COMMONWEALTH OF KENTUCKY BEFORE THE PUBLIC SERVICE COMMISSION

3 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 NUCOR CORPORATION AND)))))	Case No. 2019-00365
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MOTION OF BIG RIVERS ELECTRIC CORPORATION FOR CONFIDENTIAL PROTECTION

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- 8 1. Big Rivers Electric Corporation ("Big Rivers") hereby moves the 9 Kentucky Public Service Commission ("Commission") pursuant to KRS 10 61.878(1)(c)(1) and 807 KAR 5:001 Section 13 to grant confidential protection to 11 certain information contained in Big Rivers' first updated response to Item 5 of the 12 Commission Staff's Initial Request for Information ("PSC 1-5"). The information for 13 which Big Rivers seeks confidential protection is hereinafter referred to as the 14 "Confidential Information." The Confidential Information pertains to discussions 15 with economic development prospects.
- 16 2. One (1) copy of the pages containing Confidential Information, with the 17 Confidential Information highlighted with transparent ink, printed on yellow paper,

- 1 or otherwise marked "CONFIDENTIAL," is being filed in hardcopy format with this 2 motion. 807 KAR 5:001 Section 13(2)(e).
- 3. If and to the extent the Confidential Information becomes generally 4 available to the public, whether through filings required by other agencies or 5 otherwise, Big Rivers will notify the Commission and have its confidential status 6 removed. 807 KAR 5:001 Section 13(10)(b).
- 4. As discussed below, the Confidential Information is entitled to 8 confidential protection based upon KRS 61.878(1)(c)(1), which protects "records 9 confidentially disclosed to an agency or required by an agency to be disclosed to it, 10 generally recognized as confidential or proprietary, which if openly disclosed would 11 permit an unfair commercial advantage to competitors of the entity that disclosed the 12 records." 807 KAR 5:001 Section 13(2)(a)(1).
- 5. Section I below explains that Big Rivers operates in competitive environments in the wholesale power market and in the credit market. Section II below shows that the Confidential Information is generally recognized as confidential or proprietary. Section III below demonstrates that public disclosure of the Confidential Information would permit an unfair commercial advantage to Big Rivers' competitors.

I. Big Rivers Faces Actual Competition

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20 6. As a generation and transmission cooperative, Big Rivers competes in 21 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 Midcontinent Independent System Operator, Inc. ("MISO"), 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 as low as possible. Fundamentally, if Big Rivers' cost of producing a unit of power increases, its ability to sell that unit in competition with other utilities is adversely affected.
- 10 7. Big Rivers also competes for reasonably priced credit in the credit
 11 markets, and its ability to compete is directly impacted by its financial results. Lower
 12 revenues and any events that adversely affect Big Rivers' margins will adversely
 13 affect its financial results and potentially impact the price it pays for credit. A
 14 competitor armed with Big Rivers' proprietary and confidential information will be
 15 able to increase Big Rivers' costs or decrease Big Rivers' revenues, which could in
 16 turn affect Big Rivers' apparent creditworthiness. A utility the size of Big Rivers that
 17 operates generation and transmission facilities will always have periodic cash and
 18 borrowing requirements for both anticipated and unanticipated needs. Big Rivers
 19 expects to be in the credit markets on a regular basis in the future, and it is
 20 imperative that Big Rivers improve and maintain its credit profile.
- 8. Finally, Big Rivers competes for economic development opportunities both within the Commonwealth and throughout the nation. The ability to negotiate

- 1 competitive electric pricing structures with companies interested in expanding in
- 2 Kentucky is fundamental to the success of Big Rivers' economic development efforts.

3 II. The Confidential Information is Generally Recognized as Confidential or Proprietary

- 5 9. The Confidential Information for which Big Rivers seeks confidential treatment under KRS 61.878(1)(c)(1) is generally recognized as confidential or 7 proprietary under Kentucky law. As noted above, the Confidential Information pertains to discussions with a company potentially looking to locate within Big Rivers' Members' service territory. The Commission has previously recognized the confidential or proprietary nature of third party information such as confidential discussions with economic development prospects and proprietary third party reports. See, e.g., In the Matter of: Electronic Application of Kentucky Power Company for Approval of a Contract for Electric Service with Braidy Industries Inc., P.S.C. Case No. 2018-00418 (August 20, 2019); In the Matter of: Application of Big Rivers Electric Corporation for a General Adjustment in Rates, Order, P.S.C. Case No. 2012-0535 (April 25, 2013) (granting confidential treatment to details of sensitive commercial negotiations); In the Matter of: Electric Application of Duke Energy Kentucky, Inc. for a Certificate of Public Convenience and Necessity for Dry Bottom Ash Conversion of the East Bend Generating Station, P.S.C. Case No. 2016-00268 (Jan. 24, 2019) (granting confidential treatment to proprietary third party information).
- 21 10. The Confidential Information is not publicly available, is not 22 disseminated within Big Rivers except to those employees and professionals with a

- 1 legitimate business need to know and act upon the information, and is not
- 2 disseminated to others without a legitimate need to know and act upon the
- 3 information. As such, the Confidential Information is generally recognized as
- 4 confidential and proprietary.

5 III. Disclosure of the Confidential Information Would Permit an 6 Unfair Commercial Advantage to Big Rivers' Competitors

- 7 11. Big Rivers would likely suffer competitive injury if the Confidential 8 Information is publicly disclosed.
- 9 12. In P.S.C. Case No. 2003-00054, the Commission granted confidential 10 protection for bids submitted to Union Light Heat & Power ("ULH&P"). ULH&P 11 argued, and the Commission implicitly accepted, that the bidding contractors would 12 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, Heat and Power Company for Confidential Treatment, Order, P.S.C. Case No. 2003-00054 (August 4, 2003). Similarly, in Hoy v. Kentucky Indus. <u>Revitalization Authority</u>, the Kentucky Supreme Court found that without protection for 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 21 Authority, 907 S.W.2d 766, 769 (Ky. 1995).

1 13. Here, Big Rivers is actively pursuing additional economic development opportunities in its service territory. If confidential treatment of the discussions with economic development prospects, companies interested in locating in Big Rivers' service territory would know that the confidential information relating to their intentions to locate in a certain area may be publicly disclosed. Because many companies are reluctant to have such information disclosed, public disclosure of the Confidential Information in this case would likely reduce the pool of companies willing to negotiate with Big Rivers, reducing Big Rivers' ability to promote economic development in its territory and providing an unfair competitive advantage to competitors of Big Rivers.

IV. Time Period

14. Big Rivers requests that all of the Confidential Information remain 13 confidential indefinitely because for so long as Big Rivers is in the wholesale power 14 market, the public disclosure of confidential discussions with third parties could be 15 used to Big Rivers' competitive disadvantage for the reasons stated above. 807 KAR 16 5:001 Section 13(2)(a)(2).

V. Conclusion

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18 15. Based on the foregoing, the Confidential Information is entitled to confidential protection. If the Commission disagrees, then the Commission should 20 hold an evidential hearing to protect Big Rivers' due process rights and to supply the Commission with a complete record to enable it to reach a decision with regard to

- 1 this matter. <u>See Utility Regulatory Com'n v. Kentucky Water Service Co., Inc., 642</u>
- 2 S.W.2d 591 (Ky. App. 1982).
- 3 WHEREFORE, Big Rivers respectfully request that the Commission classify
- 4 and protect as confidential the Confidential Information.

On this the 10th day of January, 2020.

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