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

*In the Matter of:*

<b>AN ELECTRONIC EXAMINATION OF THE APPLICATION OF THE FUEL ADJUSTMENT CLAUSE OF BIG RIVERS ELECTRIC CORPORATION FROM NOVEMBER 1, 2021 THROUGH APRIL 30, 2022</b>	) ) ) ) ) )	<b>Case No. 2022-00268</b>
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**MOTION OF BIG RIVERS ELECTRIC CORPORATION FOR  
CONFIDENTIAL TREATMENT**

1. Big Rivers Electric Corporation (“*Big Rivers*”) hereby moves the Public Service Commission of Kentucky ( the “*Commission*”), pursuant to 807 KAR 5:001 Section 13, KRS 61.878 and KRS 278.160(3) to grant confidential treatment to certain information contained in Big Rivers’ responses to Items 12 and 13 of the Commission Staff’s First Request in Appendix B of the Commission’s September 13, 2022, Order and in the Direct Testimony of Natalie R. Hankins filed in this matter.
2. The information for which Big Rivers seeks confidential treatment is hereinafter referred to as the “*Confidential Information.*” The Confidential Information consists of:
  - (a) terms of special contracts and other non-member sales and purchases, contained in Big Rivers’ response to Item 12;

1 (b) private usage data of individual retail customers and sales to  
2 non-members, contained in the attachment Big Rivers’ response  
3 to Item 13; and

4 (c) information related to Big Rivers’ projected capacity position,  
5 contained in the Direct Testimony of Natalie R. Hankins.

6 3. Pursuant to the Commission’s Emergency Orders in *In the Matter of:*  
7 *Electronic Emergency Docket Related to the Novel Coronavirus Covid-19*, Case No.  
8 2020-00085, one (1) copy of the Confidential Information highlighted in yellow or  
9 otherwise marked “CONFIDENTIAL,” is being filed with this motion via  
10 electronic mail sent to [PSCED@ky.gov](mailto:PSCED@ky.gov). One (1) copy of the documents with the  
11 Confidential Information redacted is also being electronically filed with this  
12 request. 807 KAR 5:001 Section 13(2)(a)(3).

13 4. A copy of this motion with the Confidential Information redacted has  
14 been served on all parties to this proceeding through the use of electronic filing.  
15 807 KAR 5:001 Section 13(2)(b).

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

20 6. Pursuant to 807 KAR 5:001 Section 13(2)(a)(1) as discussed below,  
21 the Confidential Information is entitled to confidential treatment and is being

1 submitted confidentially under the purview of KRS 278.160(3), KRS 61.878(1)(a)  
2 and KRS 61.878(1)(c)(1).

3           **I. The Confidential Information is entitled to confidential**  
4           **treatment based upon KRS 278.160(3)**

5           7. Certain Confidential Information contained in Big Rivers’ response  
6 to Item 12 is entitled to confidential protection based upon KRS 278.160(3), which  
7 shields from disclosure “a provision of a special contract that contains rates and  
8 conditions of service not filed in a utility’s general schedule if such provision  
9 would otherwise be entitled to be excluded from the application of KRS 61.870 to  
10 61.884 under the provisions of KRS 61.878(1)(c)(1).”

11           8. The special contracts in question relate to Big Rivers’ power sales  
12 contracts with the Kentucky Municipal Energy Agency (“*KyMEA*”). The  
13 Commission has already found that the confidential terms of the contracts are  
14 entitled to confidential treatment under KRS 61.878(1)(c)(1),<sup>1</sup> and the confidential  
15 terms of these special contracts should again be granted confidential treatment.

16           **II. The Confidential Information is also entitled to**  
17           **confidential treatment based upon KRS 61.878(1)(a)**

18           9. Certain Confidential Information contained in Big Rivers’ response  
19 to Item 12 and the attachment to its response to Item 13 is entitled to confidential

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<sup>1</sup> See *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*, P.S.C. Case No. 2016-00306, Order (Jan. 2, 2019) (granting confidential treatment to the confidential terms of the *KyMEA* contract for an indefinite time period).

1 treatment based upon KRS 61.878(1)(a), which explicitly protects “[p]ublic records  
2 containing information of a personal nature where the public disclosure thereof  
3 would constitute a clearly unwarranted invasion of personal privacy.”

4       10.     The attachment to Big Rivers’ response to Item 13 reveals the power  
5 usage of individual large industrial retail customers on the Big Rivers system and  
6 sales to non-members. Big Rivers’ response to Item 12 reveals purchases and  
7 sales to non-members. Because the individual customers and non-members  
8 identified in the responses and attachment are not parties to this proceeding,  
9 publicly revealing such information would constitute a clearly unwarranted  
10 invasion of their privacy. Moreover, the Commission has previously granted  
11 confidential treatment to similar retail information under the purview of KRS  
12 61.878(1)(a).<sup>2</sup>

13       11.     As such, Big Rivers requests confidential treatment for the identity  
14 of these entities in order to protect their private information.

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<sup>2</sup> See, e.g., *In the Matter of: Sanctuary Church v. Louisville Gas and Electric Company*, Order, P.S.C. Case No. 2018-00181 (Jan. 8, 2019) (granting confidential treatment pursuant to KRS 61.878(1)(a) for an indefinite period to a retail customer’s account and usage information); *In the Matter of: Application of Kentucky Utilities Company for an Adjustment of its Electric Rates*, Order, P.S.C. Case No. 2012-00221 (July 25, 2013) (holding customer names, account numbers and usage information exempt from disclosure under KRS 61.878(1)(a)); see also *In the Matter of: An Electronic Examination of the Application of the Fuel Adjustment Clause of Big Rivers Electric Corporation From May 1, 2019 Through October 31, 2019*, P.S.C. Case No. 2020-00009, Order (April 13, 2020).

1           **III. Certain Confidential Information is also entitled to**  
2           **confidential treatment based upon KRS 61.878(1)(c)(1)**

3           12.     Under the Kentucky Open Records Act, the Commission is entitled  
4 to withhold from public disclosure “records confidentially disclosed to an agency  
5 or required by an agency to be disclosed to it, generally recognized as confidential  
6 or proprietary, which if openly disclosed would permit an unfair commercial  
7 advantage to competitors of the entity that disclosed the records.” *See* KRS  
8 61.878(1)(c)(1).

9           13.     Subsection A below explains that Big Rivers operates in competitive  
10 environments in the wholesale power market and in the credit market.  
11 Subsection B below shows that the Confidential Information is generally  
12 recognized as confidential or proprietary. Subsection C below demonstrates that  
13 public disclosure of the Confidential Information would permit an unfair  
14 commercial advantage to Big Rivers’ competitors. As such, the Commission  
15 should grant confidential treatment to the Confidential Information.

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

17           14.     As a generation and transmission cooperative, Big Rivers competes  
18 in the wholesale power market. This includes not only the short-term bilateral  
19 energy market, the day-ahead and real time energy and ancillary services  
20 markets, and the capacity market to which Big Rivers has access by virtue of its  
21 membership in Midcontinent Independent System Operator, Inc. (“MISO”), but  
22 also forward bilateral long-term agreements and wholesale agreements with

1 utilities and industrial customers. Big Rivers' ability to successfully compete in  
2 the market is dependent upon a combination of its ability to: 1) obtain the  
3 maximum price for the power it sells, and 2) keep its cost of production or  
4 purchase as low as possible. Fundamentally, if Big Rivers' cost of producing or  
5 purchasing a unit of power increases, its ability to sell that unit in competition  
6 with other utilities is adversely affected.

7       15.     Big Rivers also competes for reasonably-priced credit in the credit  
8 markets, and its ability to compete is directly impacted by its financial results.  
9 Lower revenues and any events that adversely affect Big Rivers' margins will  
10 adversely affect its financial results and potentially impact the price it pays for  
11 credit. A competitor armed with Big Rivers' proprietary and confidential  
12 information will be able to increase Big Rivers' costs or decrease Big Rivers'  
13 revenues, which could in turn affect Big Rivers' apparent creditworthiness. A  
14 utility the size of Big Rivers that operates generation and transmission facilities  
15 will always have periodic cash and borrowing requirements for both anticipated  
16 and unanticipated needs. Big Rivers expects to be in the credit markets on a  
17 regular basis in the future, and it is imperative that Big Rivers improve and  
18 maintain its credit profile.

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

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

3           17.     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           18.     As noted above, the Confidential Information protected under KRS  
7 61.878(1)(c)(1) consists of or reveals information about confidential terms of  
8 special contracts and other non-member sales and Big Rivers’ projections of its  
9 future capacity position. The Confidential Information is precisely the sort of  
10 information meant to be protected by KRS 61.878(1)(c)(1).

11          19.     Public disclosure of confidential terms of special contracts and other  
12 non-members sales would cause competitive harm to Big Rivers, giving Big  
13 Rivers’ suppliers, buyers and competitors insight into prices and other terms at  
14 which it is willing to sell and buy power. Big Rivers’ projections related to its  
15 future capacity position would provide market participants, suppliers and  
16 competitors insight into the timing of Big Rivers capacity needs. Kentucky courts  
17 have held that information about a company’s detailed inner workings is  
18 generally recognized as confidential or proprietary. In *Hoy v. Kentucky Industrial*  
19 *Revitalization Authority*, the Kentucky Supreme Court held that financial  
20 information submitted by General Electric Company with its application for  
21 investment tax credits was not subject to disclosure simply because it had been  
22 filed with a state agency. 907 S.W.2d 766, 4 (Ky. 1995). The Court applied the  
23 plain meaning rule to KRS 61.878(1)(c)(1), and reasoned: “[i]t does not take a

1 degree in finance to recognize that such information concerning the inner  
2 workings of a corporation is ‘generally recognized as confidential or proprietary.’”  
3 *Id.* at 768. Similarly, in *Marina Management Services, Inc. v. Commonwealth*  
4 *Cabinet for Tourism*, the Court held: “[t]hese are records of privately owned  
5 marina operators, disclosure of which would unfairly advantage competing  
6 operators. The most obvious disadvantage may be the ability to ascertain the  
7 economic status of the entities without the hurdles systematically associated with  
8 acquisition of such information about privately owned organizations.” 906 S.W.2d  
9 318, 319 (Ky. 1995).

10           20. In Big Rivers’ case, Big Rivers is currently in negotiations with  
11 potential counterparties and expects to continue to engage in negotiations with  
12 counterparties for power sales agreements. If confidential treatment of the  
13 confidential terms of the special contracts and other non-member sales in Big  
14 Rivers’ response to Item 12 is denied, potential counterparties would know that  
15 the confidential terms of their contracts could be publicly disclosed, which could  
16 reveal information to their competitors about their competitiveness. Because  
17 many companies would be reluctant to have such information disclosed, public  
18 disclosure of the Confidential Information would likely reduce the pool of  
19 counterparties willing to negotiate with Big Rivers, reducing Big Rivers’ ability to  
20 sell power and impairing its ability to compete in the wholesale power and credit  
21 markets.



1           21.    In sum, the Confidential Information is not publicly available, is not  
2 disseminated within Big Rivers except to those employees and professionals with  
3 a legitimate business need to know and act upon the information, and is not  
4 disseminated to others without a legitimate need to know and act upon the  
5 information. As such, the Confidential Information details the “inner workings”  
6 of Big Rivers’ and is generally recognized as confidential and proprietary.

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

9           22.    Disclosure of the Confidential Information that is protected under  
10 KRS 61.878(1)(c)(1) would permit an unfair commercial advantage to Big Rivers’  
11 competitors. As discussed above, Big Rivers faces actual competition in the  
12 wholesale power market and in the credit markets, and it is likely that Big Rivers  
13 would suffer competitive injury if the Confidential Information were publicly  
14 disclosed.

15           23.    Given the nature of the Confidential Information, its disclosure  
16 would provide other market participants, suppliers, buyers and competitors  
17 insight into the prices and terms at which Big Rivers is willing to buy and sell  
18 power, as well as specifics regarding Big Rivers’ future capacity position. In turn,  
19 the Confidential Information could be used to manipulate the bidding process,  
20 leading to higher costs and/or lower revenues for Big Rivers, thereby impairing its  
21 ability to compete in the wholesale power markets. Furthermore, any competitive  
22 pressure that adversely affects Big Rivers’ revenue and/or margins could make

1 Big Rivers appear less creditworthy and impair its ability to compete in the credit  
2 markets.

3 24. Accordingly, public disclosure of the information that Big Rivers  
4 seeks to protect pursuant to KRS 61.878(1)(c)(1) would provide Big Rivers'  
5 competitors with an unfair commercial advantage.

6 **IV. Time Period**

7 25. Big Rivers requests that the Confidential Information regarding the  
8 Big Rivers' projections related to its future capacity position in the Direct  
9 Testimony of Natalie R. Hankins remain confidential for a period of five (5) years  
10 from the date of this motion, which will allow sufficient time for the information  
11 to become sufficiently outdated to no longer pose a competitive risk to Big Rivers.  
12 807 KAR 5:001 Section 13(2)(a)(2).

13 26. Big Rivers requests that all other Confidential Information remain  
14 confidential indefinitely for the reasons stated above. 807 KAR 5:001 Section  
15 13(2)(a)(2).

16 **V. Conclusion**

17 27. Based on the foregoing, the Confidential Information is entitled to  
18 confidential treatment, pursuant to KRS 278.160(3); 807 KAR 5:001 Section 13;  
19 and KRS 61.878. If the Commission disagrees that Big Rivers' Confidential  
20 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 classify and protect as confidential the Confidential Information.

5 On this the 30th day of September, 2022.

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Respectfully submitted,

*/s/ Senthia Santana*

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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](mailto:senthia.santana@bigrivers.com)  
[tyson.kamuf@bigrivers.com](mailto:tyson.kamuf@bigrivers.com)  
[whitney.kegley@bigrivers.com](mailto:whitney.kegley@bigrivers.com)

Counsel for Big Rivers Electric  
Corporation