



1 highlighted with transparent ink, printed on yellow paper, or otherwise marked  
2 “CONFIDENTIAL,” is being filed with this motion by use of an encrypted file-share  
3 site, whereby the Commission may retrieve the confidential materials. A copy of those  
4 pages, with the Confidential Information redacted, is being electronically filed with  
5 the Responses to the Information Requests filed with this Motion.

6 4. A copy of this motion with the Confidential Information redacted has  
7 been served on all parties to this proceeding through the use of electronic filing. *See*  
8 807 KAR 5:001, Section 13(b). A copy of the Confidential Information has been served  
9 on all parties that have signed a confidentiality agreement.

10 5. 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.

15 6. If disclosed, the Confidential Information included herein would allow  
16 Big Rivers’ competitors to discover, and make use of, confidential information  
17 concerning Big Rivers’ financial condition and business strategies, to the unfair  
18 competitive disadvantage of Big Rivers.

19 7. If and to the extent the Confidential Information becomes generally  
20 available to the public, whether through filings required by other agencies or  
21 otherwise, Big Rivers will notify the Commission in writing. *See* 807 KAR 5:001,  
22 Section 13(10)(b).

1           8.     As discussed below, the Confidential Information is entitled to  
2 confidential treatment pursuant to KRS 61.878(1)(c)(1), which protects “records  
3 confidentially disclosed to an agency or required by an agency to be disclosed to it,  
4 generally recognized as confidential or proprietary, which if openly disclosed would  
5 permit an unfair commercial advantage to competitors of the entity that disclosed the  
6 records.” In addition, a portion of the Confidential Information also is entitled to  
7 confidential treatment under to KRS 61.878(1)(m), which protects “records the  
8 disclosure of which would have a reasonable likelihood of threatening the public  
9 safety by exposing a vulnerability in preventing, protecting against, mitigating, or  
10 responding to a terrorist act . . .” Because the Confidential Information falls within  
11 one or both of these exceptions to the disclosure requirement of the Kentucky Open  
12 Records Act, it is entitled to confidential treatment in this proceeding. 807 KAR 5:001  
13 Section 13(2)(a)(1).

14           9.     Finally, all of the Confidential Information contained in Big Rivers’  
15 Supplemental Responses to Item AG 1-42 of AG’s First Set of Data Requests is  
16 information for which, on April 6, 2020, the Commission granted confidential  
17 treatment for a period of ten (10) years.<sup>1</sup>

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

19           10.    Big Rivers competes in the wholesale power markets to sell energy it  
20 produces in excess of its Members’ needs. Big Rivers’ ability to successfully compete

---

<sup>1</sup> *In the Matter of: Electronic Application of Big Rivers Electric Corporation for Enforcement of Rate and Service Standards*, Order, P.S.C. Case No. 2019-00269 (Apr. 6, 2020), available at [https://psc.ky.gov/pscscf/2019%20Cases/2019-00269//20200406\\_PSC\\_ORDER.pdf](https://psc.ky.gov/pscscf/2019%20Cases/2019-00269//20200406_PSC_ORDER.pdf).

1 in the wholesale power markets is dependent upon a combination of its ability to  
2 negotiate the maximum price for the power sold and its ability to keep its cost of  
3 production as low as possible. If Big Rivers' cost of producing a kilowatt-hour of  
4 energy increases, its competitive position against other power producers is adversely  
5 affected.

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

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

20 **II. The Confidential Information is Generally Recognized as Confidential**  
21 **or Proprietary.**

22  
23 **A. Item 40 – Case No. 2019-00435**

24

1           13.    The Confidential Information for which Big Rivers seeks confidential  
2 treatment under KRS 61.878(1)(c)(1) that is contained in the unredacted documents  
3 filed with Big Rivers’ application in Case No. 2019-00435 (the “ECP Proceeding”) is  
4 generally recognized as confidential or proprietary under Kentucky law. As noted  
5 above, much of the Confidential Information throughout the Application filed in the  
6 ECP Proceeding and its Exhibits reflects specific estimated cost and savings  
7 information related to the projects Big Rivers proposes to pursue as part of the ECP  
8 proceeding, including projected capital costs, financing costs, and costs related to  
9 ongoing fixed and variable O&M. The Confidential Information in ECP Proceeding  
10 application also includes sensitive commercial bids and related budgetary  
11 information utilized by Big Rivers in connection with anticipated work (Exhibits  
12 Pullen-2, Pullen-3, Pullen-4, and Pullen-5) and proprietary financial modeling  
13 performed by Big Rivers as part of conducting economic analyses (Exhibit Smith-2).  
14 In the Direct Testimony of Mr. Michael T. Pullen, Big Rivers’ Vice President of  
15 Production (Exhibit G in the ECP Proceeding), the Confidential Information includes  
16 the expected operating characteristics of Big Rivers’ generation facilities (*see*  
17 estimated Equivalent Unplanned Outage Rate (EUOR) at p. 21) and confidential  
18 detail about Big Rivers’ proposed special contract with Nucor Corporation presently  
19 pending before the Commission in Case No. 2019-00365<sup>2</sup> (*see* anticipated load

---

<sup>2</sup> *In the Matter of the Electronic Joint Application of Big Rivers Electric Corporation and Meade County Rural Electric Cooperative Corporation for (1) Approval of Contracts for Electric Service with Nucor Corporation; and (2) Approval of Tariff* (filed Sept. 26, 2019). The Commission granted confidential protection for this and related information by Order entered Jan. 22, 2020, in that docket.

1 information at p. 6; this information is also contained in the Direct Testimony of Mr.  
2 Paul G. Smith, Big Rivers' Chief Financial Officer, at p. 9, filed in the ECP  
3 Proceeding). Finally, the Confidential Information in the ECP Proceeding includes  
4 the proprietary reports and data of third-party consultants obtained by Big Rivers  
5 (Exhibit Hoydick-2, Hoydick-3, Yoder-2, Yoder-3, and Yoder-4), each of which is  
6 replete with operational and financial information and conclusions that detail Big  
7 Rivers' facilities and other detailed inner workings. The public disclosure of these  
8 reports will inevitably inure to the benefit of the cooperative's competitors, which  
9 would gain valuable, non-public information about the cooperative's business and  
10 facilities, as well as access to proprietary third-party expertise and analysis of the  
11 cooperative. Information such as this is generally recognized as confidential or  
12 proprietary.<sup>3</sup>

13 14. Moreover, the Confidential Information contained in the unredacted  
14 documents filed in the ECP Proceeding are subject to a pending Motion for  
15 Confidential Treatment filed by Big Rivers in the ECP Proceeding.<sup>4</sup> Pursuant to 807

---

<sup>3</sup> 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).

<sup>4</sup> *In the Matter of: Application of Big Rivers Electric Corporation for Approval of its 2020 Environmental Compliance Plan, Authority to Recover Costs through a Revised Environmental Surcharge and Tariff, the Issuance of a Certificate of Public Convenience and Necessity for Certain Projects, and Appropriate Accounting and Other Relief*, Motion for Confidential Treatment, P.S.C. Case No. 2019-00435 (Feb. 7, 2020).

1 KAR 5:001 Section 13(4), “[p]ending action by the commission on a motion for  
2 confidential treatment or by its executive director on a request for confidential  
3 treatment, the material specifically identified *shall* be accorded confidential  
4 treatment.” (emphasis added). As such, the Confidential Information contained in the  
5 attachment to Big Rivers’ supplemental response to AG 1-40 is entitled to confidential  
6 treatment while Big Rivers’ February 7, 2020 motion for confidential treatment in  
7 the ECP Proceeding remains pending.

8 **B. Item 42 – Case No. 2019-00269**

9 15. The Confidential Information for which Big Rivers seeks confidential  
10 treatment under KRS 61.878(1)(c)(1) that is contained in the unredacted documents  
11 filed with Big Rivers’ application in Case No. 2019-00269 (the “Enforcement of Rate  
12 and Service Standards Proceeding”) is generally recognized as confidential or  
13 proprietary under Kentucky law.

14 16. The Confidential Information in the unredacted application filed in the  
15 Enforcement of Rate and Service Standards Proceeding includes Exhibit Pullen-8,  
16 which consists of confidential projections of the cost of projects necessary to retire Big  
17 Rivers’ Coleman Station. Further, the Confidential Information in the Direct  
18 Testimony of Michael T. Pullen filed in the Enforcement of Rate and Service  
19 Standards Proceeding is derived from the Confidential Information in Exhibit Pullen-  
20 8, and if not afforded confidential treatment, could readily be used to determine the  
21 Confidential Information in Exhibit Pullen-8.

1           17.     Public disclosure of the Confidential Information from Case No. 2019-  
2     00269 would give potential purchasers of the Coleman Station and potential bidders  
3     on the projects listed in Exhibit Pullen-8 insight into Big Rivers' valuation for the  
4     Coleman Station and the costs of the projects. Information about a company's detailed  
5     inner workings is generally recognized as confidential or proprietary. *See, e.g., Hoy v.*  
6     *Ky. Indus. Revitalization Auth.*, 907 S.W.2d 766, 768 (Ky. 1995) ("It does not take a  
7     degree in finance to recognize that such information concerning the inner workings  
8     of a corporation is 'generally recognized as confidential or proprietary.'"); *Marina*  
9     *Mgm't Servs. v. Cabinet for Tourism, Dep't of Parks*, 906 S.W.2d 318, 319 (Ky. 1995)  
10    (unfair commercial advantage arises simply from "the ability to ascertain the  
11    economic status of the entities without the hurdles systematically associated with the  
12    acquisition of such information about privately owned organizations"). Moreover, not  
13    only has the Commission previously granted confidential treatment to similar  
14    information, it has granted confidential treatment to this exact information. *See In*  
15    *the Matter of: Electronic Application of Big Rivers Electric Corporation for*  
16    *Enforcement of Rate and Service Standards*, Order, P.S.C. Case No. 2019-00269 (Apr.  
17    6, 2020), available at [https://psc.ky.gov/pscscf/2019%20Cases/2019-](https://psc.ky.gov/pscscf/2019%20Cases/2019-00269//20200406_PSC_ORDER.pdf)  
18    [00269//20200406 PSC ORDER.pdf](https://psc.ky.gov/pscscf/2019%20Cases/2019-00269//20200406_PSC_ORDER.pdf); *see also, e.g., In the Matter of: An Examination*  
19    *of the Application of the Fuel Adjustment Clause of Ky. Power Company from Nov. 1,*  
20    *2012 through Oct. 31, 2014*, Order, P.S.C. Case No. 2014-00450 (Jan. 24, 2019)  
21    (granting confidential treatment to forecasted cost data).

22



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

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

10 19. In Case No. 2018-00056, the Commission granted confidential  
11 treatment to pricing information provided by Cumberland Valley Electric, Inc.  
12 (“Cumberland Valley”).<sup>5</sup> In that case, the Commission recognized “that the specific  
13 cost information may be used to the financial detriment of Cumberland Valley and  
14 its ratepayers by allowing potential future vendors to bid just under the cost of its  
15 current vendor, which, in turn, would place Cumberland Valley at a competitive  
16 disadvantage.” Likewise, disclosure of the Confidential Information would afford Big  
17 Rivers’ contractors, vendors, and competitors access to cost and operational  
18 parameters which are material to Big Rivers, thereby allowing them to manipulate  
19 contract negotiations and bidding processes. If Big Rivers’ potential vendors or  
20 competitors are privy to detailed information about the cooperative’s estimated  
21 expenses, operations and maintenance activities, and related information about the

---

<sup>5</sup> *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         20. 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 bids  
8 it received were publicly disclosed, contractors on future work could use the bids as a  
9 benchmark, which would likely lead to the submission of higher bids.<sup>6</sup> 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         21. Similarly, public disclosure of fixed costs and other projected budgetary  
15 and O&M costs would give power producers and marketers with which Big Rivers  
16 competes in the wholesale power markets insight into Big Rivers’ cost of producing  
17 power. Knowledge of this information would give those power producers and  
18 marketers an unfair competitive advantage because they could use that information  
19 to potentially underbid Big Rivers in wholesale transactions, reducing Big Rivers’  
20 revenue and impairing Big Rivers’ ability to compete in the wholesale power and  
21 credit markets. Further, any competitive pressure that adversely affects Big Rivers’

---

<sup>6</sup> See *In the Matter of: Application of Union Light, Heat & Power Company for Confidential Treatment* (Ky. P.S.C. Aug. 4, 2003).

1 revenue and margins could make the company appear less creditworthy and thus  
2 impair its ability to compete in the credit markets.

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

8 **IV. Disclosure of Certain Confidential Information From the ECP**  
9 **Proceeding Would Have a Reasonable Likelihood of Threatening**  
10 **Public Safety**

11 23. Certain of the Confidential Information from the unredacted application  
12 filed in the ECP Proceeding contains detailed information that depicts or describes  
13 the location, layout, configuration and operation of critical energy infrastructure,  
14 specifically Big Rivers' generating facilities. This Confidential Information is  
15 contained in the maps provided at Exhibit C to the application filed in the ECP  
16 Proceeding and the drawings, maps, plans, and specifications appended to direct  
17 testimony in the ECP Proceeding. If publicly disclosed, this Confidential Information  
18 could be utilized to commit or further a terrorist act, including the intimidation or  
19 coercion of all or part of the civilian population and the disruption of public utility  
20 and other critical systems. The public release of such Confidential Information has  
21 a reasonable likelihood of threatening the public safety, particularly because it  
22 reflects detailed, precise, and highly-technical information about the configuration  
23 and operations of valuable infrastructure upon which many individuals and  
24

1 businesses rely. Pursuant to KRS 61.878(1)(m), the records should be exempt from  
2 public disclosure.

3 **V. Time Period**

4 24. With respect to Confidential Information contained in Big Rivers’  
5 unredacted application filed in the ECP Proceeding, Big Rivers requests that the  
6 Confidential Information remain confidential for the following time periods:

7 a. With respect to the critical energy infrastructure information for which  
8 Big Rivers seeks confidential protection under KRS 61.878(1)(m), Big  
9 Rivers requests that the Confidential Information be protected  
10 indefinitely, at least as long as the relevant facilities are in service.

11 b. Big Rivers also requests confidential protection indefinitely for the  
12 third-party work product and specific bid information reflected in  
13 Exhibits Pullen-2, Pullen-3, Pullen-4, Hoydick-2, Hoydick-3, Yoder-2,  
14 Yoder-3, and Yoder-4, filed with Big Rivers’ application in the ECP  
15 Proceeding

16 c. Moreover, with respect to the information provided concerning Big  
17 Rivers’ agreement with Nucor, Big Rivers seeks confidential protection  
18 indefinitely because for so long as Big Rivers is in the wholesale power  
19 market, the public disclosure of the confidential terms of the Agreement  
20 could be used to Big Rivers’ competitive disadvantage. *See, e.g.,*  
21 Commission’s March 17, 2020 Order, Case No. 2020-00064 (granting  
22 confidentiality to information related to the Nucor contract indefinitely).

1 d. Finally, Big Rivers requests that the remaining Confidential  
2 Information contained in the Application and testimonies filed with the  
3 ECP Proceeding remain confidential for a period of five (5) years, which  
4 will allow that Confidential Information to become sufficiently historic  
5 such that its public disclosure would not provide competitors with an  
6 advantage in the marketplace.

7 25. For the reasons recognized by the Commission in its April 6, 2020 Order  
8 in the Enforcement of Rate and Service Standards Proceeding,<sup>7</sup> Big Rivers requests  
9 that the Confidential Information contained in the application from the Enforcement  
10 of Rate and Service Standards Proceeding remain confidential for 10 years, after  
11 which the information will likely be sufficiently outdated to no longer pose a  
12 competitive risk to Big Rivers. 807 KAR 5:001 Section 13(2)(a)(2).

## 13 **VI. Conclusion**

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

---

<sup>7</sup> See *In the Matter of: Electronic Application of Big Rivers Electric Corporation for Enforcement of Rate and Service Standards*, Order, P.S.C. Case No. 2019-00269 (Apr. 6, 2020), available at [https://psc.ky.gov/pscscf/2019%20Cases/2019-00269//20200406\\_PSC\\_ORDER.pdf](https://psc.ky.gov/pscscf/2019%20Cases/2019-00269//20200406_PSC_ORDER.pdf) (granting confidential treatment to the identical documents for a period of 10 years).

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

3                           This 15<sup>th</sup> day of April, 2020.

4   Respectfully submitted,

5   **BIG RIVERS ELECTRIC CORPORATION**

6   /s/ Tyson Kamuf \_\_\_\_\_  
7   Tyson Kamuf  
8   Gregory E. Mayes, Jr.  
9   201 Third Street, P.O. Box 24  
10    Henderson, Kentucky 42419-0024  
11    Phone: (270) 827-2561 Fax: (270) 844-6417  
12    Email: tyson.kamuf@bigrivers.com  
13    Email: gregory.mayes@bigrivers.com

14    **DINSMORE & SHOHL LLP**

15    Edward T. Depp  
16    R. Brooks Herrick  
17    101 South Fifth Street, Suite 2500  
18    Louisville, Kentucky 40202  
19    E-mail: tip.depp@dinsmore.com  
20    E-mail: brooks.herrick@dinsmore.com  
21    Phone: (502) 540-2300 Fax: (502) 585-2207

22    M. Evan Buckley  
23    100 West Main Street, Suite 900  
24    Lexington, Kentucky 40507  
25    E-mail: evan.buckley@dinsmore.com  
26    Phone: (859) 425-1000 Fax: (859) 425-1099

27    *Counsel to Big Rivers Electric Corporation*

28  
29  
30  
31  
32  
33  
34  
35  
36

