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COMMONWEALTH OF KENTUCKY
BEFORE THE KENTUCKY PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC 2020 INTEGRATED RESOURCE) CASE NO.
PLAN OF BIG RIVERS ELECTRIC CORPORATION) 2020-00299

**MOTION OF BIG RIVERS ELECTRIC CORPORATION FOR
CONFIDENTIAL TREATMENT**

1. Big Rivers Electric Corporation (“*Big Rivers*”) hereby petitions the Kentucky Public Service Commission (“*Commission*”), pursuant to 807 KAR 5:001 Section 13; KRS 61.878; and KRS 278.160(3), to grant confidential treatment to certain information contained in Big Rivers’ Response to the Commission Staff’s Second Request for Information and Big Rivers’ Response to the Attorney General’s Supplemental Data Requests. The information for which Big Rivers seeks confidential treatment is hereinafter referred to as the “*Confidential Information.*” The Confidential Information primarily consists of terms of special contracts; a list of planned transmission systems additions from 2021-2025; projected annual generation and net capacity factors; and related information.
2. The Confidential Information includes portions of the responses and/or attachments for the responses to Items 5, 18, 19, 25, 26, and 28 of the Commission Staff’s Second Request for Information (“*PSC 2-5,*” “*PSC 2-18,*” “*PSC 2-19,*” “*PSC 2-25,*” “*PSC 2-26,*” and “*PSC 2-28,*” respectively).

1 3. The Confidential Information also includes portions of the response to
2 Item 7 of the Attorney General’s Supplemental Data Requests (“AG 2-7”).

3 4. Pursuant to the Commission’s March 24, 2020, Order in *In the Matter*
4 *of Electronic Emergency Docket Related to the Novel Coronavirus COVID-19*, Case
5 No. 2020-00085 (“*Case No. 2020-00085*”), one (1) copy of the Confidential
6 Information highlighted with transparent ink, printed on yellow paper, or
7 otherwise marked “CONFIDENTIAL,” is being filed with this motion by electronic
8 mail. A copy of those pages, with the Confidential Information redacted, is being
9 electronically filed with Big Rivers’ Response to the Commission Staff’s Second
10 Request for Information and Big Rivers’ Response to the Attorney General’s
11 Supplemental Data Requests.¹

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

16 6. If and to the extent the Confidential Information becomes generally
17 available to the public, whether through filings required by other agencies or
18 otherwise, Big Rivers will notify the Commission and have its confidential status
19 removed. *See* 807 KAR 5:001 Section 13(10)(b).

¹ Big Rivers’ Response to Sierra Club’s Supplemental Requests for Information is also being filed with this motion, but Big Rivers is not seeking confidential treatment for information contained in that response.

1 7. As discussed below, the Confidential Information is entitled to
2 confidential treatment under KRS 278.160(3) and/or KRS 61.878. *See* 807 KAR
3 5:001 Section 13(2)(a)(1). Public disclosure of the Confidential Information
4 contained in Big Rivers’ Response to the Commission Staff’s Second Request for
5 Information and Big Rivers’ Response to the Attorney General’s Supplemental
6 Data Requests would afford Big Rivers’ competitors an unfair commercial
7 advantage as discussed fully below.

8 **I. Information Exempted from Public Disclosure by 807 KAR**
9 **5:001 Section 13(4) and KRS 278.160(3)**

10
11 8. The Confidential Information contained in Big Rivers’ responses
12 and/or attachment to its responses to PSC 2-5, PSC 2-19, PSC 2-25, PSC 2-26, and
13 PSC 2-28 are entitled to confidential protection based upon KRS 278.160(3), which
14 shields from disclosure “a provision of a special contract that contains rates and
15 conditions of service not filed in a utility’s general schedule if such provision would
16 otherwise be entitled to be excluded from the application of KRS 61.870 to 61.884
17 under the provisions of KRS 61.878(1)(c)(1).”

18 9. The special contracts in question relate to Big Rivers’ power sales
19 contracts with the Kentucky Municipal Energy Agency (“*KyMEA*”), Owensboro
20 Municipal Utilities (“*OMU*”), and to the retail electric service agreement between
21 Meade County Rural Electric Cooperative Corporation and Nucor Corporation
22 (“*Nucor*”). The Commission has already found that the confidential terms of the
23 *KyMEA*, and Nucor contracts are entitled to confidential treatment under KRS

1 611.878(1)(c)(1),² and the confidential terms of these special contracts should again
2 be granted confidential treatment. Big Rivers’ motion for confidential treatment of
3 the confidential terms of the OMU contract is still pending,³ and those terms
4 should be afforded confidential treatment for the reasons stated in that motion
5 and pursuant to 807 KAR 5:001 Section 13(4), which provides, “Pending action by
6 the commission on a motion for confidential treatment or by its executive director
7 on a request for confidential treatment, the material specifically identified shall be
8 accorded confidential treatment.”

9 **II. Information Exempted from Public Disclosure**
10 **by KRS 61.878(1)(c)(1)**

11
12 10. KRS 61.878(1)(c)(1) protects “records confidentially disclosed to an
13 agency or required by an agency to be disclosed to it, generally recognized as
14 confidential or proprietary, which if openly disclosed would permit an unfair
15 commercial advantage to competitors of the entity that disclosed the records.”
16 Section A below explains that Big Rivers operates in competitive environments in
17 the wholesale power market and in the credit market. Section B below shows that

² *In the Matter of: Filing of Agreement for the Purchase and Sale of Firm Capacity and Energy Between Big Rivers Electric Corporation and the Kentucky Municipal Energy Agency*, P.S.C. Case No. 2016-00306, Order (Jan. 2, 2019) (granting confidential treatment to the confidential terms of the KyMEA contract for an indefinite time period); *In the Matter of: Joint Application of Big Rivers Electric Corporation and Meade County Rural Electric Cooperative Cooperation for Approval of Contracts for Electric Service with Nucor Corporation*, P.S.C. Case No. 2019-00365, Orders (Jan. 22, 2020) (granting confidential treatment to the confidential terms of the Nucor contract for an indefinite time period).

³ See TFS 2018-00318; see also *In the Matter of: Electronic Application of Big Rivers Electric Corporation for a Certificate of Public Convenience and Necessity Authorizing the Conversion of the Green Station Units to Natural Gas-Fired Units and an Order Approving the Establishment of a Regulatory Asset*, P.S.C. Case No. 2021-000079, Order (Mar. 5, 2021) (granting confidential treatment for confidential terms of the OMU contract for an indefinite time period).

1 the Confidential Information is generally recognized as confidential or proprietary.
2 Section C below demonstrates that public disclosure of the Confidential
3 Information would permit an unfair commercial advantage to Big Rivers'
4 competitors.

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

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

18 12. Big Rivers also competes for reasonably priced credit in the credit
19 markets, and its ability to compete is directly impacted by its financial results.
20 Lower revenues and any events that adversely affect Big Rivers' margins will
21 adversely affect its financial results and potentially impact the price it pays for
22 credit. A competitor armed with Big Rivers' proprietary and confidential

1 information will be able to increase Big Rivers' costs or decrease Big Rivers'
2 revenues, which could in turn affects Big Rivers' apparent creditworthiness. A
3 utility the size of Big Rivers that operates generation and transmission facilities
4 will always have periodic cash and borrowing requirements for both anticipated
5 and unanticipated needs. Big Rivers expects to be in the credit markets on a
6 regular basis in the future, and it is imperative that Big Rivers improve and
7 maintain its credit profile.

8 13. Accordingly, Big Rivers has competitors in both the power and credit
9 markets, and its Confidential Information should be protected to prevent the
10 imposition of an unfair competitive advantage.

11 **B. The Confidential Information is Generally Recognized**
12 **as Confidential or Proprietary**

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

17 15. As discussed above, the Confidential Information contained in Big
18 Rivers' responses and/or attachment to its responses to PSC 2-5, PSC 2-19, PSC 2-
19 25, PSC 2-26 and PSC 2-28 includes confidential terms of special contracts. KRS
20 278.160 specifically recognizes that terms of a special contract are not required to
21 be publicly disclosed if such terms are entitled to protection under KRS
22 61.878(1)(c)(1). *See* KRS 278.160(3).

23

1 16. The Confidential Information in Big Rivers’ response to PSC 2-18
2 consists of information related to its projected annual generation and net capacity
3 factors. The Confidential Information in the attachments to Big Rivers’ responses
4 to PSC 2-25 and PSC 2-28 consists of information related to Big Rivers’ Planned
5 Reserve Margins Requirements (“*PRMR*”) and capacity position. This Confidential
6 Information in Big Rivers’ response to PSC 2-18, as well as in the attachments to
7 Big Rivers’ responses to PSC 2-25 and PSC 2-28 provides insight into the timing of
8 Big Rivers’ energy needs. With information regarding Big Rivers’ generation
9 levels and capacity position, potential suppliers to Big Rivers will be able to
10 manipulate the price of power bid to Big Rivers in order to maximize their
11 revenues, and potential market power purchasers could use the information to
12 know when and to the extent Big Rivers is long on power and could use that
13 information to manipulate their bids, leading to lower revenues to Big Rivers.

14 17. The Confidential Information in Big Rivers’ response to AG 2-7
15 consists of a list of planned transmission systems additions from 2021-2025, which
16 provides insight into the timing and extent of Big Rivers’ future maintenance
17 plans and capital improvements. Knowledge of future capital projects would allow
18 contractors and suppliers of materials for those projects to manipulate their bids,
19 leading to higher costs to Big Rivers and placing it at an unfair competitive
20 disadvantage in the wholesale power and credit markets. Moreover, the
21 Commission has previously granted confidential treatment to the type of
22 information contained in Big Rivers’ responses to PSC 2-18 and AG 2-7. *See, e.g.,*

1 *In the Matter of 2017 Integrated Resource Plan of Big Rivers Electric Corporation,*
2 Order, P.S.C. Case No. 2017-00384 (April 25, 2019) (granting confidential
3 treatment to a similar list of planned transmission system additions); *In the*
4 *Matter of: Electronic Application of Kentucky Power Company for (1) a General*
5 *Adjustment of its Rates for Electric Service; (2) an Order Approving its 2017*
6 *Environmental Compliance Plan; (3) an Order Approving its Tariffs and Riders’ (4)*
7 *an Order Approving Accounting Practices to Establish Regulatory Assets and*
8 *Liabilities; and (5) an Order Granting all other Required Approvals and Relief,*
9 Order, P.S.C. Case No. 2017-00179 (June 19, 2018) (granting confidential
10 treatment to maintenance and budget information that could be used to determine
11 scope and timing of planned maintenance outages). Big Rivers’ pending motion for
12 confidential treatment for a similar list of confidential future transmission
13 additions is still pending,⁴ and those future additions should be afforded
14 confidential treatment for the reasons stated in that motion and pursuant to 807
15 KAR 5:001 Section 13(4), which provides, “Pending action by the commission on a
16 motion for confidential treatment or by its executive director on a request for
17 confidential treatment, the material specifically identified shall be accorded
18 confidential treatment.”
19

⁴ See, *In the Matter of: A Review of the Adequacy of Kentucky’s Generation Capacity and Transmission System*, P.S.C. Administrative Case No. 387, Motion of Big Rivers Electric Corporation for Confidential Protection (March 1, 2021).

1 18. The Confidential Information is not publicly available, is not
2 disseminated within Big Rivers except to those employees and professionals with a
3 legitimate business need to know and act upon the information, and is not
4 disseminated to others without a legitimate need to know and act upon the
5 information. As such, the Confidential Information is generally recognized as
6 confidential and proprietary.

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

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10 19. Disclosure of the Confidential Information would permit an unfair
11 commercial advantage to Big Rivers' competitors. As discussed above, Big Rivers
12 faces actual competition in the wholesale power market and in the credit market.
13 It is likely that Big Rivers would suffer competitive injury if that Confidential
14 Information was publicly disclosed.

15 20. The Confidential Information includes material such as Big Rivers'
16 terms of special contracts; projected annual generation and net capacity factors;
17 planned transmission systems additions from 2021-2025; and related information.
18 If that information is publicly disclosed, market participants would have insight
19 into the timing of Big Rivers' energy needs and the prices and terms at which it is
20 willing to buy and sell power, and could use that information to manipulate the
21 bidding process, leading to higher costs or lower revenues for Big Rivers and
22 impairing its ability to compete in the wholesale power markets. Furthermore,
23 any competitive pressure that adversely affects Big Rivers' revenue and margins

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

3 21. These effects were recognized in P.S.C. Case No. 2003-00054, in
4 which the Commission granted confidential treatment to bids submitted to Union
5 Light, Heat & Power (“*ULH&P*”). *ULH&P* argued, and the Commission implicitly
6 accepted, that if the bids it received were publicly disclosed, contractors in the
7 future could use the bids as a benchmark, which would likely lead to the
8 submission of higher bids. *In the Matter of Application of the Union Light, Heat
9 and Power Company for Confidential Treatment*, P.S.C. Case No. 2003-00054,
10 Order (Aug. 4, 2003); *see also In the Matter of An Examination of the Application of
11 the Fuel Adjustment Clause of East Kentucky Power Cooperative, Inc. from May 1,
12 2007 through October 31, 2007*, P.S.C. Case No. 2007-00523, Letter (Feb. 27, 2008).

13 22. The Commission also implicitly accepted *ULH&P*'s further argument
14 that the higher bids would lessen *ULH&P*'s ability to compete with other gas
15 suppliers. *In the Matter of Application of the Union Light, Heat and Power
16 Company for Confidential Treatment*, P.S.C. Case No. 2003-00054, Order (Aug. 4,
17 2003).

18 23. Similarly, potential power suppliers and purchasers manipulating
19 Big Rivers' bidding process would lead to higher costs to, or lower revenues for, Big
20 Rivers and would place it at an unfair competitive disadvantage in the wholesale
21 power and credit markets.

1 24. Public disclosure of Big Rivers’ projections of its annual generation
2 and net capacity factors would give the power producers and marketers with
3 which Big Rivers competes in the wholesale power market insight into the timing
4 of Big Rivers’ energy needs. Knowledge of this information would give those power
5 producers and marketers an unfair competitive advantage because they could use
6 that information to potentially underbid Big Rivers in wholesale transactions.

7 25. Public disclosure of the confidential terms of special contracts would
8 also cause competitive harm to Big Rivers by reducing the number of
9 counterparties willing to do business with Big Rivers. In P.S.C. Case No. 2003-
10 00054, the Commission additionally implicitly accepted ULH&P's argument that
11 the bidding contractors would not want their bid information publicly disclosed,
12 and that disclosure would reduce the contractor pool available to ULH&P, which
13 would drive up ULH&P's costs, hurting its ability to compete with other gas
14 suppliers. *In the Matter of Application of the Union Light, Heat and Power*
15 *Company for Confidential Treatment*, P.S.C. Case No. 2003-00054, Order (Aug. 4,
16 2003). Similarly, in *Hoy v. Kentucky Indus. Revitalization Authority*, the Kentucky
17 Supreme Court found that without protection for confidential information provided
18 to a public agency, “companies would be reluctant to apply for investment tax
19 credits for fear the confidentiality of financial information would be compromised.”
20 *Hoy v. Kentucky Indus. Revitalization Authority*, 907 S.W.2d 766, 769 (Ky. 1995).

21 26. In Big Rivers’ case, Big Rivers is currently in negotiations with
22 potential and expects to engage in negotiations with counterparties for purchase

1 power agreements other counterparties in the future. If confidential treatment of
2 the confidential terms of the special contract in Big Rivers' responses and/or
3 attachment to its responses to PSC 2-5, PSC 2-19, PSC 2-25, PSC 2-26, and PSC
4 2-28 is denied, potential counterparties would know that the confidential terms of
5 their contracts could be publicly disclosed, which could reveal information to their
6 competitors about their competitiveness. Because many companies would be
7 reluctant to have such information disclosed, public disclosure of the Confidential
8 Information would likely reduce the pool of counterparties willing to negotiate
9 with Big Rivers, reducing Big Rivers' ability to sell power and impairing its ability
10 to compete in the wholesale power and credit markets.

11 27. Accordingly, the public disclosure of the information that Big Rivers
12 seeks to protect pursuant to KRS 61.878(1)(c)(1) would provide Big Rivers'
13 competitors with an unfair commercial advantage.

14 **III. Time Period**

15 28. Pursuant to 807 KAR 5:001 Section 13(2)(a)(2), Big Rivers requests
16 that the Confidential Information be afforded confidential treatment for the time
17 periods explained below.

18 29. Big Rivers requests that the Confidential Information in its responses
19 and/or the attachments to its responses to PSC 2-5, PSC 2-19, PSC 2-25, PSC 26-
20 43, and PSC 2-28, which is the confidential special contract terms, remain
21 confidential indefinitely for the above-stated reasons.

22

1 30. Big Rivers requests that the Confidential Information in its responses
2 and/or the attachments to its responses to PSC 2-18 remain confidential for a
3 period of ten (10) years from the date of this motion, which should allow sufficient
4 time for the projected data to become historical and sufficiently outdated that it
5 could not be used to determine similar confidential information at that time or to
6 competitively disadvantage Big Rivers.

7 31. Big Rivers requests that the Confidential Information in its responses
8 and/or the attachments to its responses to AG 2-7 remain confidential for a period
9 of five (5) years from the date of this motion, which should allow sufficient time
10 for the projected data to become historical and sufficiently outdated that it could
11 not be used to determine similar confidential information at that time or to
12 competitively disadvantage Big Rivers.

13 **IV. Conclusion**

14 32. Based on the foregoing, the Confidential Information is entitled to
15 confidential treatment pursuant to 807 KAR 5:001 Section 13, KRS 61.878, and
16 KRS 278.160(3). If the Commission disagrees that Big Rivers' Confidential
17 Information is entitled to confidential treatment, due process requires the
18 Commission to hold an evidentiary hearing. *See Utility Regulatory Comm'n v.*
19 *Kentucky Water Serv. Co., Inc.*, 642 S.W.2d 591 (Ky. App. 1982).

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1 WHEREFORE, Big Rivers respectfully requests that the Commission grant
2 this motion and classify and treat as confidential the Confidential Information.

3 On this the 11th day of May, 2021.

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Respectfully submitted,

/s/ Tyson Kamuf

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