$1\\2\\3$	COMMONWEALTH OF KENTUCKY BEFORE THE PUBLIC SERVICE COMMISSION			
4	IN THE MATTER OF:			
5				
	ELECTRONIC APPLICATION OF BIG RIVERS ELECTRIC CORPORATION FOR APPROVAL OF SOLAR POWER CONTRACTS Case No. 2020-00183			
6				
7	MOTION OF BIG RIVERS ELECTRIC CORPORATION FOR			
8 9	CONFIDENTIAL PROTECTION			
10	1. Big Rivers Electric Corporation ("Big Rivers") hereby moves the			
11	Kentucky Public Service Commission ("Commission") pursuant to KRS 278.160(3),			
12	KRS 61.878, and 807 KAR 5:001 Section 13 to grant confidential protection to			
13	certain information contained in Big Rivers' Response to Commission Staff's			
14	Supplemental Request for Information and in Big Rivers' Response to the Office of			
15	the Attorney General's Second Request for Information. The information for which			
16	Big Rivers seeks confidential treatment is hereinafter referred to as the			
17	"Confidential Information." The Confidential Information includes:			
18	a. Portions of the response to Item 6 of the Commission Staff's			
19	Supplemental Request for Information ("PSC 2-6,"); and			
20	b. Portions of the responses to Items 1, 8, and 17 of the Attorney			
21	General's Second Request for Information ("AG 2-1," "AG 2-8," and "AG 2-17			
22	respectively).			
23	2. Pursuant to the Commission's March 24, 2020, Order in In the Matter			
24	of Electronic Emergency Docket Related to the Novel Coronavirus COVID-19, Case			

- 1 No. 2020-00085 ("Case No. 2020-00085"), one (1) copy of the Confidential
- 2 Information highlighted with transparent ink, printed on yellow paper, or otherwise
- 3 marked "CONFIDENTIAL," is being filed with this motion by electronic mail or
- 4 posting on a secure file share site. A copy of those pages, with the Confidential
- 5 Information redacted, is being electronically filed with the information request
- 6 responses accompanying this motion.
- 7 3. A copy of this motion with the Confidential Information redacted has
- 8 been served on all parties to this proceeding through the use of electronic filing. 807
- 9 KAR 5:001 Section 13(b).
- 10 4. If and to the extent the Confidential Information becomes generally
- 11 available to the public, whether through filings required by other agencies or
- 12 otherwise, Big Rivers will notify the Commission and have its confidential status
- 13 removed. 807 KAR 5:001 Section 13(10)(b).
- 14 5. As fully discussed below, the Confidential Information is entitled to
- 15 confidential protection based upon KRS 278.160(3), which shields from disclosure "a
- 16 provision of a special contract that contains rates and conditions of service not filed
- 17 in a utility's general schedule if such provision would otherwise be entitled to be
- 18 excluded from the application of KRS 61.870 to 61.884 under the provisions of KRS
- 19 61.878(1)(c)(1);" and KRS 61.878(1)(c)(1), which protects "records confidentially
- 20 disclosed to an agency or required by an agency to be disclosed to it, generally
- 21 recognized as confidential or proprietary, which if openly disclosed would permit an

- 1 unfair commercial advantage to competitors of the entity that disclosed the records."
- 2 807 KAR 5:001 Section 13(2)(a)(1).
- 3 6. Section I below explains that Big Rivers operates in competitive
- 4 environments in the wholesale power market and in the credit market. Section II
- 5 below shows that the Confidential Information is generally recognized as
- 6 confidential or proprietary. Section III below demonstrates that public disclosure of
- 7 the Confidential Information would permit an unfair commercial advantage to Big
- 8 Rivers' competitors,.

10

9 SECTION I

Big Rivers Faces Actual Competition

- 11 7. As a generation and transmission cooperative, Big Rivers competes in
- 12 the wholesale power market. This includes not only the short-term bilateral energy
- 13 market, the day-ahead and real time energy and ancillary services markets, and the
- 14 capacity market to which Big Rivers has access by virtue of its membership in the
- 15 Midcontinent Independent System Operator, Inc. ("MISO") system, but also forward
- 16 bilateral long-term agreements and wholesale agreements with utilities and
- 17 industrial customers. Big Rivers' ability to successfully compete in the market is
- 18 dependent upon a combination of its ability to: 1) obtain the maximum price for the
- 19 power it sells, and 2) keep its cost of production or purchase as low as possible.
- 20 Fundamentally, if Big Rivers' cost of producing or purchasing a unit of power
- 21 increases, its ability to sell that unit in competition with other utilities is adversely
- 22 affected.

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

both within the Commonwealth and throughout the nation. The ability to negotiate the most advantageous power purchase agreements and then offer competitive prices to Big Rivers' Members, companies interested in expanding in Kentucky, such as Nucor Corporation ("Nucor"), and potential new Members is fundamental to Big Rivers' continued success.

19 <u>SECTION II</u>

2021

The Confidential Information is Generally Recognized as Confidential or Proprietary

10. The Confidential Information for which Big Rivers seeks confidential treatment under KRS 278.160(3) and KRS 61.878(1)(c)(1) is generally recognized as

- 1 confidential or proprietary under Kentucky law. As fully discussed below, the
- 2 Confidential Information consists of:
- a. the negotiated, confidential terms of special contracts with Nucor
- 4 Corporation contained in the responses to PSC 2-6 and AG 2-1;
- 5 b. the negotiated, confidential terms of the three solar contracts that are
- 6 the subject of this proceeding between Big Rivers and Henderson
- 7 Solar, LLC, Meade County Solar, LLC, and McCracken County Solar,
- 8 LLC (collectively, the "Solar Developers"), contained in the responses to
- 9 PSC 2-6 and AG 2-8, more specifically the Solar Developers'
- 10 confidential and proprietary projected generation; and,
- 11 c. Big Rivers' confidential and proprietary financial information,
- including its projected market prices for renewable energy credits
- 13 ("RECs"), contained in the response to AG 2-17 and Big Rivers' hedging
- strategies contained in the response to PSC 2-6.
- 15 11. As noted above and fully discussed below, the Confidential Information
- 16 consists of the negotiated, confidential terms of certain contracts including the
- 17 Nucor contracts and the three solar contracts that are the subject of this proceeding
- 18 and information, which reveals Big Rivers' confidential and proprietary strategic
- 19 business plan, including sensitive projected information regarding market prices for
- 20 RECs and Big Rivers' hedging strategies.
- 21 12. Public disclosure of such information would give Big Rivers' suppliers.
- 22 buyers, and competitors insight into Big Rivers' view of future energy, capacity, and

- 1 REC prices; the contract terms Big Rivers has agreed to in the past; Big Rivers' cost
- 2 of producing power; Big Rivers' need and availability of power; and the market
- 3 conditions Big Rivers expects to encounter, all of which would indicate the prices
- 4 and terms on which Big Rivers is willing to buy or sell such commodities.
- 5 13. In fact, the Commission has granted confidential treatment for the
- 6 same Nucor contract terms contained in the responses to PSC 2-6 and AG 2-1 for
- 7 which Big Rivers seeks confidential treatment in this proceeding, as well as Big
- 8 Rivers' economic analysis of the Nucor contract in Case No. 2019-00365, Order (Jan.
- 9 22, 2020) (granting confidential treatment to the information for an indefinite
- 10 period).¹
- 11 14. 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 generally recognized as
- 16 confidential and proprietary.

¹ See also In the Matter of: 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, P.S.C. Case No. 2019-00365, Orders (January 22, 2020, January 27, 2020, and January 28, 2020) (granting confidential protection to information similar in nature to the subject Confidential Information regarding the terms and conditions of the Nucor contracts); In the Matter of: Electronic Application of Big Rivers Electric Corporation for Approval to Modify its MRSM, Tariff, Cease Deferring Depreciation Expenses, Establish Regulatory Assets, Amortize Regulatory Assets, and other Appropriate Relief, P.S.C. Case No. 2020-00064, Order (March 17, 2020) (granting confidential treatment to, among other things, the confidential terms of the Nucor contracts).

1 <u>SECTION III</u>

Disclosure of the Confidential Information Would Permit an Unfair Commercial Advantage to Big Rivers' Competitors

- 4 15. Public disclosure of the Confidential Information would allow Big
- 5 Rivers' competitors to discover, and make use of, confidential contract terms and
- 6 information concerning Big Rivers' business strategies, to the unfair competitive
- 7 disadvantage of Big Rivers. Public disclosure of the Confidential Information will
- 8 adversely affect Big Rivers in several respects.
- 9 16. First, public disclosure of confidential significant contract terms within
- 10 Big Rivers' responses to PSC 2-6, AG 2-1, and AG 2-8 will place Big Rivers at a
- 11 considerable disadvantage when negotiating future contracts. Disclosure of the
- 12 contract terms will provide insight into Big Rivers' cost of producing power and
- 13 indicate the prices at and terms on which it is willing to sell and purchase power.
- 14 Potential buyers of power from, or sellers of power to, Big Rivers could thus use the
- 15 Confidential Information as a benchmark in negotiating the terms of a transaction.
- 16 The Commission recognized this danger in P.S.C. Case No. 2003-00054, where
- 17 Union Light, Heat and Power ("ULH&P") argued, and the Commission implicitly
- 18 accepted, that if the bids it received were publicly disclosed, contractors on future
- 19 work could use the bids as a benchmark, which would likely lead to the submission
- 20 of higher bids.² The Commission also implicitly accepted ULH&P's further

² See In the Matter of: Application of the Union Light, Heat and Power Company for Confidential Treatment, P.S.C. Case No. 2003-00054, Order (August 4, 2003).

- 1 argument that the higher bids would lessen ULH&P's ability to compete with other
- 2 gas suppliers.³
- 3 17. Likewise, in P.S.C. Case No. 2018-00056, the Commission granted
- 4 confidential treatment to the pricing terms of a contract, recognizing "that the
- 5 specific cost information may be used to the financial detriment of Cumberland
- 6 Valley and its ratepayers by allowing potential future vendors to bid just under the
- 7 cost of its current vendor, which, in turn, would place Cumberland Valley at a
- 8 competitive disadvantage."4
- 9 18. Similarly, potential suppliers or buyers manipulating Big Rivers'
- 10 bidding process would lead to higher costs or lower revenues to Big Rivers and
- 11 would place it at an unfair competitive disadvantage in the wholesale power market
- 12 and credit markets.
- 13 19. Further, if the confidential, negotiated terms of the subject solar
- 14 contracts and Nucor contracts were disclosed, then other economic development
- 15 prospects and companies interested in buying or selling power in Kentucky would
- 16 know that the confidential terms of their future contracts, plans, or bids may also be
- 17 publicly disclosed. Many companies would be reluctant to have such confidential
- 18 and proprietary information disclosed because public disclosure would, for example,
- 19 allow their competitors to know how they offer and price their projects. This would

 $^{^3}$ Id.

⁴ See 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, P.S.C. Case No. 2018-00056, Order (May 9, 2018).

- 1 create precisely the kind of competitive harm to the counterparties that KRS
- $2 \quad 61.878(1)(c)(1)$ is intended to prevent.
- 3 20. Because companies would not want their confidential and proprietary
- 4 information disclosed to their competitors, public disclosure of the Confidential
- 5 Information in this case would likely reduce the pool of companies willing to
- 6 negotiate with Big Rivers, reducing Big Rivers' and other utilities' ability to secure
- 7 economic development prospects and the best terms in power purchase agreements.
- 8 Big Rivers' competition for future renewable purchase contracts is not limited to its
- 9 traditional regulated competitors. Large industrial consumers, municipals, cities,
- 10 and communities are reaching out to contract with solar developers as well.
- 11 21. The Commission has also recognized this real danger to utilities in
- 12 Kentucky. In P.S.C. Case No. 2003-00054, the Commission granted confidential
- 13 protection for bids submitted to ULH&P. ULH&P argued, and the Commission
- 14 implicitly accepted, that the bidding contractors would not want their bid
- 15 information publicly disclosed, and that disclosure would reduce the contractor pool
- 16 available to ULH&P, which would drive up ULH&P's costs, hurting its ability to
- 17 compete with other gas suppliers.⁵ Similarly, in *Hoy v. Kentucky Indus*.
- 18 Revitalization Authority, the Kentucky Supreme Court found that without
- 19 protection for confidential information provided to a public agency, "companies
- 20 would be reluctant to apply for investment tax credits for fear the confidentiality of

⁵ See In the Matter of: Application of the Union Light, Heat and Power Company for Confidential Treatment, P.S.C. Case No. 2003-00054, Order (August 4, 2003).

- 1 financial information would be compromised." Hoy v. Kentucky Indus.
- 2 Revitalization Authority, 907 S.W.2d 766, 769 (Ky. 1995).
- 3 22. Public disclosure of Big Rivers' confidential and proprietary financial
- 4 information, within Big Rivers' response to AG 2-17, consisting of projections of the
- 5 market value of RECs and Big Rivers' response to PSC 2-6, consisting of its hedging
- 6 strategies, will provide insight into Big Rivers' cost of producing power and indicate
- 7 the prices at and terms on which it is willing to sell and purchase power, capacity,
- 8 REC's, and other commodities.
- 9 23. Information about a company's detailed inner workings is generally
- 10 recognized as confidential or proprietary. See, e.g., Hoy v. Kentucky Indus.
- 11 Revitalization Authority, 907 S.W.2d 766, 768 (Ky. 1995) ("It does not take a degree
- 12 in finance to recognize that such information concerning the inner workings of a
- 13 corporation is 'generally recognized as confidential or proprietary"); Marina
- 14 Management Servs. v. Cabinet for Tourism, Dep't of Parks, 906 S.W.2d 318, 319 (Ky.
- 15 1995) (unfair commercial advantage arises simply from "the ability to ascertain the
- 16 economic status of the entities without the hurdles systemically associated with the
- 17 acquisition of such information about privately owned organizations").
- 18 24. Accordingly, the public disclosure of the Confidential Information
- 19 would provide Big Rivers' competitors with an unfair commercial advantage.
- 20 <u>SECTION IV</u>
- 21 <u>Time Period</u>
- 22 25. Big Rivers requests that the Confidential Information contained in the
- 23 response and the attachment to the response to AG 2-17 (projected market prices of

- 1 the RECs) remain confidential for 5 years from the date of this motion, which will
- 2 allow sufficient time for the information to become sufficiently outdated to no longer
- 3 pose a competitive risk to Big Rivers. <u>807 KAR 5:001 Section 13(2)(a)(2).</u>
- 4 26. Big Rivers requests that all other Confidential Information, which
- 5 includes the confidential contract terms of the subject solar contracts and Nucor
- 6 contracts and Big Rivers hedging strategies, remains confidential indefinitely
- 7 because for so long as Big Rivers is in the wholesale power market, the public
- 8 disclosure of the Confidential Information can be used to Big Rivers' competitive
- 9 disadvantage for the reasons stated above. See In the Matter of: Electronic Joint
- 10 Application of Big Rivers Electric Corporation and Meade County Rural Electric
- 11 Cooperative Corporation for (1) Approval of Contracts for Electric Service with Nucor
- 12 Corporation; and (2) Approval of Tariff, P.S.C. Case No. 2019-00365, Order (Jan. 22,
- 13 2020) (granting confidential treatment to the confidential terms of the Nucor
- 14 contract for an indefinite time); In the Matter of: Application of Kentucky Power
- 15 Company for Approval of Renewable Energy Purchase Agreement for Wind Energy
- 16 Resources Between Kentucky Power Company and FPL Illinois Wind, LLC. P.S.C.
- 17 Case No. 2009-00545, Order (July 31, 2019) (granting confidential treatment to
- 18 confidential contract terms for an indefinite time).

19 <u>SECTION V</u>

- 20 Conclusion
- 21 27. Based on the foregoing, the Confidential Information is entitled to
- 22 confidential protection. If the Commission disagrees, then the Commission should
- 23 hold an evidential hearing to protect Big Rivers' due process rights and to supply

- 1 the Commission with a complete record to enable it to reach a decision with regard
- 2 to this matter. See Utility Regulatory Com'n v. Kentucky Water Service Co., Inc.,
- 3 642 S.W.2d 591 (Ky. App. 1982).
- 4 WHEREFORE, Big Rivers respectfully requests that the Commission classify
- 5 and protect as confidential the Confidential Information.
- 6 On this the 10th day of September, 2020.

7	Respectfully submitted,
8	
9	/s/ Tyson Kamuf
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