

1 (c) third party proprietary information, specifically usage data of
2 individual retail customers and sales to non-members (Big Rivers’
3 attachment its response to Item 13).

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 motion 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
20 submitted confidentially under the purview of KRS 278.160(3), KRS 61.878(1)(a),
21 and KRS 61.878(1)(c)(1).

1 **I. The Confidential Information is entitled to confidential**
2 **treatment based upon KRS 278.160(3)**

3 7. Certain Confidential Information contained in Big Rivers’ response
4 to Item 12 is entitled to confidential protection based upon KRS 278.160(3), which
5 shields from disclosure “a provision of a special contract that contains rates and
6 conditions of service not filed in a utility’s general schedule if such provision
7 would otherwise be entitled to be excluded from the application of KRS 61.870 to
8 61.884 under the provisions of KRS 61.878(1)(c)(1).”

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

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

17 9. Certain Confidential Information contained in Big Rivers’ response
18 to Item 12 and the attachment to its response to Item 13 is entitled to confidential

¹ 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 protection based upon KRS 61.878(1)(a), which explicitly protects “[p]ublic records
2 containing information of a personal nature where the public disclosure thereof
3 would constitute a clearly unwarranted invasion of personal privacy.”

4 10. The attachment to Big Rivers’ response to Item 13 reveals the power
5 usage of individual large industrial retail customers on the Big Rivers system and
6 sales to non-members. Big Rivers’ response to Item 12 reveals purchases and
7 sales to non-members. Because the individual customers and non-members
8 identified in the responses and attachment are not parties to this proceeding,
9 publicly revealing such information would constitute a clearly unwarranted
10 invasion of their privacy. Moreover, the Commission has previously granted
11 confidential treatment to similar retail information under the purview of KRS
12 61.878(1)(a).²

13 11. As such, Big Rivers requests confidential treatment for the identity
14 of these entities in order to protect their private information.

15 **III. Certain Confidential Information is also entitled to**
16 **confidential treatment based upon KRS 61.878(1)(c)(1)**

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

² See, e.g., *In the Matter of: Sanctuary Church v. Louisville Gas and Electric Company*, Order, P.S.C. Case No. 2018-00181 (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 (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 confidential or proprietary, which if openly disclosed would permit an unfair
2 commercial advantage to competitors of the entity that disclosed the records.” See
3 807 KAR 5:001 Section 13(3)(a)(1). Subsection A *infra* describes how Big Rivers
4 operates in competitive environments in the wholesale power market and in the
5 credit market; Subsection B *infra* explains that the Confidential Information is
6 generally recognized as confidential or proprietary; and Subsection C *infra*
7 demonstrates that public disclosure of the Confidential Information would permit
8 an unfair commercial advantage to Big Rivers’ competitors. As such, the
9 Commission should grant confidential treatment to the Confidential Information.

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

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

19 14. Big Rivers also competes for reasonably-priced credit in the credit
20 markets, and its ability to compete is directly impacted by the financial results it
21 obtains. Any event that adversely affects Big Rivers’ margins may impact the
22 price it pays for credit. Impediments to Big Rivers’ obtaining the best contract

1 terms could likewise affect is apparent creditworthiness. A utility the size of Big
2 Rivers that operates generation and transmission facilities will always have
3 periodic cash and borrowing requirements for both anticipated and unanticipated
4 needs. Big Rivers expects to be in the credit markets on a regular basis in the
5 future, and it is imperative that Big Rivers improve and maintain its credit
6 profile.

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

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

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

16 17. As noted above, the Confidential Information protected under KRS
17 61.878(1)(c)(1) consists of or reveals information about confidential fuel supply
18 bids to Big Rivers and Big Rivers' analysis of those bids and the terms of special
19 contracts and other non-member sales. The Confidential Information is precisely
20 the sort of information meant to be protected by KRS 61.878(1)(c)(1).

21 18. The Commission has often found that similar information relating to
22 competitive bidding is generally recognized as confidential and proprietary. *See,*
23 *e.g., In the Matter of Application of Union Light, Heat and Power Company for*

1 *Confidential Treatment*, P.S.C. Case No. 2003-00054, Order (August 4, 2003).³ In
2 fact, the Commission has granted confidential protection to the same type of
3 information that is presented in the bid tabulation sheets when provided by other
4 utilities in cases involving a review of their fuel adjustment clauses. *See, e.g.*,
5 letter from the Commission dated October 23, 2009, granting confidential
6 protection to East Kentucky Power Cooperative, Inc.’s bid tabulation sheet and
7 related information in P.S.C. Case No. 2009-00286; letter from the Commission
8 dated December 11, 2009, granting confidential protection to Kentucky Utilities
9 Company’s coal bid analysis procedure in P.S.C. Case No. 2009-00287. The
10 Commission has also granted confidential protection to the bid tabulation sheets
11 that Big Rivers filed in previous reviews of its fuel adjustment clause. *See, e.g.*,
12 letter from the Commission dated September 22, 2010, in P.S.C. Case No. 2010-
13 00269 and more recently in P.S.C. Case No. 2019-00231.⁴ Thus, the Confidential
14 Information in the response and attachment to the response to Item 4 is generally
15 recognized as confidential or proprietary.

³ In P.S.C. Case No. 2003-00054, the Commission additionally implicitly accepted ULH&P’s argument that the bidding contractors would not want their bid information publicly disclosed, and that disclosure would reduce the contractor pool available to ULH&P, which would drive up ULH&P’s costs, hurting its ability to compete with other gas suppliers. *In the Matter of Application of the Union Light, Heat and Power Company for Confidential Treatment*, P.S.C. Case No. 2003-00054, Order (Aug. 4, 2003). Similarly, in *Hoy v. Kentucky Indus. Revitalization Authority*, the Kentucky Supreme Court found that without protection for confidential information provided to a public agency, “companies would be reluctant to apply for investment tax credits for fear the confidentiality of financial information would be compromised.” *Hoy v. Kentucky Indus. Revitalization Authority*, 907 S.W.2d 766, 769 (Ky. 1995).

⁴ *In the Matter of: An Electronic Examination of the Application of the Fuel Adjustment Clause of Big Rivers Electric Corporation from November 1, 2018 through April 30, 2019*, P.S.C. Case No. 2019-00231, Order (April 2, 2020) (granting confidential treatment for fuel supply bids, future off-system sales, and private usage information of individual retail customers).

1 19. Public disclosure of confidential terms of special contracts and other
2 non-members sales would also cause competitive harm to Big Rivers, giving Big
3 Rivers’ suppliers, buyers, and competitors insight into prices and other terms at
4 which it is willing to sell and buy power. Kentucky courts have held that
5 information about a company’s detailed inner workings is generally recognized as
6 confidential or proprietary. In *Hoy v. Kentucky Industrial Revitalization*
7 *Authority*, the Kentucky Supreme Court held that financial information
8 submitted by General Electric Company with its application for investment tax
9 credits was not subject to disclosure simply because it had been filed with a state
10 agency. 907 S.W.2d 766, 4 (Ky. 1995). The Court applied the plain meaning rule
11 to KRS 61.878(1)(c)(1), and reasoned: “[i]t 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.’” *Id.* at 768. Similarly, in
14 *Marina Management Services, Inc. v. Commonwealth Cabinet for Tourism*, the
15 Court held: “[t]hese are records of privately owned marina operators, disclosure of
16 which would unfairly advantage competing operators. The most obvious
17 disadvantage may be the ability to ascertain the economic status of the entities
18 without the hurdles systematically associated with acquisition of such
19 information about privately owned organizations.” 906 S.W.2d 318, 319 (Ky.
20 1995).

21 20. In Big Rivers’ case, Big Rivers is currently in negotiations with
22 potential counterparties and expects to continue to engage in negotiations with

1 counterparties for purchase power agreements. If confidential treatment of the
2 confidential terms of the special contracts and other non-member sales in Big
3 Rivers' response to Item 12 is denied, potential counterparties would know that
4 the confidential terms of their contracts could be publicly disclosed, which could
5 reveal information to their competitors about their competitiveness. Because
6 many companies would be reluctant to have such information disclosed, public
7 disclosure of the Confidential Information would likely reduce the pool of
8 counterparties willing to negotiate with Big Rivers, reducing Big Rivers' ability to
9 sell power and impairing its ability to compete in the wholesale power and credit
10 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***
18 ***an Unfair Commercial Advantage to Big Rivers' Competitors***

19 22. Disclosure of the Confidential Information that is protected under
20 KRS 61.878(1)(c)(1) would permit an unfair commercial advantage to Big Rivers'
21 competitors. As discussed above, Big Rivers faces actual competition in the
22 wholesale power market and in the credit market, and it is likely that Big Rivers

1 would suffer competitive injury if the Confidential Information were publicly
2 disclosed.

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

12 24. Accordingly, public disclosure of the information that Big Rivers
13 seeks to protect pursuant to KRS 61.878(1)(c)(1) would provide Big Rivers'
14 competitors with an unfair commercial advantage.

15 **IV. Time Period**

16 25. Big Rivers requests that the Confidential Information remain
17 confidential indefinitely for the reasons stated above. 807 KAR 5:001 Section
18 13(2)(a)(2).

19 **V. Conclusion**

20 26. Based on the foregoing, the Confidential Information is entitled to
21 confidential treatment, pursuant to KRS 278.160(3); 807 KAR 5:001 Section 13;
22 and KRS 61.878. If the Commission disagrees that Big Rivers' Confidential

1 Information is entitled to confidential treatment, due process requires the
2 Commission to hold an evidentiary hearing. *See Utility Regulatory Comm'n v.*
3 *Kentucky Water Serv. Co., Inc.*, 642 S.W.2d 591 (Ky. App. 1982).

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

6 On this the 1st day of September, 2021.

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Respectfully submitted,

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