

1 d. planned maintenance outages for its generating units for years
2 2023 and 2024 (Big Rivers’ Response to Item 34); and
3 e. internal projections related to market prices, and potential effects
4 of market conditions on Big Rivers, and Big Rivers’ capacity
5 projections (Direct Testimony of Terry Wright, Jr.).

6 3. Pursuant to the Commission’s orders in *In the Matter of Electronic*
7 *Emergency Docket Related to the Novel Coronavirus COVID-19*, Case No. 2020-
8 00085 (“*Case No. 2020-00085*”), one (1) copy of the Confidential Information
9 highlighted with transparent ink, printed on yellow paper, or otherwise marked
10 “CONFIDENTIAL,” is being filed with this motion by electronic mail to
11 PSCED@ky.gov . A copy of those pages, with the Confidential Information
12 redacted, is being electronically filed with Big Rivers’ Responses accompanying
13 this motion. 807 KAR 5:001 Section 13(2)(a)(3)(b).

14 4. A copy of this motion 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 5. If and to the extent the Confidential Information becomes generally
18 available to the public, whether through filings required by other agencies or
19 otherwise, Big Rivers will notify the Commission and have its confidential status
20 removed. 807 KAR 5:001 Section 13(10)(b).

21

1 **I. The Confidential Information is entitled to confidential**
2 **treatment based upon KRS 278.160(3)**

3 6. Certain Confidential Information contained in Big Rivers’ responses
4 and/or attachments to Items 12 and 13 is entitled to confidential protection based
5 upon KRS 278.160(3), which shields from disclosure “a provision of a special
6 contract that contains rates and conditions of service not filed in a utility’s
7 general schedule if such provision would otherwise be entitled to be excluded from
8 the application of KRS 61.870 to 61.884 under the provisions of KRS
9 61.878(1)(c)(1).”

10 7. The special contracts in question relate to Big Rivers’ power sales
11 contracts with the Kentucky Municipal Energy Agency (“*KyMEA*”), Owensboro
12 Municipal Utilities (“*OMU*”); Nucor Corporation (“*Nucor*”); municipalities in
13 Nebraska; and to short term contracts with other non-members. The Commission
14 has already found that confidential terms of the contracts are entitled to
15 confidential treatment under KRS 61.878(1)(c)(1).¹ The confidential terms of
16 these special contracts should again be granted confidential treatment.

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¹ See *In the Matter of: An Electronic Examination of the Application of Big Rivers Electric Corporation from November 1, 2021 Through April 30, 2022*, Case No. 2022-000268, Order (Mar. 1, 2023).

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

3 8. KRS 61.878(1)(a) protects and affords confidentiality 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 9. The attachment to Big Rivers’ response to Item 13 reveals sales to,
7 and inferably the power usage of, individual large industrial retail customers on
8 the Big Rivers system and to non-members under special contract. Because the
9 individual customers and non-members identified in the attachment to Big
10 Rivers’ response to Item 13 are not parties to this proceeding, publicly revealing
11 such information would constitute a clearly unwarranted invasion of those
12 customers’ privacy. Moreover, the Commission has previously granted
13 confidential treatment to similar retail customer usage information under the
14 purview of KRS 61.878(1)(a).²

15 10. As such, Big Rivers requests confidential treatment for the identity
16 of these customers in order to protect their private usage information.

17

² See, e.g., *In the Matter of: Sanctuary Church v. Louisville Gas and Electric Company*, Case No. 2018-00181, Order (Jan. 8, 2019) (granting confidential treatment pursuant to KRS 61.878(1)(a) for an indefinite period to a retail customer’s account and usage information); *In the Matter of: Application of Kentucky Utilities Company for an Adjustment of its Electric Rates*, Case No. 2012-00221, Order (July 25, 2013) (holding customer names, account numbers, and usage information exempt from disclosure under KRS 61.878(1)(a)). See also, *In the Matter of: An Electronic Examination of the Application of the Fuel Adjustment Clause of Big Rivers Electric Corporation From May 1, 2019 Through October 31, 2019*, Case No. 2020-00009, Order (April 13, 2020).

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

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

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

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

1 possible. Fundamentally, if Big Rivers' cost of producing a kilowatt hour of
2 energy increases, its ability to sell that kilowatt hour in competition with other
3 utilities is adversely affected.

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

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

1 15. 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 16. 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. As noted above, the Confidential Information
10 contains Big Rivers': special contract terms, third party proprietary usage
11 information; projected fuel requirements; sales projections; planned maintenance
12 outages for each of its generating units; internal projections related to market
13 prices and potential effects of market conditions on the Company; and Big Rivers
14 capacity projections. The Confidential Information is precisely the sort of
15 information meant to be protected by KRS 61.878(1)(c)(1).

16 17. Kentucky courts have held that information about a company's
17 detailed inner workings is generally recognized as confidential or proprietary. In
18 *Hoy v. Kentucky Industrial Revitalization Authority*, the Kentucky Supreme Court
19 held that financial information submitted by General Electric Company with its
20 application for investment tax credits was not subject to disclosure simply
21 because it had been filed with a state agency. 907 S.W.2d 766, 4 (Ky. 1995). The
22 Court applied the plain meaning rule to KRS 61.878(1)(c)(1), and reasoned: "[i]t
23 does not take a degree in finance to recognize that such information concerning

1 the inner workings of a corporation is ‘generally recognized as confidential or
2 proprietary.’” *Id.* at 768. Similarly, in *Marina Management Services, Inc. v.*
3 *Commonwealth Cabinet for Tourism*, the Court held: “[t]hese are records of
4 privately owned marina operators, disclosure of which would unfairly advantage
5 competing operators. The most obvious disadvantage may be the ability to
6 ascertain the economic status of the entities without the hurdles systematically
7 associated with acquisition of such information about privately owned
8 organizations.” 906 S.W.2d 318, 319 (Ky. 1995)

9 18. In this proceeding, the potential public disclosure of the Confidential
10 Information could give Big Rivers’ suppliers, buyers, and competitors insight into
11 Big Rivers’ “inner workings.” For instance, the Confidential Information could be
12 used to determine when Big Rivers will have power available to sell into the
13 market or when Big Rivers needs power, the amount of power Big Rivers has to
14 sell or will need, as well as the prices at which it is willing to sell power. Such
15 information would also provide market participants with insight into Big Rivers’
16 production costs.

17 19. Public disclosure of the confidential terms of special contracts and
18 third party proprietary information would also cause competitive harm to Big
19 Rivers. In P.S.C. Case No. 2003-00054, the Commission implicitly accepted
20 ULH&P’s argument that the bidding contractors would not want their bid
21 information publicly disclosed, and that disclosure would reduce the contractor
22 pool available to ULH&P, which would drive up ULH&P’s costs, hurting its

1 ability to compete with other gas suppliers. *In the Matter of Application of the*
2 *Union Light, Heat and Power Company for Confidential Treatment*, P.S.C. Case
3 No. 2003-00054, Order (Aug. 4, 2003). Similarly, in *Hoy v. Kentucky Indus.*
4 *Revitalization Authority*, the Kentucky Supreme Court found that without
5 protection for confidential information provided to a public agency, “companies
6 would be reluctant to apply for investment tax credits for fear the confidentiality
7 of financial information would be compromised.” *Hoy v. Kentucky Indus.*
8 *Revitalization Authority*, 907 S.W.2d 766, 769 (Ky. 1995).

9 20. In Big Rivers’ case, Big Rivers is currently in negotiations with
10 potential counterparties and expects to engage in negotiations with other
11 counterparties for purchase power agreements and sales in the future. If
12 confidential treatment of the confidential terms of the special contract in Big
13 Rivers’ responses or attachments to its responses to Item 12 and Item 13 is
14 denied, potential counterparties would know that the confidential terms of their
15 contracts could be publicly disclosed, which could reveal information to their
16 competitors about their competitiveness. Because many companies would be
17 reluctant to have such information disclosed, public disclosure of the Confidential
18 Information would likely reduce the pool of counterparties willing to negotiate
19 with Big Rivers, reducing Big Rivers’ ability to sell power and impairing its ability
20 to compete in the wholesale power and credit markets.

21 21. Notably, the Commission, in its recent reviews of Big Rivers’ FAC,
22 has applied similar reasoning in granting confidential treatment to the same type

1 of information as the Confidential Information in Big Rivers’ response to Item 12
2 and Item 13, consisting of the private usage information of individual retail
3 customers and projected ongoing sales.³

4 22. Further, the Commission has granted confidential treatment to
5 information similar to the Confidential Information in the Direct Testimony of
6 Terry Wright, Jr., projections related to market conditions.⁴

7 23. In sum, the Confidential Information is not publicly available, is not
8 disseminated within Big Rivers except to those employees and professionals with
9 a legitimate business need to know and act upon the information, and is not
10 disseminated to others without a legitimate need to know and act upon the
11 information. As such, the Confidential Information details the “inner workings”
12 of Big Rivers’ and is generally recognized as confidential and proprietary under
13 Kentucky law.

14

³ See *In the Matter of: Electronic Examination of the Application of the Fuel Adjustment Clause of Big Rivers Electric Corporation from November 1, 2017 through April 30, 2018*, Case No. 2018-00221, Order (Oct. 16, 2018 (granting confidential treatment for Big Rivers’ projected ongoing-off system sales); see also *In the Matter of: Electronic Examination of the Application of the Fuel Adjustment Clause of Big Rivers Electric Corporation from November 1, 2018 through April 30, 2019*, Case No. 2019-00231, Order (April 2, 2020) (granting confidential treatment for fuel supply bids, future off-system sales, and private usage information of individual retail customers).

⁴ *In the Matter of: Electronic Application of Big Rivers Electric Corporation for a Certificate of Public Convenience and Necessity Authorizing the Conversion of the Green Station Units to Natural Gas-Fired Units and an Order Approving the Establishment of a Regulatory Asset*, Case No. 2021-000079, Order (Mar. 5, 2021).

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

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

10 25. Given the nature of the Confidential Information, its disclosure
11 would provide other market participants, suppliers, buyers, and competitors
12 insight into the timing of Big Rivers' capacity needs, its cost of producing power,
13 and the prices at which it is willing to buy fuel or buy and sell power. In turn, the
14 Confidential Information could be used to manipulate the bidding process, leading
15 to higher costs and/or lower revenues for Big Rivers, thereby impairing its ability
16 to compete in the wholesale power markets. Furthermore, any competitive
17 pressure that adversely affects Big Rivers' revenue and/or margins could make
18 Big Rivers appear less creditworthy and impair its ability to compete in the credit
19 market.

20 26. Thus, public disclosure of the information that Big Rivers seeks to
21 protect pursuant to KRS 61.878(1)(c)(1) would permit an unfair competitive
22 advantage to Big Rivers' competitors.

1 **IV. Time Period**

2 27. Big Rivers requests that the Confidential Information in the Big
3 Rivers' responses and attachments to its responses to Item 12 and Item 13, which
4 consists of confidential terms of special contracts and protected private customer
5 usage information remain confidential indefinitely because for as long as Big
6 Rivers is in the wholesale power market, the public disclosure of the Confidential
7 Information can be used to Big Rivers' competitive disadvantage for the above
8 stated reasons. 807 KAR 5:001 Section 13(2)(a)(2).

9 28. Big Rivers requests that all other Confidential Information remain
10 confidential for a period of five (5) years from the date of this motion, which will
11 allow sufficient time for the information to become sufficiently outdated to no
12 longer pose a competitive risk to Big Rivers. 807 KAR 5:001 Section 13(2)(a)(2).

13

14 **V. Conclusion**

15 29. Based on the foregoing, the Confidential Information is entitled to
16 confidential treatment, pursuant to KRS 278.160(3); 807 KAR 5:001 Section 13;
17 and KRS 61.878. If the Commission disagrees that Big Rivers' Confidential
18 Information is entitled to confidential treatment, due process requires the
19 Commission to hold an evidentiary hearing. *See Utility Regulatory Comm'n v.*
20 *Kentucky Water Serv. Co., Inc.*, 642 S.W.2d 591 (Ky. App. 1982).

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