

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

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4
5 *In the Matter of:*
6

AN ELECTRONIC EXAMINATION OF THE)
 APPLICATION OF THE FUEL ADJUSTMENT)
 CLAUSE OF BIG RIVERS ELECTRIC) **Case No.**
 CORPORATION FROM NOVEMBER 1, 2021) **2022-00268**
 THROUGH APRIL 30, 2022)

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9 **MOTION OF BIG RIVERS ELECTRIC CORPORATION FOR**
10 **CONFIDENTIAL TREATMENT**
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12 1. Big Rivers Electric Corporation (“*Big Rivers*”) hereby moves the
13 Public Service Commission of Kentucky (the “*Commission*”), pursuant to 807
14 KAR 5:001, Section 13 and KRS 61.878(1)(c)(1) to grant confidential treatment to
15 certain information contained in Big Rivers’ response to Item 5 of the Commission
16 Staff’s Second Request for Information dated October 14, 2022, in this matter.

17 2. The information for which Big Rivers seeks confidential treatment is
18 hereinafter referred to as the “*Confidential Information.*” The Confidential
19 Information consists of information that describes internal planning assumptions
20 and fuel procurement strategies.

21 3. Pursuant to the Commission’s Emergency Orders in *In the Matter of:*
22 *Electronic Emergency Docket Related to the Novel Coronavirus Covid-19*, Case No.
23 2020-00085, one (1) copy of the Confidential Information highlighted in yellow or
24 otherwise marked “CONFIDENTIAL,” is being filed with this motion via
25 electronic mail sent to PSCED@ky.gov. One (1) copy of the documents with the

1 Confidential Information redacted is also being electronically filed with this
2 request. 807 KAR 5:001 Section 13(2)(a)(3).

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

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

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

13 I. **Certain Confidential Information is also entitled to**
14 **confidential treatment based upon KRS 61.878(1)(c)(1)**

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

21 8. Subsection A below explains that Big Rivers operates in competitive
22 environments in the wholesale power market and in the credit market.

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

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

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

18 10. Big Rivers also competes for reasonably-priced credit in the credit
19 markets, and its ability to compete is directly impacted by its financial results.
20 Lower revenues and any events that adversely affect Big Rivers' margins will
21 adversely affect its financial results and potentially impact the price it pays for
22 credit. A competitor armed with Big Rivers' proprietary and confidential

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

8 11. Accordingly, Big Rivers faces competition in the wholesale power and
9 capital 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 as***
13 ***Confidential or Proprietary***

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

17 13. As noted above, the Confidential Information protected under KRS
18 61.878(1)(c)(1) consists of or reveals Big Rivers' internal planning assumptions
19 and fuel procurement strategies. The Confidential Information is precisely the
20 sort of information meant to be protected by KRS 61.878(1)(c)(1).

21 14. Public disclosure of Big Rivers' internal planning assumptions and
22 fuel procurement strategies would provide suppliers and competitors insight into

1 the timing of Big Rivers fuel supply needs. Kentucky courts have held that
2 information about a company's detailed inner workings is generally recognized as
3 confidential or proprietary. In *Hoy v. Kentucky Industrial Revitalization*
4 *Authority*, the Kentucky Supreme Court held that financial information
5 submitted by General Electric Company with its application for investment tax
6 credits was not subject to disclosure simply because it had been filed with a state
7 agency. 907 S.W.2d 766, 4 (Ky. 1995). The Court applied the plain meaning rule
8 to KRS 61.878(1)(c)(1), and reasoned: “[i]t does not take a degree in finance to
9 recognize that such information concerning the inner workings of a corporation is
10 ‘generally recognized as confidential or proprietary.’” *Id.* at 768. Similarly, in
11 *Marina Management Services, Inc. v. Commonwealth Cabinet for Tourism*, the
12 Court held: “[t]hese are records of privately owned marina operators, disclosure of
13 which would unfairly advantage competing operators. The most obvious
14 disadvantage may be the ability to ascertain the economic status of the entities
15 without the hurdles systematically associated with acquisition of such
16 information about privately owned organizations.” 906 S.W.2d 318, 319 (Ky.
17 1995).

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

1 information. As such, the Confidential Information details the “inner workings”
2 of Big Rivers’ and is generally recognized as confidential and proprietary.

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

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

11 17. Given the nature of the Confidential Information, its disclosure
12 would provide suppliers, other buyers and competitors insight into details
13 including timing of Big Rivers’ future coal procurement requirements. In turn,
14 the Confidential Information could be used to manipulate the bidding process,
15 leading to higher costs or less advantageous contract terms for Big Rivers,
16 thereby impairing its ability to compete in the wholesale power markets.
17 Furthermore, any competitive pressure that adversely affects Big Rivers’ revenue
18 and/or margins could make Big Rivers appear less creditworthy and impair its
19 ability to compete in the credit markets.

20 18. Accordingly, public disclosure of the information that Big Rivers
21 seeks to protect pursuant to KRS 61.878(1)(c)(1) would provide Big Rivers’
22 competitors with an unfair commercial advantage.

1 **II. Time Period**

2 19. Big Rivers requests that the Confidential Information remain
3 confidential for a period of five (5) years from the date of this motion, which will
4 allow sufficient time for the information to become sufficiently outdated to no
5 longer pose a competitive risk to Big Rivers. 807 KAR 5:001 Section 13(2)(a)(2).

6 **III. Conclusion**

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

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

1 On this the 28th day of October, 2022.

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Respectfully submitted,

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