

1 COMMONWEALTH OF KENTUCKY
2 BEFORE THE PUBLIC SERVICE COMMISSION

3 In the Matter of:

**ELECTRONIC APPLICATION OF)
BIG RIVERS ELECTRIC CORPORATION)
FOR A CERTIFICATE OF PUBLIC)
CONVENIENCE AND NECESSITY) Case No.
AUTHORIZING CONSTRUCTION OF A NEW) 2022-00433
TRANSMISSION OPERATIONS CENTER AND)
AN ORDER AUTHORIZING BIG RIVERS TO)
DISPOSE OF PROPERTY)**

4 **MOTION FOR CONFIDENTIAL TREATMENT**

5 1. Big Rivers Electric Corporation (“Big Rivers”), by counsel, hereby moves the
6 Kentucky Public Service Commission (“Commission”), pursuant to 807 KAR 5:001 Section 13,
7 KRS 61.878, and other applicable law, to grant confidential treatment to certain information
8 provided in its Response to Commission Staff’s First Request for Information filed
9 contemporaneously herewith in the above-styled matter.

10 2. The information for which Big Rivers seeks confidential treatment is hereinafter
11 referred to as the “Confidential Information.” The Confidential Information includes:

12 a. Detailed descriptions of the location and attributes of critical energy infrastructure
13 (“CEI”), specifically with respect to Big Rivers’ existing and proposed facilities
14 utilized in connection with energy transmission, control, and engineering (*see* Big
15 Rivers’ Response to Item 2; Big Rivers’ Response to Item 6; Big Rivers’ Response
16 to Item 7; Big Rivers Response to Item 14); and

17 b. Appraisals of Big Rivers’ existing Energy Transmission & Substation facility
18 (“ET&S Facility”) and the facility’s net book value (*see* Big Rivers’ Response to
19 Item 3), appraisals of Big Rivers’ outgoing headquarters facility (*see* Big Rivers’

1 Response to Item 13), and projected sales values of both facilities (*see* Big Rivers’
2 Response to Item 13; Big Rivers’ Response to Item 14).

3 3. Pursuant to the Commission’s March 24, 2020 Order in *In the Matter of: Electronic*
4 *Emergency Docket Related to the Novel Coronavirus COVID-19*, Case No. 2020-00085 (“Case
5 No. 2020-00085”), Big Rivers is submitting with this motion one (1) copy of the documents
6 containing Confidential Information highlighted with transparent ink, printed on yellow paper, or
7 otherwise marked “CONFIDENTIAL,” via electronic mail to PSCED@ky.gov. A copy of those
8 pages, with the Confidential Information redacted, is being filed into public docket via the
9 Commission’s Electronic Filing System.

10 4. If and to the extent the Confidential Information becomes generally available to the
11 public, whether through filings required by other agencies or otherwise, Big Rivers will notify the
12 Commission in writing. *See* 807 KAR 5:001, Section 13(10)(b).

13 5. As discussed below, the Confidential Information is entitled to confidential
14 treatment based upon KRS 61.878(1)(c)(1) and KRS 8 61.878(1)(m). *See* 807 KAR 5:001, Section
15 13(2)(a)(1).

16 6. Further, much of the Confidential Information is similar to or pertains to
17 confidential information for which the Commission previously granted confidential treatment in
18 earlier proceedings. *See In the Matter of: Electronic Application of Big Rivers Electric*
19 *Corporation for a Certificate of Convenience and Necessity Authorizing Construction of a New*
20 *Headquarters Facility and an Order Authorizing Big Rivers to Sell its Existing Headquarters*
21 *Facility*, Case No. 2021-00314, Order (Ky. P.S.C. Sept. 27, 2022) (the “September 27, 2022
22 Order”) (granting confidentiality to substantially the same property-valuation information and CEI
23 information as at issue herein).

1 **I. Certain of the Confidential Information is Entitled to Protection from Public**
2 **Disclosure by KRS 61.878(1)(c)(1).**

3
4 7. KRS 61.878(1)(c)(1) protects “records confidentially disclosed to an agency or
5 required by an agency to be disclosed to it, generally recognized as confidential or proprietary,
6 which if openly disclosed would permit an unfair commercial advantage to competitors of the
7 entity that disclosed the records.” Subsection A *infra* describes how Big Rivers operates in
8 competitive environments in the wholesale power market and in the credit market; Subsection B
9 *infra* explains that the Confidential Information is generally recognized as confidential or
10 proprietary; and Subsection C *infra* demonstrates that public disclosure of the Confidential
11 Information would permit an unfair commercial advantage to Big Rivers’ competitors.

12 **A. Big Rivers Faces Actual Competition.**

13 8. Big Rivers must successfully compete in the wholesale power markets to sell
14 energy it produces in excess of its members’ needs. Big Rivers’ ability to successfully compete in
15 these markets is dependent upon a combination of its ability to: a) obtain the maximum price for
16 the power it sells and secure the most favorable contract terms available, and b) keep its cost of
17 production as low as possible. Fundamentally, if Big Rivers’ cost of producing a kilowatt hour of
18 energy increases, its ability to sell that kilowatt hour in competition with other utilities is adversely
19 affected.

20 9. Big Rivers also competes for reasonably-priced credit in the credit markets, and its
21 ability to compete is directly impacted by its financial results. Lower revenues and any events that
22 adversely affect Big Rivers’ margins will adversely affect its financial results and potentially
23 impact the price it pays for credit. A competitor or potential counterparty armed with Big Rivers’
24 proprietary and confidential information will be able to increase Big Rivers’ costs or decrease Big
25 Rivers’ revenues, which could in turn affect Big Rivers’ creditworthiness. A utility the size of Big

1 Rivers that operates generation and transmission facilities will always have periodic cash and
2 borrowing requirements for both anticipated and unanticipated needs. Big Rivers expects to be in
3 the credit markets in the future, and it is imperative that Big Rivers improve and maintain its credit
4 profile.

5 10. Accordingly, Big Rivers has competitors in both the wholesale power and credit
6 markets, and its Confidential Information should be protected to prevent the imposition of an unfair
7 competitive advantage.

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

10
11 11. The Confidential Information for which Big Rivers seeks confidential treatment
12 under KRS 61.878(1)(c)(1) is generally recognized as confidential or proprietary under Kentucky
13 law.

14 12. As described above, the Confidential Information includes detailed, proprietary
15 information pertaining to the existing and projected values of discrete Big Rivers assets,
16 specifically its outgoing headquarters facility and existing ET&S Facility. This Confidential
17 Information is critical to the effective execution of Big Rivers' business decisions and strategy
18 and, if disclosed, would allow potential counterparties and competitors to gain an advantage over
19 Big Rivers in the course of ongoing and future negotiations, potentially affecting the ultimate
20 purchase price obtained by Big Rivers for the sale of its assets.

21 13. Under Kentucky law, it is well-recognized that information about a company's
22 inner workings, such as the Confidential Information here, is generally recognized as confidential
23 or proprietary. *See, e.g., Hoy v. Ky. Indus. Revitalization Auth.*, 907 S.W.2d 766, 768 (Ky. 1995)
24 ("It does not take a degree in finance to recognize that such information concerning the inner
25 workings of a corporation is 'generally recognized as confidential or proprietary.'"); *Marina*

1 *Management Servs. v. Cabinet for Tourism, Dep't of Parks*, 906 S.W.2d 318 (Ky. 1995).
2 Additionally, the Commission has previously granted confidential treatment to essentially the
3 same information. *See, e.g.*, the September 27, 2022 Order, at p. 8 (“The appraisal reports and
4 estimated current value of BREC’s existing headquarters properties and related information shall
5 not be placed in the public record or made available for public inspection until such time as
6 the...transactions for all of BREC’s existing headquarters properties have closed or until further
7 Order of this Commission.”).

8 14. The Confidential Information is not publicly available, is not disseminated within
9 Big Rivers except to those employees and professionals with a legitimate business need to know
10 and act upon the information, and is not disseminated to others without a legitimate need to know
11 and act upon the information. As such, the Confidential Information is both recognized by Big
12 Rivers and generally recognized as confidential and proprietary.

13 **C. Disclosure of the Confidential Information Would Result in an Unfair**
14 **Commercial Advantage to Big Rivers’ Competitors.**
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16 15. Disclosure of the Confidential Information could unreasonably and unnecessarily
17 harm Big Rivers by giving interested third parties, and particularly potential counterparties in real
18 estate sales transactions, an unfair commercial advantage through insight into Big Rivers’ business
19 operations and financial strategies. As discussed *supra*, Big Rivers faces actual competition in
20 both the short-and long-term wholesale power markets and in the credit markets, and the success
21 of Big Rivers turns in large part on its ability to maximize the value of its assets. It is likely that
22 Big Rivers’ ability to compete would be adversely affected if the Confidential Information were
23 publicly disclosed, and Big Rivers seeks protection from such competitive injury.

24 16. The Commission has consistently recognized that internal strategic financial
25 planning information, projected sales information, and related materials are entitled to confidential

1 treatment, as these documents typically relate to the company’s economic status and business
2 strategies. *See, e.g.*, the September 27, 2022 Order; *see also Marina Management Servs., supra*,
3 906 S.W.2d at 319 (Ky. 1995) (unfair commercial advantage arises simply from “the ability to
4 ascertain the economic status of the entities without the hurdles systemically associated with the
5 acquisition of such information about privately owned organizations”); *In the Matter of: The Joint*
6 *Application of Duke Energy Corp., Cinergy Corp., Duke Energy Ohio, Inc., Duke Energy*
7 *Kentucky, Inc., Diamond Acquisition Corp., and Progress Energy Inc., for Approval of the Indirect*
8 *Transfer of Control of Duke Energy Kentucky, Inc.*, Case No. 2011-00124, Order (Ky. P.S.C. Dec.
9 5, 2011).

10 17. If disclosed, certain of the Confidential Information would allow Big Rivers’
11 competitors and potential counterparties to discover, and make use of, confidential information
12 concerning Big Rivers’ assets and business strategies, to the unfair competitive disadvantage of
13 Big Rivers.

14 **II. Certain of the Confidential Information is Entitled to Protection from Public**
15 **Disclosure by KRS 61.878(1)(m).**
16

17 18. Certain of the Confidential Information is entitled to confidential treatment based
18 upon KRS 61.878(1)(m)(1), which protects “[p]ublic records the disclosure of which would have
19 a reasonable likelihood of threatening the public safety by exposing a vulnerability in preventing
20 protecting against, mitigating, or responding to a terrorist act. . . .”

21 19. The Confidential Information contains detailed information that describes the
22 current and planned location and attributes of critical energy infrastructure. If publicly disclosed,
23 this Confidential Information could be utilized to commit or further a terrorist act, including the
24 intimidation or coercion of all or part of the civilian population and the disruption of public utility
25 and other critical systems. The public release of such Confidential Information has a reasonable

1 likelihood of threatening the public safety, particularly because it reflects detailed, precise, and
2 highly technical information about the configuration and operations of valuable infrastructure on
3 which many individuals and businesses rely. Pursuant to KRS 61.878(1)(m), the Confidential
4 Information should be exempt from public disclosure.

5 22. The Commission granted confidential treatment on these grounds for an indefinite
6 period to maps showing critical transmission infrastructures contained in Big Rivers' 2014 IRP and
7 2017 IRP. *See In the Matter of: 2014 Integrated Resource Plan of Big Rivers Electric Corporation*,
8 P.S.C. Case No. 2014-00166, Order (Ky. P.S.C. August 26, 2014); *In the Matter of 2017 Integrated*
9 *Resource Plan of Big Rivers Electric Corporation*, P.S.C. Case No. 2017-00384, Order (Ky. P.S.C.
10 April 25, 2019). Likewise, the Commission has granted confidential treatment of a detailed map
11 of Big Rivers' transmission system and a detailed diagram showing the system's components. *See*
12 *In the Matter of: Application of Big Rivers Electric Corporation for a Certificate of Public*
13 *Convenience and Necessity to Construct Two 161 KV Transmission Lines in Hancock County,*
14 *Kentucky*, P.S.C. Case No. 2015-00051, Order (Ky. P.S.C. January 15, 2016); *see also In The*
15 *Matter of: Application of Big Rivers Electric Corporation for Approval of Its 2020 Environmental*
16 *Compliance Plan, Authority To Recover Costs Through A revised Environmental surcharge and*
17 *Tariff, the Issuance of a Certificate of Public Convenience and Necessity For Certain Projects,*
18 *and Appropriate Accounting and Other Relief*, P.S.C. Case No. 2019-00435, Order (Ky. P.S.C.
19 August 6, 2020) (granting confidential treatment to maps and drawings of critical infrastructure).
20 More recently, the Commission granted confidential protection to information of a substantially-
21 identical nature in Big Rivers' recent case involving its new headquarters facility. *See the*
22 *September 27, 2022 Order*, at p. 8 ("The location, structure, and other sensitive information

1 regarding BREC’s energy control room shall not be placed in the public record or made available
2 for public inspection for an indefinite period or until further Order of this Commission.”).

3 **III. Time Period**

4 20. Pursuant to 807 KAR 5:001 Section 13(3)(a)(2), Big Rivers requests that the
5 Confidential Information be granted confidential treatment for the time periods detailed below.

6 21. Big Rivers requests that the Confidential Information consisting of the current book
7 value, appraised values, and projected values of Big Rivers’ outgoing headquarters properties and
8 existing ET&S Facility remain confidential until such time as the real estate transactions related
9 to these properties close or five (5) years from the date of the Motion has elapsed (thereby allowing
10 the information to become sufficiently stale as to no longer warrant confidential treatment),
11 whichever should first occur.

12 22. Big Rivers requests that the Confidential Information protected by KRS
13 61.878(1)(m) remain confidential indefinitely because as long as the critical energy infrastructure
14 remains in place, the information should be confidential for the reasons stated above.

15 **IV. Conclusion**

16 23. Based on the foregoing, the Confidential Information is entitled to confidential
17 protection. If the Commission disagrees, then the Commission should hold an evidentiary hearing
18 to protect Big Rivers’ due process rights and to supply the Commission with a complete record to
19 enable it to reach a decision with regard to this matter. *See Util. Reg. Comm'n v. Ky. Water Serv.*
20 *Co., Inc.*, 642 S.W.2d 591 (Ky. App. 1982).

21
22 WHEREFORE, Big Rivers respectfully requests that the Commission classify and protect
23 as confidential the Confidential Information.

1 Dated this 6th day of March, 2023.

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3 Respectfully submitted,
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27 **Certification**

28 I hereby certify that a copy of this Motion for Confidential Treatment has been served
29 electronically on all parties of record through the use of the Commission's electronic filing system,
30 and there are currently no parties that the Commission has excused from participation by electronic
31 means. Pursuant to the Commission's July 22, 2021 Order in Case No. 2020-00085, a paper copy
32 of this filing has not been transmitted to the Commission.
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34 _____
35 /s/
36 *Counsel to Big Rivers Electric Corporation*

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