



**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of:

**ELECTRONIC APPLICATION OF BIG RIVERS)
ELECTRIC CORPORATION FOR A CERTIFICATE)
OF CONVENIENCE AND NECESSITY)
AUTHORIZING CONSTRUCTION OF A NEW)
HEADQUARTERS FACILITY AND AN ORDER)
AUTHORIZING BIG RIVERS TO SELL ITS)
EXISTING HEADQUARTERS FACILITY)**

**Case No.
2021-00314**

MOTION FOR CONFIDENTIAL TREATMENT

FILED: August 26, 2021

- 1 b) the current and projected book values and appraised value of
2 Big Rivers’ existing headquarters properties (found in the
3 Direct Testimonies of Robert W. Berry and Paul G. Smith,
4 including calculations in the Direct Testimony of Paul G.
5 Smith and the Confidential Exhibit Smith-2 from which the
6 proposed cost could be easily derived such as “*Incremental Net*
7 *Utility Plant*” and “*Existing HQ Proceeds & Avoided Capex*”);
8 and
9 c) the location, structure, and other sensitive information
10 regarding critical energy infrastructure (found in the Direct
11 Testimonies of Robert W. Berry and Robert F. Toerne and
12 Exhibit Berry-2).

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

20 4. A copy of this motion with the Confidential Information redacted has
21 been served on all parties to this proceeding through the use of electronic filing.
22 807 KAR 5:001 Section 13(2)(b).

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

5 6. Pursuant to 807 KAR 5:001 Section 13(2)(a)(1), as discussed *infra*,
6 the Confidential Information is entitled to confidential treatment and is being
7 submitted confidentially under the purview of KRS 61.878(1)(c)(1) and KRS
8 61.878(1)(m).

9 **I. The Confidential Information is Entitled to Confidential**
10 **Treatment Based upon KRS 61.878(1)(c)(1)**

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

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

22 8. Big Rivers must successfully compete in the wholesale power
23 markets to sell energy it produces in excess of its members’ needs. Big Rivers’

1 ability to successfully compete in these wholesale power markets is dependent
2 upon an effective combination of a) obtaining the maximum price for the power it
3 sells and the best contract terms, and b) keeping its cost of production as low as
4 possible. Fundamentally, if Big Rivers' cost of producing a kilowatt hour of
5 energy increases, its ability to sell that kilowatt hour in competition with other
6 utilities is adversely affected.

7 9. Big Rivers also competes for reasonably-priced credit in the credit
8 markets, and its ability to compete is directly impacted by the financial results it
9 obtains. Any events that adversely affect Big Rivers' financial results may
10 impact the price it pays for credit. Impediments to Big Rivers' negotiating the
11 best terms for the construction of the proposed headquarters facility or the sale of
12 its existing headquarters properties could likewise affect its apparent
13 creditworthiness. A utility the size of Big Rivers that operates generation and
14 transmission facilities will always have periodic cash and borrowing
15 requirements for both anticipated and unanticipated needs. Big Rivers expects to
16 be in the credit markets on a regular basis in the future, and it is imperative that
17 Big Rivers improve and maintain its credit profile.

18 10. Accordingly, Big Rivers faces competition in both the wholesale
19 power and credit markets, and its Confidential Information should be afforded
20 confidential treatment to prevent the imposition of an unfair competitive
21 advantage to those competitors.

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

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

6 12. As noted above, the Confidential Information consists of cost
7 estimates for specific work for the proposed headquarters facility and the current
8 and projected book values and appraised value of Big Rivers' existing
9 headquarters properties. This Confidential Information is critical to the effective
10 execution of Big Rivers' business decisions and strategy.

11 13. Under Kentucky law, it is well recognized that information about a
12 company's detailed inner workings, such as the Confidential Information here, is
13 generally recognized as confidential or proprietary. *See, e.g., Hoy v. Kentucky*
14 *Indus. Revitalization Authority*, 907 S.W.2d 766, 768 (Ky. 1995) (“[it] does not
15 take a degree in finance to recognize that such information concerning the inner
16 workings of a corporation is ‘generally recognized as confidential or proprietary’”);
17 *Marina Management Servs. v. Cabinet for Tourism, Dep’t of Parks*, 906 S.W.2d
18 318, 319 (Ky. 1995) (unfair commercial advantage arises simply from “the ability
19 to ascertain the economic status of the entities without the hurdles systemically
20 associated with the acquisition of such information about privately owned
21 organizations”). Moreover, the Commission has recognized in previous cases the
22 confidentiality of capital project information similar to the Confidential
23 Information related to the construction of a new headquarters facility and the

1 sale of its existing headquarters properties. *See, e.g., In the Matter of: Electronic*
2 *Application of Jackson Purchase Energy Corporation for a Certificate of Public*
3 *Convenience and Necessity to Construct a New Headquarters Facility*, P.S.C. Case
4 No. 2019-00326, Order (Oct. 01, 2019) (granting confidential treatment of the
5 purchase price of the proposed headquarters, the anticipated cost of construction,
6 and the estimated net cost of the proposed headquarters, until the construction
7 costs became final) and Order (Jan. 14, 2020) (granting confidential treatment of
8 the commercial appraisal report on existing headquarters facilities).

9 14. The Confidential Information is not publicly available, is not
10 disseminated within Big Rivers except to those employees and professionals with
11 a legitimate business need to know and act upon the information, and is not
12 disseminated to others without a legitimate need to know and act upon the
13 information. As such, the Confidential Information is generally recognized as
14 confidential and proprietary.

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

17 15. Disclosure of the Confidential Information could unreasonably and
18 unnecessarily harm Big Rivers by giving interested third parties, potential
19 construction bidders, and potential counterparties in real estate sales
20 transactions, an unfair commercial advantage through insight into Big Rivers'
21 business operations and financial strategies. As discussed *supra*, Big Rivers
22 faces actual competition in the wholesale power market and in the credit market.
23 It is likely that Big Rivers would suffer competitive injury if that Confidential
24

1 Information was publicly disclosed, and Big Rivers seeks protection from such
2 competitive injury.

3 16. Public disclosure of the cost estimates of specific work included in
4 the construction of the proposed headquarters facility would allow prospective
5 construction bidders potentially to use this sensitive information to submit
6 construction bids higher than what they might otherwise provide if the
7 information were not publically available. The estimates shown in Exhibits
8 Toerne-2 and Toerne-3 are broken down into categories, giving potential vendors
9 insight into how much Big Rivers is willing to pay for specific work, setting a
10 benchmark that would not exist but for the disclosure of this sensitive
11 information. In this case, potential bidders would be competitors to Big Rivers as
12 contemplated by KRS 61.878(1)(c)(1), as Big Rivers and potential bidders each
13 have competing interests to secure the most favorable cost and terms.¹ This could
14 lead to higher costs or less favorable terms for Big Rivers and impair its ability to
15 compete in the wholesale power market and credit markets. The Commission has
16 often found that similar information relating to competitive bidding is generally
17 recognized as confidential and proprietary. *See, e.g., In the Matter of Application*
18 *of the Union Light, Heat and Power Company for Confidential Treatment*, Order,
19 P.S.C. Case No. 2003-00054 (Aug. 4, 2003) (finding that bids submitted to a
20 utility were confidential).

¹ See *In the Matter of: Electronic Application of Jackson Purchase Energy Corporation for a Certificate of Public Convenience and Necessity to Construct a New Headquarters Facility*, Case No. 2019-00326, Order (Jan. 14, 2020).

1 17. These effects were recognized in P.S.C. Case No. 2003-00054, in
2 which the Commission granted confidential treatment to bids submitted to Union
3 Light, Heat & Power (“*ULH&P*”). *ULH&P* argued, and the Commission
4 implicitly accepted, that if the bids it received were publicly disclosed, contractors
5 in the future could use the bids as a benchmark, which would likely lead to the
6 submission of higher bids. *In the Matter of Application of the Union Light, Heat*
7 *and Power Company for Confidential Treatment*, P.S.C. Case No. 2003-00054,
8 Order (Aug. 4, 2003); *see also In the Matter of An Examination of the Application*
9 *of the Fuel Adjustment Clause of East Kentucky Power Cooperative, Inc. from May*
10 *1, 2007 through October 31, 2007*, P.S.C. Case No. 2007-00523, Letter (Feb. 27,
11 2008).

12 18. Disclosure of the commercial appraisal price and current and
13 projected book value of the existing headquarters properties would likewise give
14 potential counterparties and competitors insight into Big Rivers’ internal
15 evaluation of the properties. The counterparties and competitors would have a
16 business advantage in the course of ongoing and future negotiations, potentially
17 affecting the ultimate purchase price obtained by Big Rivers for the sale of its
18 existing headquarters properties. Furthermore, any competitive pressure that
19 adversely affects Big Rivers’ financial results and contract terms could make the
20 company appear less creditworthy and thus impair its ability to compete in the
21 credit market.

1 19. Accordingly, the public disclosure of the information that Big Rivers
2 seeks to protect pursuant to KRS 61.878 would provide Big Rivers' competitors
3 with an unfair commercial advantage.

4 **II. The Confidential Information is also Entitled to Confidential**
5 **Treatment Based Upon KRS 61.878(1)(m)**

6 20. Certain Confidential Information is entitled to confidential
7 treatment based upon KRS 61.878(1)(m)(1), which protects “[p]ublic records the
8 disclosure of which would have a reasonable likelihood of threatening the public
9 safety by exposing a vulnerability in preventing protecting against, mitigating, or
10 responding to a terrorist act. . . .”

11 21. This Confidential Information contains detailed information that
12 describes the current and planned location, layout, and configuration of critical
13 energy infrastructure and is contained in the Direct Testimonies of Robert W.
14 Berry and Robert F. Toerne. If publically disclosed, this Confidential
15 Information could be utilized to commit or further a terrorist act, including the
16 intimidation or coercion of all or part of the civilian population and the disruption
17 of public utility and other critical systems. The public release of such
18 Confidential Information has a reasonable likelihood of threatening the public
19 safety, particularly because it reflect detailed, precise, and highly technical
20 information about the configuration and operations of valuable infrastructure
21 upon which many individuals and businesses rely. Pursuant to KRS
22 61.878(1)(m), the Confidential Information should be exempt from public
23 disclosure.

1 22. The Commission granted confidential treatment on these grounds
2 for an indefinite period to maps showing critical transmission infrastructures
3 contained in Big Rivers' 2014 IRP and 2017 IRP. *See In the Matter of: 2014*
4 *Integrated Resource Plan of Big Rivers Electric Corporation*, P.S.C. Case No.
5 2014-00166, Order (August 26, 2014); *In the Matter of 2017 Integrated Resource*
6 *Plan of Big Rivers Electric Corporation*, P.S.C. Case No. 2017-00384, Order (April
7 25, 2019). Likewise, the Commission has granted confidential treatment of a
8 detailed map of Big Rivers' transmission system and a detailed diagram showing
9 the system's components. *See In the Matter of: Application of Big Rivers Electric*
10 *Corporation for a Certificate of Public Convenience and Necessity to Construct*
11 *Two 161 KV Transmission Lines in Hancock County, Kentucky*, P.S.C. Case No.
12 2015-00051, Order (January 15, 2016). More recently, the Commission granted
13 confidential treatment to maps and drawings of critical infrastructure submitted
14 with Big Rivers' 2020 Environmental Compliance Plan. *See In The Matter of:*
15 *Application of Big Rivers Electric Corporation for Approval of Its 2020*
16 *Environmental Compliance Plan, Authority To Recover Costs Through A revised*
17 *Environmental surcharge and Tariff, the Issuance of a Certificate of Public*
18 *Convenience and Necessity For Certain Projects, and Appropriate Accounting and*
19 *Other Relief*, P.S.C. Case No. 2019-00435, Order (August 6, 2020).

1 **III. TIME PERIOD**

2 23. Pursuant to 807 KAR 5:001 Section 13(3)(a)(2), Big Rivers requests
3 that the Confidential Information be granted confidential treatment for the time
4 periods explained below.

5 24. Big Rivers requests that the Confidential Information consisting of
6 the cost estimates for specific work in the construction of the proposed
7 headquarters facility remain confidential until such time as the construction
8 costs become final.

9 25. Big Rivers requests that the Confidential Information consisting of
10 the current and projected book values and appraised value of Big Rivers' existing
11 headquarters properties remain confidential until such time as the real estate
12 transactions for all of Big Rivers' existing headquarters properties have closed.

13 26. Big Rivers requests that the Confidential Information protected by
14 KRS 61.878(1)(m) remain confidential indefinitely because as long as the critical
15 energy infrastructure remains in place, the information should be confidential for
16 the reasons stated above.

17 **IV. CONCLUSION**

18 27. Based on the foregoing, the Confidential Information is entitled to
19 confidential treatment pursuant to KRS 61.878, 807 KAR 5:001 Section 13, and
20 related law. If the Commission disagrees that Big Rivers' Confidential
21 Information is entitled to confidential treatment, due process requires the

1 Commission to hold an evidentiary hearing. *See Utility Regulatory Comm'n v.*
2 *Kentucky Water Serv. Co., Inc.*, 642 S.W.2d 591 (Ky. App. 1982).

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

6 On this 26th day of August, 2021.

7 Respectfully submitted,

8
9 /s/ *Tyson Kamuf*

10
11 _____
12 Tyson Kamuf
13 Senthia Santana
14 Gregory E. Mayes, Jr.
15 Big Rivers Electric Corporation
16 201 Third Street
17 P.O. Box 24
18 Henderson, Kentucky 42419-0024
19 Phone: (270) 827-2561
20 Facsimile: (270) 844-6417
21 tyson.kamuf@bigrivers.com
22 senthia.santana@bigrivers.com
23 gregory.mayes@bigrivers.com

24 *Counsel for Big Rivers Electric*
25 *Corporation*