

1 otherwise marked “CONFIDENTIAL,” is being filed with this motion via
2 electronic mail sent to PSCED@ky.gov. One (1) copy of the documents with the
3 Confidential Information redacted is also being electronically filed with this
4 request. 807 KAR 5:001 Section 13(2)(a)(3).

5 4. A copy of this motion with the Confidential Information redacted has
6 been served on all parties to this proceeding through the use of electronic filing.
7 807 KAR 5:001 Section 13(2)(b).

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

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

15 **I. The Confidential Information is entitled to confidential**
16 **treatment based upon KRS 61.878(1)(c)(1)**

17 7. Under the Kentucky Open Records Act, the Commission is entitled
18 to withhold from public disclosure “records confidentially disclosed to an agency
19 or required by an agency to be disclosed to it, generally recognized as confidential
20 or proprietary, which if openly disclosed would permit an unfair commercial
21 advantage to competitors of the entity that disclosed the records.” *See* KRS
22 61.878(1)(c)(1).

1 Lower revenues and any events that adversely affect Big Rivers' margins will
2 adversely affect its financial results and potentially impact the price it pays for
3 credit. A competitor armed with Big Rivers' proprietary and confidential
4 information will be able to increase Big Rivers' costs or decrease Big Rivers'
5 revenues, which could in turn affect Big Rivers' apparent creditworthiness. A
6 utility the size of Big Rivers that operates generation and transmission facilities
7 will always have periodic cash and borrowing requirements for both anticipated
8 and unanticipated needs. Big Rivers expects to be in the credit markets on a
9 regular basis in the future, and it is imperative that Big Rivers improve and
10 maintain its credit profile.

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

15 ***B. The Confidential Information is Generally Recognized as***
16 ***Confidential or Proprietary***

17 12. The Confidential Information for which Big Rivers seeks confidential
18 treatment under KRS 61.878 is generally recognized as confidential or
19 proprietary under Kentucky law.

20 13. As noted above, the Confidential Information protected under KRS
21 61.878(1)(c)(1) consists of or reveals information about confidential fuel supply
22 bids to Big Rivers and Big Rivers' analysis of those bids. The Confidential

1 Information is precisely the sort of information meant to be protected by KRS
2 61.878(1)(c)(1).

3 14. The Commission has often found that information similar to the
4 Confidential Information, relating to competitive bidding is generally recognized
5 as confidential and proprietary. *See, e.g., In the Matter of Application of Union*
6 *Light, Heat and Power Company for Confidential Treatment*, P.S.C. Case No.
7 2003-00054, Order (August 4, 2003).¹ In fact, the Commission has granted
8 confidential treatment to the bid tabulation sheets that Big Rivers filed in
9 previous reviews of its fuel adjustment clause. *See, e.g.,* letter from the
10 Commission dated September 22, 2010, in P.S.C. Case No. 2010-00269 and more
11 recently in P.S.C. Case No. 2019-00231.² While not presented in separate bid
12 tabulation sheets, the Confidential Information contained in Big Rivers' amended
13 response to Item 5, represents the confidential bid tabulation and evaluation
14 related to solicitations.

¹ 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).

² *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 and Big Rivers' analysis of the bids, terms of future off-system sales and private usage information of individual retail customers).

1 15. In *Hoy v. Kentucky Industrial Revitalization Authority*, the Kentucky
2 Supreme Court held that financial information submitted by General Electric
3 Company with its application for investment tax credits was not subject to
4 disclosure simply because it had been filed with a state agency. 907 S.W.2d 766,
5 4 (Ky. 1995). The Court applied the plain meaning rule to KRS 61.878(1)(c)(1),
6 and reasoned: “[i]t does not take a degree in finance to recognize that such
7 information concerning the inner workings of a corporation is ‘generally
8 recognized as confidential or proprietary.’” *Id.* at 768. Similarly, in *Marina*
9 *Management Services, Inc. v. Commonwealth Cabinet for Tourism*, the Court held:
10 “[t]hese are records of privately owned marina operators, disclosure of which
11 would unfairly advantage competing operators. The most obvious disadvantage
12 may be the ability to ascertain the economic status of the entities without the
13 hurdles systematically associated with acquisition of such information about
14 privately owned organizations.” 906 S.W.2d 318, 319 (Ky. 1995).

15 16. In sum, the Confidential Information is not publicly available, is not
16 disseminated within Big Rivers except to those employees and professionals with
17 a legitimate business need to know and act upon the information, and is not
18 disseminated to others without a legitimate need to know and act upon the
19 information. As such, the Confidential Information details the “inner workings”
20 of Big Rivers’ and is generally recognized as confidential and proprietary.

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

3 17. Disclosure of the Confidential Information that is protected under
4 KRS 61.878(1)(c)(1) would permit an unfair commercial advantage to Big Rivers'
5 competitors. As discussed above, Big Rivers faces actual competition in the
6 wholesale power market and in the credit markets, and it is likely that Big Rivers
7 would suffer competitive injury if the Confidential Information were publicly
8 disclosed.

9 18. Given the nature of the Confidential Information, its disclosure
10 would provide other market participants, suppliers, and competitors insight into
11 the prices and terms at which Big Rivers is willing to buy fuel. In turn, the
12 Confidential Information could be used by potential fuel suppliers to manipulate
13 the bidding process, leading to higher costs to Big Rivers, thereby placing it at an
14 unfair competitive disadvantage in the wholesale power market and credit
15 markets.

16 19. Accordingly, public disclosure of the information that Big Rivers
17 seeks to protect pursuant to KRS 61.878(1)(c)(1) would provide Big Rivers'
18 competitors with an unfair commercial advantage.

19 **IV. Time Period**

20 20. Big Rivers requests that all other Confidential Information remain
21 confidential for a period of five (5) years from the date of this motion, which will

1 allow sufficient time for the information to become sufficiently outdated to no
2 longer pose a competitive risk to Big Rivers. 807 KAR 5:001 Section 13(2)(a)(2).

3 **V. Conclusion**

4 21. Based on the foregoing, the Confidential Information is entitled to
5 confidential treatment, pursuant to 807 KAR 5:001 Section 13 and KRS 61.878. If
6 the Commission disagrees that Big Rivers' Confidential Information is entitled to
7 confidential treatment, due process requires the Commission to hold an
8 evidentiary hearing. *See Utility Regulatory Comm'n v. Kentucky Water Serv. Co.,*
9 *Inc.*, 642 S.W.2d 591 (Ky. App. 1982).

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

12 On this the 19th day of May, 2022.

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

Respectfully submitted,

/s/ Senthia Santana

Senthia Santana
Tyson Kamuf
Whitney Kegley
Big Rivers Electric Corporation
201 Third Street
P.O. Box 24
Henderson, Kentucky 42419-0024
Phone: (270) 827-2561
Facsimile: (270) 844-6417
senthia.santana@bigrivers.com
tyson.kamuf@bigrivers.com
whitney.kegley@bigrivers.com

Counsel for Big Rivers Electric
Corporation