excluded*

1 *from the application of KRS 61.870 to 61.884 under the provisions of KRS*  
2 *61.878(1)(c)(1).” KRS 61.878(1)(c)(1) protects “records confidentially disclosed to an*  
3 *agency or required by an agency to be disclosed to it, generally recognized as*  
4 *confidential or proprietary, which if openly disclosed would permit an unfair*  
5 *commercial advantage to competitors of the entity that disclosed the records.”* 807  
6 KAR 5:001 Section 13(2)(a)(1).

7         5. Section I below explains that Big Rivers operates in competitive  
8 environments in the wholesale power market and in the credit market. Section II  
9 below shows that the Confidential Information is generally recognized as confidential  
10 or proprietary. Section III below demonstrates that public disclosure of the  
11 Confidential Information would permit an unfair commercial advantage to Big  
12 Rivers’ competitors.

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

14         6. As a generation and transmission cooperative, Big Rivers competes in  
15 the wholesale power market. This includes not only the short-term bilateral energy  
16 market, the day-ahead and real time energy and ancillary services markets, and the  
17 capacity market to which Big Rivers has access by virtue of its membership in  
18 Midcontinent Independent System Operator, Inc. (“MISO”), but also forward bilateral  
19 long-term agreements and wholesale agreements with utilities and industrial  
20 customers. Big Rivers’ ability to successfully compete in the market is dependent  
21 upon a combination of its ability to: 1) obtain the maximum price for the power it  
22 sells, and 2) keep its cost of production as low as possible. Fundamentally, if Big

1 Rivers' cost of producing a unit of power increases, its ability to sell that unit in  
2 competition with other utilities is adversely affected.

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

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

18 **II. The Confidential Information is Generally**  
19 **Recognized as Confidential or Proprietary**

20 9. The Confidential Information for which Big Rivers seeks confidential  
21 treatment under KRS 278.160(3) and KRS 61.878(1)(c)(1) is generally recognized as  
22 confidential or proprietary under Kentucky law. As noted above, much of the

1 Confidential Information consists of the negotiated terms of special contracts. KRS  
2 278.160(3) specifically recognizes that rates and conditions of service set forth in a  
3 special contract are not required to be publicly disclosed if such terms are entitled to  
4 protection under KRS 61.878(1)(c)(1).

5 10. Public disclosure of the confidential internal analyses would provide  
6 insight into Big Rivers' need and availability of energy and capacity, and into the  
7 prices at which Big Rivers is willing to buy or sell energy and capacity. The  
8 information is also indicative of the market conditions Big Rivers expects to  
9 encounter and its ability to compete with competitors. Information such as this which  
10 bears upon a company's detailed inner workings is generally recognized as  
11 confidential or proprietary. See, e.g., *Hoy v. Kentucky Indus. Revitalization Authority*,  
12 907 S.W.2d 766, 768 (Ky. 1995) (“It does not take a degree in finance to recognize that  
13 such information concerning the inner workings of a corporation is ‘generally  
14 recognized as confidential or proprietary”); *Marina Management Servs. v. Cabinet for*  
15 *Tourism, Dep’t of Parks*, 906 S.W.2d 318, 319 (Ky. 1995) (unfair commercial  
16 advantage arises simply from “the ability to ascertain the economic status of the  
17 entities without the hurdles systemically associated with the acquisition of such  
18 information about privately owned organizations”). Moreover, the Commission  
19 previously granted confidential treatment to this type of information. See, e.g., *In the*  
20 *Matter of: Electronic Application of Kentucky Power Company for Approval of a*  
21 *Contract for Electric Service with Braidy Industries Inc.*, P.S.C. Case No. 2018-00418  
22 (August 20, 2019); *In the Matter of: Application of Big Rivers Electric Corporation for*

1 a General Adjustment in Rates, Order, P.S.C. Case No. 2012-0535 (April 25, 2013)  
2 (granting confidential treatment to details of sensitive commercial negotiations).

3 11. Likewise, the Commission has previously recognized the confidential or  
4 proprietary nature of information such as confidential discussions with economic  
5 development prospects and proprietary third party reports. See, e.g., id.; In the  
6 Matter of: Electric Application of Duke Energy Kentucky, Inc. for a Certificate of Public  
7 Convenience and Necessity for Dry Bottom Ash Conversion of the East Bend  
8 Generating Station, P.S.C. Case No. 2016-00268 (Jan. 24, 2019) (granting confidential  
9 treatment to proprietary third party information).

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

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

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

20 14. In P.S.C. Case No. 2003-00054, the Commission granted confidential  
21 protection for bids submitted to Union Light Heat & Power ("ULH&P"). ULH&P  
22 argued, and the Commission implicitly accepted, that the bidding contractors would

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

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

21 16. Here, Big Rivers is actively pursuing additional economic development  
22 opportunities in its service territory. If confidential treatment of the discussions with

1 economic development prospects or the rates and terms of service set forth in the  
2 special contracts is denied, companies interested in locating in Big Rivers' service  
3 territory would know that the confidential information relating to their intentions to  
4 locate in a certain area or the terms of their contracts may be publicly disclosed.  
5 Because many companies are reluctant to have such information disclosed, public  
6 disclosure of the Confidential Information in this case would likely reduce the pool of  
7 companies willing to negotiate with Big Rivers, reducing Big Rivers' ability to  
8 promote economic development in its territory.

9 17. Similarly, Big Rivers relies on proprietary data and projections from  
10 third parties, including as part of its analysis of and negotiations with respect to the  
11 rates and terms offered to economic development prospects. If confidential treatment  
12 is not granted to such proprietary information, those third parties would not provide  
13 the information to Big Rivers, and Big Rivers would lose an important tool it relies  
14 on to negotiate the best prices and other terms with such counterparties.

15 18. Big Rivers is also actively engaged in buying and selling power in the  
16 wholesale power markets, and Big Rivers expects to engage in negotiations with  
17 counterparties in the future. Public disclosure of the Confidential Information would  
18 provide potential purchasers of energy or capacity from Big Rivers; potential sellers  
19 of energy or capacity to Big Rivers; and other providers competing against Big Rivers  
20 for purchases or sales of energy or capacity with insight into the prices and the terms  
21 under which Big Rivers is willing to buy and sell energy and capacity, with insight  
22 into Big Rivers' need and availability of capacity and energy, and with insight into



1 Big Rivers' hedging strategies. These market participants could use this information  
2 as a benchmark or to gain an advantage in negotiations, leading to higher costs, lower  
3 revenues, or less favorable terms to Big Rivers, hurting Big Rivers' ability to compete  
4 in the wholesale power and credit markets. Further, any competitive pressure that  
5 adversely affects Big Rivers' revenue and margins could make the company appear  
6 less creditworthy and thus impair its ability to compete in the credit markets.

7 19. Thus, Big Rivers' competitiveness will be adversely affected if other  
8 suppliers are given such an unfair competitive advantage or if potential  
9 counterparties are given a negotiating advantage. Accordingly, the public disclosure  
10 of the information that Big Rivers seeks to protect pursuant to KRS 278.160(3) and  
11 KRS 61.878(1)(c)(1) would provide Big Rivers' competitors with an unfair commercial  
12 advantage.

#### 13 **IV. Time Period**

14 20. Big Rivers requests that all of the Confidential Information remain  
15 confidential indefinitely because for so long as Big Rivers is in the wholesale power  
16 market, the public disclosure of the confidential terms of special contracts, its  
17 analysis of those terms, confidential discussions with third parties, and the third  
18 party data used in the evaluations could be used to Big Rivers' competitive  
19 disadvantage for the reasons stated above. 807 KAR 5:001 Section 13(2)(a)(2).

#### 20 **V. Conclusion**

1           21.    Based on the foregoing, the Confidential Information is entitled to  
2 confidential protection. If the Commission disagrees, then the Commission should  
3 hold an evidential hearing to protect Big Rivers' due process rights and to supply the  
4 Commission with a complete record to enable it to reach a decision with regard to this  
5 matter. See Utility Regulatory Com'n v. Kentucky Water Service Co., Inc., 642 S.W.2d  
6 591 (Ky. App. 1982).

7           WHEREFORE, Big Rivers respectfully request that the Commission classify  
8 and protect as confidential the Confidential Information.

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1 On this the 11<sup>th</sup> day of December, 2019.

2 Respectfully submitted,

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5  
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