

1 COMMONWEALTH OF KENTUCKY
2 BEFORE THE PUBLIC SERVICE COMMISSION
3

4 In the Matter of:
5

ELECTRONIC APPLICATION OF)
BIG RIVERS ELECTRIC CORPORATION) Case No.
FOR ANNUAL REVIEW OF ITS MRSM) 2022-00028
CHARGE FOR CALENDAR YEAR 2021)

6
7
8
9
10 **MOTION FOR CONFIDENTIAL TREATMENT**
11

12 1. Big Rivers Electric Corporation (“*Big Rivers*”) hereby moves the
13 Kentucky Public Service Commission (the “*Commission*”), pursuant to 807 KAR
14 5:001 Section 13 and KRS 61.878, to grant confidential treatment of certain
15 information Big Rivers is providing in its Response to the Commission Staff’s
16 First Request for Information, dated March 22, 2022, submitted
17 contemporaneously herewith in the above-styled matter. The information for
18 which Big Rivers seeks confidential treatment is hereinafter referred to as the
19 “*Confidential Information.*”

20 2. The Confidential Information consists of (1) customer specific usage
21 data and billing information and (2) negotiated terms of special contracts,
22 contained in an attachment to Big Rivers’ response to Item No. 3 of the
23 Commission Staff’s First Request for Information dated March 22, 2022. This
24 attachment is the Application, Smith Testimony, Exhibit Smith-2 filed in the

1 above-styled matter, in Excel spreadsheet format (the “*Exhibit Smith-2*
2 *Attachment*” or “*Attachment*”).

3 3. Pursuant to the Commission’s March 24, 2020, Order in *In the*
4 *Matter of Electronic Emergency Docket Related to the Novel Coronavirus COVID-*
5 *19*, Case No. 3 2020-00085 (“*Case No. 2020-00085*”), one (1) copy of the
6 Confidential Information highlighted with transparent ink, printed on yellow
7 paper, or otherwise marked “CONFIDENTIAL,” is being filed with this motion by
8 electronic mail. A copy of those pages, with the Confidential Information
9 redacted, is being electronically filed with responses accompanying this motion.

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

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

17 6. As discussed below, the Confidential Information is entitled to
18 confidential treatment based upon KRS 61.878(1)(a) and KRS 61.878(1)(c)(1). 807
19 KAR 5:001 Section 13(2)(a)(1).

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

3 7. KRS 61.878(1)(a) protects “[p]ublic records containing information of
4 a personal nature where the public disclosure thereof would constitute a clearly
5 unwarranted invasion of personal privacy.”

6 8. The Confidential Information in the Attachment reveals the power
7 usage and billing information of individual large industrial retail customers on
8 the Big Rivers system and negotiated terms of special contracts. Because these
9 customers and the counterparties to the contracts are not parties to this
10 proceeding, publicly revealing such information would constitute a clearly
11 unwarranted invasion of personal privacy.

12 9. Moreover on March 9, 2021, the Commission granted confidential
13 treatment to Nucor Corporation’s 2020 power usage data and billing information
14 for an indefinite period in Case No. 2021-00061, *In the Matter of: Electronic*
15 *Application of Big Rivers Electronic for Annual Review of its MRSM Charge for*
16 *Calendar Year 2020* (“Big Rivers 2020 MRSM Case”), finding “the designated
17 material is generally recognized as private, confidential, or proprietary, it
18 therefore meets the criteria for confidential treatment and is exempted from
19 public disclosure pursuant to 807 KAR 5:001, Section 13, KRS 61,878(1), and KRS
20 61.878(1)(2)(1).” Additionally, on December 22, 2021, the Commission granted
21 confidential treatment for similar private information of Aleris Rolled Products,
22 Inc. (“Aleris”) redacted from Big Rivers’ April 1, 2020 and March 31, 2021 annual

1 reports filed in Case No. 2016-00117, finding “the redacted information, if
2 disclosed, would disadvantage BREC with its competitors, who could use the
3 information in the energy market with knowledge of BREC’s energy purchase
4 history” and “public disclosure of this information could harm BREC in
5 negotiating future special contracts.”¹ As such, Big Rivers requests confidential
6 treatment for the customer-specific usage data and billing information and
7 negotiated terms of special contracts in order to protect the customer’s and
8 counterparties’ proprietary, business-sensitive, or otherwise private information.

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

11 10. The Confidential Information is entitled to confidential treatment
12 based upon KRS 61.878(1)(c)(1), which protects “records confidentially disclosed to
13 an agency or required by an agency to be disclosed to it, generally recognized as
14 confidential or proprietary, which if openly disclosed would permit an unfair
15 commercial advantage to competitors of the entity that disclosed the records.”
16 807 KAR 5:001 Section 13(2)(a)(1).

17 11. In support for this ground of granting confidential treatment,
18 Subsection A infra describes how Big Rivers operates in competitive
19 environments; Subsection B infra explains that the Confidential Information is

¹ See *In the Matter of: Joint Application of Kenergy Corp. and Big Rivers Electric Corporation for Approval of Contracts*, Order, Case. No. 2016-00117 (Ky. PSC Dec. 22, 2021).

1 generally recognized as confidential or proprietary; and Subsection C infra
2 demonstrates that public disclosure of the Confidential Information would permit
3 an unfair commercial advantage to Big Rivers' competitors. As such, the
4 Commission should grant confidential treatment of the Confidential Information.

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

6 12. Big Rivers must successfully compete in the wholesale power market
7 in order to sell excess energy to meet its members' needs, including competition
8 in: term bilateral energy markets, the day-ahead and real time energy and
9 ancillary services markets, the annual capacity market, and forward bilateral
10 long-term wholesale agreements with utilities and industrial customers. Big
11 Rivers' ability to successfully compete in the wholesale power market is
12 dependent upon an effective combination of a) obtaining the maximum price for
13 the power it sells and the best contract terms, and b) keeping its cost of
14 production as low as possible. Fundamentally, if Big Rivers' cost of producing a
15 kilowatt hour or its business risk increases, its ability to sell that kilowatt hour in
16 competition with other utilities is adversely affected.

17 13. Big Rivers also competes for reasonably-priced credit in the credit
18 markets, and its ability to compete is directly impacted by the financial results it
19 obtains and the business risks it assumes. Any event that adversely affects Big
20 Rivers' financial results or increases its business risks may adversely affect the
21 price it pays for credit. A competitor armed with Big Rivers' proprietary and
22 confidential information will be able to increase Big Rivers' costs or decrease Big

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

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

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

14 15. The Confidential Information for which Big Rivers seeks confidential
15 treatment under KRS 61.878(1)(c)(1) is generally recognized as confidential or
16 proprietary under Kentucky law.

17 16. As discussed below the Confidential Information relates to the inner
18 workings of Big Rivers' business. Information such as this which bears upon a
19 company's detailed inner workings is generally recognized as confidential or
20 proprietary. *See, e.g., Hoy v. Kentucky Indus. Revitalization Authority*, 907
21 S.W.2d 766, 768 (Ky. 1995) ("It does not take a degree in finance to recognize that

1 such information concerning the inner workings of a corporation is ‘generally
2 recognized as confidential or proprietary”).

3 17. Moreover, KRS 278.160(3) specifically recognizes that terms of a
4 special contract are not required to be publicly disclosed if such terms are entitled
5 to treatment under KRS 61.878(1)(c)(1), and the Commission has previously
6 granted confidential treatment to similar information.² Additionally, the
7 Commission has recognized the confidentiality of customer information in
8 previous cases.³

9 18. The Confidential Information is not publicly available, is not
10 disseminated within Big Rivers except to those employees and professionals with

² See *In the Matter of: Big Rivers Electric Corporation Filing of Wholesale Contracts Pursuant to KRS 278.180 and KAR 5:001 §13*, Order, Case No. 2014-00134, (Ky. PSC Sept. 10, 2014) (granting confidential treatment to the confidential terms of the Nebraska contracts for an indefinite time period); *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*, Order, Case No. 2016-00306, (Ky. PSC Jan. 2, 2019) (granting confidential treatment to the confidential terms of the KyMEA contract for an indefinite time period); *In the Matter of: Joint Application of Big Rivers Electric Corporation and Meade County Rural Electric Cooperative Cooperation for Approval of Contracts for Electric Service with Nucor Corporation*, Orders, Case No. 2019-00365, (Ky. PSC Jan. 22, 2020) (granting confidential treatment to the confidential terms of the Nucor contract for an indefinite time period).

³ See *In the Matter of: Electronic Application of Big Rivers Electric Corporation for Approval to Modify Its MRSM Tariff, Cease Deferring Depreciation Expenses, Establish Regulatory Assets, Amortize Regulatory Assets, and Other Appropriate Relief*, Order, Case No. 2020-00064, (Ky. PSC June 30, 2020) (granting Confidential Treatment of information related to individual customer names and usage in Big Rivers’ responses to the Commission Staff’s First Requests for Information, Attorney General’s First Set of Data Requests and KIUC’s First Set of Data Requests); *In the Matter of: Sanctuary of Church v. Louisville Gas and Electric Company*, Order, Case No. 2018-00181 (Ky. PSC January 8, 2019) (granting confidential treatment for an indefinite period to detailed account and usage information of a non-party); and *In the Matter of: Electronic Application of Big Rivers Electric Corporation for Annual Review of its MRSM Charge for Calendar Year 2021*, Order, Case No. 2022-00028 (Ky. PSC Mar. 16, 2022) (granting confidential treatment for an indefinite period to customer-specific power usage data and billing information).

1 a legitimate business need to know and act upon the information, and is not
2 disseminated to the others without a legitimate need to know and act upon the
3 information.

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

6 19. Disclosure of the Confidential Information would afford Big Rivers'
7 competitors an unfair commercial advantage. As discussed above, Big Rivers
8 faces actual competition in the power markets and in the credit markets. It is
9 likely that Big Rivers would suffer an economic disadvantage in negotiating
10 future transactions and thus competitive injury if the Confidential Information
11 were publicly disclosed, and the information should therefore be subject to
12 confidential treatment.

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

1 investment tax credits for fear the confidentiality of financial information would
2 be compromised. *Hoy v. Kentucky Indus. Revitalization Authority*, 907 S.W.2d
3 766, 769 (Ky. 1995). In Big Rivers' case, if confidential treatment of the
4 Confidential Information is denied, potential counterparties on future special
5 contracts or future economic development prospects would know that their
6 confidential information would be publicly disclosed. Because many companies
7 would be reluctant to have such information disclosed, public disclosure of the
8 Confidential Information would likely reduce the pool of counterparties willing to
9 deal with Big Rivers, reducing Big Rivers' ability to sell power and impairing its
10 ability to compete in the wholesale power and credit markets.

11 21. Disclosure of the Confidential Information could also unreasonably
12 and unnecessarily harm Big Rivers by giving interested third parties, potential
13 counterparties and competitors, an unfair commercial advantage through
14 knowledge of Big Rivers' energy purchase and sale history and insight into Big
15 Rivers' business operations and financial strategies.

16 22. Accordingly, the public disclosure of the Confidential Information
17 would provide competitors of Big Rivers with an unfair commercial advantage.

18 **III. Time Period**

19 23. Big Rivers requests that the Confidential Information remain
20 confidential indefinitely for the reasons stated above, and for the same reasons
21 the Commission granted indefinite confidential treatment to similar information

1 in Case No. 2021-00061. *See In the Matter of: Electronic Application of Big*
2 *Rivers Electronic for Annual Review of its MRSM Charge for Calendar Year 2020,*
3 *Order (Ky. P.S.C. Mar. 9, 2021) (granting confidential treatment for an indefinite*
4 *period for customer-specific usage data and billing information; and power*
5 *purchases from and sales to specific counterparties). 807 KAR 5:001 Section*
6 *13(2)(a)(2).*

7 **IV. Conclusion**

8 24. Based on the foregoing, the Confidential Information is entitled to
9 confidential treatment. If the Commission disagrees, then the Commission
10 should hold an evidentiary hearing to protect to Big Rivers' due process rights
11 and to supply the Commission with a complete record to enable it to reach a
12 decision with regard to this matter. *See Util. Reg. Comm'n v. Ky. Water Serv. Co.,*
13 *Inc. 642 S.W.2d 591 (Ky. App. 1982).*

14

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

3

4 On this the 31st day of March 2022.

5

Respectfully submitted,

6

/s/ Senthia Santana

7

8

Senthia Santana

9

Tyson Kamuf

10

Whitney Kegley

11

201 Third Street, P.O. Box 24

12

Henderson, Kentucky 42419-0024

13

Phone: (270) 827-2561 Fax: (270) 844-6417

14

Email: senthia.santana@bigrivers.com

15

Email: tyson.kamuf@bigrivers.com

16

Email: whitney.kegley@bigrivers.com

17

18

19

20

21

Counsel for Big Rivers Electric Corporation