

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

3 In the Matter of:

ELECTRONIC APPLICATION OF BIG RIVERS)
ELECTRIC CORPORATION FOR APPROVAL)
TO MODIFY ITS MRSM TARIFF, CEASE) Case No.
DEFERRING DEPRECIATION EXPENSES,) 2020-00064
ESTABLISH REGULATORY ASSETS,)
AMORTIZE REGULATORY ASSETS, AND)
OTHER APPROPRIATE 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 (“Commission”), pursuant to 807 KAR 5:001
8 Section 13 and KRS 61.878, to grant confidential treatment to certain information
9 Big Rivers is filing with its responses to the Commission Staff’s (“PSC”) Second
10 Request for Information and the Kentucky Office of the Attorney General’s (“AG”)
11 Supplemental Data Requests. The information for which Big Rivers seeks
12 confidential treatment is hereinafter referred to as the “Confidential Information.”

13 2. The Confidential Information includes:

- 14 a. Portions of the responses and/or attachments for the responses to: Items
15 7 and 8 of the PSC’s Second Request for Information (“PSC 2-7,” “PSC
16 2-8,” respectively);
- 17 b. Portions of the responses and/or attachments for the responses to: Items
18 3, 5, 10, 12, 13, 14, 15, 16, 17, 18, 19 and 20 of the AG’s Supplemental
19 Data Requests (“AG 2-3,” “AG 2-5,” “AG 2-10,” “AG 2-12,” “AG 2-13,” “AG

1 2-14,” “AG 2-15,” “AG 2-16,” “AG 2-17,” “AG 2-18,” “AG 2-19,” and “AG
2 2-20,” respectively).

3 3. Pursuant to the Commission’s March 24, 2020 Order in *In the Matter of:*
4 *Electronic Emergency Docket Related to the Novel Coronavirus COVID-19*, Case No.
5 2020-00085 (“Case No. 2020-00085”), one (1) copy of the confidential information
6 highlighted with transparent ink, printed on yellow paper, or otherwise marked
7 “CONFIDENTIAL,” is being filed with this motion by use of an encrypted file-share
8 site, whereby the Commission may retrieve the confidential materials. A copy of those
9 pages, with the Confidential Information redacted, is being electronically filed with
10 the Responses to the Information Requests filed with this Motion.

11 4. The “live” electronic attachments containing Confidential Information
12 are contained in the confidential electronic files that are being filed pursuant to this
13 motion and placed on the encrypted file-share site. Big Rivers cannot redact only the
14 Confidential Information from the electronic spreadsheet attachments without
15 making other cells in the spreadsheet unusable or breaking the formulas contained
16 therein, and so, the entirety of those attachments must be made confidential.
17 Likewise, there are other instances where the pervasive nature of the confidential
18 information which would make public versions ineffectual and unhelpful to the
19 Commission. As such, the entirety of these confidential files have been redacted from
20 the Responses to the Information Requests electronically filed with this motion.

21 5. A copy of this motion with the Confidential Information redacted has
22 been served on all parties to this proceeding through the use of electronic filing. *See*

1 807 KAR 5:001, Section 13(b). A copy of the Confidential Information has been served
2 on all parties that have signed a confidentiality agreement.

3 6. The Confidential Information is not publicly available, is not
4 disseminated within Big Rivers except to those employees and professionals with a
5 legitimate business need to know and act upon the information, and is not
6 disseminated to others without a legitimate need to know and act upon the
7 information.

8 7. If disclosed, the Confidential Information included herein would allow
9 Big Rivers' competitors to discover, and make use of, confidential information
10 concerning Big Rivers' financial condition and business strategies, to the unfair
11 competitive disadvantage of Big Rivers.

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

16 9. As discussed below, the Confidential Information is entitled to
17 confidential treatment based upon KRS 61.878(1)(c)(1). *See* 807 KAR 5:001, Section
18 13(2)(a)(1). Further, KRS 278.160(3) shields from disclosure "a provision of a special
19 contract that contains rates and conditions of service not filed in a utility's general
20 schedule if such provision would otherwise be entitled to be excluded from the
21 application of KRS 61.870 under the provisions of KRS 61.878(1)(c)(1)."

1 10. Further, much of the Confidential Information is similar to or pertains
2 to the Confidential Information contained in Big Rivers' Application (including
3 information related to Big Rivers' confidential financial information and information
4 related to special contracts, including with Nucor Corporation ("Nucor")) and for
5 which the Commission already granted confidential treatment. *See* Commission's
6 March 17, 2020 Order, Case No. 2020-00064 (granting confidentiality to information
7 related to the Nucor contract indefinitely and granting confidentiality to financial
8 information for five years) (the "March 17, 2020 Order").

9 11. Finally, much of the Confidential Information is similar to or is derived
10 from the Confidential Information contained in Big Rivers' responses to the PSC's
11 First Request for Information, KIUC's First Set of Data Requests, and/or the AG's
12 First Set of Data Requests, for which confidentiality has been sought pursuant to the
13 pending Motion for Confidential Treatment contemporaneously with Big Rivers'
14 responses to initial data requests in this proceeding. Thus, the Confidential
15 Information should be granted confidential treatment pending review of Big Rivers'
16 previously filed Motions for Confidential Treatment in this proceeding, which were
17 filed on April 3, 2020 and April 15, 2020. *See* 807 KAR 5:001 Section 13(4) ("Pending
18 action by the commission on a motion for confidential treatment or by its executive
19 director on a request for confidential treatment, the material specifically identified
20 shall be accorded confidential treatment.").

1 **I. Information Protected by KRS 61.878(1)(c)(1)**

2 **A. Big Rivers Faces Actual Competition**

3 12. KRS 61.878(1)(c)(1) protects “records confidentially disclosed to an
4 agency or required by an agency to be disclosed to it, generally recognized as
5 confidential or proprietary, which if openly disclosed would permit an unfair
6 commercial advantage to competitors of the entity that disclosed the records.”

7 13. As a generation and transmission cooperative, Big Rivers competes in
8 the wholesale power market to sell energy that it produces in excess of its members’
9 needs. This includes not only the over-the-counter day-ahead and over-the-counter
10 hourly markets to which Big Rivers has access by virtue of its membership in
11 Midcontinent Independent System Operator, Inc. (“MISO”), but also direct, bilateral
12 long-term agreements. Big Rivers’ ability to successfully compete in these markets is
13 dependent upon a combination of its ability to: 1) obtain the maximum price for the
14 power it sells, and 2) keep its cost of production as low as possible. Fundamentally, if
15 Big Rivers’ cost of producing a unit of power increases, its ability to sell that unit in
16 competition with other utilities is adversely affected.

17 14. Big Rivers also competes for reasonably priced credit in the credit
18 markets, and its ability to compete is directly impacted by its financial results. Lower
19 revenues and any events that adversely affect Big Rivers’ margins will adversely
20 affect its financial results and potentially impact the price it pays for credit. A
21 competitor armed with Big Rivers’ proprietary and confidential information will be
22 able to increase Big Rivers’ costs or decrease Big Rivers’ revenues, which could in
23 turn affect Big Rivers’ creditworthiness. A utility the size of Big Rivers that operates

1 generation and transmission facilities will always have periodic cash and borrowing
2 requirements for both anticipated and unanticipated needs. Big Rivers expects to be
3 in the credit markets in the future, and it is imperative that Big Rivers improve and
4 maintain its credit profile.

5 15. Accordingly, Big Rivers has competitors in both the power and capital
6 markets, and its Confidential Information should be protected to prevent the
7 imposition of an unfair competitive advantage.

8 **B. The Confidential Information is Generally Recognized as**
9 **Confidential or Proprietary.**

10
11 16. The Confidential Information for which Big Rivers seeks confidential
12 treatment under KRS 61.878(1)(c)(1) is generally recognized as confidential or
13 proprietary under Kentucky law.

14 17. The Confidential Information attached to PSC 2-7 contains future
15 projected cost expenditures, and is derived from Big Rivers' long-term financial
16 forecast, which is subject to a pending Motion for Confidential Treatment.

17 18. The Confidential Information contained in response to PSC 2-8 includes
18 information derived from sensitive projected financial documents, and relates to
19 information contained in response to Item 3 of the PSC's First Request for
20 Information, which is subject to a pending Motion for Confidential Treatment.

21 19. The Confidential Information contained in and attached to the response
22 to AG 2-3 includes information related to Big Rivers' contract with Nucor, which has
23 previously been granted confidential treatment, as well as information related to Big

1 Rivers' internal projections regarding fulfilling the contract, which are derived from
2 the confidential portions of the Nucor contract.

3 20. The Confidential Information contained in response to AG 2-5 includes
4 information derived from Big Rivers' long-term financial forecast, which was attached
5 to Big Rivers' response to Item 29 of the Attorney General's First Set of Data Requests
6 and is subject to a pending Motion for Confidential Treatment.

7 21. The Confidential Information contained in response to AG 2-10 contains
8 information from Big Rivers' contract with Nucor, which has previously been granted
9 confidential treatment.

10 22. The Confidential Information contained in response to AG 2-12 contains
11 information from Big Rivers' contract with Nucor, which has previously been granted
12 confidential treatment.

13 23. The Confidential Information contained in response to AG 2-13 contains
14 information from Big Rivers' contract with Nucor, which has previously been granted
15 confidential treatment.

16 24. The Confidential Information contained in response to AG 2-14 contains
17 information from Big Rivers' contract with Nucor, which has previously been granted
18 confidential treatment.

19 25. The Confidential Information contained in response to AG 2-15 contains
20 information from Big Rivers' contract with Nucor, which has previously been granted
21 confidential treatment.

1 26. The Confidential Information contained in response to AG 2-16 contains
2 information from Big Rivers' contract with the Kentucky Municipal Energy Agency
3 ("KyMEA"), which has previously been granted confidential treatment.

4 27. The Confidential Information contained in response to AG 2-17 is
5 derived from future financial projections, and the public disclosure of which would
6 also allow the determination of Confidential Information included in response to Item
7 48 of the Attorney General's First Set of Data Requests, which is subject to a pending
8 Motion for Confidential Treatment.

9 28. The Confidential Information contained in response to AG 2-18 includes
10 information derived from Big Rivers' long-term financial forecast, which was attached
11 to Big Rivers' response to Item 29 of the Attorney General's First Set of Data Requests
12 and is subject to a pending Motion for Confidential Treatment.

13 29. The Confidential Information contained in response to AG 2-19 includes
14 information derived from Big Rivers' long-term financial forecast, which was attached
15 to Big Rivers' response to Item 29 of the Attorney General's First Set of Data Requests
16 and is subject to a pending Motion for Confidential Treatment.

17 30. The Confidential Information contained in response to AG 2-20 contains
18 information derived from Big Rivers' response to Item 54 of the Attorney General's
19 First Set of Data Requests which contained information from Big Rivers' financial
20 forecast and confidential business plans, and is subject to a pending Motion for
21 Confidential Treatment.

1 31. Public disclosure of the Confidential Information would reveal detailed
2 information relating to Big Rivers’ long-term financial forecast, including projected
3 financial data and projected expenditures. Information such as this which bears upon
4 a company’s detailed inner workings is generally recognized as confidential or
5 proprietary. *See, e.g., Hoy v. Ky. Indus. Revitalization Auth.*, 907 S.W.2d 766, 768 (Ky.
6 1995) (“It does not take a degree in finance to recognize that such information
7 concerning the inner workings of a corporation is ‘generally recognized as confidential
8 or proprietary.’”). Additionally, the Commission has previously granted confidential
9 treatment to this type of information. *See, e.g., April 25 Confidentiality Order, P.S.C.*
10 *Case No. 2012-00535* (granting confidential treatment to minutes of the Big Rivers
11 Board of Directors, Big Rivers’ Financial Model, and Big Rivers’ load forecast);
12 *November 25, 2013 Confidentiality Order, P.S.C. Case No. 2013-00199; In the Matter*
13 *of: An Examination of the Application of the Fuel Adjustment Clause of East Ky. Power*
14 *Coop., Inc. From Nov. 1, 2011 through Apr. 30, 2012, Order, P.S.C. Case No. 2012-*
15 *003919* (February 21, 2013).

16 32. Information related to sensitive negotiations between Big Rivers and
17 other entities and the proprietary information supplied to Big Rivers by its
18 consultants and industry groups of which it is a member illuminates Big Rivers’ long-
19 term business strategy and is generally subject to confidentiality agreements among
20 the various parties involved. The Commission has previously granted confidential
21 treatment to similar information. *See, e.g., November 25, 2013 Confidentiality Order,*

1 P.S.C. Case No. 2013-00199; April 25 Confidentiality Order, P.S.C. Case No. 2012-
2 00535.

3 33. Finally, the Commission has previously granted confidentiality to much
4 of the specific information for which confidentiality is sought, including through the
5 March 17, 2020 Order, in which the Commission recognized that sensitive financial
6 information and confidential portions of the Nucor contract are subject to confidential
7 treatment.

8 **C. Disclosure of the Confidential Information Would Result in an**
9 **Unfair Commercial Advantage to Big Rivers' Competitors.**

10
11 34. Disclosure of the Confidential Information would grant Big Rivers'
12 competitors an unfair commercial advantage. As discussed above in Section I.A, Big
13 Rivers faces actual competition in both the short-and long-term wholesale power
14 markets and in the credit markets. It is likely that Big Rivers' ability to compete in
15 these markets would be adversely affected if the Confidential Information were
16 publicly disclosed, and Big Rivers seeks protection from such competitive injury.

17 35. The Confidential Information includes material such as Big Rivers'
18 projected financial forecasts and expenditures, and sensitive business negotiations
19 and agreements with third-parties. If that information is publicly disclosed, market
20 participants would have insight into the prices at which Big Rivers is willing to buy
21 and sell fuel and could manipulate the bidding process, impairing the ability to
22 generate power at competitive rates and thus to compete in the wholesale power
23 markets. Furthermore, any competitive pressure that adversely affects Big Rivers'
24 revenue and margins could make the company appear less creditworthy and thus

1 impair its ability to compete in the credit markets. These effects were recognized in
2 PSC Case No. 2003-00054, in which the Commission granted confidential treatment
3 to bids submitted to Union Light, Heat & Power (“ULH&P”). ULH&P argued, and
4 the Commission implicitly accepted, that if the bids it received were publicly
5 disclosed, contractors on future work could use the bids as a benchmark, which would
6 likely lead to the submission of higher bids. *In the Matter of: Application of the Union*
7 *Light, Heat and Power Company for Confidential Treatment*, Order, PSC Case No.
8 2003-00054 (August 4, 2003). The Commission also implicitly accepted ULH&P’s
9 further argument that the higher bids would lessen ULH&P’s ability to compete with
10 other gas suppliers. *Id.* Similarly, potential suppliers to or buyers from Big Rivers
11 manipulating Big Rivers’ bidding process would lead to higher costs or lower revenues
12 to Big Rivers and would place it at an unfair competitive disadvantage in the
13 wholesale power market and credit markets.

14 36. The Commission has consistently recognized that internal strategic
15 planning information, projected financial information, and related materials are
16 entitled to confidential treatment, as these documents typically relate to the
17 company’s economic status and business strategies. *See, e.g., Marina Mgmt. Servs. v.*
18 *Cabinet for Tourism, Dep’t of Parks*, 906 S.W.2d 318, 319 (Ky. 1995) (unfair
19 commercial advantage arises simply from “the ability to ascertain the economic
20 status of the entities without the hurdles systematically associated with the
21 acquisition of such information about privately owned organizations”); *In the Matter*
22 *of: The Joint Application of Duke Energy Corp., Cinergy Corp., Duke Energy Ohio,*

1 *Inc., Duke Energy Kentucky, Inc., Diamond Acquisition Corp., and Progress Energy*
2 *Inc., for Approval of the Indirect Transfer of Control of Duke Energy Kentucky, Inc.,*
3 *P.S.C. Case No. 2011-00124 (Dec. 5, 2011); In the Matter of: The Joint Petition of*
4 *Kentucky-American Water Co., Thames Water Aqua Holdings GmbH, RWE*
5 *Aktiengesellschaft, Thames Water Aqua U.S. Holdings, Inc., and Am. Water Works*
6 *Co., Inc. for Approval of a Change in Control of Kentucky-American Water Co., P.S.C.*
7 *Case No. 2006-00197 (Aug. 29, 2006) (holding that reports from the joint applicants’*
8 *financial advisors and all board of director minutes and information is confidential*
9 *because competitors could use it to gain unfair competitive advantage).*

10 37. Accordingly, the public disclosure of the information that Big Rivers
11 seeks to protect would provide Big Rivers’ competitors with an unfair commercial
12 advantage.

13 **III. Time Period**

14 38. Big Rivers requests that the Confidential Information relating to the
15 Nucor contract remain confidential indefinitely for the same reasons the Commission
16 granted confidential treatment to the confidential terms in the Nucor contract for an
17 indefinite period of time in its January 22, 2020 and January 27, 2020 Orders in Case
18 No. 2019-00365, and the March 17, 2020 Order entered in this proceeding.

19 39. Big Rivers requests that the Confidential Information relating to the
20 KyMEA contract remain confidential indefinitely for the same reasons the
21 Commission granted confidential treatment to the confidential terms in the KyMEA
22 contract for an indefinite period of time in its January 2, 2019 Order in Case No.

1 2016-00306. See *In the Matter of: Filing of Agreement for the Purchase and Sale of*
2 *Firm Capacity and Energy Between Big Rivers Electric Corporation and the Kentucky*
3 *Municipal Energy Agency*, Order, P.S.C. Case No. 2016-00306 (Jan. 2, 2019).

4 40. Big Rivers requests that the remainder of the Confidential Information
5 remain confidential for a period of five (5) years from the date of this motion, at which
6 time the Confidential Information should be sufficiently outdated so that it could not
7 be used to competitively disadvantage Big Rivers. 807 KAR 5:001, Section 13(2)(a)(2).

8 **IV. Conclusion**

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

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

17 This 24th day of April, 2020.

18
19 Respectfully submitted,

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17
18 **Certification**

19 I hereby certify that the electronic version of this filing made with the
20 Commission on April 3, 2020, is a true and accurate copy of the paper document that
21 will be submitted to the Commission within 30 days of the Governor lifting the state
22 of the emergency pursuant to the Commission's Orders in Case No. 2020-00085, and
23 the electronic version of the filing has been transmitted to the Commission. A copy of
24 this filing has been served electronically on all parties of record for whom an email
25 address is given in the online Service List for this proceeding, and there are currently
26 no parties that the Commission has excused from participation by electronic means.

27
28
29 */s/ Tyson Kamuf*
30 *Counsel to Big Rivers Electric Corporation*

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