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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY

In the Matter of:

ELECTRONIC TARIFF FILING OF)	
BIG RIVERS ELECTRIC CORPORATION)	Case No.
AND KENERGY CORP.)	2021-00289
TO IMPLEMENT A NEW STANDBY SERVICE TARIFF)	

**MOTION OF BIG RIVERS ELECTRIC CORPORATION FOR
CONFIDENTIAL TREATMENT**

1. Big Rivers Electric Corporation (“*Big Rivers*”) hereby moves the Public Service Commission of Kentucky (the “*Commission*”), pursuant to 807 KAR 5:001 Section 13; KRS 278.160(3); KRS 61.878(1)(a); and KRS 61.878(1)(c) to grant confidential treatment to certain information contained in Big Rivers’ and Kenergy Corp.’s joint responses to the Commission Staff’s First Request for Information dated August 18, 2021, and to Kimberly-Clark Corporation’s First Set of Data Requests dated August 20, 2021, filed with this motion. 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 attachment to the response to Item 2 of the Commission Staff’s First Request for Information (“*PSC 1-2*”), consisting of Big Rivers’ projected annual bilateral capacity sales or purchases and annual capacity position; terms of special contracts; and customer specific usage data of existing large industrial customers and a future large industrial customer on the Big Rivers system;

1 3. Big Rivers also seeks continued confidential treatment of
2 Confidential Information which the Commission has recently granted such
3 protection, which includes:

4 a. portions of the attachments to the responses to Items 1 and 2
5 of Kimberly-Clark’s First Set of Data Requests (“*KC 1-1*” and
6 “*KC 1-2*,” respectively), consisting of customer-specific usage
7 data and billing information and power purchases from, and
8 sales to, specific non-members;¹ and

9 b. portions of the attachment to KC 1-1(a), consisting of Big
10 Rivers’ projections of capacity prices, natural gas prices, and
11 capacity forward curve.²

12 This Confidential Information should again be granted confidential treatment.

13 3. Pursuant to the Commission’s Emergency Orders in *In the Matter of:*
14 *Electronic Emergency Docket Related to the Novel Coronavirus Covid-19*, Case No.
15 2020-00085, one (1) copy of the Confidential Information highlighted in yellow or

¹ The Confidential Information contained in the attachments to the responses to KC 1-1 and KC 1-2, consisting of copies of the cost of service studies previously filed in Case No. 2021-00061 and related workpapers, was granted confidential treatment for an indefinite period. *See In the Matter of: Electronic Application of Big Rivers Electric Corporation for Review of its MRSM Charge for Calendar Year 2020*, P.S.C. Case No. 2021-00061, Order (Mar. 9, 2021) (the Confidential Information was provided in Big Rivers’ Application as Exhibits Wolfram-6 and Wolfram-8 to the Direct Testimony of John Wolfram).

² The Confidential Information in the attachment to the response to KC 1-1(a) was recently granted confidential treatment for a period of five years. *See 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) (the Confidential Information was provided in Big Rivers’ Application, as Exhibit B, the Direct Testimony of Mark J. Eacret and Exhibit Eacret-3).

1 otherwise marked “CONFIDENTIAL,” is being filed with this request via
2 electronic mail sent to PSCED@ky.gov. One (1) copy of the documents with the
3 Confidential Information redacted is also being electronically filed with this
4 request. 807 KAR 5:001 Section 13(2)(a)(3).

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

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

12 6. Pursuant to 807 KAR 5:001 Section 13(2)(a)(1), as discussed *infra*,
13 the Confidential Information is entitled to confidential treatment and is being
14 submitted confidentially under the purview of KRS 278.160(3), KRS 61.878(1)(a),
15 and KRS 61.878(1)(c)(1).

16 **I. Certain Confidential Information is entitled to**
17 **confidential treatment based upon KRS 278.160(3)**

18 7. Certain Confidential Information contained in the attachment to the
19 response to PSC 1-2 is entitled to confidential protection based upon KRS
20 278.160(3), which shields from disclosure “a provision of a special contract that
21 contains rates and conditions of service not filed in a utility’s general schedule if
22 such provision would otherwise be entitled to be excluded from the application of
23 KRS 61.870 to 61.884 under the provisions of KRS 61.878(1)(c)(1).”

1 8. The special contracts in question relate to Big Rivers’ power sales
2 contracts with the Kentucky Municipal Energy Agency (“KyMEA”) and
3 Owensboro Municipal Utilities (“OMU”). The Commission has already found that
4 the confidential terms of these contracts are entitled to confidential treatment
5 under KRS 61.878(1)(c)(1),³ and the confidential terms of these special contracts
6 should again be granted confidential treatment.

7 **II. The Confidential Information is also entitled to**
8 **confidential treatment based upon KRS 61.878(1)(a)**

9 9. Certain Confidential Information contained in the attachments to
10 the responses to PSC 1-2, KC 1-1, and KC 1-2 is entitled to confidential treatment
11 based upon KRS 61.878(1)(a), which explicitly protects “[p]ublic records
12 containing information of a personal nature where the public disclosure thereof
13 would constitute a clearly unwarranted invasion of personal privacy.”

14 10. Portions of these attachments reveal the power usage of existing
15 individual large industrial retail customers and a future customer on the Big
16 Rivers system or reveal sales to or purchases from named non-members. Because
17 the individual customers and non-members identified in the attachments to the
18 responses to PSC 1-2, KC 1-1, and KC 1-2 are not parties to this proceeding,

³ See *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); 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 publicly revealing such information would constitute a clearly unwarranted
2 invasion of those customers’ privacy. Moreover, the Commission has previously
3 granted confidential treatment to similar retail customer usage and billing
4 information under the purview of KRS 61.878(1)(a).⁴

5 11. As such, Big Rivers requests confidential treatment for the identity
6 of these customers in order to protect their private information.

7 **III. The Confidential Information is also entitled to**
8 **confidential treatment based upon KRS 61.878(1)(c)(1)**

9 12. KRS 61.878(1)(c)(1) protects “records confidentially disclosed to an
10 agency or required by an agency to be disclosed to it, generally recognized as
11 confidential or proprietary, which if openly disclosed would permit an unfair
12 commercial advantage to competitors of the entity that disclosed the records.” *See*
13 807 KAR 5:001 Section 13(3)(a)(1). Subsection A *infra* describes how Big Rivers
14 operates in competitive environments in the wholesale power market and in the
15 credit market; Subsection B *infra* explains that the Confidential Information is
16 generally recognized as confidential or proprietary; and Subsection C *infra*
17 demonstrates that public disclosure of the Confidential Information would permit

⁴ *See, e.g., In the Matter of: Sanctuary Church v. Louisville Gas and Electric Company*, Order, P.S.C. Case No. 2018-00181, Order (Jan. 8, 2019) (granting confidential treatment pursuant to KRS 61.878(1)(a) for an indefinite period to a retail customer’s account and usage information); *In the Matter of: Application of Kentucky Utilities Company for an Adjustment of its Electric Rates*, Order, P.S.C. Case No. 2012-00221, Order (July 25, 2013) (holding customer names, account numbers, and usage information exempt from disclosure under KRS 61.878(1)(a)). *See also In the Matter of: An Electronic Examination of the Application of the Fuel Adjustment Clause of Big Rivers Electric Corporation from May 1, 2019 through October 31, 2019*, P.S.C. Case No. 2020-00009, Order (April 13, 2020).

1 an unfair commercial advantage to Big Rivers' competitors. As such, the
2 Commission should grant confidential treatment to the Confidential Information.

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

4 13. Big Rivers must successfully compete in the wholesale power
5 markets to sell energy it produces in excess of its Members' needs. Big Rivers'
6 ability to successfully compete in the wholesale power markets is dependent upon
7 a combination of a) obtaining the maximum price for the power it sells and the
8 best contract terms, and b) keeping its cost of production as low as possible.
9 Fundamentally, if Big Rivers' cost of producing a kilowatt-hour of energy
10 increases, its ability to sell that kilowatt hour in competition with other utilities is
11 adversely affected.

12 14. Big Rivers also competes for reasonably-priced credit in the credit
13 markets, and its ability to compete is directly impacted by the financial results it
14 obtains. Any event that adversely affects Big Rivers' margins may impact the
15 price it pays for credit. Impediments to Big Rivers' obtaining the best contract
16 terms could likewise affect its apparent creditworthiness. A utility the size of Big
17 Rivers that operates generation and transmission facilities will always have
18 periodic cash and borrowing requirements for both anticipated and unanticipated
19 needs. Big Rivers expects to be in the credit markets on a regular basis in the
20 future, and it is imperative that Big Rivers improve and maintain its credit
21 profile.

1 15. Finally, Big Rivers competes for economic development opportunities
2 both within the Commonwealth and throughout the nation. The ability to
3 negotiate competitive electric pricing structures with companies interested in
4 expanding in Kentucky is fundamental to the success of Big Rivers' economic
5 development efforts.

6 16. Accordingly, Big Rivers faces competition in the wholesale power and
7 capital markets, and the Confidential Information should be afforded confidential
8 treatment to prevent the imposition of an unfair competitive advantage to those
9 competitors.

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

12 17. The Confidential Information for which Big Rivers seeks confidential
13 treatment under KRS 61.878 is generally recognized as confidential or
14 proprietary under Kentucky law.

15 18. As noted above, the Confidential Information protected under KRS
16 61.878(1)(c)(1) consists of information relating to Big Rivers' projected annual
17 bilateral capacity sales or purchases and annual capacity position; terms of
18 special contracts; customer-specific usage data and billing information; power
19 purchases from, and sales to, specific non-members; and Big Rivers' projected
20 capacity prices, natural gas prices, and capacity forward curve. The Confidential
21 Information is precisely the sort of information meant to be protected by KRS
22 61.878(1)(c)(1).

1 19. Big Rivers operates in competitive markets and the public disclosure
2 of the Confidential Information could cause an economic disadvantage in
3 negotiating future transactions, as Big Rivers’ competitors and potential
4 counterparties would have insight into Big River’s needs, available capacity, or
5 the prices at which it is willing to buy natural gas or buy or sell power.
6 Information such as this that bears upon a company’s detailed inner working is
7 generally recognized as confidential or proprietary. *See, e.g., Hoy v. Kentucky*
8 *Industrial Revitalization Authority*, 907 S.W.2d 766, 4 (Ky. 1995). In *Hoy*, the
9 Court applied the plain meaning rule to KRS 61.878(1)(c)(1), and reasoned, “It
10 does not take a degree in finance to recognize that such information concerning
11 the inner workings of a corporation is ‘generally recognized as confidential or
12 proprietary.’” *Id.* at 768. Similarly, in *Marina Management Services, Inc. v.*
13 *Commonwealth Cabinet for Tourism*, the Court held, “These are records of
14 privately owned marina operators, disclosure of which would unfairly advantage
15 competing operators. The most obvious disadvantage may be the ability to
16 ascertain the economic status of the entities without the hurdles systematically
17 associated with acquisition of such information about privately owned
18 organizations.” 906 S.W.2d 318, 319 (Ky. 1995).

19 20. In Big Rivers’ case, Big Rivers is currently in negotiations with
20 potential counterparties, expects to engage in negotiations with counterparties for
21 purchase power agreements in the future, and is actively pursuing additional
22 economic development opportunities in its service territory. If confidential

1 treatment of the confidential terms of the special contracts or customer specific
2 usage data in the attachment to the response to PSC 1-2 is denied, potential
3 counterparties would know that their proprietary information could be publicly
4 disclosed, which could reveal information to their competitors about their
5 competitiveness. Because many companies would be reluctant to have such
6 information disclosed, public disclosure of the Confidential Information would
7 likely reduce the pool of counterparties willing to negotiate with Big Rivers,
8 reducing Big Rivers' ability to sell power and promote economic development in
9 its territory, and impairing its ability to compete in the wholesale power and
10 credit markets.

11 21. In sum, the Confidential Information is not publicly available, is not
12 disseminated within Big Rivers except to those employees and professionals with
13 a legitimate business need to know and act upon the information, and is not
14 disseminated to others without a legitimate need to know and act upon the
15 information. As such, the Confidential Information details the "inner workings"
16 of Big Rivers' and is generally recognized as confidential and proprietary.

17 ***C. Disclosure of the Confidential Information Would Permit an***
18 ***Unfair Commercial Advantage to Big Rivers' Competitors***

19 22. Disclosure of the Confidential Information would permit an unfair
20 commercial advantage to Big Rivers' competitors. As discussed above, Big Rivers
21 faces actual competition in the wholesale power market and in the credit market,
22 and it is likely that Big Rivers would suffer competitive injury if the Confidential
23 Information were publicly disclosed.

1 23. Given the nature of the Confidential Information, its disclosure
2 would provide other market participants, suppliers, buyers, and competitors
3 insight into the timing of Big River’s capacity need or surplus and the prices and
4 terms at which it is willing to buy fuel or buy and sell power. In turn, the
5 Confidential Information could be used to manipulate the bidding process, leading
6 to higher costs and/or lower revenues for Big Rivers, thereby impairing its ability
7 to compete in the wholesale power markets. Furthermore, any competitive
8 pressure that adversely affects Big Rivers’ revenue and/or margins could make
9 Big Rivers appear less creditworthy and impair its ability to compete in the credit
10 market.

11 24. Thus, Big Rivers’ competitiveness will be adversely affected if other
12 suppliers are given such an unfair competitive advantage or if potential
13 counterparties are given a negotiating advantage. Accordingly, the public
14 disclosure of the information that Big Rivers seeks to protect pursuant to KRS
15 61.878(1)(c)(1) would provide Big Rivers’ competitors with an unfair commercial
16 advantage.

17 **IV. Time Period**

18 25. Big Rivers requests that the Confidential Information in the
19 attachment to the response to PSC 1-2, which consists of Big Rivers’ projected
20 annual bilateral sales or purchases and annual capacity position remain
21 confidential for a period of five (5) years from the date of this motion; and the
22 Confidential Information in the attachment to KC 1-1(a), consisting of Big Rivers’

1 projections of capacity prices, natural gas prices, and capacity forward curve
2 excerpted from the Direct Testimony of Mark J. Eacret in Case No. 2021-00079
3 remain confidential until March 5, 2026, consistent with the Commission's March
4 5, 2021, Order in P.S.C. Case No. 2021-00079. This will allow sufficient time for
5 the information to become sufficiently outdated to no longer pose a competitive
6 risk to Big Rivers. 807 KAR 5:001 Section 13(2)(a)(2).

7 26. Big Rivers requests that the Confidential Information in the
8 attachment the response to PSC 1-2, which consists of the confidential terms of
9 special contracts and specific customer usage data of existing large industrial
10 customers and a future large industrial retail customer on the Big River system
11 remain confidential indefinitely. Big Rivers also requests that the Confidential
12 Information in the attachments to the responses to KC 1-1 and KC 1-2, consisting
13 of customer-specific usage data and billing information and power purchases from
14 and sales to specific non-members, remain confidential indefinitely. 807 KAR
15 5:001 Section 13(2)(a)(2).

16 V. Conclusion

17 27. Based on the foregoing, the Confidential Information is entitled to
18 confidential treatment, pursuant to 807 KAR 5:001 Section 13; KRS 278.160(3);
19 KRS 61.878(1)(a); and KRS 61.878(1)(c). If the Commission disagrees that Big
20 Rivers' Confidential Information is entitled to confidential treatment, due process
21 requires the Commission to hold an evidentiary hearing. *See Utility Regulatory*
22 *Comm'n v. Kentucky Water Serv. Co., Inc.*, 642 S.W.2d 591 (Ky. App. 1982).

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

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4 On this the 3rd day of September, 2021.

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Respectfully submitted,

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7

/s/ Tyson Kamuf

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