

1 COMMONWEALTH OF KENTUCKY
2 BEFORE THE PUBLIC SERVICE COMMISSION
3

4 In the Matter of:
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ELECTRONIC APPLICATION OF)	
BIG RIVERS ELECTRIC CORPORATION)	Case No.
FOR REVIEW OF ITS MRSM CREDIT)	2021-00061
FOR CALENDAR YEAR 2020)	

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10 **MOTION OF BIG RIVERS ELECTRIC CORPORATION**
11 **FOR CONFIDENTIAL PROTECTION**
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13 1. Big Rivers Electric Corporation (“*Big Rivers*”) hereby moves the
14 Kentucky Public Service Commission (the “*Commission*”), pursuant to 807 KAR
15 5:001 Section 13 and KRS 61.878, to grant confidential protection to certain
16 information Big Rivers is providing in its Application submitted
17 contemporaneously herewith in the above-styled matter. The information for
18 which Big Rivers seeks confidential treatment is hereinafter referred to as the
19 “*Confidential Information*.”

20 2. The Confidential Information primarily consists of (i) customer
21 specific usage data and billing information, and (ii) information relating to power
22 purchases from, and sales to, specific counterparties; and it includes:

- 23 a. information contained in the Direct Testimony of Paul G. Smith
24 attached to the Application as Exhibit A; and

1 b. information contained in Exhibits Wolfram-6 and Wolfram-8 to the
2 Direct Testimony of John Wolfram.

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

11 4. A copy of this motion with the Confidential Information redacted has
12 been served on all parties to this proceeding through the use of electronic filing.
13 807 KAR 5:001, Section 13(b).

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

18 6. As discussed below, the Confidential Information is entitled to
19 confidential treatment based upon KRS 61.878(1)(a) and/or KRS 61.878(1)(c)(1).
20 807 KAR 5:001 Section 13(2)(a)(1).

1 *and Other Appropriate Relief*, P.S.C. Case No. 2020-00064, Order (June 30, 2020)
2 (granting confidential treatment to information related to individual customer
3 names and usage in Big Rivers’ responses to the Commission Staff’s First
4 Requests for Information, Attorney General’s First Set of Data Requests, and
5 KIUC’s First Set of Data Requests); *In the Matter of: Riverside Generating*
6 *Company, LLC v. Kentucky Power Company*, P.S.C. Case No. 2017-00472, Order
7 (May 16, 2019) (granting confidential treatment to customer specific information
8 relating to purchases and transmission of electricity for an indefinite period). As
9 such, Big Rivers requests confidential treatment for the identity of these
10 customers or their usage and billing information in order to protect their private
11 usage information.

12 **B. INFORMATION ENTITLED TO CONFIDENTIAL TREATMENT**
13 **UNDER KRS 61.878(1)(c)(1)**

14 9. Under the Kentucky Open Records Act, the Commission is entitled
15 to withhold from public disclosure “records confidentially disclosed to an agency
16 or required by an agency to be disclosed to it, generally recognized as confidential
17 or proprietary, which if openly disclosed would permit an unfair commercial
18 advantage to competitors of the entity that disclosed the records.” KRS
19 61.878(1)(c)(1). Public disclosure of the Confidential Information in the Direct
20 Testimony of Paul G. Smith and Exhibits Wolfram-6 and Wolfram-8, would
21 permit such a result as discussed fully below.

1 Lower revenues and any events that adversely affect Big Rivers' margins will
2 adversely affect its financial results and potentially impact the price it pays for
3 credit. A competitor armed with Big Rivers' proprietary and confidential
4 information will be able to increase Big Rivers' costs or decrease Big Rivers'
5 revenues, which could in turn affect Big Rivers' apparent creditworthiness. A
6 utility the size of Big Rivers that operates generation and transmission facilities
7 will always have periodic cash and borrowing requirements for both anticipated
8 and unanticipated needs. Big Rivers expects to be in the credit markets on a
9 regular basis in the future, and it is imperative that Big Rivers improve and
10 maintain its credit profile.

11 SECTION II

12 The Confidential Information is Generally Recognized as 13 Confidential or Proprietary

14 13. The Confidential Information entitled to confidential treatment
15 under KRS 61.878(1)(c)(1) consists of information relating to power purchases
16 from, and sales to, specific counterparties, and is contained in the Direct
17 Testimony of Mr. Smith and Exhibits Wolfram-6 and Wolfram-8, attached to the
18 Direct Testimony of Mr. Wolfram, Application Exhibit C. Big Rivers and the
19 wholesale counterparties operate in competitive markets and the public disclosure
20 of such information could cause all such parties an economic disadvantage in
21 negotiating future transactions, as their competitors and potential counterparties

1 would have insight into their power needs, available capacity, or the prices at
2 which they are willing to buy or sell power.

3 14. Information such as this which bears upon a company's detailed
4 inner workings is generally recognized as confidential or proprietary. *See, e.g.,*
5 *Hoy v. Kentucky Indus. Revitalization Authority*, 907 S.W.2d 766, 768 (Ky. 1995)
6 ("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
8 confidential or proprietary'"); *Marina Management Services, Inc. v.*
9 *Commonwealth, Cabinet for Tourism*, 906 S.W.2d 318, 319 (Ky. 1995) ("These are
10 records of privately owned marina operators, disclosure of which would unfairly
11 advantage competing operators. The most obvious disadvantage may be the
12 ability to ascertain the economic status of the entities without the hurdles
13 systematically associated with acquisition of such information about privately
14 owned organizations"). Moreover, the Commission has previously granted
15 confidential treatment to such information. *See, e.g., In the Matter of: Riverside*
16 *Generating Company, LLC v. Kentucky Power Company*, P.S.C. Case No. 2017-
17 00472, Order (May 16, 2019) (granting confidential treatment to customer specific
18 information relating to purchases and transmission of electricity for an indefinite
19 period); *In the Matter of Electronic Application of Big Rivers Electric Corporation*
20 *and Meade Couty Rural Electric Cooperative Corporation for (1) Approval of*
21 *Contracts for Electric Service with Nucor Corporation; and (2) Approval of Tariff,*
22 P.S.C. Case No. 2019-00365, Order (Sept. 30, 2020) (granting confidential

1 treatment to the terms of Nucor Corporation’s retail electric service agreement
2 and power purchase agreements between Big Rivers and solar developers).

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

8 **SECTION III**

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

11 16. Public disclosure of the Confidential Information will adversely
12 affect Big Rivers in several respects.

13 17. Disclosure of the Confidential Information would afford Big Rivers’
14 competitors an unfair commercial advantage. As discussed above, Big Rivers
15 faces actual competition in the power markets and in the credit markets. It is
16 likely that Big Rivers would suffer competitive injury if the Confidential
17 Information were publicly disclosed, and the information should therefore be
18 subject to confidential treatment.

19 18. In P.S.C. Case No. 2018-00056, the Commission granted confidential
20 treatment to pricing information provided by Cumberland Valley. *See In the*
21 *Matter of: Application of Cumberland Valley Electric, Inc. for Commission*
22 *Approval for a Certificate of Public Convenience and Necessity to Install an*

1 *Advanced Metering Infrastructure (AMI) System Pursuant to KRS 807 KAR 5:001*
2 *and KRS 278.020*, Order, P.S.C. Case No. 2018-00056 (May 9, 2018). In that case,
3 the Commission recognized “that the specific cost information may be used to the
4 financial detriment of Cumberland Valley and its ratepayers by allowing
5 potential future vendors to bid just under the cost of its current vendor, which, in
6 turn, would place Cumberland Valley at a competitive disadvantage.” *Id.*

7 19. The Commission also recognized these effects in P.S.C. Case No.
8 2003-00054. In that case, Union Light Heat & Power (“*ULH&P*”) argued, and the
9 Commission implicitly accepted, that if the bids it received were publicly
10 disclosed, contractors on future work could use the bids as a benchmark, which
11 would likely lead to the submission of higher bids. *In the Matter of: Application of*
12 *the Union Light, Heat and Power Company for Confidential Treatment*, Order,
13 P.S.C. Case No. 2003-00054 (Aug. 4, 2003). The Commission also implicitly
14 accepted ULH&P’s further argument that the higher bids would lessen ULH&P’s
15 ability to compete with other gas suppliers. *Id.*

16 20. The same competitive harm that the Commission recognized in
17 P.S.C. Case Nos. 2003-00054 and 2018-00056 would befall Big Rivers if the
18 Confidential Information in this case were publicly disclosed. Public disclosure of
19 the Confidential Information would provide potential bidders on future power
20 contracts and future economic development prospects with insight into the prices
21 at which Big Rivers is willing to buy and sell power. These counterparties could
22 use this information as a benchmark, leading to higher costs or lower revenues to

1 Big Rivers, hurting Big Rivers' ability to compete in the wholesale power and
2 credit markets.

3 21. Additionally, in P.S.C. Case No. 2003-00054, the Commission
4 implicitly accepted ULH&P's argument that the bidding contractors would not
5 want their bid information publicly disclosed, and that disclosure would reduce
6 the contractor pool available to ULH&P, which would drive up ULH&P's costs,
7 hurting its ability to compete with other gas suppliers. *In the Matter of*
8 *Application of the Union Light, Heat and Power Company for Confidential*
9 *Treatment*, Order, P.S.C. Case No. 2003-00054 (August 4, 2003). Similarly, in
10 *Hoy v. Kentucky Indus. Revitalization Authority*, the Kentucky Supreme Court
11 found that without protection for confidential information provided to a public
12 agency, "companies would be reluctant to apply for investment tax credits for fear
13 the confidentiality of financial information would be compromised. *Hoy v.*
14 *Kentucky Indus. Revitalization Authority*, 907 S.W.2d 766, 769 (Ky. 1995). In Big
15 Rivers' case, if confidential treatment of the confidential purchase and sales
16 information is denied, potential bidders on future power contracts or future
17 economic development prospects would know that their confidential information
18 would be publicly disclosed. Because many companies would be reluctant to have
19 such information disclosed, public disclosure of the Confidential Information
20 would likely suppress the competitive bidding process and reduce the pool of
21 bidders willing to bid on Big Rivers' power contracts, or disincentive other
22 companies from locating in Big Rivers' service area, driving up Big Rivers' costs

1 (which could then drive up the cost of credit to Big Rivers) or reducing its
2 revenues, and impairing its ability to compete in the wholesale power market.

3 22. Accordingly, the public disclosure of the Confidential Information
4 would provide Big Rivers' competitors with an unfair commercial advantage.

5 **C. Time Period**

6 23. Big Rivers requests that the Confidential Information remain
7 confidential indefinitely for the reasons stated above, and for the same reasons
8 the Commission granted indefinite confidential treatment to similar information
9 in Case Nos. 2017-00472 and 2019-00365. *See In the Matter of: Riverside*
10 *Generating Company, LLC v. Kentucky Power Company*, P.S.C. Case No. 2017-
11 00472, Order (May 16, 2019); *In the Matter of Electronic Application of Big Rivers*
12 *Electric Corporation and Meade County Rural Electric Cooperative Corporation for*
13 *(1) Approval of Contracts for Electric Service with Nucor Corporation; and (2)*
14 *Approval of Tariff*, P.S.C. Case No. 2019-00365, Order (Sept. 30, 2020). 807 KAR
15 5:001 Section 13(2)(a)(2).

16 **D. Conclusion**

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

