

1 COMMONWEALTH OF KENTUCKY
2 BEFORE THE PUBLIC SERVICE COMMISSION
3

4 In the Matter of:
5

ELECTRONIC APPLICATION OF) Case No.
BIG RIVERS ELECTRIC CORPORATION) 2021-00061
FOR ANNUAL REPORT ON MRSM CREDIT)

6
7
8
9
10 **MOTION OF BIG RIVERS ELECTRIC CORPORATION**
11 **FOR CONFIDENTIAL PROTECTION**
12

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 contained in Big Rivers’ responses to the Commission Staff’s First
17 Request for Information and to the Joint Initial Data Requests of the Attorney
18 General and Kentucky Industrial Utility Customers (“*KIUC*”). The information
19 for which Big Rivers seeks confidential treatment is hereinafter referred to as the
20 “Confidential Information.”

21 2. The Confidential Information primarily consists of (i) customer
22 specific power usage data and billing information; (ii) information relating to
23 power purchases from, and sales to, specific counterparties; and (iii) Big Rivers’
24 projected financial information, specifically its forecasted margins and TIER, and
25 it includes:

1 a. portions of Big Rivers’ response to Item 4 of the Commission Staff’s
2 First Request for Information (“PSC 1-4”); and

3 b. portions of an attachment, in electronic spreadsheet format, to Big
4 Rivers’ response to Item 1 of the Joint Initial Data Requests of the
5 Attorney General and KIUC (“AG-KIUC 1-1”).

6 3. Pursuant to the Commission’s March 24, 2020, Order in *In the*
7 *Matter of Electronic Emergency Docket Related to the Novel Coronavirus COVID-*
8 *19*, Case No. 3 2020-00085 (“*Case No. 2020-00085*”), one (1) copy of the
9 Confidential Information highlighted with transparent ink, printed on yellow
10 paper, or otherwise marked “CONFIDENTIAL,” is being filed with this motion by
11 electronic mail. A copy of the attachment to Big Rivers’ response to AG-KIUC 1-1,
12 in electronic spreadsheet format (Excel format), and a copy of Big Rivers’ response
13 to PSC 1-4 in PDF format, with the Confidential Information redacted, are being
14 electronically filed with the Big Rivers’ responses to the information requests that
15 accompany this motion.

16 4. A copy of this motion with the Confidential Information redacted has
17 been served on all parties to this proceeding through the use of electronic filing.
18 807 KAR 5:001, Section 13(b). A copy of the Confidential Information has been
19 served on all parties that have signed a confidentiality agreement.

20 5. If and to the extent the Confidential Information becomes generally
21 available to the public, whether through filings required by other agencies or

1 otherwise, Big Rivers will notify the Commission and have its confidential status
2 removed. 807 KAR 5:001 Section 13(10)(b).

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

6 **A. INFORMATION ENTITLED TO CONFIDENTIAL TREATMENT**
7 **UNDER KRS 61.878(1)(a)**

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

11 8. The Confidential Information in Attachment 1 to Big Rivers’
12 response to AG-KIUC 1-1 reveals the power usage of individual large industrial
13 retail customers on the Big Rivers system or sales to, or purchases from, named
14 counterparties. In fact, the Commission recently granted confidential protection
15 to the exact Confidential Information in Exhibits Wolfram-6 and Wolfram-8 to the
16 Direct Testimony of John Wolfram in Big Rivers’ Application in this matter. *See*
17 *The Commission’s March 9, 2021 Order*.

18 9. Because these customers and counterparties are not parties to this
19 proceeding, publicly revealing such information would constitute a clearly
20 unwarranted invasion of personal privacy. Moreover, the Commission has
21 previously granted confidential treatment to similar information. *See, e.g., In the*
22 *Matter of: Sanctuary Church v. Louisville Gas and Electric Company, P.S.C. Case*

1 No. 2018-00181, Order (Jan. 8, 2019) (granting confidential treatment pursuant
2 to KRS 61.878(1)(a) for an indefinite period to a retail customer’s account and
3 usage information); *In the Matter of: Application of Kentucky Utilities Company*
4 *for an Adjustment of its Electric Rates*, P.S.C. Case No. 2012-00221, Order (July
5 25, 2013) (holding customer names, account numbers, and usage information
6 exempt from disclosure under KRS 61.878(1)(a)); *In the Matter of: Electronic*
7 *Application of Big Rivers Electric Corporation for Approval to Modify Its MRSM*
8 *Tariff, Cease Deferring Depreciation Expenses, Establish Regulatory Assets,*
9 *Amortize Regulatory Assets, and Other Appropriate Relief*, P.S.C. Case No. 2020-
10 00064, Order (June 30, 2020) (granting confidential treatment to information
11 related to individual customer names and usage in Big Rivers’ responses to the
12 Commission Staff’s First Requests for Information, Attorney General’s First Set of
13 Data Requests, and KIUC’s First Set of Data Requests); *In the Matter of:*
14 *Riverside Generating Company, LLC v. Kentucky Power Company*, P.S.C. Case
15 No. 2017-00472, Order (May 16, 2019) (granting confidential treatment to
16 customer specific information relating to purchases and transmission of electricity
17 for an indefinite period). As such, Big Rivers requests confidential treatment for
18 the identity of these customers or their usage and billing information in order to
19 protect their private usage information.

20

1 membership in Midcontinent Independent System Operator, Inc. (“MISO”), but
2 also forward bilateral long-term agreements and wholesale agreements with
3 utilities and industrial customers. Big Rivers’ ability to successfully compete in
4 the market is dependent upon a combination of its ability to: 1) obtain the
5 maximum price for the power it sells, and 2) keep its cost of production or
6 purchase as low as possible. Fundamentally, if Big Rivers’ cost of producing or
7 purchasing a unit of power increases, its ability to sell that unit in competition
8 with other utilities is adversely affected.

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

1 **SECTION II**

2 **The Confidential Information is Generally Recognized as**
3 **Confidential or Proprietary**

4 14. The Confidential Information entitled to confidential treatment
5 under KRS 61.878(1)(c)(1) consists of Big Rivers’ projected financial information,
6 and information relating to power purchases from, and sales to, specific
7 counterparties. Big Rivers’ financial projections contained in its response to PSC
8 1-4 is precisely the sort of information meant to be protected by KRS
9 61.878(1)(c)(1).

10 15. Information such as this which bears upon a company’s detailed
11 inner workings is generally recognized as confidential or proprietary. *See, e.g.,*
12 *Hoy v. Kentucky Indus. Revitalization Authority*, 907 S.W.2d 766, 768 (Ky. 1995)
13 (“It does not take a degree in finance to recognize that such information
14 concerning the inner workings of a corporation is ‘generally recognized as
15 confidential or proprietary’”); *Marina Management Services, Inc. v.*
16 *Commonwealth, Cabinet for Tourism*, 906 S.W.2d 318, 319 (Ky. 1995) (“These are
17 records of privately owned marina operators, disclosure of which would unfairly
18 advantage competing operators. The most obvious disadvantage may be the
19 ability to ascertain the economic status of the entities without the hurdles
20 systematically associated with acquisition of such information about privately
21 owned organizations”). Moreover, the Commission has recently granted
22 confidential treatment to similar Big Rivers’ financial projections. *See, In the*

1 *Matter of: Application of Big Rivers Electric Corporation for Approval to Modify its*
2 *MRSM Tariff, Cease Deferring Depreciation Expenses, Establish Regulatory*
3 *Assets, Amortize Regulatory Assets, and Other Appropriate Relief*, P.S.C. Case No.
4 2020-00064, Order (Mar. 17, 2020) (granting confidential treatment to similar
5 projected financial information for five years).

6 16. Big Rivers and the wholesale counterparties identified in Big Rivers’
7 response to AG-KIUC 1-1 operate in competitive markets and the public
8 disclosure of such information could cause all such parties an economic
9 disadvantage in negotiating future transactions, as their competitors and
10 potential counterparties would have insight into their power needs, available
11 capacity, or the prices at which they are willing to buy or sell power. As stated
12 above, the Commission has recently granted confidential treatment to the exact
13 information in this matter.¹

14 17. The Confidential Information is not publicly available, is not
15 disseminated within Big Rivers except to those employees and professionals with
16 a legitimate business need to know and act upon the information, and is not
17 disseminated to the others without a legitimate need to know and act upon the
18 information.

¹ See also, *In the Matter of: Riverside Generating Company, LLC v. Kentucky Power Company*, P.S.C. Case No. 2017-00472, Order (May 16, 2019) (granting confidential treatment to customer specific information relating to purchases and transmission of electricity for an indefinite period); *In the Matter of Electronic 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, Order (Sept. 30, 2020) (granting confidential treatment to the terms of Nucor Corporation’s retail electric service agreement and power purchase agreements between Big Rivers and solar developers).

1 **SECTION III**

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

4 18. Public disclosure of the Confidential Information will adversely
5 affect Big Rivers in several respects.

6 19. Disclosure of the Confidential Information would afford Big Rivers'
7 competitors an unfair commercial advantage. As discussed above, Big Rivers
8 faces actual competition in the power markets and in the credit markets. It is
9 likely that Big Rivers would suffer competitive injury if the Confidential
10 Information were publicly disclosed, and the information should therefore be
11 subject to confidential treatment.

12 20. In P.S.C. Case No. 2018-00056, the Commission granted confidential
13 treatment to pricing information provided by Cumberland Valley. *See In the*
14 *Matter of: Application of Cumberland Valley Electric, Inc. for Commission*
15 *Approval for a Certificate of Public Convenience and Necessity to Install an*
16 *Advanced Metering Infrastructure (AMI) System Pursuant to KRS 807 KAR 5:001*
17 *and KRS 278.020*, Order, P.S.C. Case No. 2018-00056 (May 9, 2018). In that case,
18 the Commission recognized "that the specific cost information may be used to the
19 financial detriment of Cumberland Valley and its ratepayers by allowing
20 potential future vendors to bid just under the cost of its current vendor, which, in
21 turn, would place Cumberland Valley at a competitive disadvantage." *Id.*

1 21. The Commission also recognized these effects in P.S.C. Case No.
2 2003-00054. In that case, Union Light Heat & Power (“*ULH&P*”) argued, and the
3 Commission implicitly accepted, that if the bids it received were publicly
4 disclosed, contractors on future work could use the bids as a benchmark, which
5 would likely lead to the submission of higher bids. *In the Matter of: Application of*
6 *the Union Light, Heat and Power Company for Confidential Treatment*, Order,
7 P.S.C. Case No. 2003-00054 (Aug. 4, 2003). The Commission also implicitly
8 accepted ULH&P’s further argument that the higher bids would lessen ULH&P’s
9 ability to compete with other gas suppliers. *Id.*

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

19 23. Additionally, in P.S.C. Case No. 2003-00054, the Commission
20 implicitly accepted ULH&P’s argument that the bidding contractors would not
21 want their bid information publicly disclosed, and that disclosure would reduce
22 the contractor pool available to ULH&P, which would drive up ULH&P’s costs,

1 hurting its ability to compete with other gas suppliers. *In the Matter of*
2 *Application of the Union Light, Heat and Power Company for Confidential*
3 *Treatment*, Order, P.S.C. Case No. 2003-00054 (August 4, 2003). Similarly, in
4 *Hoy v. Kentucky Indus. Revitalization Authority*, the Kentucky Supreme Court
5 found that without protection for confidential information provided to a public
6 agency, “companies would be reluctant to apply for investment tax credits for fear
7 the confidentiality of financial information would be compromised. *Hoy v.*
8 *Kentucky Indus. Revitalization Authority*, 907 S.W.2d 766, 769 (Ky. 1995). In Big
9 Rivers’ case, if confidential treatment of the confidential purchase and sales
10 information is denied, potential bidders on future power contracts or future
11 economic development prospects would know that their confidential information
12 would be publicly disclosed. Because many companies would be reluctant to have
13 such information disclosed, public disclosure of the Confidential Information
14 would likely suppress the competitive bidding process and reduce the pool of
15 bidders willing to bid on Big Rivers’ power contracts, or disincentive other
16 companies from locating in Big Rivers’ service area, driving up Big Rivers’ costs
17 (which could then drive up the cost of credit to Big Rivers) or reducing its
18 revenues, and impairing its ability to compete in the wholesale power market.

19 24. Accordingly, the public disclosure of the Confidential Information
20 would provide Big Rivers’ competitors with an unfair commercial advantage.

1 **C. Time Period**

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

12 26. Big Rivers requests that the Confidential Information included in its
13 response to PSC 1-4 remain confidential for a period of five (5) years from the date
14 of this motion, at which time the Confidential Information should be sufficiently
15 outdated so that it could not be used to competitively disadvantage Big Rivers.
16 807 KAR 5:001, Section 13(2)(a)(2).

17 **D. Conclusion**

18 27. Based on the foregoing, the Confidential Information is entitled to
19 confidential protection. If the Commission disagrees, then the Commission
20 should hold an evidentiary hearing to protect to Big Rivers' due process rights
21 and to supply the Commission with a complete record to enable it to reach a

1 decision with regard to this matter. *See Util. Reg. Comm'n v. Ky. Water Serv. Co.,*
2 *Inc.* 642 S.W.2d 591 (Ky. App. 1982).

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

5 On this the 29th day of March 2021.

6

7 Respectfully submitted,

8

9

10 */s/ Tyson Kamuf*

11

12

Tyson Kamuf

13

Senthia Santana

14

Gregory E. Mayes, Jr.

15

201 Third Street, P.O. Box 24

16

Henderson, Kentucky 42419-0024

17

Phone: (270) 827-2561 Fax: (270) 844-6417

18

Email: tyson.kamuf@bigrivers.com

19

Email: senthia.santana@bigrivers.com

20

Email: gregory.mayes@bigrivers.com

21

22

23

Counsel for Big Rivers Electric Corporation