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

In the Matter of:

**AN ELECTRONIC EXAMINATION OF THE)
APPLICATION OF THE FUEL ADJUSTMENT CLAUSE) Case No.
OF BIG RIVERS ELECTRIC CORPORATION) 2023-00013
FROM NOVEMBER 1, 2020 THROUGH OCTOBER 31, 2022)**

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

- 1. Big Rivers Electric Corporation (“*Big Rivers*” or the “*Company*”) hereby moves the Public Service Commission of Kentucky (the “*Commission*”), pursuant to 807 KAR 5:001 Section 13; KRS 61.878; and KRS 278.160(3) to grant confidential treatment to certain information contained in Big Rivers’ responses and/or attachments to its responses to the Commission Staff’s Second Request for Information filed in this matter (the “*Confidential Information*”).
- 2. The Confidential Information consists of:
 - a. negotiated terms of special contracts and third party proprietary information;
 - b. detailed data related to Big Rivers’ recent power bids into MISO’s day ahead market; and
 - c. Big Rivers’ internal projections related to its future energy purchases, market prices, potential effects of market conditions on Big Rivers, and Big Rivers’ future capacity position.

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

9 4. A copy of this motion with the Confidential Information redacted has
10 been served on all parties to this proceeding through the use of electronic filing.
11 807 KAR 5:001 Section 13(b).

12 5. Item No. 26 of the Commission Staff’s Second Request for
13 Information, requests detailed data in “an Excel spreadsheet format with all
14 formulas, columns, and rows unprotected and fully accessible, for the period
15 under review and when the units are available to run.” (Emphasis added) As the
16 attachment to Big Rivers’ response to Item No. 26 is in the requested format,
17 some Confidential Information is inextricably intertwined with non-confidential
18 information. Big Rivers cannot redact only the Confidential Information without
19 making other cells in the spreadsheets unusable. Consequently, the attachment
20 to Big Rivers’ response to Item No. 26, the Excel spreadsheet, is being filed by
21 electronic mail to PSCED@ky.gov.

1 6. If and to the extent the Confidential Information becomes generally
2 available to the public, whether through filings required by other agencies or
3 otherwise, Big Rivers will notify the Commission and have its confidential status
4 removed. 807 KAR 5:001 Section 13(10)(b).

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

7 7. Certain Confidential Information contained in Big Rivers’ responses
8 and/or attachments to Items 6 and 27 is entitled to confidential protection based
9 upon KRS 278.160(3), which shields from disclosure “a provision of a special
10 contract that contains rates and conditions of service not filed in a utility’s
11 general schedule if such provision would otherwise be entitled to be excluded from
12 the application of KRS 61.870 to 61.884 under the provisions of KRS
13 61.878(1)(c)(1).”

14 8. The special contracts in question are the power sales contract with
15 Block Mining, Inc., formerly known as Blockware Mining, LLC, (“*Block Mining*”)
16 and the Power Purchase Agreement with Unbridled Solar, LLC, formerly known
17 as Henderson Solar, LLC (“*Unbridle Solar*”). The Commission has already found
18 that confidential terms of the contracts are entitled to confidential treatment.¹

¹ See, *In the Matter of: Electronic Tariff Filing of Big Rivers Electric Corporation and Jackson Purchase Energy Corporation for Approval and Confidential Treatment of a Special Contract and Cost Analysis Information and a Request for Deviation from the Commission’s September 24, 1990 Order in Administrative Case No. 327*, Case No. 2021-00282, Order (Oct. 14, 2021); *Joint Special Contract Filing of Big Rivers Electric Corporation and Jackson Purchase Energy Corporation*, TFS 2023-00388, Executive Director Letter, (Oct. 10, 2023); *In the Matter of: In the Matter of: Electronic Application of Big Rivers Electric Corporation for Approval of Solar Power Contracts*, Case No. 2020-00183, Order (Mar. 25, 2021); *In the Matter of: Electronic Application of Big Rivers Electric Corporation for Approval of Amendment to Power Purchase Agreement*, Case No. 2022-00296, Orders (Nov. 7, 2022) and (Aug. 3, 2023).

1 The confidential terms of these special contracts should again be granted
2 confidential treatment.

3 **II. The Confidential Information is also entitled to**
4 **confidential treatment based upon KRS 61.878(1)(c)(1)**

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

17

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

2 10. Big Rivers must successfully compete in the wholesale power
3 market in order to sell excess energy to meet its members' needs, including
4 competition in: term bilateral energy markets, day-ahead and real-time energy
5 and ancillary services markets, the annual capacity market, and forward bilateral
6 long-term wholesale agreements with utilities and industrial customers. Big
7 Rivers' ability to successfully compete in these wholesale power markets is
8 dependent upon a combination of a) obtaining the maximum price for power it
9 sells and the best contract terms, and b) keeping its cost of production as low as
10 possible. Fundamentally, if Big Rivers' cost of producing a kilowatt hour of
11 energy increases, its ability to sell that kilowatt hour in competition with other
12 utilities is adversely affected.

13 11. Big Rivers also competes for reasonably-priced credit in the credit
14 markets, and its ability to compete for such credit is directly impacted by the
15 financial results it obtains and the business risks it assumes. Any event that
16 adversely affects Big Rivers' financial results or increases its business risks may
17 adversely affect the price it pays for credit. A competitor, including potential
18 counterparties to future contracts, armed with Big Rivers' proprietary and
19 confidential information will be able to increase Big Rivers' costs or decrease Big
20 Rivers' revenues, which could in turn affect Big Rivers' apparent
21 creditworthiness. Impediments to Big Rivers' obtaining the best contract terms
22 could likewise affect its apparent creditworthiness. A utility the size of Big Rivers

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

5 12. Finally, the ability to negotiate the most advantageous power
6 purchase agreements and then to 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. As noted above, the Confidential Information
18 consists of Big Rivers': special contract terms, third party proprietary usage
19 information; detailed data related to Big Rivers' recent power bids into MISO's
20 day ahead market; and internal projections related to future energy purchases,
21 market prices, potential effects of market conditions on Big Rivers, and Big
22 Rivers' future capacity position. The Confidential Information is precisely the
23 sort of information meant to be protected by KRS 61.878(1)(c)(1).

1 15. Kentucky courts have held that information about a company’s
2 detailed inner workings is generally recognized as confidential or proprietary. In
3 *Hoy v. Kentucky Industrial Revitalization Authority*, the Kentucky Supreme Court
4 held that financial information submitted by General Electric Company with its
5 application for investment tax credits was not subject to disclosure simply
6 because it had been filed with a state agency. 907 S.W.2d 766, 4 (Ky. 1995). The
7 Court applied the plain meaning rule to KRS 61.878(1)(c)(1), and reasoned: “[i]t
8 does not take a degree in finance to recognize that such information concerning
9 the inner workings of a corporation is ‘generally recognized as confidential or
10 proprietary.’” *Id.* at 768. Similarly, in *Marina Management Services, Inc. v.*
11 *Commonwealth Cabinet for Tourism*, the Court held: “[t]hese are records of
12 privately owned marina operators, disclosure of which would unfairly advantage
13 competing operators. The most obvious disadvantage may be the ability to
14 ascertain the economic status of the entities without the hurdles systematically
15 associated with acquisition of such information about privately owned
16 organizations.” 906 S.W.2d 318, 319 (Ky. 1995)

17 16. In this proceeding, the potential public disclosure of the Confidential
18 Information could give Big Rivers’ suppliers, buyers, and other competitors
19 insight into Big Rivers’ “inner workings.” For instance, the Confidential
20 Information could be used to determine when Big Rivers will have power
21 available to sell into the market or when Big Rivers needs power, the amount of
22 power Big Rivers has to sell or will need, as well as the prices at which it is

1 willing to sell power. Knowledge of this information would give other power
2 producers and marketers in wholesale markets an unfair competitive advantage,
3 because they could potentially underbid Big Rivers in the wholesale transactions,
4 reducing Big Rivers' revenue and impairing Big Rivers' ability to compete in the
5 wholesale power and credit markets.

6 17. Likewise, the public disclosure of detailed data related to Big Rivers'
7 bids into MISO's day ahead market, which are cost-based offers, would also Big
8 Rivers' competitors insight into Big Rivers' cost of producing power, giving the
9 competitors an unfair competitive advantage.

10 18. Finally, the public disclosure of the confidential terms of special
11 contracts and third party proprietary information would also cause further
12 competitive harm to Big Rivers. In P.S.C. Case No. 2003-00054, the Commission
13 implicitly accepted ULH&P's argument that the bidding contractors would not
14 want their bid information publicly disclosed, and that disclosure would reduce
15 the contractor pool available to ULH&P, which would drive up ULH&P's costs,
16 hurting its ability to compete with other gas suppliers. *In the Matter of*
17 *Application of the Union Light, Heat and Power Company for Confidential*
18 *Treatment*, P.S.C. Case No. 2003-00054, Order (Aug. 4, 2003). Similarly, in *Hoy v.*
19 *Kentucky Indus. Revitalization Authority*, the Kentucky Supreme Court found
20 that without protection for confidential information provided to a public agency,
21 "companies would be reluctant to apply for investment tax credits for fear the

1 confidentiality of financial information would be compromised.” *Hoy v. Kentucky*
2 *Indus. Revitalization Authority*, 907 S.W.2d 766, 769 (Ky. 1995).

3 19. In Big Rivers’ case, Big Rivers is currently in negotiations with
4 potential counterparties and expects to engage in negotiations with other
5 counterparties for purchase power agreements and sales in the future. If
6 confidential treatment of the confidential terms of the special contract in Big
7 Rivers’ responses or attachments to its responses to Item 6 and Item 27 is denied,
8 potential counterparties would know that the confidential terms of their contracts
9 could be publicly disclosed, which could reveal information to their competitors
10 about their competitiveness. Because many companies would be reluctant to have
11 such information disclosed, public disclosure of the Confidential Information
12 would likely reduce the pool of counterparties willing to negotiate with Big Rivers,
13 reducing Big Rivers’ ability to sell power and impairing its ability to compete in
14 the wholesale power and credit markets.

15 20. Notably, the Commission, in its recent reviews of Big Rivers’ FAC,
16 has applied similar reasoning in granting confidential treatment to information
17 similar to the Confidential Information in Big Rivers’ response to Item 6 and Item
18 27.²

² 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).

1 21. Further, the Commission has granted confidential treatment to
2 information similar to the Confidential Information consisting of Big Rivers’
3 internal projections³ and the detailed data related to Big Rivers’ recent power bids
4 into MISO’s day ahead market, which provides insight into the prices at which
5 Big Rivers is willing to buy and sell power and into Big Rivers’ cost of producing
6 power.⁴

7 22. 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 ***C. Disclosure of the Confidential Information Would Permit an***
15 ***Unfair Commercial Advantage to Big Rivers’ Competitors***

16 23. Disclosure of the Confidential Information could unreasonably and
17 unnecessarily harm Big Rivers by giving interested third parties an unfair
18 commercial advantage through insight into Big Rivers’ business operations and
19 financial strategies. As discussed above, Big Rivers faces actual competition in the

³ See, *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).

⁴ See, *In the Matter of: Application of Big Rivers Electric Corporation for Termination of Contracts and a Declaratory Order and For Authority to Establish a Regulatory Asset*, Order (Jan. 11, 2019).

1 wholesale power market and in the credit market. It is likely that Big Rivers would
2 suffer competitive injury if that Confidential Information were publicly disclosed,
3 and the information should therefore be subject to confidential treatment.

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

14 25. Thus, public disclosure of the information that Big Rivers seeks to
15 protect pursuant to KRS 61.878(1)(c)(1) would permit an unfair competitive
16 advantage to Big Rivers' competitors.

17 **III. Time Period**

18 26. Big Rivers requests that the Confidential Information in the Big
19 Rivers' responses to Item 6 and Item 27, which consists of confidential terms of
20 special contracts and protected private customer usage information remain
21 confidential indefinitely, because for as long as Big Rivers is in the wholesale
22 power market, the public disclosure of the Confidential Information can be used

1 to Big Rivers' competitive disadvantage for the above stated reasons. 807 KAR
2 5:001 Section 13(2)(a)(2).

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

7 **IV. Conclusion**

8 28. Based on the foregoing, the Confidential Information is entitled to
9 confidential treatment, pursuant to KRS 278.160(3); 807 KAR 5:001 Section 13;
10 and KRS 61.878. If the Commission disagrees that Big Rivers' Confidential
11 Information is entitled to confidential treatment, due process requires the
12 Commission to hold an evidentiary hearing. *See Utility Regulatory Comm'n v.*
13 *Kentucky Water Serv. Co., Inc.*, 642 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 20th day of October, 2023.

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Respectfully submitted,

/s/ Senthia Santana

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