$1 \\ 2 \\ 3 \\ 4$	COMMONWEALTH OF KENTUCKY BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY
<b>5</b>	In the Matter of:
6	ELECTRONIC APPLICATION OF ) BIG RIVERS ELECTRIC CORPORATION ) Case No. FOR APPROVAL OF AMENDMENT TO ) 2022-00296 POWER PURCHASE AGREEMENT )
$7 \\ 8$	
9	MOTION OF BIG RIVERS ELECTRIC CORPORATION
10 11	FOR CONFIDENTIAL TREATMENT
12	1. Big Rivers Electric Corporation hereby moves the Kentucky Public
13	Service Commission ("Commission") pursuant to KRS 61.878(1)(c)(1), KRS
14	61.878(1)(a), and 807 KAR 5:001 Section 13 to grant confidential treatment to
15	certain information contained in the Application, Exhibits, and Direct Testimony
16	filed in this matter (the "Confidential Information"). The Confidential
17	Information pertains to specific terms of an amendment ("Amendment No. 1") to
18	the power purchase agreement between Big Rivers and Unbridled Solar, LLC,
19	("Unbridled Solar") formerly known as Henderson Solar, LLC, entered on May 26
20	2020 (the "Unbridled PPA") and information pertaining to the proprietary
21	internal economic analysis of the Unbridled PPA and Amendment No. 1.
22	2. The designated Confidential Information includes the following
23	information, which the Commission has previously granted confidential
24	treatment for an indefinite period:

26,

1		a.	certain negotiated terms of the Unbridled PPA; <sup>1</sup>
2		b.	Big Rivers' internal economic analysis of the Unbridled PPA; <sup>2</sup>
3			and
4		c.	certain negotiated terms of the special contracts between Big
5			Rivers, Meade County Rural Electric Cooperative Corporation
6			("Meade County RECC"), and Nucor Corporation ("Nucor"). <sup>3</sup>
7	3.	The r	emaining Confidential Information is substantially similar to
8	information	which	the Commission Order on March 25, 2021, granted confidential
9	treatment ir	n Case	No. 2020-00183. This includes:
10		a.	certain negotiated terms of Amendment No. 1;
11		b.	Big Rivers' internal economic analysis of Amendment No. 1;
12		c.	information pertaining to third-party bids submitted in
13			response to a request for proposals (" $RFP$ "); <sup>4</sup> and

 $^{2}$  Id.

<sup>&</sup>lt;sup>1</sup> In the Matter of: Electronic Application of Big Rivers Electric Corporation for Approval of Solar Power Contracts, P.S.C. Case No. 2020-00183, Order (Mar. 25, 2021) (granting confidential treatment for an indefinite period of all designated contract terms of the Unbridled PPA, excluding the Contract Price).

<sup>&</sup>lt;sup>3</sup> Id. See also In the Matter of: Electronic Application of Big Rivers Electric Corporation of Big Rivers Electric Corporation and Meade County Rural Electric Cooperative Corporation for (1) Approval of Contracts for Electric Service with Nucor Corporation; and (2) Approval of Tariff, P.S.C. Case No. 2019-00365, Orders, (Mar. 12, 2020) and (Sept. 30, 2020).

<sup>&</sup>lt;sup>4</sup> This Confidential Information is located at Application Exhibit 3, Direct Testimony of Mark Eacret, page 17.

 1
 d. National Grid Renewables' ("NGR") proprietary information

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 presented to Big Rivers during negotiations of Amendment

 3
 No. 1.5

4 4. Pursuant to the Commission's March 24, 2020, Order in In the Matter of Electronic Emergency Docket Related to the Novel Coronavirus COVID-19, Case  $\mathbf{5}$ No. 2020-00085 ("Case No. 2020-00085"), one (1) copy of the Confidential 6 Information marked "CONFIDENTIAL," is being filed via electronic mail to 7 PSCED@ky.gov. A copy of the filing, with the Confidential Information redacted, 8 is being electronically filed with this motion. 807 KAR 5:001 Section 13(2)(a)(3)(b). 9 10 A copy of the filing with the Confidential Information redacted has 5. been served on all parties to this proceeding through the use of electronic filing. 11 12807 KAR 5:001 Section 13(b).

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

18 7. If and to the extent the Confidential Information becomes generally19 available to the public, whether through filings required by other agencies or

<sup>&</sup>lt;sup>5</sup> This Confidential Information is designated at Application Exhibit 3, Direct Testimony of Mark Eacret at page 13 and Exhibit Eacret-4.

otherwise, Big Rivers will notify the Commission and have the information's
 confidential status removed. <u>807 KAR 5:001 Section 13(10)(b).</u>

3 8. As discussed below, the Confidential Information is entitled to
4 confidential treatment based under KRS 61.878(1)(c)(1) and KRS 61.787()(a). 807
5 KAR 5:001 Section 13(2)(a)(1).

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## 7 I. <u>The Confidential Information is entitled to confidential treatment</u> 8 <u>based upon KRS 61.878(1)(c)(1)</u>

9 9. The Confidential Information is entitled to confidential treatment 10 based upon KRS 61.878(1)(c)(1), which protects "records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as 11 confidential or proprietary, which if openly disclosed would permit an unfair 12commercial advantage to competitors of the entity that disclosed the records." See 13 14 807 KAR 5:001 Section 13(3)(a)(1). In support for this ground of granting confidential treatment, Subsection A *infra* describes how Big Rivers operates in 15competitive environments; Subsection Section B infra explains that the 1617 Confidential Information is generally recognized as confidential or proprietary; and Subsection C infra demonstrates that public disclosure of the Confidential 18 19Information would permit an unfair commercial advantage to Big Rivers' competitors. As such, the Commission should grant confidential treatment to the 20Confidential Information. 21

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**A**.

#### **Big Rivers' Faces Actual Competition**

 $\mathbf{2}$ 10. Big Rivers must successfully compete in the wholesale power market in order to sell excess energy to meet its members' needs, including competition in: 3 term bilateral energy markets, day-ahead and real-time energy and ancillary 4 services markets, the annual capacity market, and forward bilateral long-term 5 6 wholesale agreements with utilities and industrial customers. Big Rivers' ability to successfully compete in these wholesale power markets is dependent upon a 7 combination of a) obtaining the maximum price for power it sells and the best 8 contract terms, and b) keeping its cost of production as low as possible. 9 Fundamentally, if Big Rivers' cost of producing a kilowatt hour of energy increases, 10its ability to sell that kilowatt hour in competition with other utilities is adversely 11 affected. 12

13Big Rivers also competes for reasonably-priced credit in the credit 11. markets, and its ability to compete is directly impacted by the financial results it 1415obtains and the business risks it assumes. Any event that adversely affects Big Rivers' financial results or increases its business risks may adversely affect the 16 price it pays for credit. A competitor, including potential counterparties to future 17contracts, armed with Big Rivers' proprietary and confidential information will be 18 able to increase Big Rivers' costs or decrease Big Rivers' revenues, which could in 19turn affect Big Rivers' apparent creditworthiness. 20Impediments to Big Rivers' obtaining the best contract terms could likewise affect its 21apparent creditworthiness. A utility the size of Big Rivers that operates generation and 22

transmission facilities will always have periodic cash and borrowing requirements
 for both anticipated and unanticipated needs. Big Rivers expects to be in the credit
 markets on a regular basis in the future, and it is imperative that Big Rivers
 improves and maintains its credit profile.

5 12. Finally, the ability to negotiate the most advantageous power 6 purchase agreements and then offer competitive prices to Big Rivers' Members, 7 companies interested in expanding in Kentucky, and potential new Members is 8 fundamental to Big Rivers' continued success.

9 13. Accordingly, Big Rivers faces competition in the wholesale power and 10 capital markets, and the Confidential Information should be afforded confidential 11 treatment to prevent the imposition of an unfair competitive advantage to those 12 competitors.

# 13B.The Confidential Information is Generally Recognized as14Confidential or Proprietary.

15 14. The Confidential Information for which Big Rivers seeks confidential 16 treatment under KRS 61.878(1)(c)(1) is generally recognized as confidential or 17 proprietary under Kentucky law. The Confidential Information consists of (i) 18 negotiated contract terms of Amendment No. 1; (ii) Big Rivers internal economic 19 analysis of the Unbridled PPA and Amendment No. 1; (iii) information related to 20 RFP bids; and (iii) NGR's proprietary and confidential information consisting of not

1 only the negotiated terms of special contracts, but also NGR's internal market  $\mathbf{2}$ projections, as well as its analysis of the Unbridled Project<sup>6</sup> and the Unbridled PPA. 3 15. Public disclosure of the Confidential Information will allow Big Rivers' suppliers and competitor insight into Big Rivers business strategies and the terms 4 on which Big Rivers is willing to sell and purchase power. Information about a  $\mathbf{5}$ company's detailed inner workings is generally recognized as confidential or 6 proprietary. See, e.g., Hoy v. Kentucky Indus. Revitalization Authority, 907 S.W.2d 7 766, 768 (Ky. 1995) ("It does not take a degree in finance to recognize that such 8 information concerning the inner workings of a corporation is 'generally recognized 9 as confidential or proprietary"); Marina Management Servs. v. Cabinet for 10 Tourism, Dep't of Parks, 906 S.W.2d 318, 319 (Ky. 1995) (unfair commercial 11 advantage arises simply from "the ability to ascertain the economic status of the 12entities without the hurdles systemically associated with the acquisition of such 13 information about privately owned organizations"). Moreover, as referenced above, 14 15the Commission previously granted confidential treatment to this type of 16 information.

17 16. Accordingly, the information for which Big Rivers seeks confidential 18 treatment is recognized as confidential or proprietary under Kentucky law and is 19 entitled to confidential treatment as further discussed below.

 $<sup>^{\</sup>rm 6}$  The subject solar facility approved for construction in Henderson and Webster County, Kentucky.

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

3 17. Disclosure of the Confidential Information could unreasonably and 4 unnecessarily harm Big Rivers by giving interested third parties an unfair 5 commercial advantage through insight into Big Rivers' business operations and 6 financial strategies. As discussed above, Big Rivers faces actual competition in the 7 wholesale power market and in the credit market. It is likely that Big Rivers would 8 suffer competitive injury if that Confidential Information were publicly disclosed, 9 and the information should therefore be subject to confidential treatment.

10 18. If the Confidential Information is publicly disclosed, Big Rivers' competitors would have insight into not only the contract terms Big Rivers has 11 agreed to recently, but also the market conditions Big Rivers expects to encounter 12and the timing of Big Rivers' need and availability of power in the future. This 13 14 information and projections could indicate the prices and terms on which Big Rivers is willing to buy and sell energy, capacity, and renewable energy certificates. With 15that information, potential suppliers to Big Rivers will be able to manipulate the 16price of power bid to Big Rivers in order to maximize their revenues, and potential 17market power purchasers could use the information to know when and to the extent 18 19Big Rivers is long on power and could use that information to manipulate their bids, leading to lower revenues to Big Rivers. In P.S.C. Case No. 2003-00054, the 20Commission granted confidential protection to bids submitted to Union Light, Heat 21 & Power ("ULH&P"). ULH&P argued, and the Commission implicitly accepted, 2223that if the bids it received were publicly disclosed, contractors on future work could

1 use the bids as a benchmark, which would likely lead to the submission of higher  $\mathbf{2}$ bids. In the Matter of: Application of the Union Light, Heat and Power Company for Confidential Treatment, Order, P.S.C. Case No. 2003-00054 (August 4, 2003). 3 The Commission also implicitly accepted ULH&P's further argument that the 4  $\mathbf{5}$ higher bids would lessen ULH&P's ability to compete with other gas suppliers. Id. Similarly, potential power suppliers or purchasers manipulating Big Rivers' 6 7 bidding process would lead to higher costs or lower revenues to Big Rivers and would place it at an unfair competitive disadvantage in the wholesale power market 8 and credit markets. Likewise, disclosure of the Confidential Information would 9 place Big Rivers at a considerable disadvantage when negotiating future contracts. 10

11 19. Further, if confidential treatment of the confidential, negotiated terms of the Unbridled PPA, Amendment No. 1, or Nucor contracts, the bid 12information, or NGR's proprietary information is denied, then other economic 13 development prospects and companies interested in buying or selling power in 14 15Kentucky would know that the confidential terms of their future contracts, plans, or bids may also be publicly disclosed. Many companies would be reluctant to 16 have such confidential and proprietary information disclosed because public 17disclosure would, for example, allow their competitors to know how they offer and 18 price their projects or view future market conditions. This would create precisely 19the kind of competitive harm KRS 61.878(1)(c)(1) is intended to prevent. 202120.Because companies would not want their confidential and

22 proprietary information disclosed to their competitors, public disclosure of the

Confidential Information in this case would likely reduce the pool of companies
 willing to negotiate with Big Rivers, reducing Big Rivers' and other utilities'
 ability to secure economic development prospects and the best terms in power
 purchase agreements. Big Rivers' competition for future renewable purchase
 contracts is not limited to its traditional regulated competitors. Large industrial
 consumers, municipals, cities, and communities are reaching out to solar
 developers as well.

8 21.The Commission has also recognized this real danger to utilities in 9 Kentucky. In P.S.C. Case No. 2003-00054, the Commission granted confidential protection for bids submitted to ULH&P. ULH&P argued, and the Commission 10implicitly accepted, that the bidding contractors would not want their bid 11 12information publicly disclosed, and that disclosure would reduce the contractor pool available to ULH&P, which would drive up ULH&P's costs, hurting its 13 ability to compete with other gas suppliers. In the Matter of: Application of the 1415Union Light, Heat and Power Company for Confidential Treatment, P.S.C. Case No. 2003-00054, Order (August 4, 2003). Similarly, in Hoy v. Kentucky Indus. 16 *Revitalization Authority*, the Kentucky Supreme Court found that without 17protection for confidential information provided to a public agency, "companies 18would be reluctant to apply for investment tax credits for fear the confidentiality 19of financial information would be compromised." Hoy v. Kentucky Indus. 2021 Revitalization Authority, 907 S.W.2d 766, 769 (Ky. 1995).

1 22. Thus, public disclosure of the Confidential Information would permit 2 an unfair competitive advantage to Big Rivers' competitors.

## 3II.<u>The Confidential Information is also entitled to confidential</u>4<u>treatment based upon KRS 61.878(1)(a)</u>

23. $\mathbf{5}$ KRS 61.878(1)(a) explicitly grants confidential treatment to "[p]ublic records containing information of a personal nature where the public disclosure 6 thereof would constitute a clearly unwarranted invasion of personal privacy." 7 Here, the Confidential Information reveals proprietary and otherwise private 8 information of NGR, Big Rivers' counterpart to Amendment No. 1 and non-party 9 10 to this proceeding. This proprietary information includes not only the negotiated terms of Amendment No. 1, but also NGR's internal market projections, as well as 11 its analysis of the Unbridled Project<sup>7</sup> and the Unbridled PPA. 12

13 24.Because public disclosure of the Confidential Information consisting 14 of NGR's proprietary information would constitute an unwarranted invasion of the NGR's privacy, this Confidential Information should be granted confidential 15treatment. See Ky. Op. Atty. Gen. 96-ORD-176 (August 20, 1996) (holding Kroger 16Company's utility bills exempt from disclosure under KRS 61.878(1)(a)); In the 17 Matter of: Application of Kentucky Utilities Company for an Adjustment of its 18 Electric Rates, Order, P.S.C. Case No. 2012-00221 (July 25, 2013) (holding customer 1920 names, account numbers, and usage information exempt from disclosure under 21 KRS 61.878(1)(a)).

<sup>&</sup>lt;sup>7</sup> The solar facility approved for construction on the Henderson /Webster County line just south of Henderson, Kentucky in Henderson and Webster County, Kentucky.

### 1 III. <u>Time Period</u>

2	25. B	ig Rivers requests the Confidential Information contained
3	Application Ex	whibit 3, Direct Testimony of Mark Eacret at page 13 and Exhibit
4	Eacret-4 (NG	R's proprietary information) remain confidential indefinitely so as
5	to protect priv	ate non-party information. See In the Matter of: Sanctuary Church
6	v. Louisville G	as and Electric Company, Order, P.S.C. Case No. 2018-00181
7	(January 8, 20	19) (granting confidential treatment for an indefinite period to
8	detailed accour	nt and usage information of a non-party).
9	26. F	urther, Big Rivers requests that all of the Confidential Information
10	remain confide	ential indefinitely because for so long as Big Rivers is in the
11	wholesale pow	er market, the public disclosure of the Confidential Information can
12	be used to Big	Rivers' competitive disadvantage for the reasons stated above. <u><math>807</math></u>
13	<u>KAR 5:001 Sec</u>	ction 13(2)(a)(2) See In the Matter of: Electronic Joint Application
14	of Big Rivers H	Electric Corporation and Meade County Rural Electric Cooperative
15	Corporation fo	r (1) Approval of Contracts for Electric Service with Nucor
16	Corporation; a	and (2) Approval of Tariff, P.S.C. Case No. 2019-00365, Order (Jan.
17	22, 2020) (gran	nting confidential treatment to the confidential terms of the Nucor
18	contract for an	indefinite time);
19	IV. <u>Co</u>	nclusion

20 27. Based on the foregoing, the Confidential Information is entitled to 21 confidential treatment. If the Commission disagrees that Big Rivers is entitled to 22 confidential treatment, due process requires the Commission to hold an evidentiary

1	hearing. See Utility Regulatory Comm'n v. Kentucky Water Serv. Co., Inc., 642
2	S.W.2d 591 (Ky. App. 1982).
3	
4	WHEREFORE, Big Rivers respectfully requests that the Commission
5	classify and protect as confidential the Confidential Information.
6	On this the 22nd day of September, 2022.
7	Respectfully submitted,
8	<u>/s/ Senthia Santana</u>
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