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COMMONWEALTH OF KENTUCKY
BEFORE THE KENTUCKY PUBLIC SERVICE COMMISSION

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)**

**Case No.
2021-00079**

**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 First Request for Information and the Attorney General’s Initial Data Requests. The information for which Big Rivers seeks confidential treatment is hereinafter referred to as the “*Confidential Information*.”

2. The Confidential Information includes portions of the responses and/or attachments for the responses to Items 4, 6, 15, and 18 of the Commission Staff’s First Request for Information (“*PSC 1-4*,” “*PSC 1-6*,” “*PSC 1-15*,” and “*PSC 1-18*” respectively).

1 3. The Confidential Information includes portions of the responses
2 and/or attachments for response to Item 10 of the Attorney General’s Initial Data
3 requests (“AG 1-10”).

4 4. The Confidential Information primarily consists of information
5 related to planned outages for Big Rivers’ generating units (AG 1-10); a discussion
6 of a transmission system vulnerability (PSC 1-4); bids, Big Rivers’ evaluation of
7 those bids, and related negotiations (PSC 1-6 and its attachment); confidential
8 contract terms (PSC 1-15 and PSC 1-18); and related information.

9 5. Pursuant to the Commission’s March 24, 2020, Order in *In the Matter*
10 *of Electronic Emergency Docket Related to the Novel Coronavirus COVID-19, Case*
11 *No. 2020-00085 (“Case No. 2020-00085”)*, one (1) copy of the Confidential
12 Information highlighted with transparent ink, printed on yellow paper, or
13 otherwise marked “CONFIDENTIAL,” is being filed with this motion by electronic
14 mail. A copy of those pages, with the Confidential Information redacted, is being
15 electronically filed with Big Rivers’ responses to the information requests that
16 accompany this motion.

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

21 7. If and to the extent the Confidential Information becomes generally
22 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. *See* 807 KAR 5:001 Section 13(10)(b).

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

9 I. **Information Exempted from Public Disclosure by 807 KAR**
10 **5:001 Section 13(4) and KRS 278.160(3)**

11 9. As discussed below, the Confidential Information contained in Big
12 Rivers’ response to PSC 1-18 is entitled to confidential protection based upon KRS
13 278.160(3), which shields from disclosure “a provision of a special contract that
14 contains rates and conditions of service not filed in a utility’s general schedule if
15 such provision would otherwise be entitled to be excluded from the application of
16 KRS 61.870 to 61.884 under the provisions of KRS 61.878(1)(c)(1).”

17 10. The special contract in question relates to negotiated, confidential
18 terms of Big Rivers’ power sales contract with Owensboro Municipal Utilities
19 (“OMU”). Big Rivers’ motion for confidential treatment of the confidential terms of
20 the OMU contract is still pending,¹ and those terms should be afforded confidential

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

6 11. As fully discussed in the pending motion and below, public disclosure
7 of the negotiated confidential terms would create precisely the kind of competitive
8 harm to Big Rivers and its counterparty (OMU) that KRS 61.878(1)(c)(1) is
9 intended to prevent.

10 **II. Information Exempted from Public Disclosure by KRS**
11 **61.878(1)(m)**

12 12. KRS 61.878(1)(m)(1) protects “[p]ublic records the disclosure of which
13 would have a reasonable likelihood of threatening the public safety by exposing a
14 vulnerability in preventing protecting against, mitigating, or responding to a
15 terrorist act. . . .”

16 13. The Confidential Information in Big Rivers’ response to PSC 1-4 is a
17 discussion of a vulnerability in the transmission system, which is a public utility
18 critical system, and which could therefore threaten public safety. As disclosure of
19 this information would provide the public with information about a transmission
20 system vulnerability, this information should be granted confidential treatment.

21 **III. Information Exempted from Public Disclosure by KRS**
22 **61.878(1)(c)(1)**

23 14. KRS 61.878(1)(c)(1) protects “records confidentially disclosed to an
24 agency or required by an agency to be disclosed to it, generally recognized as

1 confidential or proprietary, which if openly disclosed would permit an unfair
2 commercial advantage to competitors of the entity that disclosed the records.”
3 Section A below explains that Big Rivers operates in competitive environments in
4 the wholesale power market and in the credit market. Section B below shows that
5 the Confidential Information is generally recognized as confidential or proprietary.
6 Section C below demonstrates that public disclosure of the Confidential
7 Information would permit an unfair commercial advantage to Big Rivers’
8 competitors.

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

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

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

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

16 **B. The Confidential Information is Generally Recognized**
17 **as Confidential or Proprietary**

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

21 19. The Confidential Information consisting of information regarding
22 planned outages for Big Rivers' generating units (AG 1-10) provides Big Rivers'
23 suppliers and competitors insight into when Big Rivers' generation levels will drop

1 and thus have crucial input into Big Rivers’ need for power and energy during
2 those periods. Information about a company’s detailed inner workings is generally
3 recognized as confidential or proprietary. *See, e.g., Hoy v. Kentucky Indus.*
4 *Revitalization Authority*, 907 S.W.2d 766, 768 (Ky. 1995) (“It does not take a
5 degree in finance to recognize that such information concerning the inner
6 workings of a corporation is ‘generally recognized as confidential or proprietary’”);
7 *Marina Management Servs. v. Cabinet for Tourism, Dep’t of Parks*, 906 S.W.2d
8 318, 319 (Ky. 1995) (unfair commercial advantage arises simply from “the ability
9 to ascertain the economic status of the entities without the hurdles systemically
10 associated with the acquisition of such information about privately owned
11 organizations”). Moreover, the Commission previously granted confidential
12 treatment to this type of information. *See* letter from the Commission dated
13 August 13, 2019, in Administrative Case No. 387 (granting confidential treatment
14 to a list of future scheduled outages and planned transmission system additions
15 that Big Rivers filed as part of the supplement to its annual report).

16 20. The Confidential Information contained in Big Rivers’ responses to
17 PSC 1-15 and PSC 1-18 includes confidential contract terms. KRS 278.160
18 specifically recognizes that terms of a special contract are not required to be
19 publicly disclosed if such terms are entitled to protection under KRS
20 61.878(1)(c)(1). *See* KRS 278.160(3). And the Commission recently granted
21 confidential treatment to the confidential terms of the solar power purchase
22 agreements (“*Solar PPA’s*”) that are contained in Big Rivers’ response to PSC 1-16

1 in this case. *In the Matter of: Electronic Application of Big Rivers Electric*
2 *Corporation for Approval of Solar Power Contracts*, P.S.C. Case No. 2020-00183,
3 Order (March 25, 2021).

4 21. The Confidential Information in Big Rivers' response to PSC 1-6 and
5 its attachment consists of bids for capacity purchase agreements, Big Rivers'
6 evaluation of those bids, and related negotiations. The Commission has often
7 found that similar information relating to competitive bidding is generally
8 recognized as confidential and proprietary. *See, e.g., In the Matter of Application*
9 *of the Union Light, Heat and Power Company for Confidential Treatment*, Order,
10 P.S.C. Case No. 2003-00054 (Aug. 4, 2003) (finding that bids submitted to a utility
11 were confidential).

12 22. The Confidential Information is not publicly available, is not
13 disseminated within Big Rivers except to those employees and professionals with a
14 legitimate business need to know and act upon the information, and is not
15 disseminated to others without a legitimate need to know and act upon the
16 information. As such, the Confidential Information is generally recognized as
17 confidential and proprietary.

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

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21 23. Disclosure of the Confidential Information would permit an unfair
22 commercial advantage to Big Rivers' competitors. As discussed above, Big Rivers
23 faces actual competition in the wholesale power market and in the credit market.

1 It is likely that Big Rivers would suffer competitive injury if that Confidential
2 Information was publicly disclosed.

3 24. The Confidential Information includes material such as Big Rivers’
4 planned outages for its generating units (AG 1-10) and a discussion of a
5 transmission system vulnerability (PSC 1-4). If that information is publicly
6 disclosed, market participants and potential power buyers and suppliers would
7 have insight into the timing of Big Rivers’ energy needs and a transmission system
8 issue, and could use that information to manipulate the bidding process, leading to
9 higher costs or lower revenues for Big Rivers and impairing its ability to compete
10 in the wholesale power markets. Furthermore, any competitive pressure that
11 adversely affects Big Rivers’ revenue and margins could make the company appear
12 less creditworthy and thus impair its ability to compete in the credit market.

13 25. These effects were recognized in P.S.C. Case No. 2003-00054, in
14 which the Commission granted confidential treatment to bids submitted to Union
15 Light, Heat & Power (“ULH&P”). ULH&P argued, and the Commission implicitly
16 accepted, that if the bids it received were publicly disclosed, contractors in the
17 future could use the bids as a benchmark, which would likely lead to the
18 submission of higher bids. *In the Matter of Application of the Union Light, Heat
19 and Power Company for Confidential Treatment*, P.S.C. Case No. 2003-00054,
20 Order (Aug. 4, 2003); *see also In the Matter of An Examination of the Application of
21 the Fuel Adjustment Clause of East Kentucky Power Cooperative, Inc. from May 1,
22 2007 through October 31, 2007*, P.S.C. Case No. 2007-00523, Letter (Feb. 27, 2008).

1 26. The Commission also implicitly accepted ULH&P’s further argument
2 that the higher bids would lessen ULH&P’s ability to compete with other gas
3 suppliers. *In the Matter of Application of the Union Light, Heat and Power*
4 *Company for Confidential Treatment*, P.S.C. Case No. 2003-00054, Order (Aug. 4,
5 2003). Likewise, market participants could use the Confidential Information in
6 Big Rivers’ response to PSC 1-4 and AG 1-10 to potentially win bids when
7 competing for wholesale power sales, and potential power buyers and suppliers
8 could manipulate the bidding process, leading to higher costs or lower revenues to
9 Big Rivers and impairing its competitiveness.

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

1 28. In Big Rivers' case, Big Rivers is currently in negotiations with
2 potential and expects to engage in negotiations with counterparties for purchase
3 power agreements other counterparties in the future. If confidential treatment is
4 denied for the confidential contract terms in Big Rivers' response to PSC 1-15 and
5 PSC 1-18, or the information involving bids, Big Rivers' evaluation of those bids,
6 and related negotiations in Big Rivers' response to PSC 1-6 and its attachment,
7 potential counterparties would know that their bids or the confidential terms of
8 their contracts could be publicly disclosed, which could reveal information to their
9 competitors about their competitiveness. Because many companies would be
10 reluctant to have such information disclosed, public disclosure of the Confidential
11 Information would likely reduce the pool of counterparties willing to negotiate
12 with Big Rivers, reducing Big Rivers' ability to sell power and impairing its ability
13 to compete in the wholesale power and credit markets.

14 29. Accordingly, the public disclosure of the information that Big Rivers
15 seeks to protect pursuant to KRS 61.878 would provide Big Rivers' competitors
16 with an unfair commercial advantage.

17 **III. Time Period**

18 30. Pursuant to 807 KAR 5:001 Section 13(2)(a)(2), Big Rivers requests
19 that the Confidential Information be afforded confidential treatment for the time
20 periods explained below.

21 31. Big Rivers requests that the Confidential Information in its response
22 to PSC 1-4, which is the discussion of the transmission system vulnerability,
23 remain confidential indefinitely for the above-stated reasons.

1 32. Big Rivers requests that the Confidential Information in its responses
2 to PSC 1-15 and PSC 18, which is the confidential contract terms, remain
3 confidential indefinitely for the above-stated reasons.

4 33. Big Rivers requests that the Confidential Information related to
5 third-party private and/or proprietary information and private negotiations of
6 capacity purchase agreements in its response and the attachments to PSC 1-6,
7 protected by KRS 61.878(1)(a), remain confidential indefinitely for the above-
8 stated reasons.

9 34. Big Rivers requests that the Confidential Information in its responses
10 and/or the attachments to its responses to AG 1-10 remain confidential for a period
11 of two (2) years from the date of this motion, which should allow sufficient time for
12 the projected data to become historical and sufficiently outdated that it could not
13 be used to determine similar confidential information at that time or to
14 competitively disadvantage Big Rivers.

15 **IV. Conclusion**

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

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

1 On this the 26th day of March, 2021.

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Respectfully submitted,

/s/ Tyson Kamuf

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