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

In the Matter of:

ELECTRONIC APPLICATION OF BIG RIVERS ELECTRIC CORPORATION FOR APPROVAL OF AMENDMENT TO POWER PURCHASE AGREEMENT)))))	Case No. 2022-00296
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**MOTION OF BIG RIVERS ELECTRIC CORPORATION
FOR CONFIDENTIAL TREATMENT**

1. Big Rivers Electric Corporation hereby moves the Kentucky Public Service Commission (“Commission”) pursuant to KRS 61.878(1)(c)(1), KRS 61.878(1)(a), and 807 KAR 5:001 Section 13 to grant confidential treatment to certain information Big Rivers is providing in its Response to the Commission Staff’s First Request for Information dated January 26, 2023, and Big Rivers’ Response to the Initial Data Requests of the Attorney General dated January 26, 2023, submitted contemporaneously with this motion.

2. The information for which Big Rivers seeks confidential treatment is hereinafter referred to as the “Confidential Information.” The Confidential Information includes portions of the responses and/or attachments for the responses to Items 1, 2, 6, 9, and 10 of the Commission Staff’s First Request for Information (“PSC 1-1,” “PSC 1-2,” “PSC 1-6,” “PSC 1-9,” and “PSC 1-10,” respectively) and to Items 1, 7, 8, 9, 10, 17 and 18 of the Initial Data Requests of the Attorney General (“AG 1-1,” “AG 1-7,” “AG 1-8,” “AG 1-9,” “AG 1-10,” “AG 1-17,” and “AG 1-18,” respectively).

- 1 3. The designated Confidential Information includes the following
2 information, which the Commission has previously granted confidential
3 treatment for an indefinite period:
- 4 a. certain negotiated terms of the Unbridled PPA, contained in the
5 responses and/or attachments to the responses to PSC 1-2, PSC 1-9,
6 AG 1-1, AG 1-7, and AG 1-8,¹
- 7 b. Big Rivers’ internal economic analysis of the Unbridled PPA,
8 contained in responses and/or attachments to the responses to PSC
9 1-9 and AG 1-8;² and
- 10 c. certain negotiated terms of the special contracts between Big Rivers,
11 Meade County Rural Electric Cooperative Corporation (“*Meade*
12 *County RECC*”), and Nucor Corporation (“*Nucor*”), contained in
13 responses and/or attachments to the responses to PSC 1-1, PSC 1-6,
14 PSC 1-9, PSC 1-10, AG 1-10, and AG 1-18.³
- 15 4. The remaining Confidential Information is substantially similar to
16 information which the Commission Order on March 25, 2021, granted confidential
17 treatment in Case No. 2020-00183. This includes:
- 18 a. certain negotiated terms of Amendment No. 1, contained in the
19 responses and/or attachments to the responses for PSC 1-2, PSC 1-9,
20 AG 1-1, AG 1-7, and AG 1-8;
- 21 b. Big Rivers’ internal economic analysis of Amendment No. 1,
22 contained in responses and/or attachments to the responses for PSC
23 1-9 and AG 1-8;
- 24 c. Big Rivers’ internal projections related to its future energy and
25 capacity positions, contained in Big Rivers’ response to AG 1-17;

¹ *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).

² *Id.*

³ *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).

- 1 d. information pertaining to confidential third-party bids submitted in
2 response to a request for proposals (“RFP”), contained in Attachment
3 No. 2 to Big Rivers’ response to AG 1-9;⁴ and
- 4 e. National Grid Renewables’ (“NGR”) and Big Rivers’ business
5 strategies, proprietary information, and other confidential
6 information communicated during negotiations of Amendment No. 1,
7 contained in the attachment to Big Rivers’ response to AG 1-1.
- 8 5. Pursuant to the Commission’s March 24, 2020, Order in *In the Matter*
9 *of Electronic Emergency Docket Related to the Novel Coronavirus COVID-19*, Case
10 No. 2020-00085 (“*Case No. 2020-00085*”), one (1) copy of the Confidential
11 Information marked “CONFIDENTIAL,” is being filed via electronic mail to
12 PSCED@ky.gov. A copy of the filing, with the Confidential Information redacted,
13 is being electronically filed with this motion. 807 KAR 5:001 Section 13(2)(a)(3)(b).
- 14 6. A copy of the filing with the Confidential Information redacted has
15 been served on all parties to this proceeding through the use of electronic filing.
16 807 KAR 5:001 Section 13(b).
- 17 7. The Confidential Information is not publicly available, is not
18 disseminated within Big Rivers except to those employees and professionals with a
19 legitimate business need to know and act upon the information, and is not
20 disseminated to others without a legitimate need to know and act upon the
21 information.

⁴ *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 information pertaining to bids submitted in response to a RFP).

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

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

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

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

23

1 **A. *Big Rivers' Faces Actual Competition***

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

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

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

5 13. 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 14. 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.

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

15 15. 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 the Nucor Contract, the Unbridled PPA and
19 Amendment No. 1; (ii) Big Rivers internal economic analysis of the Unbridled PPA
20 and Amendment No. 1; (iii) information related to third party bids submitted in
21 response to a RFP; (iv) Big Rivers' internal projections related to its future energy
22 and capacity positions; and (v) National Grid Renewables' ("NGR") and Big Rivers'

1 business strategies, proprietary information, and other confidential information
2 communicated during negotiations of Amendment No. 1, consisting of not only the
3 negotiated terms of special contracts, but also internal market projections, as well
4 as economic analysis of the Unbridled Project⁵ and the Unbridled PPA.

5 16. Public disclosure of the Confidential Information will allow Big Rivers’
6 suppliers and competitor insight into Big Rivers business strategies and the terms
7 on which Big Rivers is willing to sell and purchase power. Information about a
8 company’s detailed inner workings is generally recognized as confidential or
9 proprietary. *See, e.g., Hoy v. Kentucky Indus. Revitalization Authority*, 907 S.W.2d
10 766, 768 (Ky. 1995) (“It does not take a degree in finance to recognize that such
11 information concerning the inner workings of a corporation is ‘generally recognized
12 as confidential or proprietary’”); *Marina Management Servs. v. Cabinet for*
13 *Tourism, Dep’t of Parks*, 906 S.W.2d 318, 319 (Ky. 1995) (unfair commercial
14 advantage arises simply from “the ability to ascertain the economic status of the
15 entities without the hurdles systemically associated with the acquisition of such
16 information about privately owned organizations”). Moreover, as referenced above,
17 the Commission previously granted confidential treatment to this type of
18 information.

⁵ The subject solar facility approved for construction in Henderson and Webster County, Kentucky.

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

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

6 18. Disclosure of the Confidential Information could unreasonably and
7 unnecessarily harm Big Rivers by giving interested third parties an unfair
8 commercial advantage through insight into Big Rivers' business operations and
9 business and financial strategies. As discussed above, Big Rivers faces actual
10 competition in the wholesale power market and in the credit market. It is likely
11 that Big Rivers would suffer competitive injury if that Confidential Information
12 were publicly disclosed, and the information should therefore be subject to
13 confidential treatment. If the Confidential Information is publicly disclosed, Big
14 Rivers' competitors would have insight into not only the contract terms Big Rivers
15 has agreed to recently and those that have been offered through third-party bids,
16 but also the market conditions Big Rivers expects to encounter and the timing of
17 Big Rivers' need and availability of power in the future. This information and
18 projections could indicate the prices and terms on which Big Rivers is willing to buy
19 and sell energy, capacity, and renewable energy certificates. With that
20 information, potential suppliers to Big Rivers will be able to manipulate the price
21 of power bid to Big Rivers in order to maximize their revenues, and potential
22 market power purchasers could use the information to know when and to the extent

1 Big Rivers is long on power and could use that information to manipulate their
2 bids, leading to lower revenues to Big Rivers.

3 19. Further, if confidential treatment of the confidential, negotiated
4 terms of the Unbridled PPA, Amendment No. 1, Nucor Contracts, the third-party
5 bid information, or NGR's proprietary information is denied, then economic
6 development prospects and other companies interested in buying or selling power
7 in Kentucky would know that the confidential terms of their future contracts,
8 plans, or bids may also be publicly disclosed. Many companies would be reluctant
9 to have such confidential and proprietary information disclosed because public
10 disclosure would, for example, allow their competitors to know how they offer and
11 price their projects or view future market conditions. This would create precisely
12 the kind of competitive harm KRS 61.878(1)(c)(1) is intended to prevent.

13 20. Because companies would not want their confidential and
14 proprietary information disclosed to their competitors, public disclosure of the
15 Confidential Information in this case would likely reduce the pool of companies
16 willing to negotiate with Big Rivers, reducing Big Rivers' and other utilities'
17 ability to secure economic development prospects and the best terms in power
18 purchase agreements. Big Rivers' competition for future renewable purchase
19 contracts is not limited to its traditional regulated competitors. Large industrial
20 consumers, municipals, cities, and communities are reaching out to solar
21 developers as well.

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

15 22. Similarly, potential power suppliers or purchasers manipulating Big
16 Rivers' bidding process would lead to higher costs or lower revenues to Big Rivers
17 and would place it at an unfair competitive disadvantage in the wholesale power
18 market and credit markets. Therefore disclosure of the Confidential Information
19 would place Big Rivers at a considerable disadvantage when negotiating future
20 contracts.

21

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

3 23. KRS 61.878(1)(a) explicitly grants confidential treatment to “[p]ublic
4 records containing information of a personal nature where the public disclosure
5 thereof would constitute a clearly unwarranted invasion of personal privacy.”
6 Here, the Confidential Information reveals proprietary and otherwise private
7 information of third parties that submitted bids in response to a RFP and NGR,
8 Big Rivers’ counterpart to Amendment No. 1, non-parties to this proceeding. This
9 proprietary information includes not only the negotiated terms of Amendment No.
10 1, but also NGR’s internal market projections, as well as its analysis of the
11 Unbridled Project⁶ and the Unbridled PPA.

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

21

⁶ 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. Time Period**

2 25. Big Rivers requests the Confidential Information contained in the
3 Big Rivers' response to AG 1-17 (Big Rivers' projected short-term capacity
4 position) remain confidential for five (5) years from the date of this motion, which
5 will allow sufficient time for the information to become sufficiently outdated to no
6 longer pose a competitive risk to Big Rivers. 807 KAR 5:001 Section 13(2)(a)(2).

7 26. Big Rivers requests the Confidential Information contained in the
8 attachments to Big Rivers' responses to AG 1-1 and AG 1-9 remain confidential
9 indefinitely so as to protect private non-party information⁷ and because the public
10 disclosure of the Confidential Information can be used to Big Rivers' competitive
11 disadvantage for the reasons stated above. 807 KAR 5:001 Section 13(2)(a)(2).

12 27. Further, Big Rivers requests that the other Confidential Information
13 remain confidential indefinitely because for so long as Big Rivers is in the
14 wholesale power market, the public disclosure of the Confidential Information can
15 be used to Big Rivers' competitive disadvantage for the reasons stated above. 807
16 KAR 5:001 Section 13(2)(a)(2).

17 **IV. Conclusion**

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

⁷ See *In the Matter of: Sanctuary Church v. Louisville Gas and Electric Company*, Order, P.S.C. Case No. 2018-00181 (January 8, 2019) (granting confidential treatment for an indefinite period to detailed account and usage information of a non-party).

1 hearing. See *Utility Regulatory Comm'n v. Kentucky Water Serv. Co., Inc.*, 642
2 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 10th day of February, 2023.

6 Respectfully submitted,

7 /s/ Senthia Santana

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