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COMMONWEALTH OF KENTUCKY
BEFORE THE KENTUCKY PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF)
BIG RIVERS ELECTRIC CORPORATION) Case No.
FOR APPROVAL TO ISSUE EVIDENCES) 2021-00468
OF INDEBTEDNESS)

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

1. Big Rivers Electric Corporation (“Big Rivers”) hereby moves the Kentucky Public Service Commission (“Commission”), pursuant to 807 KAR 5:001 Section 13 and KRS 61.878, to grant confidential treatment to certain information that Big Rivers is providing in its Application submitted contemporaneously herewith in the above-styled matter. The information for which Big Rivers seeks confidential treatment is hereinafter referred to as the “*Confidential Information*.”

2. In the above-styled matter Big Rivers seeks the Commission’s approval to issue certain evidences of indebtedness, in connection with the long term debt financing of two ongoing Commission-approved capital projects. The Commission authorized a Certificate of Public Convenience and Necessity (“CPCN”) for the construction of the first of these two projects, Project 12 of Big Rivers’ 2020 Environmental Compliance Plan, in Case No. 2019-00435, finding that the project reflected the most reasonable least-cost alternative to comply

1 with the environmental regulations.¹ The Commission granted a CPCN for the
2 second project, the conversion of Big Rivers' Robert D. Green Station's generating
3 units to burn natural gas (the "Green Station Conversion") in Case No. 2021-
4 00079.² These two cases collective are referred to below as the "CPCN cases".

5 3. In the CPCN cases, the Commission found that Big Rivers
6 presented sufficient evidence to support a determination that there was need for
7 the projects and the projects would not create wasteful duplication of facilities.³

8 4. As Exhibits 1 through 4 attached to Big Rivers' Application consist of
9 information regarding these two Commission- approved capital projects, a portion
10 of the Confidential Information was previously submitted in the CPCN cases. As
11 discussed below, the Commission granted confidential treatment of this
12 information.

13 5. The Confidential Information includes the following information
14 contained in Application Exhibits 1 through 4:

15 a. detailed power plant schematics, diagrams, drawings (civil
16 drawings, structural drawings, equipment design or condition

¹ See *In the Matter of: Application of Big Rivers Electric Corporation for Approval of Its 2020 Environmental Compliance Plan, Authority to Recover Costs Through a Revised Environmental Surcharge and Tariff, the Issuance of Certificate of Public Convenience and Necessity for Certain Projects, and Appropriate Accounting and Other Relief*, P.S.C. Case No. 2019-00435. (Project 12 is the Wilson Station flue gas desulfurization system replacement and upgrade.)

² 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.

³ See P.S.C. Case No. 2019-00435, Order (Aug. 6, 2020), at pages 19-20; See also, P.S.C. Case No. 2021-00079, Order (June 11, 2021) at pages 11-12.

1 drawings, and electrical drawings), plans, and photographs of Big
2 Rivers' D.B. Wilson Station ("Wilson Station"), K.C. Coleman Station
3 ("Coleman Station") and Robert D. Green Station ("Green Station");
4 and

5 b. detailed scope of work plans and technical specifications, detailed
6 itemized cost of specific services or equipment,⁴ and other
7 commercially sensitive information contained in construction
8 contracts.

9 6. Pursuant to the Commission's March 24, 2020, Order in *In the*
10 *Matter of Electronic Emergency Docket Related to the Novel Coronavirus COVID-*
11 *19*, Case No. 2020-00085 ("*Case No. 2020-00085*"), one (1) copy of the Confidential
12 Information marked "CONFIDENTIAL," is being filed with this motion by posting
13 on a secure file share site. A copy of the filing, with the Confidential Information
14 redacted, is being electronically filed with this motion.

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

18 8. If and to the extent the Confidential Information becomes generally
19 available to the public, whether through filings required by other agencies or

⁴ Application Exhibits 2 and 4, as well as the construction contracts contained in Application Exhibits 1 and 3 contain detailed itemized pricing for specific services and equipment.

1 otherwise, Big Rivers will notify the Commission and have its confidential status
2 removed. *See* 807 KAR 5:001 Section 13(10)(b).

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

6 **I. The Confidential Information is exempted from public disclosure**
7 **by KRS 61.878(1)(m)**

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

12 11. The Confidential Information consisting of detailed power plant
13 schematics, diagrams, drawings (civil drawings, structural drawings, equipment
14 design or condition drawings, and electrical drawings), plans, and photographs of
15 Big Rivers’ Wilson Station, Coleman Station, and Green Station and detailed
16 scope of work plans and technical specifications could be used to analyze
17 vulnerable locations in the plants or the interconnected transmission system,
18 which are public utility critical systems, and which could therefore threaten
19 public safety. Having access to such detailed schematics and diagrams could be
20 used to damage or destroy the plant structures and injure persons or property at
21 or near the plant, or to locate chemicals and other material that could be used to
22 the detriment of public safety. It could also be used to gain an understanding of

1 the workings of the power plants or other similar power plants. As disclosure of
2 this information would provide the public with a tool to analyze the
3 vulnerabilities in public utility critical systems, this information should be
4 granted confidential treatment.

5 12. The Commission recently granted confidential treatment for an
6 indefinite period for information that is identical or significantly similar to the
7 Confidential Information regarding Wilson Station and Coleman Station
8 pursuant to KRS 61.878(1)(m).⁵

9 13. The Commission also granted confidential treatment for an
10 indefinite period for information significantly similar to the Confidential
11 Information regarding Green Station pursuant to KRS 61.878(1)(m).⁶

12 14. Based on the foregoing, the Confidential Information consisting of
13 detailed power plant schematics, diagrams, drawings (civil drawings, structural
14 drawings, equipment design or condition drawings, and electrical drawings),
15 plans, and photographs of Big Rivers' Wilson Station, Coleman Station, and
16 Green Station; and detailed scope of work plans and technical specifications

⁵ See *In the Matter of: Electronic Application of Big Rivers Electric Corporation for Approval of its 2020 Environmental Compliance Plan, Authority to Recover Costs Through a Revised Environmental Surcharge and Tariff, the Issuance of a Certificate of Public Convenience and Necessity for Certain Projects, and Appropriate Accounting and Other Relief*, P.S.C. Case No. 2019-00435, Order (Dec. 27, 2021) (finding “Detailed power plant schematics, diagrams, plans, equipment and construction specifications, and photographs, if disclosed, could expose vulnerabilities in these systems.”).

⁶ 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, Orders (Mar. 5, 2021) (April 6, 2021) (both orders granting confidential protection of bid information and generation system maps and design drawings for an indefinite period).

1 is entitled to confidential treatment for an indefinite period under KRS
2 61.878(1)(m).

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

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

18 ***A. Big Rivers’ Faces Actual Competition***

19 16. Big Rivers must successfully compete in the wholesale power market
20 in order to sell excess energy to meet its members’ needs, including competition
21 in: term bilateral energy markets, day-ahead and real-time energy and ancillary

1 services markets, the annual capacity market, and forward bilateral long-term
2 wholesale agreements with utilities and industrial customers. Big Rivers' ability
3 to successfully compete in these wholesale power markets is dependent upon a
4 combination of a) obtaining the maximum price for power it sells and the best
5 contract terms, and b) keeping its cost of production as low as possible.
6 Fundamentally, if Big Rivers' cost of producing a kilowatt hour of energy
7 increases, its ability to sell that kilowatt hour in competition with other utilities is
8 adversely affected.

9 17. Big Rivers also competes for reasonably-priced credit in the credit
10 markets, and its ability to compete is directly impacted by the financial results it
11 obtains and the business risks it assumes. Any event that adversely affects Big
12 Rivers' financial results or increases its business risks may adversely affect the
13 price it pays for credit. A competitor, including potential third-party vendors,
14 armed with Big Rivers' proprietary and confidential information will be able to
15 increase Big Rivers' costs or decrease Big Rivers' revenues, which could in turn
16 affect Big Rivers' apparent creditworthiness. Impediments to Big Rivers'
17 obtaining the best contract terms could likewise affect its apparent
18 creditworthiness. A utility the size of Big Rivers that operates generation and
19 transmission facilities will always have periodic cash and borrowing requirements
20 for both anticipated and unanticipated needs. Big Rivers expects to be in the
21 credit markets on a regular basis in the future, and it is imperative that Big
22 Rivers improves and maintains its credit profile.

1 18. Accordingly, Big Rivers faces competition in the wholesale power and
2 capital markets, and the Confidential Information should be afforded confidential
3 treatment to prevent the imposition of an unfair competitive advantage to those
4 competitors.

5 ***B. The Confidential Information is Generally Recognized as Confidential***
6 ***or Proprietary***

7 19. The Confidential Information for which Big Rivers seeks confidential
8 treatment under KRS 61.878 is generally recognized as confidential or
9 proprietary under Kentucky law.

10 20. In addition to the above described Confidential Information that is
11 entitled to treatment under KRS 61.878(1)(m), the Confidential Information
12 consists of detailed itemized cost of specific construction services or equipment,⁷
13 and other commercially sensitive information contained in construction contracts
14 included in Application Exhibits 1 and 3.

15 21. The Confidential Information is not publicly available, nor is such
16 information known or disseminated within Big Rivers except to those employees
17 and professionals with a legitimate business need to know and act upon the
18 information. Under Kentucky law, its well-recognized that the information about
19 a company’s detailed inner workings, such as the Confidential Information is
20 recognized as confidential or proprietary. *See, e.g. Hoy v. Kentucky Indus.*

⁷ Application Exhibits 2 and 4, as well as the construction contracts contained in Application Exhibits 1 and 3 contain detailed itemized costs of specific services and equipment.

1 *Revitalization Authority*, 907 S.W.2d 766, 768 (y. 1995) (“[i]t does not take a
2 degree in finance to recognize that such information concerning the inner working
3 of a corporation is ‘generally recognized as confidential or proprietary’”). The
4 Court was referring to information including “projected cost of the project and the
5 specific timing of capital investment.”⁸

6 22. Moreover, the Commission has previously granted confidential
7 treatment to similar information. *See, e.g. In the Matter of Electronic Application*
8 *of Kentucky Utilities Company for an Order Authorizing the Issuance of Securities*
9 *and Assumptions of Obligations and an Order Amending and Extending Existing*
10 *Authority with Respect to Revolving Line of Credit*. P.S.C. Case No. 2018-00153,
11 Order (Aug. 22, 2018).

12 23. Based on the foregoing, the Confidential Information is generally
13 recognized as confidential or proprietary under Kentucky law.

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

16 24. Disclosure of the Confidential Information could unreasonably and
17 unnecessarily harm Big Rivers by giving interested third parties, potential
18 construction bidders, an unfair commercial advantage through insight into Big
19 Rivers’ business operations and financial strategies. As discussed above, Big
20 Rivers faces actual competition in the wholesale power and credit markets. It is
21 likely that Big Rivers would suffer competitive injury if the Confidential

⁸ *Hoy v. Kentucky Industrial Revitalization Authority*, 907 S.W.2d 766, 768 (Ky. 1995).

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

3 25. Such disclosure would allow prospective construction bidders
4 potentially to use this sensitive information to submit construction bids higher
5 than what they might otherwise provide if the information were not publically
6 available. The estimates shown in Application Exhibits 2 and 4 and the cost
7 information contained in the construction contracts in Application Exhibits 1 and
8 3 are detailed and itemize, giving potential vendors insight into how much Big
9 Rivers is willing to pay for specific work, setting a benchmark that would not exist
10 but for the disclosure of this sensitive information. In this case, potential bidders
11 would become competitors to Big Rivers as contemplated by KRS 61.878(1)(c)(1),
12 as Big Rivers and potential bidders each have competing interests to secure the
13 most favorable cost and terms.⁹ This could impair Big Rivers' ability to receive
14 the best proposals and procure the best contracts terms in future negotiations.

15 26. These effects were recognized in P.S.C. Case No. 2003-00054, in
16 which the Commission granted confidential treatment to bids submitted to Union
17 Light, Heat & Power ("ULH&P"). ULH&P argued, and the Commission implicitly
18 accepted, that if the bids it received were publicly disclosed, contractors in the
19 future could use the bids as a benchmark, which would likely lead to the
20 submission of higher bids. *In the Matter of Application of the Union Light, Heat*

⁹ 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 *and Power Company for Confidential Treatment*, P.S.C. Case No. 2003-00054,
2 Order (Aug. 4, 2003); *see also In the Matter of An Examination of the Application*
3 *of the Fuel Adjustment Clause of East Kentucky Power Cooperative, Inc. from May*
4 *1, 2007 through October 31, 2007*, P.S.C. Case No. 2007-00523, Letter (Feb. 27,
5 2008).

6 27. Big Rivers is actively engaged in the construction of Project 12 and
7 the Green Station Conversion, as well as other capital projects including those
8 identified in Big Rivers' 2020 Environmental Compliance Plan.¹⁰

9 28. Big Rivers is also actively engaged in negotiating with potential
10 counterparties in connection with the construction of capital projects, including
11 the construction of a new headquarters facility.¹¹ Further, Big Rivers anticipates
12 engaging in negotiations with counterparties in connection with additional capital
13 projects in the near future. If confidential treatment of the confidential
14 negotiated terms of the contracts or other commercially sensitive information
15 contained in the construction contracts in Application Exhibits 1 and 3 filed with
16 this request is denied, potential counterparties would know that such information
17 could be disclosed, which could reveal information to their competitors about their

¹⁰ See *In the Matter of: Electronic Application of Big Rivers Electric Corporation for Approval of its 2020 Environmental Compliance Plan, Authority to Recover Costs Through a Revised Environmental Surcharge and Tariff, the Issuance of a Certificate of Public Convenience and Necessity for Certain Projects, and Appropriate Accounting and Other Relief*, P.S.C. Case No. 2019-00435.

¹¹ See *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*, P.S.C. Case No. 2021-00314.

1 competitiveness. Because many companies would be reluctant to have
2 confidential information or concessions disclosed in their respective competitive
3 markets, public disclosure of the Confidential Information in this case would
4 likely reduce the pool of counterparties willing to negotiate with Big Rivers,
5 reducing Big Rivers' ability to receive the best proposals and contracts for the best
6 possible terms. This could result in harm to Big Rivers and its members through
7 increased costs of service. Further, any competitive pressure that adversely
8 affects Big Rivers' revenue and margins could make the company appear less
9 creditworthy and thus impair its ability to compete in the credit markets.

10 29. In P.S.C. Case No. 2003-00054, the Commission granted confidential
11 protection for bids submitted to Union Light Heat & Power (“*ULH&P*”).
12 *ULH&P*'s argued, and the Commission implicitly accepted, that the bidding
13 contractors would not want their bid information publicly disclosed, and that
14 disclosure would reduce the contractor pool available to *ULH&P*, which would
15 drive up *ULH&P*'s costs, hurting its ability to compete with other gas suppliers.
16 *In the Matter of: Application of the Union Light, Heat and Power Company for*
17 *Confidential Treatment*, Order, P.S.C. Case No. 2003-00054 (August 4, 2003).
18 Similarly, in *Hoy v. Kentucky Indus. Revitalization Authority*, the Kentucky
19 Supreme Court found that without protection for confidential information
20 provided to a public agency, “companies would be reluctant to apply for
21 investment tax credits for fear the confidentiality of financial information would

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

3 30. Accordingly, the public disclosure of the information that Big Rivers
4 seeks to protect pursuant to KRS 61.878 would provide Big Rivers' competitor
5 with an unfair commercial advantage.

6 **III. Time Period**

7 31. Big Rivers requests that the Confidential Information consisting of
8 detailed power plant schematics, diagrams, drawings (civil drawings, structural
9 drawings, equipment design or condition drawings, and electrical drawings),
10 plans, and photographs of Big Rivers' Wilson Station, Coleman Station, and
11 Green Station; and detailed scope of work plans and technical specifications
12 remain confidential indefinitely for the reasons stated above. *See* 807 KAR 5:001
13 Section 13(2)(a)(2),.

14 32. Big Rivers requests the remaining Confidential Information remain
15 confidential for a period of five (5) years from the date of this motion, at which
16 time the Confidential Information should be sufficiently outdated so that it could
17 not be used to competitively disadvantage Big Rivers. *See* 807 KAR 5:001 Section
18 13(2)(a)(2).

19 **IV. Conclusion**

20 33. Based on the foregoing, the Confidential Information is entitled to
21 confidential treatment pursuant to 807 KAR 5:001 Section 13 and KRS 61.878. If

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

5

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

8 On this the 26th day of January, 2022.

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Respectfully submitted,

/s/ Senthia Santana

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