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

In the Matter of:

AN ELECTRONIC EXAMINATION OF THE)
APPLICATION OF THE FUEL ADJUSTMENT CLAUSE) Case No.
OF BIG RIVERS ELECTRIC CORPORATION) 2021-00058
FROM NOVEMBER 1, 2018 THROUGH OCTOBER 31, 2020)

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

1. Big Rivers Electric Corporation (“*Big Rivers*”) hereby moves the Public Service Commission of Kentucky (the “*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’ responses to Items 12, 13, 22, 30, 31, and 32 of the information requested in Appendix B to the Commission’s March 4, 2021, Order and in the Direct Testimony of Natalie R. Hankins filed in this matter (the “*Confidential Information*”). The Confidential Information consists of Big Rivers’ projected energy purchases through 2022 and terms of special contracts (Big Rivers’ Response to Item 12); third party proprietary information and terms of special contracts within monthly billing summaries for sales to other electric utilities (Big Rivers’ response to Item 13); forecasted monthly Fuel Adjustment Clause (“*FAC*”) factors for years 2021 and 2022 (Big Rivers’ Response and its attachment to Item 22); projected fuel requirements for years 2021 and 2022 (Big Rivers’ Response to Item 30); off-

1 system sales projections for years 2021 and 2022 (Big Rivers' Response to Item
2 31); planned maintenance outages for each of its generating units for years 2021
3 and 2022 (Big Rivers' Response to Item 32); and capacity price projections (Direct
4 Testimony of Natalie R. Hankins).

5 2. Pursuant to the Commission's March 24, 2020, Order in *In the*
6 *Matter of Electronic Emergency Docket Related to the Novel Coronavirus COVID-*
7 *19*, Case No. 2020-00085 ("*Case No. 2020-00085*"), one (1) copy of the Confidential
8 Information highlighted with transparent ink, printed on yellow paper, or
9 otherwise marked "CONFIDENTIAL," is being filed with this motion by electronic
10 mail or posting on a secure file share site. A copy of those pages, with the
11 Confidential Information redacted, is being electronically filed with Big Rivers'
12 Responses accompanying this motion.

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

16 4. 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).

20 5. As discussed below, the Confidential Information is entitled to
21 confidential treatment pursuant to KRS 278.160(3), KRS 61.878(1)(a), and KRS
22 61.878(1)(c)(1). *See* 807 KAR 5:001 Section 13(2)(a)(1).

1 I. **Confidential Information Exempted from Public**
2 **Disclosure by KRS 278.160(3)**

3 6. Certain Confidential Information contained in Big Rivers’ responses
4 and/or attachments to Items 12 and 13 is entitled to confidential protection based
5 upon KRS 278.160(3), which shields from disclosure “a provision of a special
6 contract that contains rates and conditions of service not filed in a utility’s
7 general schedule if such provision would otherwise be entitled to be excluded from
8 the application of KRS 61.870 to 61.884 under the provisions of KRS
9 61.878(1)(c)(1).

10 7. The special contracts in question relate to Big Rivers’ power sales
11 contracts with the Kentucky Municipal Energy Agency (“KyMEA”), Owensboro
12 Municipal Utilities (“OMU”); and municipalities in Nebraska; and to short term
13 contracts with other non-members. The Commission has already found that the
14 confidential terms of the KyMEA and Nebraska contracts are entitled to
15 confidential treatment under KRS 61.878(1)(c)(1),¹ and the confidential terms of
16 these special contracts should again be granted confidential treatment.

17 8. Big Rivers’ motion for confidential treatment of the confidential
18 terms of the OMU contract is still pending,² and those terms should be afforded

¹ *In the Matter of: Big Rivers Electric Corporation Filing of Wholesale Contracts Pursuant to KRS 278.180 and KAR 5:001 §13*, P.S.C. Case No. 2014-00134, Order (Sept. 10, 2014) (granting confidential treatment to the confidential terms of the Nebraska contracts for an indefinite time period); *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).

² 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*

1 confidential treatment for the reasons stated in that motion and pursuant to 807
2 KAR 5:001 Section 13(4), which provides, “[p]ending action by the commission on
3 a motion for confidential treatment or by its executive director on a request for
4 confidential treatment, the material specifically identified shall be accorded
5 confidential treatment.”

6 **II. The Confidential Information Exempted from**
7 **Disclosure under KRS 61.878(1)(a)**

8 9. KRS 61.878(1)(a) protects and affords confidentiality to “[p]ublic
9 records containing information of a personal nature where the public disclosure
10 thereof would constitute a clearly unwarranted invasion of personal privacy.”

11 10. The attachment to Big Rivers’ response to Item 13 reveals sales to,
12 and inferably the power usage of, individual large industrial retail customers on
13 the Big Rivers system and to non-members under special contract. Because the
14 individual customers and non-members identified in the attachment to Big
15 Rivers’ response to Item 13 are not parties to this proceeding, publicly revealing
16 such information would constitute a clearly unwarranted invasion of those
17 customers’ privacy. Moreover, the Commission has previously granted
18 confidential treatment to similar retail customer usage information under the
19 purview of KRS 61.878(1)(a).³

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).

³ See, e.g., *In the Matter of: Sanctuary Church v. Louisville Gas and Electric Company*, Order, P.S.C. Case No. 2018-00181 (Jan. 8, 2019) (granting confidential treatment pursuant to KRS 61.878(1)(a) for an indefinite period to a retail customer’s account and usage information); *In the Matter of: Application of Kentucky Utilities Company for an Adjustment of its Electric Rates*, Order, P.S.C. Case No. 2012-00221 (July 25, 2013) (holding customer names, account numbers, and usage information exempt from disclosure under KRS 61.878(1)(a)). See also, *In the Matter of:*

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

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

19 15. As is evidenced by these economic pressures, Big Rivers faces actual
20 competition from other market participants.

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1 competing operators. The most obvious disadvantage may be the ability to
2 ascertain the economic status of the entities without the hurdles systematically
3 associated with acquisition of such information about privately owned
4 organizations.” 906 S.W.2d 318, 319 (Ky. 1995)

5 18. In this proceeding, the potential public disclosure of the Confidential
6 Information could give Big Rivers’ suppliers, buyers, and competitors insight into
7 Big Rivers’ “inner workings.” For instance, the Confidential Information could be
8 used to determine when Big Rivers will have power available to sell into the
9 market or when Big Rivers needs power, the amount of power Big Rivers has to
10 sell or will need, as well as the prices at which it is willing to sell power. Such
11 information would also provide market participants with insight into Big Rivers’
12 production costs.

13 19. Public disclosure of the confidential terms of special contracts and
14 third party proprietary information would also cause competitive harm to Big
15 Rivers. In P.S.C. Case No. 2003-00054, the Commission additionally implicitly
16 accepted ULH&P’s argument that the bidding contractors would not want their
17 bid information publicly disclosed, and that disclosure would reduce the
18 contractor pool available to ULH&P, which would drive up ULH&P’s costs,
19 hurting its ability to compete with other gas suppliers. *In the Matter of*
20 *Application of the Union Light, Heat and Power Company for Confidential*
21 *Treatment*, P.S.C. Case No. 2003-00054, Order (Aug. 4, 2003). Similarly, in *Hoy v.*
22 *Kentucky Indus. Revitalization Authority*, the Kentucky Supreme Court found

1 that without protection for confidential information provided to a public agency,
2 “companies would be reluctant to apply for investment tax credits for fear the
3 confidentiality of financial information would be compromised.” *Hoy v. Kentucky*
4 *Indus. Revitalization Authority*, 907 S.W.2d 766, 769 (Ky. 1995).

5 20. In Big Rivers’ case, Big Rivers is currently in negotiations with
6 potential and expects to engage in negotiations with counterparties for purchase
7 power agreements other counterparties in the future. If confidential treatment of
8 the confidential terms of the special contract in Big Rivers’ responses and/or
9 attachment to its responses to Item 12 and Item 13 is denied, potential
10 counterparties would know that the confidential terms of their contracts could be
11 publicly disclosed, which could reveal information to their competitors about their
12 competitiveness. Because many companies would be reluctant to have such
13 information disclosed, public disclosure of the Confidential Information would
14 likely reduce the pool of counterparties willing to negotiate with Big Rivers,
15 reducing Big Rivers’ ability to sell power and impairing its ability to compete in
16 the wholesale power and credit markets.

17 21. Notably, the Commission, in its recent reviews of Big Rivers’ FAC,
18 has applied similar reasoning in granting confidential treatment to the same type
19 of information as the Confidential Information in Big Rivers’ response to Items 13
20 and 31, the private usage information of individual retail customers and projected
21 ongoing sales.⁴

⁴ See *In the Matter of: Electronic Examination of the Application of the Fuel Adjustment Clause of Big Rivers Electric Corporation from November 1, 2017 through April 30, 2018, Order*,

1 22. The Commission has recently granted confidential treatment to the
2 same Confidential Information, projections of capacity prices based on third-party
3 offers, contained in the Direct Testimony of Natalie R. Hankins.⁵

4 23. In sum, the Confidential Information is not publicly available, is not
5 disseminated within Big Rivers except to those employees and professionals with
6 a legitimate business need to know and act upon the information, and is not
7 disseminated to others without a legitimate need to know and act upon the
8 information. As such, the Confidential Information details the “inner workings”
9 of Big Rivers’ and is generally recognized as confidential and proprietary.

10 **C. Disclosure of the Confidential Information Would Permit an**
11 **Unfair Commercial Advantage to Big Rivers’ Competitors**

12 24. Disclosure of the Confidential Information would permit an unfair
13 commercial advantage to Big Rivers’ competitors. As discussed above, Big Rivers
14 faces actual competition in the wholesale power market and in the credit market,
15 and it is likely that Big Rivers would suffer competitive injury if the Confidential
16 Information were publicly disclosed.

P.S.C. Case No. 2018-00221 (Oct. 16, 2018 (granting confidential treatment for Big Rivers’ projected ongoing-off system sales); see also In the Matter of: Electronic Examination of the Application of the Fuel Adjustment Clause of Big Rivers Electric Corporation from November 1, 2018 through April 30, 2019, Order, P.S.C. Case No. 2019-00231 (April 2, 2020) (granting confidential treatment for fuel supply bids, future off-system sales, and private usage information of individual retail customers).

⁵ *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).*

1 25. Given the nature of the Confidential Information, its disclosure
2 would provide other market participants, suppliers, buyers, and competitors
3 insight into the timing of Big Rivers' capacity needs, its cost of producing power,
4 and the prices at which it is willing to buy fuel or buy and sell power. In turn, the
5 Confidential Information could be used to manipulate the bidding process, leading
6 to higher costs and/or lower revenues for Big Rivers, thereby impairing its ability
7 to compete in the wholesale power markets. Furthermore, any competitive
8 pressure that adversely affects Big Rivers' revenue and/or margins could make
9 Big Rivers appear less creditworthy and impair its ability to compete in the credit
10 market.

11 26. 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 **IV. Time Period**

15 27. Big Rivers requests that the Confidential Information in the Big
16 Rivers' response to Item 12 and Item 13 which is terms of special contracts and
17 the Confidential Information in the attachment to Big Rivers' response to Item 13
18 which is protected private customer usage information remain confidential
19 indefinitely. Big Rivers requests that all other Confidential Information remain
20 confidential for a period of five (5) years from the date of this motion, which will
21 allow sufficient time for the information to become sufficiently outdated to no

1 longer pose a competitive risk to Big Rivers. *See* 807 KAR 5:001 Section
2 13(2)(a)(2).

3 **V. Conclusion**

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

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

12 On this the 22nd day of March, 2021.

13 Respectfully submitted,

14
15 */s/ Tyson Kamuf*

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