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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 and KRS 61.878, to grant confidential treatment to certain information contained in Big Rivers’ Response to the Commission Staff’s Third Request for Information. The information for which Big Rivers seeks confidential treatment is hereinafter referred to as the “*Confidential Information*.”

2. The Confidential Information consists of:
- a. a portion of the composite attachment to Big Rivers’ response to Item 1 of the Commission Staff’s Third Request for Information (“*PSC 3-1*”), more specifically five Excel files of previously filed documents; and
 - b. a portion of the attachment to its response to Item 5 (“*PSC 3-5*”).

1 3. Four of the Excel files attached to Big Rivers’ response to PSC 3-1,
2 are copies of exhibits to Direct Testimony in Big Rivers’ Application in this matter
3 (Exhibit Pullen-2, Exhibit Pullen-3, Exhibit Eacret-3 and Exhibit Eacret-5). The
4 Confidential Information in these exhibits consists of Big Rivers’ capacity price
5 projections, natural gas price projections, and internal economic analysis, and the
6 Commission previously granted confidential treatment of this information for a
7 period of five years.¹

8 4. The fifth Excel file attached to Big Rivers’ response to PSC 3-1 is a
9 copy of the attachment to Big Rivers’ response to PSC 3-5 in Excel spreadsheet
10 format. The attachment to Big Rivers’ response to PSC 3-5 contains Confidential
11 Information concerning Big Rivers’ financial condition and business strategies.
12 The Commission has previously granted confidential treatment of the same type of
13 information in previous matters.²

14

¹ 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. 2021-00079, Order (Mar. 5, 2021).

² *In the Matter of: Electronic Application of Big Rivers Electric Corporation for Approval to Modify Its MRSMS Tariff, Cease Deferring Depreciation Expenses, Establish Regulatory Assets, Amortize Regulatory Assets, and Other Appropriate Relief*, P.S.C. Case No. 2020-00064, Order (Mar. 17, 2020) (granting confidential treatment for five years for Big Rivers’ projected financial information within the Direct Testimonies of Robert W. Berry and Paul G. Smith) and Order (June 30, 2020) (granting confidential treatment for five years of financial projections in Big Rivers’ responses to information requests); *In the Matter of: Electronic Application of Big Rivers Electric Corporation For Annual Report on MRSMS Credit*, P.S.C. Case No. 2021-00061, Order (April 8, 2021) (granting confidential treatment for five years for projected financial information in Big Rivers’ response to Item 1 of the Commission Staff’s First Request for Information dated March 16, 2021).

1 5. Pursuant to the Commission’s March 24, 2020, Order in *In the Matter*
2 *of Electronic Emergency Docket Related to the Novel Coronavirus COVID-19*, Case
3 No. 2020-00085 (“*Case No. 2020-00085*”), Big Rivers is filing the Confidential
4 Information, including the Confidential Excel files, with the Commission via email
5 to PSCED@ky.gov or providing the Commission a link to an encrypted file-share
6 site from which the Confidential Information can be downloaded. Big Rivers will
7 include the Excel files (Confidential and Public) on electronic media when filing
8 the requisite paper copies of this electronic filing within thirty days after the
9 current state of emergency is lifted, as required by the Commission’s Orders in
10 Case No. 2020-00085. A copy of the attachment to PSC 3-5 (in .PDF), with the
11 Confidential Information redacted, is being electronically filed with Big Rivers’
12 responses to the information requests that accompany this motion.

13 6. 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). A copy of the Confidential Information has been
16 served on all parties that have signed a confidentiality agreement.

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

21 8. As discussed below, the Confidential Information is entitled to
22 confidential treatment under KRS 61.878. *See* 807 KAR 5:001 Section 13(2)(a)(1).

1 Public disclosure of the Confidential Information contained in Big Rivers’
2 Response to the Commission Staff’s Third Request for Information would afford
3 Big Rivers’ competitors an unfair commercial advantage as discussed fully below.

4 **I. Information Exempted from Public Disclosure by KRS**
5 **61.878(1)(c)(1)**

6 9. KRS 61.878(1)(c)(1) protects “records confidentially disclosed to an
7 agency or required by an agency to be disclosed to it, generally recognized as
8 confidential or proprietary, which if openly disclosed would permit an unfair
9 commercial advantage to competitors of the entity that disclosed the records.”

10 Section A below explains that Big Rivers operates in competitive environments in
11 the wholesale power market and in the credit market. Section B below shows that
12 the Confidential Information is generally recognized as confidential or proprietary.
13 Section C below demonstrates that public disclosure of the Confidential
14 Information would permit an unfair commercial advantage to Big Rivers’
15 competitors.

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

17 10. As a generation and transmission cooperative, Big Rivers competes in
18 the wholesale power market. This includes not only the short-term bilateral
19 energy market, the day-ahead and real time energy and ancillary services
20 markets, and the capacity market to which Big Rivers has access by virtue of its
21 membership in the Midcontinent Independent System Operator, Inc. (“MISO”)
22 system, but also forward bilateral long-term agreements and wholesale
23 agreements with utilities and industrial customers. Big Rivers’ ability to

1 successfully compete in the market is dependent upon a combination of its ability
2 to: 1) obtain the maximum price for the power it sells, and 2) keep its cost of
3 production or purchase as low as possible. Fundamentally, if Big Rivers' cost of
4 producing or purchasing a unit of power increases, its ability to sell that unit in
5 competition with other utilities is adversely affected.

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

18 12. Accordingly, Big Rivers has competitors in both the power and credit
19 markets, and its Confidential Information should be protected to prevent the
20 imposition of an unfair competitive advantage.

1 **B. The Confidential Information is Generally Recognized**
2 **as Confidential or Proprietary**

3 13. The Confidential Information for which Big Rivers seeks confidential
4 treatment under KRS 61.878(1)(c)(1) is generally recognized as confidential or
5 proprietary under Kentucky law.

6 14. The Confidential Information consists of Big Rivers' capacity price
7 projections, natural gas price projections, internal economic analysis, and
8 information concerning Big Rivers' financial condition and business strategies.
9 Information about a company's detailed inner workings is generally recognized as
10 confidential or proprietary. *See, e.g., Hoy v. Kentucky Indus. Revitalization*
11 *Authority*, 907 S.W.2d 766, 768 (Ky. 1995) ("It does not take a degree in finance to
12 recognize that such information concerning the inner workings of a corporation is
13 'generally recognized as confidential or proprietary'"). Moreover, the Commission
14 previously granted confidential treatment to this type of information, as cited
15 above.

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

22

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

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4 16. Disclosure of the Confidential Information would permit an unfair
5 commercial advantage to Big Rivers' competitors. As discussed above, Big Rivers
6 faces actual competition in the wholesale power market and in the credit market.
7 It is likely that Big Rivers would suffer competitive injury if the Confidential
8 Information was publicly disclosed.

9 17. The Confidential Information includes Big Rivers' capacity price projections
10 and natural gas price projections. If the Confidential Information is publicly disclosed,
11 market participants and potential power buyers and suppliers would have insight
12 into Big Rivers' cost of producing power and the price at which Big Rivers is
13 willing to buy or sell fuel, power, and other products, and could use that
14 information to manipulate the bidding process, leading to higher costs or lower
15 revenues for Big Rivers and impairing its ability to compete in the wholesale
16 power markets. Furthermore, any competitive pressure that adversely affects Big
17 Rivers' revenue and margins could make the company appear less creditworthy
18 and thus impair its ability to compete in the credit market.

19 18. These effects were recognized in P.S.C. Case No. 2003-00054, in
20 which the Commission granted confidential treatment to bids submitted to Union
21 Light, Heat & Power ("*ULH&P*"). *ULH&P* argued, and the Commission implicitly
22 accepted, that if the bids it received were publicly disclosed, contractors in the
23 future could use the bids as a benchmark, which would likely lead to the
24 submission of higher bids. *In the Matter of Application of the Union Light, Heat*

1 *and Power Company for Confidential Treatment*, P.S.C. Case No. 2003-00054,
2 Order (Aug. 4, 2003); *see also In the Matter of An Examination of the Application of*
3 *the Fuel Adjustment Clause of East Kentucky Power Cooperative, Inc. from May 1,*
4 *2007 through October 31, 2007*, P.S.C. Case No. 2007-00523, Letter (Feb. 27, 2008).

5 19. The Confidential Information also includes material that is derived
6 from Big Rivers’ projected financial forecasts and expenditures.³ The Commission
7 has consistently recognized that internal strategic planning information, projected
8 financial information, and related materials are entitled to confidential treatment,
9 as these documents typically relate to the company’s economic status and business
10 strategies. *See, e.g., Marina Management Servs. v. Cabinet for Tourism, Dep’t of*
11 *Parks*, 906 S.W.2d 318, 319 (Ky. 1995) (unfair commercial advantage arises simply
12 from “the ability to ascertain the economic status of the entities without the
13 hurdles systemically associated with the acquisition of such information about
14 privately owned organizations”). Accordingly, the public disclosure of the
15 information that Big Rivers seeks to protect pursuant to KRS 61.878 would
16 provide Big Rivers’ competitors with an unfair commercial advantage.

17 **II. Time Period**

18 20. Pursuant to 807 KAR 5:001 Section 13(2)(a)(2), Big Rivers requests
19 that the Confidential Information be afforded confidential treatment for a period of
20 five (5) years from the date of this motion, which should allow sufficient time for

³ See the Exhibits Pullen-2 and Pullen-3, included in Excel spreadsheet format in the composite attachment to Big Rivers’ response to PSC 3-1 and Big River’s attachment to PSC 3-1, which is also provided in the composite attachment to Big Rivers’ response to PSC 3-1 in Excel spreadsheet format.

1 the projected data to become historical and sufficiently outdated that it could not
2 be used to determine similar confidential information at that time or to
3 competitively disadvantage Big Rivers.

4 **III. Conclusion**

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

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

13 On this the 10th day of May, 2021.

14 Respectfully submitted,

15
16 /s/ *Tyson Kamuf*

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18 _____
19 Tyson Kamuf
20 Senthia Santana
21 Gregory E. Mayes, Jr.
22 Big Rivers Electric Corporation
23 201 Third Street, P.O. Box 24
24 Henderson, Kentucky 42419-0024
25 Phone: (270) 827-2561
26 Facsimile: (270) 844-6417
27 tyson.kamuf@bigrivers.com
28 senthia.santana@bigrivers.com
29 gregory.mayes@bigrivers.com

30 *Counsel for Big Rivers Electric*
31 *Corporation*