

1 or otherwise marked “CONFIDENTIAL,” is being filed in hardcopy format with this
2 motion. 807 KAR 5:001 Section 13(2)(e).

3 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).

7 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).

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

19 I. Big Rivers Faces Actual Competition

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

1 market, the day-ahead and real time energy and ancillary services markets, and the
2 capacity market to which Big Rivers has access by virtue of its membership in
3 Midcontinent Independent System Operator, Inc. (“MISO”), but also forward
4 bilateral long-term agreements and wholesale agreements with utilities and
5 industrial customers. Big Rivers’ ability to successfully compete in the market is
6 dependent upon a combination of its ability to: 1) obtain the maximum price for the
7 power it sells, and 2) keep its cost of production as low as possible. Fundamentally,
8 if Big Rivers’ cost of producing a unit of power increases, its ability to sell that unit
9 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.

21 8. Finally, Big Rivers competes for economic development opportunities
22 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**
4 **Recognized as Confidential or Proprietary**

5 9. The Confidential Information for which Big Rivers seeks confidential
6 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
8 pertains to discussions with a company potentially looking to locate within Big
9 Rivers' Members' service territory. The Commission has previously recognized the
10 confidential or proprietary nature of third party information such as confidential
11 discussions with economic development prospects and proprietary third party
12 reports. See, e.g., In the Matter of: Electronic Application of Kentucky Power Company
13 for Approval of a Contract for Electric Service with Braidy Industries Inc., P.S.C. Case
14 No. 2018-00418 (August 20, 2019); In the Matter of: Application of Big Rivers Electric
15 Corporation for a General Adjustment in Rates, Order, P.S.C. Case No. 2012-0535
16 (April 25, 2013) (granting confidential treatment to details of sensitive commercial
17 negotiations); In the Matter of: Electric Application of Duke Energy Kentucky, Inc. for
18 a Certificate of Public Convenience and Necessity for Dry Bottom Ash Conversion of
19 the East Bend Generating Station, P.S.C. Case No. 2016-00268 (Jan. 24, 2019)
20 (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
13 the contractor pool available to ULH&P, which would drive up ULH&P's costs,
14 hurting its ability to compete with other gas suppliers. In the Matter of: Application
15 of the Union Light, Heat and Power Company for Confidential Treatment, Order,
16 P.S.C. Case No. 2003-00054 (August 4, 2003). Similarly, in Hoy v. Kentucky Indus.
17 Revitalization Authority, the Kentucky Supreme Court found that without protection
18 for confidential information provided to a public agency, "companies would be
19 reluctant to apply for investment tax credits for fear the confidentiality of financial
20 information would be compromised." Hoy v. Kentucky Indus. Revitalization
21 Authority, 907 S.W.2d 766, 769 (Ky. 1995).

1 this matter. See Utility Regulatory Com'n v. Kentucky Water Service Co., Inc., 642
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.

5

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*