

1 **COMMONWEALTH OF KENTUCKY**
2 **BEFORE THE PUBLIC SERVICE COMMISSION**
3

4 **IN THE MATTER OF:**

5
6 **ELECTRONIC APPLICATION OF)**
 BIG RIVERS ELECTRIC CORPORATION FOR) **Case No.**
 APPROVAL OF SOLAR POWER CONTRACTS) **2020-00183**

7 **MOTION OF BIG RIVERS ELECTRIC CORPORATION FOR**
8 **CONFIDENTIAL PROTECTION**
9

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 confidential or proprietary under Kentucky law. As fully discussed below, the

2 Confidential Information consists of:

3 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,
12 including its projected market prices for renewable energy credits
13 (“*RECs*”), contained in the response to AG 2-17 and Big Rivers’ hedging
14 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 SECTION III

2 Disclosure of the Confidential Information Would Permit an Unfair
3 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 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 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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