

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

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4
5 **IN THE MATTER OF:**

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ELECTRONIC APPLICATION OF)	
BIG RIVERS ELECTRIC CORPORATION)	
FOR A CERTIFICATE OF PUBLIC)	Case No.
CONVENIENCE AND NECESSITY TO)	2022-00012
CONSTRUCT A 161 KV TRANSMISSION LINE)	
IN HENDERSON COUNTY, KENTUCKY)	

MOTION FOR CONFIDENTIAL TREATMENT

8
9 1. Big Rivers Electric Corporation ("*Big Rivers*") hereby moves the
10 Kentucky Public Service Commission (the "*Commission*"), pursuant to KRS
11 61.878 and 807 KAR 5:001 Section 13, to grant confidential treatment to certain
12 information contained in Big Rivers' Responses to the Commission Staff's First
13 Request for Information being filed contemporaneously with this motion.

14 2. The information for which Big Rivers confidential treatment is
15 hereinafter referred to as the "Confidential Information." The Confidential
16 Information consists of:

17 a) Negotiated terms of a Memorandum of Understanding between
18 Big Rivers, Pratt Paper (KY), LLC , ("*Pratt*") and Kenergy
19 Corp. ("*Kenergy*") in connection with a retail electric service
20 agreement between Pratt and Kenergy and corresponding letter

1 wholesale agreement between Kenergy and Big Rivers (the “*Pratt*
2 *Agreement*”).¹

3 b) Information related to Pratt’s private information, including its
4 projected energy usage for a new paper mill and box factory
5 locating in Henderson, Kentucky, and the cost it will pay for
6 power.

7 c) Big Rivers’ internal projections of
8 i. its margins and the Net Present Value (“*NPV*”) of the benefits
9 to its Members from the Pratt Agreement and
10 ii. market energy and capacity prices.

11 3. Pursuant to the Commission’s March 24, 2020, Order in *In the*
12 *Matter of Electronic Emergency Docket Related to the Novel Coronavirus COVID-*
13 *19*, Case No. 2020-00085 (“*Case No. 2020-00085*”), one (1) copy of the Confidential
14 Information marked “CONFIDENTIAL,” is being filed with this motion via
15 electronic mail sent to PSCED@ky.gov.

16 4. One (1) copy of the filing, with the Confidential Information
17 redacted, is being electronically filed with this motion. *See* 807 KAR 5:001
18 Section 13(2)(b).

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

¹ Big Rivers will file the retail electric service agreement between Pratt and Kenergy (“Retail Agreement”) and the corresponding letter agreement between Kenergy and Big Rivers (“Wholesale Agreement”) with the Commission immediately after the parties have completed and executed the contracts.

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

6 **I. The Confidential Information is entitled to confidential**
7 **treatment based upon KRS 61.878(1)(a)**

8 7. KRS 61.878(1)(a) explicitly grants confidential protection to “[p]ublic
9 records containing information of a personal nature where the public disclosure
10 thereof would constitute a clearly unwarranted invasion of personal privacy.”
11 Here, Pratt is constructing and plans to operate a paper mill and box factory in
12 Henderson, Kentucky, and the Confidential Information reveals its proprietary
13 and otherwise private information, including its projected power usage and the
14 cost it will pay for power. Because public disclosure of the Confidential
15 Information would constitute an unwarranted invasion of this customer’s privacy,
16 this Confidential Information should be granted confidential treatment. *See* Ky.
17 Op. Atty. Gen. 96-ORD-176 (August 20, 1996) (holding Kroger Company’s utility
18 bills exempt from disclosure under KRS 61.878(1)(a)); *In the Matter of:*
19 *Application of Kentucky Utilities Company for an Adjustment of its Electric Rates,*
20 P.S.C. Case No. 2012-00221, Order (July 25, 2013) (holding customer names,
21 account numbers, and usage information exempt from disclosure under KRS
22 61.878(1)(a)); *In the Matter of: Electronic Application of Big Rivers Electric*

1 *Corporation for Annual Review of Its MRSB Charge for Calendar Year 2021,*
2 P.S.C. Case No. 2022-00028, Order (March 16, 2022) (granting confidential
3 treatment for customer-specific usage and billing information for an indefinite
4 time period).

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

7 8. The Confidential Information is also entitled to confidential
8 treatment based upon KRS 61.878(1)(c)(1), which protects “records confidentially
9 disclosed to an agency or required by an agency to be disclosed to it, generally
10 recognized as confidential or proprietary, which if openly disclosed would permit
11 an unfair commercial advantage to competitors of the entity that disclosed the
12 records.” *See* 807 KAR 5:001 Section 13(2)(a)(1). Subsection A *infra* describes
13 how Big Rivers operates in competitive environments; Subsection B *infra* explains
14 that the Confidential Information is generally recognized as confidential or
15 proprietary; and Subsection C *infra* demonstrates that public disclosure of the
16 Confidential Information would permit an unfair commercial advantage to Big
17 Rivers’ competitors. As such, the Commission should grant confidential
18 treatment to the Confidential Information.

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

20 9. Big Rivers must successfully compete in the wholesale power
21 markets to sell energy it produces in excess of its needs. Big Rivers’ ability to

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

7 10. 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 and the business risks it assumes. Any event that adversely affects Big
10 Rivers' financial results or increases its business risks may adversely affect the
11 price it pays for credit. Impediments to Big Rivers' obtaining the best contract
12 terms could likewise affect its apparent creditworthiness. A utility the size of Big
13 Rivers that operates generation and transmission facilities will always have
14 periodic cash and borrowing requirements for both anticipated and unanticipated
15 needs. Big Rivers expects to be in the credit markets on a regular basis in the
16 future, and it is imperative that Big Rivers improve and maintain its credit
17 profile.

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

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

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

6 13. As noted above, the Confidential Information consists of
7 confidential, negotiated terms of a Memorandum of Understanding and the
8 pending retail electric service agreement between Pratt and Kenergy and
9 corresponding letter agreement between Kenergy and Big Rivers. KRS 278.160(3)
10 specifically recognizes that terms of a special contract are not required to be
11 publicly disclosed if such terms are entitled to treatment under KRS
12 61.878(1)(c)(1).

13 14. The Confidential Information also consists of Big Rivers' projections
14 of its margins, the Net Present Value of the benefits to its Members from the
15 Pratt Agreement, and future market energy and capacity prices. That
16 information, and the confidential contract terms, are indicative of the market
17 conditions Big Rivers expects to encounter and the prices and terms on which it is
18 willing to buy and sell power. It is clear that the disclosure of this information
19 would disclose detailed inner workings of Big Rivers.

20 15. Under Kentucky law, it is well recognized that information about a
21 company's detailed inner workings, such as the Confidential Information here, is
22 generally recognized as confidential or proprietary. *See, e.g., Hoy v. Kentucky*

1 *Indus. Revitalization Authority*, 907 S.W.2d 766, 768 (Ky. 1995) (“[i]t does not
2 take a degree in finance to recognize that such information concerning the inner
3 workings of a corporation is ‘generally recognized as confidential or proprietary’”).

4 16. Moreover, the Commission has recognized in previous cases the
5 confidentiality of customer information similar to the Confidential Information
6 related to Pratt’s projected power usage and cost of power. *See, e.g., In the Matter*
7 *of: Riverside Generating Company, LLC v. Kentucky Power Company*, Order,
8 P.S.C. Case No. 2017-00472 (May 16, 2019) (granting confidential treatment to
9 customer specific information relating to purchases and transmission of electricity
10 for an indefinite period); *In the Matter of: Sanctuary of Church v. Louisville Gas*
11 *and Electric Company*, Order, P.S.C. Case No. 2018-00181 (January 8, 2019)
12 (granting confidential treatment for an indefinite period to detailed account and
13 usage information of a non-party); *In the Matter of: Electronic Application of Big*
14 *Rivers Electric Corporation for Approval to Modify Its MRSM Tariff, Cease*
15 *Deferring Depreciation Expenses, Establish Regulatory Assets, Amortize*
16 *Regulatory Assets, and Other Appropriate Relief*, Order, P.S.C. Case No. 2020-
17 00064 (June 30, 2020) (granting confidential treatment for information that
18 would reveal individual customers’ power usage).

19 17. The Confidential Information is not publicly available, is not
20 disseminated within Big Rivers except to those employees and professionals with
21 a legitimate business need to know and act upon the information, and is not
22 disseminated to others without a legitimate need to know and act upon the

1 information. As such, the Confidential Information is generally recognized as
2 confidential and proprietary.

3 18. Based on the foregoing, the Confidential Information is generally
4 recognized as confidential or proprietary under Kentucky law.

5 ***C. Disclosure of the Confidential Information Would***
6 ***Permit an Unfair Commercial Advantage to Big***
7 ***Rivers' Competitors***

8 19. Disclosure of the Confidential Information would permit an unfair
9 commercial advantage to Big Rivers' competitors. As discussed *supra*, Big Rivers
10 faces actual competition in the wholesale power and credit markets. It is likely
11 that Big Rivers' ability to compete in these markets would be adversely affected if
12 the Confidential Information were publicly disclosed, and Big Rivers seeks
13 protection from such competitive injury.

14 20. Big Rivers is actively engaged in buying and selling power in the
15 wholesale power markets and expects to engage in negotiations with
16 counterparties in the future. Additionally, it is actively engaged in discussions
17 with economic development prospects. If confidential treatment of the
18 confidential terms of the Pratt Agreement is denied, potential counterparties
19 would know that the confidential terms of their agreement would be publicly
20 disclosed, which could reveal information to their competitors about their
21 competitiveness. Because many companies would be reluctant to have such
22 information disclosed, public disclosure of the Confidential Information in this
23 case would likely reduce the pool of counterparties willing to negotiate with Big

1 Rivers, reducing Big Rivers' ability to buy and sell power at favorable prices and
2 its ability to secure economic development prospects.

3 21. Public disclosure of the Confidential Information would provide
4 potential purchasers of energy or capacity from Big Rivers; potential sellers of
5 energy or capacity to Big Rivers; and other providers competing against Big
6 Rivers for purchases or sales of energy or capacity with insight into the terms
7 under which Big Rivers is willing to buy and sell energy and capacity. These
8 market participants could use this information as a benchmark or to manipulate
9 the bidding process, leading to higher costs, lower revenues, or less favorable
10 terms to Big Rivers, hurting Big Rivers' ability to compete in the wholesale power
11 and credit markets. Thus, Big Rivers' competitiveness will be adversely affected
12 if other suppliers are given such an unfair competitive advantage or if potential
13 counterparties are given a negotiating advantage.

14 22. Further, any competitive pressure that adversely affects Big Rivers'
15 revenue and margins could make the company appear less creditworthy, and thus
16 impair its ability to compete in the credit markets.

17 23. Accordingly, the public disclosure of the information that Big Rivers
18 seeks to protect pursuant to KRS 61.878 would provide competitors of Big Rivers
19 with an unfair commercial advantage.

20 **III. Time Period**

21 24. Big Rivers requests that the Confidential Information remain
22 confidential indefinitely because it reveals private customer data and confidential

1 contract terms, which public disclosure of such information would cause
2 competitive harm to Big Rivers for the reasons above, for so long as Big Rivers is
3 buying and selling power or competing for economic development prospects. All
4 other Confidential Information is intertwined with the contract terms and private
5 customer data and cannot be publicly disclosed without revealing the confidential
6 contract terms and customer data. *See* 807 KAR 5:001 Section 13(2)(a)(2).

7 **IV. Conclusion**

8 25. Based on the foregoing, the Confidential Information is entitled to
9 confidential treatment. If the Commission disagrees that Big Rivers is entitled to
10 confidential treatment, due process requires the Commission to hold an
11 evidentiary hearing. *See Utility Regulatory Com'n v. Kentucky Water Service Co.,*
12 *Inc.*, 642 S.W.2d 591 (Ky. App. 1982).

13 WHEREFORE, Big Rivers respectfully request that the Commission
14 classify and treat as confidential the Confidential Information.

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1 On this the 21st day of March, 2022.

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Respectfully submitted,

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