

- 1 a. certain negotiated terms of the Unbridled PPA;¹
- 2 b. Big Rivers’ internal economic analysis of the Unbridled PPA;²
- 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*”).³
- 7 3. The remaining Confidential Information is substantially similar to
- 8 information which the Commission Order on March 25, 2021, granted confidential
- 9 treatment in 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*”);⁴ and

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).

⁴ This Confidential Information is located at Application Exhibit 3, Direct Testimony of Mark Eacret, page 17.

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 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).

6

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

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

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

2 10. 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 11. 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 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.

13 ***B. The Confidential Information is Generally Recognized as***
14 ***Confidential 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
2 projections, as well as its analysis of the Unbridled Project⁶ and the Unbridled PPA.

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

⁶ The subject solar facility approved for construction in Henderson and Webster County, Kentucky.

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

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

21 20. Because companies would not want their confidential and
22 proprietary information disclosed to their competitors, public disclosure of the

1 Confidential Information in this case would likely reduce the pool of companies
2 willing to negotiate with Big Rivers, reducing Big Rivers' and other utilities'
3 ability to secure economic development prospects and the best terms in power
4 purchase agreements. Big Rivers' competition for future renewable purchase
5 contracts is not limited to its traditional regulated competitors. Large industrial
6 consumers, municipals, cities, and communities are reaching out to solar
7 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
10 protection for bids submitted to ULH&P. ULH&P argued, and the Commission
11 implicitly accepted, that the bidding contractors would not want their bid
12 information publicly disclosed, and that disclosure would reduce the contractor
13 pool available to ULH&P, which would drive up ULH&P's costs, hurting its
14 ability to compete with other gas suppliers. *In the Matter of: Application of the*
15 *Union Light, Heat and Power Company for Confidential Treatment*, P.S.C. Case
16 No. 2003-00054, Order (August 4, 2003). Similarly, in *Hoy v. Kentucky Indus.*
17 *Revitalization Authority*, the Kentucky Supreme Court found that without
18 protection for confidential information provided to a public agency, "companies
19 would be reluctant to apply for investment tax credits for fear the confidentiality
20 of financial information would be compromised." *Hoy v. Kentucky Indus.*
21 *Revitalization Authority*, 907 S.W.2d 766, 769 (Ky. 1995).

1 **III. Time Period**

2 25. Big Rivers requests the Confidential Information contained
3 Application Exhibit 3, Direct Testimony of Mark Eacret at page 13 and Exhibit
4 Eacret-4 (NGR’s proprietary information) remain confidential indefinitely so as
5 to protect private non-party information. *See In the Matter of: Sanctuary Church*
6 *v. Louisville Gas and Electric Company*, Order, P.S.C. Case No. 2018-00181
7 (January 8, 2019) (granting confidential treatment for an indefinite period to
8 detailed account and usage information of a non-party).

9 26. Further, Big Rivers requests that all of the Confidential Information
10 remain confidential indefinitely because for so long as Big Rivers is in the
11 wholesale power market, the public disclosure of the Confidential Information can
12 be used to Big Rivers’ competitive disadvantage for the reasons stated above. 807
13 KAR 5:001 Section 13(2)(a)(2). . *See In the Matter of: Electronic Joint Application*
14 *of Big Rivers Electric Corporation and Meade County Rural Electric Cooperative*
15 *Corporation for (1) Approval of Contracts for Electric Service with Nucor*
16 *Corporation; and (2) Approval of Tariff*, P.S.C. Case No. 2019-00365, Order (Jan.
17 22, 2020) (granting confidential treatment to the confidential terms of the Nucor
18 contract for an indefinite time);

19 **IV. Conclusion**

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.

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Respectfully submitted,

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/s/ Senthia Santana

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