

1 Solar, LLC, (“*Unbridled Solar*”) formerly known as Henderson Solar, LLC,
2 entered on May 26, 2020 (the “*Unbridled PPA*”).

3 3. Big Rivers’ Motion for Confidential Treatment filed on February 10,
4 2023, sought confidential treatment of the Attachment in its entirety. Big Rivers
5 filed the entire attachment confidentially, with each sheet of the Attachment
6 marked “CONFIDENTIAL” in red font. Both the public version of Big Rivers’
7 response to AG 1-1 and the confidential version of the Attachment contained a
8 sheet noting that the entire attachment was being filed pursuant to a motion for
9 confidential treatment.

10 4. The August 3 Order denied confidential treatment to the Attachment
11 based on KRS 61.878(1)(c)(1) and based on KRS 61.878(1)(a). Big Rivers recently
12 filed a motion asking the Commission to grant rehearing with respect to that
13 decision of the August 3 Order, on grounds including that the August 3 Order
14 misconstrues Big Rivers’ February 10, 2023, Motion for Confidential Treatment;
15 misapplies KRS 61.878(1)(a); and deviates from Commission precedent.²

16 5. As stated in Big Rivers’ Motion for Rehearing, after reconsideration,
17 Big Rivers believes that with the exception of only two partially-confidential
18 emails containing the final Amendment No.1, the entirety of the Attachment is
19 entitled to confidential treatment.³ These emails are pages 2-12 and 30-40 of the
20 Attachment.

² See Motion of Big Rivers Electric Corporation for Rehearing dated August 26, 2023.

³ *Id.* at p. 8.

1 6. Therefore, Big Rivers is refileing the Attachment. The public version
2 consists of the two emails appropriately redacted.

3 7. The remainder of the Attachment (the “*Confidential Information*”) is
4 entitled to confidential treatment based under KRS 61.878(1)(c)(1) and KRS
5 61.787(1)(a). 807 KAR 5:001 Section 13(2)(a)(1).

6 8. A copy of the filing with the Confidential Information redacted has
7 been served on all parties to this proceeding through the use of electronic filing.
8 807 KAR 5:001 Section 13(b).

9 9. Pursuant to the Commission’s March 24, 2020, Order in *In the Matter*
10 *of Electronic Emergency Docket Related to the Novel Coronavirus COVID-19*, Case
11 No. 2020-00085 (“*Case No. 2020-00085*”), one (1) copy of the Confidential
12 Information marked “CONFIDENTIAL,” is being filed via electronic mail to
13 PSCED@ky.gov. 807 KAR 5:001 Section 13(2)(a)(3)(b).

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

19 11. If and to the extent the Confidential Information becomes generally
20 available to the public, whether through filings required by other agencies or
21 otherwise, Big Rivers will notify the Commission and have the information’s
22 confidential status removed. 807 KAR 5:001 Section 13(10)(b).

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

3 12. The Confidential Information is entitled to confidential treatment
4 based upon KRS 61.878(1)(c)(1), which protects “records confidentially disclosed to
5 an agency or required by an agency to be disclosed to it, generally recognized as
6 confidential or proprietary, which if openly disclosed would permit an unfair
7 commercial advantage to competitors of the entity that disclosed the records.” *See*
8 807 KAR 5:001 Section 13(3)(a)(1). In support for this ground of granting
9 confidential treatment, Subsection A *infra* describes how Big Rivers operates in
10 competitive environments; Subsection Section B *infra* explains that the
11 Confidential Information is generally recognized as confidential or proprietary; and
12 Subsection C *infra* demonstrates that public disclosure of the Confidential
13 Information would permit an unfair commercial advantage to Big Rivers’
14 competitors. As such, the Commission should grant confidential treatment to the
15 Confidential Information.

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

17 13. Big Rivers must successfully compete in the wholesale power market
18 in order to sell excess energy to meet its members’ needs, including competition in:
19 term bilateral energy markets, day-ahead and real-time energy and ancillary
20 services markets, the annual capacity market, and forward bilateral long-term
21 wholesale agreements with utilities and industrial customers. Big Rivers’ ability
22 to successfully compete in these wholesale power markets is dependent upon a
23 combination of a) obtaining the maximum price for power it sells and the best

1 contract terms, and b) keeping its cost of production as low as possible.
2 Fundamentally, if Big Rivers' cost of producing a kilowatt hour of energy increases,
3 its ability to sell that kilowatt hour in competition with other utilities is adversely
4 affected.

5 14. Big Rivers also competes for reasonably-priced credit in the credit
6 markets, and its ability to compete is directly impacted by the financial results it
7 obtains and the business risks it assumes. Any event that adversely affects Big
8 Rivers' financial results or increases its business risks may adversely affect the
9 price it pays for credit. A competitor, including potential counterparties to future
10 contracts, armed with Big Rivers' proprietary and confidential information will be
11 able to increase Big Rivers' costs or decrease Big Rivers' revenues, which could in
12 turn affect Big Rivers' apparent creditworthiness. Impediments to Big Rivers'
13 obtaining the best contract terms could likewise affect its apparent
14 creditworthiness. A utility the size of Big Rivers that operates generation and
15 transmission facilities will always have periodic cash and borrowing requirements
16 for both anticipated and unanticipated needs. Big Rivers expects to be in the credit
17 markets on a regular basis in the future, and it is imperative that Big Rivers
18 improves and maintains its credit profile.

19 15. Finally, the ability to negotiate the most advantageous power
20 purchase agreements and then offer competitive prices to Big Rivers' Members,
21 companies interested in expanding in Kentucky, and potential new Members is
22 fundamental to Big Rivers' continued success.

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

5 **B. *The Confidential Information is Generally Recognized as***
6 ***Confidential or Proprietary.***

7 17. The Confidential Information for which Big Rivers seeks confidential
8 treatment under KRS 61.878(1)(c)(1) is generally recognized as confidential or
9 proprietary under Kentucky law. The Confidential Information consists of
10 confidential and sensitive contract negotiations contained in a number of emails
11 between two private parties. Communications containing contract negotiations
12 provide substantial insight into a company’s business strategies and the value it
13 places on specific contract terms. Such communications reflect “the give and take
14 of arm’s length negotiations...[which] amounts to commercial information not
15 ordinarily made public.”⁴

16 18. Information about a company’s detailed inner workings is generally
17 recognized as confidential or proprietary. *See, e.g., Hoy v. Kentucky Indus.*
18 *Revitalization Authority*, 907 S.W.2d 766, 768 (Ky. 1995) (“It does not take a
19 degree in finance to recognize that such information concerning the inner
20 workings of a corporation is ‘generally recognized as confidential or proprietary’”);
21 *Marina Management Servs. v. Cabinet for Tourism, Dep’t of Parks*, 906 S.W.2d

⁴ *Providence J. Co. v. Convention Ctr. Auth.*, 774 A.2d 40, 45 (R.I. 2001).

1 318, 319 (Ky. 1995) (unfair commercial advantage arises simply from “the ability
2 to ascertain the economic status of the entities without the hurdles systemically
3 associated with the acquisition of such information about privately owned
4 organizations”).

5 19. Further, the Commission has long recognized that communications
6 involving contract negotiations are confidential and proprietary.⁵ For example, in
7 Case No. 2020-00354, the Commission granted confidential treatment for an
8 affidavit containing confidential contract negotiations, finding that “the affidavit
9 they provided is recognized as confidential or proprietary as it contains internal
10 details regarding decisions over cellular tower leasing.”⁶ In that same case, the
11 Commission also granted confidential treatment to information in an email
12 between SBA Properties, LLC (“SBA”) and a third party “regarding details of
13 contract negotiations.”⁷ The Commission explained that “proposed contract terms
14 in contract negotiations are generally recognized as confidential or proprietary
15 and SBA would be harmed if its competitors had access to this information.”⁸ The

⁵ See, e.g., *In the Matter of: Electronic Application of New Cingular Wireless PCS, LLC d/b/a AT&T Mobility for Issuance of a Certificate of Public Convenience and Necessity to Construct a Wireless Communications Facility in the Commonwealth of Kentucky in the County of Russell*, Case No. 2022-00010, Order (Aug. 30, 2022) (granting confidential treatment to an affidavit containing “a description of the negotiations of rental terms”); *In the Matter of: Application of Big Rivers Electric Corporation for a General Adjustment in Rates*, Case No. 2013-00199, Order (Nov. 25, 2013) (granting confidential treatment to contract negotiations attached to Big Rivers’ response to Item 41 of the Attorney General’s Initial Request for Information).

⁶ *In the Matter of: Electronic Application of New Cingular Wireless PSC, LLC d/b/a AT&T Mobility for Issuance of a Certificate of Public Convenience and Necessity to Construct a Wireless Communications Facility in the Commonwealth of Kentucky in the County of Wayne*, Case No. 2020-00354, Order (Dec. 10, 2021), at p. 2.

⁷ *Id.* at p. 1.

⁸ *Id.* at p. 2.

1 Commission further noted that it previously granted confidential treatment to
2 similar information describing contract negotiations.⁹

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

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

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

15 22. With the exception of two partially confidential emails containing
16 the final Amendment No. 1, the emails attached to Big Rivers' response to AG 1-1
17 contain draft versions of Amendment No.1 and PowerPoint presentations
18 disclosed during confidential contract negotiations. These documents contain
19 various proposals, discussions, redlines, comments, and NGR's analysis of its
20 agreement with Big Rivers and need for Amendment No. 1. Public disclosure of
21 such information reveals business strategies of both Big Rivers and NGR with

⁹ *Id.* at pp 2-3.

1 respect to contract terms and internal analyses. As the Kentucky Supreme Court
2 has noted, “It does not take a degree in finance to recognize that such information
3 concerning the inner workings of a corporation is ‘generally recognized as
4 confidential or proprietary.’”¹⁰

5 23. If confidential treatment of contract negotiations between Big Rivers
6 and a contract counterparty are publicly disclosed, other companies interested in
7 buying or selling power in Kentucky and economic development prospects would
8 know that such information related to their business strategies, negotiations, and
9 internal analyses with respect to future proposals may also be publicly disclosed.
10 Many companies would be reluctant to have such sensitive information publicly
11 disclosed, and would be less willing to negotiate freely with Big Rivers, if at all.
12 This harm has been recognized by both the Commission and the Kentucky
13 Supreme Court. For example, in Case No. 2003-00054, the Commission granted
14 confidential protection for bids submitted to Union Light, Heat & Power
15 (“*ULH&P*”). *ULH&P* argued, and the Commission implicitly accepted, that the
16 bidding contractors would not want their bid information publicly disclosed, and
17 that disclosure would reduce the contractor pool available to *ULH&P*, which
18 would drive up *ULH&P*’s costs, hurting its ability to compete with other gas
19 suppliers.¹¹ Similarly, in *Hoy v. Kentucky Indus. Revitalization Authority*, the

¹⁰ *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 information concerning the inner workings of a corporation is ‘generally recognized as confidential or proprietary’”).

¹¹ *In the Matter of: Application of the Union Light, Heat and Power Company for Confidential Treatment*, Case No. 2003-00054, Order (Aug. 4, 2003).

1 Kentucky Supreme Court found that without protection for confidential
2 information provided to a public agency, “companies would be reluctant to apply
3 for investment tax credits for fear the confidentiality of financial information
4 would be compromised.”¹² In Big Rivers’ case, public disclosure of its and/or a
5 counterparty’s sensitive business strategies, internal analyses, proposals, and
6 negotiations contained in the Attachment would drive down the pool of
7 counterparties willing to deal with Big Rivers, driving up Big Rivers’ costs, and
8 hurting its ability to compete in the wholesale power markets and to compete for
9 economic development prospects.

10 24. Thus, public disclosure of the Confidential Information would permit
11 an unfair competitive advantage to Big Rivers’ competitors.

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

14 25. KRS 61.878(1)(a) explicitly grants confidential treatment to “[p]ublic
15 records containing information of a personal nature where the public disclosure
16 thereof would constitute a clearly unwarranted invasion of personal privacy.”
17 Here, the Confidential Information reveals proprietary and otherwise private
18 information of NGR, Big Rivers’ counterpart to Amendment No. 1 and non-party
19 to this proceeding. This proprietary information includes not only the negotiated
20 terms of Amendment No. 1, but also NGR’s internal market projections, as well as
21 its analysis of the Unbridled Project¹³ and the Unbridled PPA.

¹² *Hoy v. Kentucky Indus. Revitalization Authority*, 907 S.W.2d at 769.

¹³ The solar facility approved for construction on the Henderson /Webster County line just south of Henderson, Kentucky in Henderson and Webster County, Kentucky.

1 26. Because public disclosure of the Confidential Information consisting
2 of NGR's proprietary information would constitute an unwarranted invasion of the
3 NGR's privacy, this Confidential Information should be granted confidential
4 treatment. Both the Attorney General and the Commission have held that KRS
5 61.878(1)(a) protects such sensitive third party commercial information. *See Ky.*
6 *Op. Atty. Gen. 96-ORD-176* (August 20, 1996) (holding Kroger Company's utility
7 bills exempt from disclosure under KRS 61.878(1)(a)); *In the Matter of: Application*
8 *of Kentucky Utilities Company for an Adjustment of its Electric Rates*, Order, P.S.C.
9 Case No. 2012-00221 (July 25, 2013) (holding customer names, account numbers,
10 and usage information exempt from disclosure under KRS 61.878(1)(a)).

11 **III. Time Period**

12 27. Big Rivers requests the Confidential Information remain confidential
13 indefinitely because for so long as Big Rivers is in the wholesale power market,
14 the public disclosure of the Confidential Information can be used to Big Rivers'
15 competitive disadvantage for the reasons stated above. 807 KAR 5:001 Section
16 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
21 hearing. *See Utility Regulatory Comm'n v. Kentucky Water Serv. Co., Inc.*, 642
22 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 31st day of August, 2023.

4 Respectfully submitted,

5 */s/ Senthia Santana*

6 Senthia Santana

7 Tyson Kamuf

8 Whitney Kegley

9 Big Rivers Electric Corporation

10 201 Third Street, P.O. Box 24

11 Henderson, Kentucky 42419-0024

12 Phone: (270) 827-2561

13 Facsimile: (270) 844-6417

14 senthia.santana@bigrivers.com

15 tyson.kamuf@bigrivers.com

16 whitney.kegley@bigrivers.com

17
18 *Counsel for Big Rivers Electric*
19 *Corporation*
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