

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

3 In the Matter of:

ELECTRONIC APPLICATION OF BIG RIVERS)	
ELECTRIC CORPORATION FOR APPROVAL OF ITS)	
2020 ENVIRONMENTAL COMPLIANCE PLAN,)	
AUTHORITY TO RECOVER COSTS THROUGH)	Case No.
A REVISED ENVIRONMENTAL SURCHARGE)	2019-00435
AND TARIFF, THE ISSUANCE OF A CERTIFICATE)	
OF PUBLIC CONVENIENCE AND NECESSITY)	
FOR CERTAIN PROJECTS, AND APPROPRIATE)	
ACCOUNTING AND OTHER RELIEF)	

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

6 1. Big Rivers Electric Corporation (“Big Rivers”) hereby moves the
7 Kentucky Public Service Commission (the “Commission”), pursuant to KRS 61.878
8 and 807 KAR 5:001 Section 13, to grant confidential protection to certain information
9 contained in Big Rivers’ Response to the Second Request for Information propounded
10 by Commission Staff in the above-styled matter. The information for which Big
11 Rivers seeks confidential protection is hereinafter referred to as the “Confidential
12 Information,” and it is contained in Big Rivers’ responses to Item Nos. 2 and 3 of
13 Commission Staff’s Second Request.

14 2. Pursuant to the Commission’s March 24, 2020 Order in *In the Matter of:*
15 *Electronic Emergency Docket Related to the Novel Coronavirus COVID-19*, Case No.
16 2020-00085, one (1) copy of each response containing Confidential Information, with
17 the Confidential Information highlighted with transparent ink and marked

1 “CONFIDENTIAL,” is being filed with this motion by email to PSCED@ky.gov with
2 a read receipt. A redacted copy of each of those responses is being filed with the
3 Commission via its Electronic Filing System.

4 3. A copy of this motion with the Confidential Information redacted has
5 been served on all parties to this proceeding through the use of electronic filing. *See*
6 807 KAR 5:001, Section 13(b). A copy of the Confidential Information has been served
7 on all parties that have signed a confidentiality agreement.

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
10 otherwise, Big Rivers will notify the Commission and have its confidential status
11 removed. 807 KAR 5:001 Section 13(10)(b).

12 5. The Confidential Information includes specific projected revenues from
13 byproduct sales and projected generation. As discussed below, this Confidential
14 Information is entitled to confidential treatment pursuant to KRS 61.878(1)(c)(1),
15 which protects “records confidentially disclosed to an agency or required by an agency
16 to be disclosed to it, generally recognized as confidential or proprietary, which if
17 openly disclosed would permit an unfair commercial advantage to competitors of the
18 entity that disclosed the records.” 807 KAR 5:001 Section 13(2)(a)(1).

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

20 6. Big Rivers competes in the wholesale power markets to sell energy it
21 produces in excess of its Members’ needs. Big Rivers’ ability to successfully compete
22 in the wholesale power markets is dependent upon a combination of its ability to

1 negotiate the maximum price for the power sold and its ability to keep its cost of
2 production as low as possible. If Big Rivers' cost of producing a kilowatt-hour of
3 energy increases, its competitive position against other power producers is adversely
4 affected. Similarly, Big Rivers' efforts to maximize the value of its generation assets
5 through the sale of generation by-products are hindered if other participants in those
6 markets are privy to internal projections detailing estimated output and pricing.

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

18 8. As is evidenced by these economic pressures, Big Rivers has
19 "competitors" as contemplated under KRS 61.878(1)(c)(1) and faces actual
20 competition from other market participants.

1 **II. The Confidential Information is Generally**
2 **Recognized as Confidential or Proprietary**

3 9. The Confidential Information for which Big Rivers seeks confidential
4 treatment under KRS 61.878(1)(c)(1) is generally recognized as confidential or
5 proprietary under Kentucky law. As noted above, the Confidential Information
6 includes operational and financial information and conclusions that detail Big Rivers’
7 facilities and other detailed inner workings. The public disclosure of this information
8 will inevitably inure to the benefit of the cooperative’s competitors, which would gain
9 valuable, non-public information about the cooperative’s business. Information such
10 as this is generally recognized as confidential or proprietary.¹

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

¹ See, e.g., *Hoy v. Kentucky Indus. Revitalization Authority*, 907 S.W.2d 766, 768 (Ky. 1995) (“It does not take a degree in finance to recognize that such information concerning the inner workings of a corporation is ‘generally recognized as confidential or proprietary’”); *Marina Management Servs. v. Cabinet for Tourism, 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 hurdles systemically associated with the acquisition of such information about privately owned organizations”); Case No. 2019-00115, *In the Matter of: Electronic Application of Grayson County Water District for a Deviation from Meter Testing Requirements of 807 KAR 5:066, Section 16(1)*, Order (Ky. P.S.C. September 19, 2019) (granting confidential protection for proprietary product produced by a third party that was not available to the general public/required membership to obtain and was generally recognized as confidential).

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

3 11. Disclosure of the Confidential Information would afford Big Rivers’
4 competitors an unfair commercial advantage. As discussed above, Big Rivers faces
5 actual competition in the power and by-product markets and in the credit markets.
6 It is likely that Big Rivers would suffer competitive injury if the Confidential
7 Information were publicly disclosed, and the information should therefore be subject
8 to confidential treatment.

9 12. In Case No. 2018-00056, the Commission granted confidential
10 treatment to pricing information provided by Cumberland Valley Electric, Inc.
11 (“Cumberland Valley”).² In that case, the Commission recognized “that the specific
12 cost information may be used to the financial detriment of Cumberland Valley and
13 its ratepayers by allowing potential future vendors to bid just under the cost of its
14 current vendor, which, in turn, would place Cumberland Valley at a competitive
15 disadvantage.” Likewise, disclosure of the Confidential Information would afford Big
16 Rivers’ contractors, vendors, and competitors access to cost and operational
17 parameters which are material to Big Rivers, thereby allowing them to manipulate
18 contract negotiations and bidding processes. If Big Rivers’ potential vendors or
19 competitors are privy to detailed information about the cooperative’s estimated
20 expenses, operations and maintenance activities, and related information about the

² *In the Matter of: Application of Cumberland Valley Electric, Inc. for Commission Approval for a Certificate of Public Convenience and Necessity to Install an Advanced Metering Infrastructure (AMI) System Pursuant to KRS 807 KAR 5:001 and KRS 278.020 (Ky. P.S.C. May 9, 2018).*

1 inner-workings of the cooperative and its generation assets, the advantage they gain
2 is a competitive disadvantage to Big Rivers, its Member-Owners, and the customers
3 they serve. This is especially true given that Big Rivers faces actual competition in
4 the electricity markets.

5 13. In Case No. 2003-00054, the Commission likewise granted confidential
6 treatment to contractor bids submitted to Union Light, Heat & Power Company
7 (“ULH&P”). ULH&P argued, and the Commission implicitly accepted, that if the
8 bids it received were publicly disclosed, contractors on future work could use the bids
9 as a benchmark, which would likely lead to the submission of higher bids.³ The
10 Commission also implicitly accepted ULH&P’s further argument that the higher bids
11 would lessen ULH&P’s ability to compete with other gas suppliers, under the
12 assumption that higher bids would lead to high prices, and higher prices would lead
13 to higher rates.

14 14. Moreover, public disclosure of projected budgetary and O&M costs
15 would give power producers and marketers with which Big Rivers competes in the
16 wholesale power markets insight into Big Rivers’ cost of producing power. Knowledge
17 of this information would give those power producers and marketers an unfair
18 competitive advantage because they could use that information to potentially
19 underbid Big Rivers in wholesale transactions, reducing Big Rivers’ revenue and
20 impairing Big Rivers’ ability to compete in the wholesale power and credit markets.

³ See *In the Matter of: Application of Union Light, Heat & Power Company for Confidential Treatment* (Ky. P.S.C. Aug. 4, 2003).

1 Further, any competitive pressure that adversely affects Big Rivers' revenue and
2 margins could make the company appear less creditworthy and thus impair its ability
3 to compete in the credit markets.

4 15. Thus, Big Rivers' competitiveness will be adversely affected if potential
5 counterparties and competitors are provided with Big Rivers' private, proprietary,
6 and commercially-sensitive information. Accordingly, the public disclosure of the
7 Confidential Information Big Rivers seeks to protect pursuant to KRS 61.878(1)(c)(1)
8 would provide Big Rivers' competitors with an unfair commercial advantage.

9 **IV. Time Period**

10 16. Big Rivers requests that the Confidential Information remain
11 confidential for a period of five (5) years, which will allow that Confidential
12 Information to become sufficiently historic such that its public disclosure would not
13 provide competitors with an advantage in the marketplace.

14 **V. Conclusion**

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

1 WHEREFORE, Big Rivers respectfully requests that the Commission classify
2 and protect as confidential the Confidential Information.

3 This 4th day of May, 2020.

4 Respectfully submitted,

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31 **Certification**
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I hereby certify that the electronic version of this filing made with the Commission on May 4, 2020, is a true and accurate copy of the paper document that will be submitted to the Commission within 30 days of the Governor lifting the state of the emergency pursuant to the Commission's Orders in Case No. 2020-00085, and the electronic version of the filing has been transmitted to the Commission. A copy of this filing has been served electronically on all parties of record for whom an email address is given in the online Service List for this proceeding, and there are currently no parties that the Commission has excused from participation by electronic means.

/s/ Edward T. Depp
Counsel to Big Rivers Electric Corporation