

1 No. 2020-00085 (“*Case No. 2020-00085*”), one (1) copy of the Confidential
2 Information highlighted with transparent ink, printed on yellow paper, or otherwise
3 marked “CONFIDENTIAL,” is being filed with this motion by electronic mail. A
4 copy of those pages, with the Confidential Information redacted, is being
5 electronically filed with the Application accompanying this motion.

6 3. A copy of this motion with the Confidential Information redacted has
7 been served on all parties to this proceeding through the use of electronic filing.
8 807 KAR 5:001 Section 13(2)(b).

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

13 5. The Confidential Information related to:

14 a. Big Rivers’ projected capacity position is contained in Exhibit
15 Eacret-2 to the Direct Testimony of Mark Eacret, Big Rivers’ Vice
16 President of Energy Services;

17 b. projections of fuel and other operating and maintenance costs is
18 contained in the Direct Testimony of Mr. Eacret, Exhibit Eacret-5 to
19 the Direct Testimony of Mr. Eacret, and Exhibit Pullen-2 to the Direct
20 Testimony of Michael T. Pullen, Big River’s Chief Operating Officer;

21 c. energy and capacity price projections is contained in the Direct
22 Testimony of Mr. Eacret, Exhibit Eacret-3 to the Direct Testimony of

1 Mr. Eacret, and Exhibit Pullen-2 to the Direct Testimony of Mr.
2 Pullen;

3 d. terms of special contracts is contained in the Direct Testimony
4 of Mr. Eacret and Exhibit Eacret-2 to the Direct Testimony of Mr.
5 Eacret;

6 e. Big Rivers' internal economic analysis is contained in Exhibits
7 Pullen-2 and Pullen-3 to the Direct Testimony of Mr. Pullen;

8 f. generation system maps and designs is contained in Exhibits D
9 and E to the Application in this matter; and

10 g. the bids from potential suppliers and contractors is contained in
11 the Direct Testimony of Mr. Eacret and Exhibit Pullen-4 to the Direct
12 Testimony of Mr. Pullen.

13 6. As discussed below, the Confidential Information is entitled to
14 confidential treatment under KRS 61.878(1)(m), KRS 278.160(3), and/or KRS
15 61.878(1)(c)(1). *See* 807 KAR 5:001 Section 13(2)(a)(1).

16
17 **I. Information Exempted from Public Disclosure by KRS 61.878(1)(m)**

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

1 8. Exhibits D and E of the Application are generation system maps, more
2 specifically site maps, photographs, and design drawings of Big Rivers' Green
3 Station, illustrating the exact proposed route of the natural gas pipeline and the
4 proposed and existing plant infrastructure, which could be used to analyze
5 vulnerable locations in Big Rivers' system, which is a public utility critical system,
6 and which could therefore threaten public safety. As disclosure of this information
7 would provide the public with a tool to analyze the vulnerabilities in Big Rivers'
8 system, this information should be granted confidential treatment. In fact, the
9 Commission granted confidential treatment on these grounds for an indefinite
10 period to similar maps contained in Big Rivers' 2014 IRP¹ and 2017 IRP.²

11
12 **II. Information Exempted from Public Closure by KRS 278.160(3)**

13
14 9. As discussed below, certain of the Confidential Information contained
15 in the Direct Testimony of Mr. Eacret and in Exhibit Eacret-2 is entitled to
16 confidential protection based upon KRS 278.160(3), which shields from disclosure “a
17 provision of a special contract that contains rates and conditions of service not filed
18 in a utility's general schedule if such provision would otherwise be entitled to be
19 excluded from the application of KRS 61.870 to 61.884 under the provisions of KRS
20 61.878(1)(c)(1).”

¹ *In the Matter of: 2014 Integrated Resource Plan of Big Rivers Electric Corporation*, P.S.C. Case No. 2014-00166, Order (August 26, 2014).

² *In the Matter of 2017 Integrated Resource Plan of Big Rivers Electric Corporation*, P.S.C. Case No. 2017-00384, Order (April 25, 2019) (the “2017 IRP Confidentiality Order”).

1 10. The special contracts in question relate to Big Rivers’ power sales
2 contracts with entities in Nebraska, the Kentucky Municipal Energy Agency
3 (“*KyMEA*”), and Owensboro Municipal Utilities (“*OMU*”); and to the retail electric
4 service agreement between Meade County Rural Electric Cooperative Corporation
5 and Nucor Corporation (“*Nucor*”). The Commission has already found that the
6 confidential terms of the Nebraska, *KyMEA*, and Nucor contracts are entitled to
7 confidential treatment under KRS 611.878(1)(c)(1),³ and the confidential terms of
8 these special contracts should again be granted confidential treatment. Big Rivers’
9 motion for confidential treatment of the confidential terms of the *OMU* contract is
10 still pending,⁴ and those terms should be afforded confidential treatment for the
11 reasons stated in that motion and pursuant to 807 KAR 5:001 Section 13(4), which
12 provides, “Pending action by the commission on a motion for confidential treatment
13 or by its executive director on a request for confidential treatment, the material
14 specifically identified shall be accorded confidential treatment.”

15
16 **III. Information Exempted from Public Closure by KRS 61.878(1)(c)(1)**

³ *In the Matter of: Big Rivers Electric Corporation Filing of Wholesale Contracts Pursuant to KRs 278.180 and KAR 5:001 §13*, 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); *In the Matter of: Joint Application of Big Rivers Electric Corporation and Meade County Rural Electric Cooperative Cooperation for Approval of Contracts for Electric Service with Nucor Corporation*, P.S.C. Case No. 2019-00365, Orders (January 22, 2020) (granting confidential treatment to the confidential terms of the Nucor contract for an indefinite time period).

⁴ See TFS 2018-00318.

1 11. KRS 61.878(1)(c)(1) protects “records confidentially disclosed to an
2 agency or required by an agency to be disclosed to it, generally recognized as
3 confidential or proprietary, which if openly disclosed would permit an unfair
4 commercial advantage to competitors of the entity that disclosed the records.”
5 Section A below explains that Big Rivers operates in competitive environments in
6 the wholesale power market and in the credit market. Section B below shows that
7 the Confidential Information is generally recognized as confidential or proprietary.
8 Section C below demonstrates that public disclosure of the Confidential Information
9 would permit an unfair commercial advantage to Big Rivers’ competitors.

10
11 **A. Big Rivers Faces Actual Competition**

12 12. Big Rivers competes in the wholesale power markets to sell energy it
13 produces in excess of its Members’ needs. Big Rivers’ ability to successfully compete
14 in the wholesale power markets is dependent upon a combination of its ability to
15 negotiate the maximum price for the power sold and its ability to keep its cost of
16 production as low as possible. If Big Rivers’ cost of producing a kilowatt-hour of
17 energy increases, its competitive position against other power producers is
18 adversely affected.

19 13. Big Rivers also competes for reasonably priced credit in the credit
20 markets, and its ability to compete is directly impacted by its financial results.
21 Lower revenues and any events that adversely affect Big Rivers’ margins will
22 adversely affect its financial results and potentially impact the price it pays for

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

9 14. As is evidenced by these economic pressures, Big Rivers faces actual
10 competition from other market participants.

11 **B. The Confidential Information is Generally Recognized as**
12 **Confidential or Proprietary**

13
14 15. The Confidential Information for which Big Rivers seeks confidential
15 treatment under KRS 61.878(1)(c)(1) is generally recognized as confidential or
16 proprietary under Kentucky law. As noted above, the Confidential Information
17 primarily consists of Big Rivers' projected capacity position; projections of fuel and
18 other operating and maintenance costs; energy and capacity prices projections; Big
19 Rivers' internal economic analyses; and confidential bids from potential suppliers
20 and contractors, which is precisely the sort of information meant to be protected by
21 KRS 61.878(1)(c)(1).

22 16. Further, the Confidential Information also contains information
23 related to special contracts fully described above, which Big Rivers has privately
24 negotiated. As such, public disclosure of this Confidential Information is indicative

1 of the market conditions Big Rivers expects to encounter and the prices at which it
2 is willing to sell power, which provides competitors and potential buyers with
3 insight into Big Rivers' production costs.

4 17. In *Hoy v. Kentucky Industrial Revitalization Authority*, 907 S.W.2d 766
5 (Ky. 1995), the Kentucky Supreme Court held that financial information submitted
6 by General Electric Company with its application for investment tax credits was not
7 subject to disclosure simply because it had been filed with a state agency. The Court
8 applied the plain meaning rule to the statute, reasoning that “[i]t does not take a
9 degree in finance to recognize that such information concerning the inner workings
10 of a corporation is ‘generally recognized as confidential or proprietary.’” *Id.* at 768.

11 18. Similarly, in *Marina Management Services, Inc. v. Commonwealth,*
12 *Cabinet for Tourism*, 906 S.W.2d 318, 319 (Ky. 1995), the Court held: “[t]hese are
13 records of privately owned marina operators, disclosure of which would unfairly
14 advantage competing operators. The most obvious disadvantage may be the ability
15 to ascertain the economic status of the entities without the hurdles systematically
16 associated with acquisition of such information about privately owned
17 organizations.”

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

1 information. As such, the Confidential Information is generally recognized as
2 confidential and proprietary.

3 **C. Disclosure of the Confidential Information Would Permit**
4 **an Unfair Commercial Advantage to Big Rivers’**
5 **Competitors**

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

13 21. The Confidential Information includes material such as Big Rivers’
14 projections of its capacity position; projections of fuel and other operating and
15 maintenance costs; energy and capacity prices projections; Big Rivers’ internal
16 economic analyses; confidential bids from potential suppliers and contractors; and
17 the terms of special contracts. If that information is publicly disclosed, market
18 participants would have insight into the timing of Big Rivers’ capacity needs, its
19 cost of producing power, and the prices at which it is willing to buy fuel or buy and
20 sell power, and could use that information to manipulate the bidding process,
21 leading to higher costs or lower revenues for Big Rivers and impairing its ability to
22 compete in the wholesale power markets. Furthermore, any competitive pressure
23 that adversely affects Big Rivers’ revenue and margins could make the company

1 appear less creditworthy and thus impair its ability to compete in the credit
2 market.

3 22. These effects were recognized in P.S.C. Case No. 2003-00054, in which
4 the Commission granted confidential treatment to bids submitted to Union Light,
5 Heat & Power (“*ULH&P*”). *ULH&P* argued, and the Commission implicitly
6 accepted, that if the bids it received were publicly disclosed, contractors in the
7 future could use the bids as a benchmark, which would likely lead to the submission
8 of higher bids.⁵ The Commission also implicitly accepted *ULH&P*'s further
9 argument that the higher bids would lessen *ULH&P*'s ability to compete with other
10 gas suppliers.⁶

11 23. Similarly, potential fuel and power suppliers manipulating Big Rivers'
12 bidding process would lead to higher costs to Big Rivers and would place it at an
13 unfair competitive disadvantage in the wholesale power and credit markets.
14 Potential market power purchasers could likewise use the information to
15 manipulate their bids to Big Rivers, leading to lower revenues to Big Rivers and
16 placing it at an unfair competitive is advantage in the wholesale power and credit
17 markets. And competitors in the wholesale power market could use the information
18 to potentially underbid Big Rivers.

⁵ *In the Matter of Application of the Union Light, Heat and Power Company for Confidential Treatment*, P.S.C. Case No. 2003-00054, Order (August 4, 2003); *see also In the Matter of An Examination of the Application of the Fuel Adjustment Clause of East Kentucky Power Cooperative, Inc. from May 1, 2007 through October 31, 2007*, P.S.C. Case No. 2007-00523, Letter (February 27, 2008).

⁶ *In the Matter of Application of the Union Light, Heat and Power Company for Confidential Treatment*, P.S.C. Case No. 2003-00054, Order (August 4, 2003).

1 24. Public disclosure of the confidential bids from suppliers and
2 contractors and the confidential terms of special contracts would also cause
3 competitive harm to Big Rivers as a result of having fewer entities willing to do
4 business with Big Rivers. In P.S.C. Case No. 2003-00054, the Commission
5 additionally implicitly accepted ULH&P's argument that the bidding contractors
6 would not want their bid information publicly disclosed, and that disclosure would
7 reduce the contractor pool available to ULH&P, which would drive up ULH&P's
8 costs, hurting its ability to compete with other gas suppliers.⁷ Similarly, in *Hoy v.*
9 *Kentucky Indus. Revitalization Authority*, the Kentucky Supreme Court found that
10 without protection for confidential information provided to a public agency,
11 “companies would be reluctant to apply for investment tax credits for fear the
12 confidentiality of financial information would be compromised.”⁸

13 25. In Big Rivers' case, if confidential treatment of the confidential terms
14 of the special contracts and bids Big Rivers has received is denied, potential
15 counterparties would know that the confidential terms of their contracts or bids
16 could be publicly disclosed, which could reveal information to their competitors
17 about their competitiveness. Because many companies would be reluctant to have
18 such information disclosed, public disclosure of the Confidential Information would
19 likely reduce the pool of counterparties willing to negotiate with Big Rivers,

⁷ *In the Matter of Application of the Union Light, Heat and Power Company for Confidential Treatment*, Order, P.S.C. Case No. 2003-00054 (August 4, 2003).

⁸ *Hoy v. Kentucky Indus. Revitalization Authority*, 907 S.W.2d 766, 769 (Ky. 1995).

1 reducing Big Rivers' ability to sell power and increasing the cost of contracts and
2 impairing its ability to compete in the wholesale power and credit markets.

3 26. Accordingly, the public disclosure of the information that Big Rivers
4 seeks to protect pursuant to KRS 61.878(1)(c)(1) would provide Big Rivers'
5 competitors with an unfair commercial advantage.

6 27. Thus, Big Rivers' competitiveness will be adversely affected if potential
7 counterparties and competitors are provided with Big Rivers' private, proprietary,
8 and commercially-sensitive information. Accordingly, the public disclosure of the
9 Confidential Information Big Rivers seeks to protect pursuant to KRS
10 61.878(1)(c)(1) would provide Big Rivers' competitors with an unfair commercial
11 advantage.

12
13 **IV. Time Period**

14
15 28. Big Rivers requests that the Confidential Information relating to the
16 special contracts and the bid information remain confidential indefinitely for the
17 reasons stated above. Additionally, Big Rivers requests that the Confidential
18 Information contained in the Exhibits D and E to the Application (the generation
19 system maps and design drawings) remain confidential indefinitely for the above-
20 stated reasons. The Commission has previously granted confidential treatment to
21 such information for an indefinite period of time.⁹

⁹ *In the Matter of: Joint Application of Big Rivers Electric Corporation and Meade County Rural Electric Cooperative Cooperation for Approval of Contracts for Electric Service with Nucor Corporation*, P.S.C. Case No. 2019-00365, Orders (January 22, 2020); *In the Matter of: 2017*

1 29. Big Rivers requests that the remainder of the Confidential Information
2 remain confidential for a period of five (5) years from the date of this motion, at
3 which time the Confidential Information should be sufficiently outdated so that it
4 could not be used to competitively disadvantage Big Rivers. 807 KAR 5:001 Section
5 13(2)(a)(2).

6
7 **V. Conclusion**

8
9 30. Based on the foregoing, the Confidential Information is entitled to
10 confidential protection. If the Commission disagrees, then the Commission should
11 hold an evidentiary hearing to protect Big Rivers' due process rights and to supply
12 the Commission with a complete record to enable it to reach a decision with regard
13 to this matter. *See Util. Reg. Comm'n v. Ky. Water Serv. Co., Inc.*, 642 S.W.2d 591
14 (Ky. App. 1982).

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

Integrated Resource Plan of Big Rivers Electric Corporation, P.S.C. Case No. 2017-00384, Order (April 25, 2019).

1 On this the 28th day of February, 2021.

2 Respectfully submitted,

3
4 /s/ *Tyson Kamuf*

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