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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)**

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**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 61.878(1)(a); and KRS 61.878(1)(c)(1) to grant confidential treatment to certain information contained in Big Rivers’ and Kenergy Corp.’s joint response to the Commission Staff’s Second Request for Information dated September 16, 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 Attachment 4 and Attachment 5 to the response to Item 3 of the Commission Staff’s Second Request for Information (“*PSC 2-3*”), consisting of Big Rivers’ projected annual bilateral capacity sales or purchases for 2022-2024;¹ information related to specific capacity

¹ Contained in Attachment 4 to the Joint Response to 2-3a and identified as “Total Sold,” under columns, “2021/2022” through “2023/2024.”

1 purchases from, and sales to, individual non-members;² and the projected capacity
2 price per kw-month of its Robert D. Green generating station (“*Green Station*”)
3 units converted to burn natural gas and related information.³

4 3. Pursuant to the Commission’s Emergency Orders in *In the Matter of:*
5 *Electronic Emergency Docket Related to the Novel Coronavirus Covid-19*, Case No.
6 2020-00085, one (1) copy of the Confidential Information highlighted in yellow or
7 otherwise marked “CONFIDENTIAL,” is being filed with this request via
8 electronic mail sent to PSCED@ky.gov. One (1) copy of the documents with the
9 Confidential Information redacted is also being electronically filed with this
10 request. 807 KAR 5:001 Section 13(2)(a)(3).

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

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

18 6. Pursuant to 807 KAR 5:001 Section 13(2)(a)(1), as discussed *infra*,
19 the Confidential Information is entitled to confidential treatment and is being

² Contained in Attachment 4 to the Joint Response to 2-3a, consisting of the names of the non-members and the future quantity and prices under columns, “2021/2022” through “2023/2024.”

³ Contained in Attachment 5 to the Joint Response to 2-3a.

1 submitted confidentially under the purview of KRS 61.878(1)(a), and KRS
2 61.878(1)(c)(1).

3 **I. The Confidential Information is also entitled to**
4 **confidential treatment based upon KRS 61.878(1)(a)**

5 7. Certain Confidential Information contained in the Attachment 4 to
6 the response to PSC 2-3 is entitled to confidential treatment based upon KRS
7 61.878(1)(a), which explicitly protects “[p]ublic records containing information of a
8 personal nature where the public disclosure thereof would constitute a clearly
9 unwarranted invasion of personal privacy.”

10 8. Portions of Attachment 4 reveal capacity sales to or purchases from
11 specific named non-members. Because the individual non-members identified in
12 the attachment to the response to PSC 2-3 are not parties to this proceeding,
13 publicly revealing such information would constitute a clearly unwarranted
14 invasion of those non-members’ privacy. Moreover, the Commission has
15 previously granted confidential treatment to similar information related to these
16 individual non-members for an indefinite period of time, under the purview of
17 KRS 61.878(1)(a).⁴

18 9. As such, Big Rivers requests confidential treatment for the identity
19 of these customers in order to protect their private information.

⁴ 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 cost of service studies, containing the confidential information, were provided in Big Rivers’ Application as Exhibits Wolfram-6 and Wolfram-8 to the Direct Testimony of John Wolfram).

1 **II. The Confidential Information is also entitled to**
2 **confidential treatment based upon KRS 61.878(1)(c)(1)**

3 10. KRS 61.878(1)(c)(1) protects “records confidentially disclosed to an
4 agency or required by an agency to be disclosed to it, generally recognized as
5 confidential or proprietary, which if openly disclosed would permit an unfair
6 commercial advantage to competitors of the entity that disclosed the records.” *See*
7 807 KAR 5:001 Section 13(3)(a)(1). Subsection A *infra* describes how Big Rivers
8 operates in competitive environments in the wholesale power market and in the
9 credit market; Subsection B *infra* explains that the Confidential Information is
10 generally recognized as confidential or proprietary; and Subsection C *infra*
11 demonstrates that public disclosure of the Confidential Information would permit
12 an unfair commercial advantage to Big Rivers’ competitors. As such, the
13 Commission should grant confidential treatment to the Confidential Information.

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

15 11. Big Rivers must successfully compete in the wholesale power
16 markets to sell energy it produces in excess of its Members’ needs. Big Rivers’
17 ability to successfully compete in the wholesale power markets is dependent upon
18 a combination of a) obtaining the maximum price for the power it sells and the
19 best contract terms, and b) keeping its cost of production as low as possible.
20 Fundamentally, if Big Rivers’ cost of producing a kilowatt-hour of energy
21 increases, its ability to sell that kilowatt hour in competition with other utilities is
22 adversely affected.

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

11 13. Accordingly, Big Rivers faces competition in the wholesale power and
12 credit markets, and the Confidential Information should be afforded confidential
13 treatment to prevent the imposition of an unfair competitive advantage to those
14 competitors.

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

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

20 15. As noted above, the Confidential Information protected under KRS
21 61.878(1)(c)(1) consists of information relating to Big Rivers' projected annual
22 bilateral capacity sales or purchases for 2022-2024; specific future capacity
23 purchases from, and sales to, individual non-members; and the projected capacity

1 price per kw-month of its Green Station units converted to burn natural gas and
2 related information. The Confidential Information is precisely the sort of
3 information meant to be protected by KRS 61.878(1)(c)(1).

4 16. Big Rivers operates in competitive markets and the public disclosure
5 of the Confidential Information could cause an economic disadvantage in
6 negotiating future transactions, as Big Rivers’ competitors and potential
7 counterparties would have insight into Big River’s needs, available capacity, or
8 the prices at which it is willing to buy or sell power or capacity. Information such
9 as this that bears upon a company’s detailed inner working is generally
10 recognized as confidential or proprietary. *See, e.g., Hoy v. Kentucky Industrial*
11 *Revitalization Authority*, 907 S.W.2d 766, 4 (Ky. 1995). In *Hoy*, the Court applied
12 the plain meaning rule to KRS 61.878(1)(c)(1), and reasoned, “It does not take a
13 degree in finance to recognize that such information concerning the inner
14 workings of a corporation is ‘generally recognized as confidential or proprietary.’”
15 *Id.* at 768. Similarly, in *Marina Management Services, Inc. v. Commonwealth*
16 *Cabinet for Tourism*, the Court held, “These are records of privately owned
17 marina operators, disclosure of which would unfairly advantage competing
18 operators. The most obvious disadvantage may be the ability to ascertain the
19 economic status of the entities without the hurdles systematically associated with
20 acquisition of such information about privately owned organizations.” 906 S.W.2d
21 318, 319 (Ky. 1995).

1 17. In Big Rivers’ case, Big Rivers is currently in negotiations with
2 potential counterparties and expects to engage in negotiations with
3 counterparties for capacity and power purchase agreements in the future. If
4 confidential treatment of the capacity purchases from, and sales to, individual
5 non-members in Attachment 4 to the response to PSC 2-3a is denied, potential
6 counterparties would know that their proprietary information could be publicly
7 disclosed, which could reveal information to their competitors about their
8 competitiveness. Because many companies would be reluctant to have such
9 information disclosed, public disclosure of the Confidential Information would
10 likely reduce the pool of counterparties willing to negotiate with Big Rivers,
11 reducing Big Rivers’ ability to sell or purchase power or capacity and impairing its
12 ability to compete in the wholesale power and credit markets.

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

19 ***C. Disclosure of the Confidential Information Would Permit an***
20 ***Unfair Commercial Advantage to Big Rivers’ Competitors***

21 19. 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 and it is likely that Big Rivers would suffer competitive injury if the Confidential
2 Information were publicly disclosed.

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

13 21. Public disclosure of the Confidential Information contained in the
14 Attachment 5 to the response to PSC 2-3a, the projected capacity price per kw-
15 month of its Green Station units converted to burn natural gas and related
16 information, likewise would provide other market participants, suppliers, buyers,
17 and competitors insight into the price at which Big Rivers is willing to buy and
18 sell capacity. Moreover, the Commission has previously granted confidential
19 treatment to similar capacity price projections related to Big Rivers' Green
20 Station for a period of five years under the purview of KRS 61.878(1)(c)(1).⁵

⁵ 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

1 22. Thus, Big Rivers’ competitiveness will be adversely affected if other
2 suppliers are given such an unfair competitive advantage or if potential
3 counterparties are given a negotiating advantage. Accordingly, the public
4 disclosure of the information that Big Rivers seeks to protect pursuant to KRS
5 61.878(1)(c)(1) would provide Big Rivers’ competitors with an unfair commercial
6 advantage.

7 **III. Time Period**

8 23. Big Rivers requests that the Confidential Information in the
9 Attachment 4 to the response to PSC 2-3a, which consists of Big Rivers’ projected
10 annual bilateral sales or purchases, and the quantity and price of future capacity
11 purchases from, and sales to, individual non-members (all shown in the
12 attachment under columns “2021/2021” through “2023/2024”), and the
13 Confidential Information in the Attachment 5 to PSC 2-3a, consisting of the
14 projected capacity price per kw-month of its Green Station units converted to
15 burn natural gas and related information, remain confidential for a period of five
16 (5) years from the date of this motion. This will allow sufficient time for the
17 information to become sufficiently outdated to no longer pose a competitive risk to
18 Big Rivers. 807 KAR 5:001 Section 13(2)(a)(2).

19 24. Big Rivers requests that the Confidential Information consisting of
20 the identity of the individual non-members, counterparties to capacity purchases

provided in Big Rivers’ Application, as Confidential Exhibit Eacret-3 to the Direct Testimony of Mark J. Eacret and Confidential Exhibit Pullen-2 to the Direct Testimony of Michael T. Pullen).

1 and sales, in Attachment 4 to the response to PSC 2-3a remain confidential
2 indefinitely. 807 KAR 5:001 Section 13(2)(a)(2).

3 **IV. Conclusion**

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

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

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On this the 1st day of October, 2021.

Respectfully submitted,

/s/ Tyson Kamuf

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