

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 estimated cost and
13 pricing information related to the projects Big Rivers proposes to pursue as part of
14 this proceeding, including projected capital costs (*see* Response to Item No. 9) and
15 ongoing variable operations and maintenance (“O&M”) costs (*see* Response to Item
16 No. 3). The Confidential Information also reflects expected operating characteristics
17 of Big Rivers’ D.B. Wilson Station, specifically that related to emissions performance
18 (*see* Response to Item No. 7) and anticipated yields and value of marketable by-
19 products resulting from generation activities (*see* Response to Item No. 3). As
20 discussed below, this Confidential Information is entitled to confidential treatment
21 pursuant to KRS 61.878(1)(c)(1), which protects “records confidentially disclosed to
22 an agency or required by an agency to be disclosed to it, generally recognized as

1 confidential or proprietary, which if openly disclosed would permit an unfair
2 commercial advantage to competitors of the entity that disclosed the records.” 807
3 KAR 5:001 Section 13(2)(a)(1).

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

5 6. Big Rivers competes in the wholesale power markets to sell energy it
6 produces in excess of its Members’ needs. Big Rivers’ ability to successfully compete
7 in the wholesale power markets is dependent upon a combination of its ability to
8 negotiate the maximum price for the power sold and its ability to keep its cost of
9 production as low as possible. If Big Rivers’ cost of producing a kilowatt-hour of
10 energy increases, its competitive position against other power producers is adversely
11 affected. Similarly, Big Rivers’ efforts to maximize the value of its generation assets
12 through the sale of generation by-products are hindered if other participants in those
13 markets are privy to internal projections detailing estimated output and pricing.

14 7. Big Rivers also competes for reasonably priced credit in the credit
15 markets, and its ability to compete is directly impacted by its financial results. Lower
16 revenues and any events that adversely affect Big Rivers’ margins will adversely
17 affect its financial results and potentially impact the price it pays for credit. A
18 competitor armed with Big Rivers’ proprietary and confidential information will be
19 able to increase Big Rivers’ costs or decrease Big Rivers’ revenues, which could in
20 turn affect Big Rivers’ apparent creditworthiness. A utility the size of Big Rivers that
21 operates generation and transmission facilities will always have periodic cash and
22 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. As is evidenced by these economic pressures, Big Rivers has
4 “competitors” as contemplated under KRS 61.878(1)(c)(1) and faces actual
5 competition from other market participants.

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

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

16 10. The Confidential Information is not publicly available, is not
17 disseminated within Big Rivers except to those employees and professionals with a

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 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 recognized as confidential and
4 proprietary both internally and generally.

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

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

13 12. In Case No. 2018-00056, the Commission granted confidential
14 treatment to pricing information provided by Cumberland Valley Electric, Inc.
15 ("Cumberland Valley").² In that case, the Commission recognized "that the specific
16 cost information may be used to the financial detriment of Cumberland Valley and
17 its ratepayers by allowing potential future vendors to bid just under the cost of its
18 current vendor, which, in turn, would place Cumberland Valley at a competitive
19 disadvantage." Likewise, disclosure of the Confidential Information would afford Big
20 Rivers' contractors, vendors, and competitors access to cost and operational

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 parameters which are material to Big Rivers, thereby allowing them to manipulate
2 contract negotiations and bidding processes. If Big Rivers' potential vendors or
3 competitors are privy to detailed information about the cooperative's estimated
4 expenses, operations and maintenance activities, and related information about the
5 inner-workings of the cooperative and its generation assets, the advantage they gain
6 is a competitive disadvantage to Big Rivers, its Member-Owners, and the customers
7 they serve. This is especially true given that Big Rivers faces actual competition in
8 the electricity markets.

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

18 14. Moreover, public disclosure of projected budgetary and O&M costs
19 would give power producers and marketers with which Big Rivers competes in the
20 wholesale power markets insight into Big Rivers' cost of producing power. Knowledge

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

1 of this information would give those power producers and marketers an unfair
2 competitive advantage because they could use that information to potentially
3 underbid Big Rivers in wholesale transactions, reducing Big Rivers' revenue and
4 impairing Big Rivers' ability to compete in the wholesale power and credit markets.
5 Further, any competitive pressure that adversely affects Big Rivers' revenue and
6 margins could make the company appear less creditworthy and thus impair its ability
7 to compete in the credit markets.

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

13 **IV. Time Period**

14 16. With respect to the estimated by-product output and pricing information
15 and related ongoing variable O&M information contained in Big Rivers' response to
16 Item No. 3, Big Rivers requests that the Confidential Information be protected
17 indefinitely, at least as long as the relevant facilities are in service. Big Rivers also
18 requests confidential protection indefinitely for the projected emissions performance
19 information contained in Big Rivers' response to Item No. 7, as the public disclosure
20 of this confidential information could be used to Big Rivers' competitive disadvantage
21 well into the future. Finally, Big Rivers requests that the projected capital cost
22 information reflected in its response to Item No. 9 remain confidential for a period of

1 five (5) years, which will allow that Confidential Information to become sufficiently
2 historic such that its public disclosure would not provide competitors with an
3 advantage in the marketplace.

4 **V. Conclusion**

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

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

13 This 13th day of April, 2020.

14 Respectfully submitted,

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20 **Certification**

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22 I hereby certify that the electronic version of this filing made with the
23 Commission on April 13, 2020, is a true and accurate copy of the paper document that
24 will be submitted to the Commission within 30 days of the Governor lifting the state
25 of the emergency pursuant to the Commission's Orders in Case No. 2020-00085, and
26 the electronic version of the filing has been transmitted to the Commission. A copy of
27 this filing has been served electronically on all parties of record for whom an email
28 address is given in the online Service List for this proceeding, and there are currently
29 no parties that the Commission has excused from participation by electronic means.
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31
32 /s/ Edward T. Depp
33 *Counsel to Big Rivers Electric Corporation*
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