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

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In the Matter of:

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

**MOTION OF BIG RIVERS ELECTRIC CORPORATION
FOR CONFIDENTIAL TREATMENT**

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1. Big Rivers Electric Corporation hereby moves the Kentucky Public Service Commission (“*Commission*”) pursuant to KRS 278.160(3), KRS 61.878(1)(c)(1), and 807 KAR 5:001 Section 13 to grant confidential treatment to certain information contained in Big Rivers’ responses and/or the attachments to Big Rivers’ responses to Items 7 and 10 of the Supplemental Data Requests of the Attorney General (“AG 2-7” and “AG 2-10,” respectively). The information for which Big Rivers seeks confidential treatment is hereinafter referred to as the “*Confidential Information*.”

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2. In Case No. 2019-00365,¹ the Commission previously granted confidential treatment of the Confidential Information, which consists of the following information, which

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a. Certain negotiated terms of the special contracts between Big Rivers, Meade County Rural Electric Cooperative Corporation (“*Meade County RECC*”), and Nucor Corporation (“*Nucor*”); and

¹ *In the matter of: Electronic Joint Application 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. Cases No. 2019-00365, Order (Jan. 22, 2020).

- 1 b. The attachment to the response to AG 1-10,² an internal analysis of
2 the Nucor rates, including energy and capacity cost projections and
3 proprietary reports and projections from third party vendors such as
4 ACES and S&P Global Market Intelligence.
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- 6 3. Pursuant to the Commission’s March 24, 2020, Order in *In the Matter*
7 *of Electronic Emergency Docket Related to the Novel Coronavirus COVID-19*, Case
8 No. 2020-00085 (“*Case No. 2020-00085*”), one (1) copy of the Confidential
9 Information marked “CONFIDENTIAL,” is being filed via electronic mail to
10 PSCED@ky.gov. A copy of the filing, with the Confidential Information redacted,
11 is being electronically filed with this motion. 807 KAR 5:001 Section 13(2)(a)(3)(b).
- 12 4. A copy of the filing with the Confidential Information redacted has
13 been served on all parties to this proceeding through the use of electronic filing.
14 807 KAR 5:001 Section 13(b).
- 15 5. The Confidential Information is not publicly available, is not
16 disseminated within Big Rivers except to those employees and professionals with a
17 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.
- 20 6. If and to the extent the Confidential Information becomes generally
21 available to the public, whether through filings required by other agencies or

² *Id.* The confidential attachment to AG-10 is s copy of the Excel file previously provided in response to Item No. 2 of the Commission Staff’s First Request for Information in Case No. 2019-00365, which the Commission granted confidential protection for an indefinite period on January 22, 2020.

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

3 7. As discussed below, the Confidential Information is entitled to
4 confidential treatment based under KRS 278.160(3), which shields from disclosure
5 “a provision of a special contract that contains rates and conditions of service not
6 filed in a utility’s general schedule if such provision would otherwise be entitled to
7 be excluded from the application of KRS 61.870 to 61.844 under the provisions of
8 61.878(1)(c)(1).” KRS 61.878(1)(c)(1) protects “records confidentially disclosed to an
9 agency or required by an agency to be disclosed to it, generally recognized as
10 confidential or proprietary, which if openly disclosed would permit an unfair
11 commercial advantage to competitors of the entity that disclosed the records.” 807
12 KAR 5:001 Section 13(2)(a)(1).

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

15 8. In support for granting confidential treatment based upon KRS
16 61.878(1)(c)(1), Subsection A *infra* describes how Big Rivers operates in competitive
17 environments; Subsection Section B *infra* explains that the Confidential
18 Information is generally recognized as confidential or proprietary; and Subsection
19 C *infra* demonstrates that public disclosure of the Confidential Information would
20 permit an unfair commercial advantage to Big Rivers’ competitors. As such, the
21 Commission should grant confidential treatment to the Confidential Information.

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

2 9. 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 10. 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 11. Accordingly, Big Rivers faces competition in the wholesale power and
6 capital markets, and the Confidential Information should be afforded confidential
7 treatment to prevent the imposition of an unfair competitive advantage to those
8 competitors.

9 ***B. The Confidential Information is Generally Recognized as***
10 ***Confidential or Proprietary.***

11 12. The Confidential Information for which Big Rivers seeks confidential
12 treatment under KRS 278.160(3) and KRS 61.878(1)(c)(1) is generally recognized
13 as confidential or proprietary under Kentucky law. As noted above, much of the
14 Confidential information consists of the negotiated terms of special contracts. KRS
15 278.160(3) specifically recognizes that rates and conditions of service set forth in a
16 special contract are not required to be publicly discussed if such terms are entitled
17 to protection under KRS 61.878(1)(c)(1).

18 13. Public disclosure of the confidential analyses of the Nucor rates would
19 provide Big Rivers' suppliers and competitor insight into Big Rivers' need and
20 availability of energy and capacity, and into the prices at which Big Rivers is willing
21 to buy or sell energy or capacity. The information is also indicative of the market
22 conditions Big Rivers expects to encounter. Information such as this which bears
23 upon a company's detailed inner workings is generally recognized as confidential

1 or proprietary. *See, e.g., Hoy v. Kentucky Indus. Revitalization Authority*, 907
2 S.W.2d 766, 768 (Ky. 1995) (“It does not take a degree in finance to recognize that
3 such information concerning the inner workings of a corporation is ‘generally
4 recognized as confidential or proprietary’”); *Marina Management Servs. v. Cabinet*
5 *for Tourism, Dep’t of Parks*, 906 S.W.2d 318, 319 (Ky. 1995) (unfair commercial
6 advantage arises simply from “the ability to ascertain the economic status of the
7 entities without the hurdles systemically associated with the acquisition of such
8 information about privately owned organizations”).

9 14. Likewise, the Commission has previously recognized the confidential
10 or proprietary nature of information such as confidential discussions with economic
11 development prospects and proprietary third party reports. *See, e.g., id; In the*
12 *Matter of: Electric Application of Duke Energy Kentucky, Inc. for a Certificate of*
13 *Public Convenience and Necessity for Dry Bottom Ash Conversion of the East Bend*
14 *Generating Station*, P.S.C. Case No. 2016-00268 (Jan. 24, 2019) (granting
15 confidential treatment to proprietary third party information).

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

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

21 16. As discussed above, Big Rivers faces actual competition in the
22 wholesale power market and in the credit market. It is likely that Big Rivers would

1 suffer competitive injury if that Confidential Information were publicly disclosed,
2 and the information should therefore be subject to confidential treatment.

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

16 18. Here, Big Rivers is actively pursuing additional economic
17 development opportunities in its service territory. If confidential treatment of the
18 rates and terms of service set forth in special contracts is denied, companies
19 interested in locating in Big Rivers’ service territory would know that the
20 confidential information relating to the terms of their contracts may be publicly
21 disclosed. Because many companies are reluctant to have such confidential and
22 proprietary information disclosed, public disclosure of the Confidential

1 Information would likely reduce the pool of companies willing to negotiate with
2 Big Rivers, reducing Big Rivers' ability to secure economic development prospects.

3 19. Big Rivers is also actively engaged in buying and selling power in the
4 wholesale power markets, and Big Rivers expects to engage in negotiations with
5 counterparties in the future. Public disclosure of the Confidential Information
6 would provide potential purchasers of energy or capacity from Big Rivers; potential
7 sellers of energy or capacity to Big Rivers; and other providers competing against
8 Big Rivers for purchases or sales energy or capacity with insight into the prices and
9 the terms under which Big Rivers is willing to buy and sell energy and capacity.
10 These market participants could use this information as a benchmark or to gain an
11 advantage in negotiations, leading to higher costs lower revenues, or less favorable
12 terms to Big Rivers, hurting Big Rivers' ability to compete in the wholesale power
13 and credit markets. Further, any competitive pressure that adversely affects Big
14 Rivers' revenue and margins could make the company appear less creditworthy and
15 thus impair its ability to compete in the credit markets.

16 20. Thus, Big Rivers' competitiveness will be adversely affected if other
17 suppliers are given such an unfair competitive advantage or if potential
18 counterparties are given a negotiating advantage. Accordingly, the public
19 disclosure of the information that Big Rivers seeks to protect pursuant to KRS
20 278.160(3) and KRS 61.878(1)(c)(1) would provide Big Rivers' competitors with an
21 unfair commercial advantage.

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1 **II. Time Period**

2 21. Big Rivers requests the Confidential Information remain confidential
3 indefinitely, because for so long as Big Rivers is in the wholesale power market,
4 the public disclosure of the confidential terms of special contracts, its analysis of
5 those terms, and the third party data used in the evaluations could be used to Big
6 Rivers' competitive disadvantage for the reasons stated above. 807 KAR 5:001
7 Section 13(2)(a)(2).

8 **III. Conclusion**

9 22. Based on the foregoing, the Confidential Information is entitled to
10 confidential treatment. If the Commission disagrees that Big Rivers is entitled to
11 confidential treatment, due process requires the Commission to hold an evidentiary
12 hearing. *See Utility Regulatory Comm'n v. Kentucky Water Serv. Co., Inc.*, 642
13 S.W.2d 591 (Ky. App. 1982).

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

3 On this the 10th day of March, 2023.

4 Respectfully submitted,

5 /s/ Senthia Santana

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