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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 )**

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

11       1.       Big Rivers Electric Corporation (“*Big Rivers*” or the “*Company*”)  
12 hereby moves the Public Service Commission of Kentucky ( the “*Commission*”),  
13 pursuant to 807 KAR 5:001 Section 13, KRS 61.878, and other applicable law to  
14 grant confidential treatment to certain information contained in Big Rivers’  
15 response to the Commission Staff’s Third Request for Information filed in this  
16 matter (the “*Confidential Information*”).

17       2.       The Confidential Information consists information about Big Rivers’  
18 inner workings. More specifically, the Confidential Information consists of a  
19 detailed description of Big Rivers’ future plans and business strategies (*see* Big  
20 Rivers’ response to Request No. 3-1).

21       3.       Further, the Confidential Information indirectly discloses  
22 confidential information contained in Big Rivers’ response to Request No. 4 of the  
23 Commission Staff’s Second Request for Information, for which confidentiality has  
24 been sought pursuant to the pending Motion for Confidential Treatment filed  
25 with said response in this matter. Thus, the Confidential Information should be

1 granted confidential treatment pending review of Big Rivers’ previously filed  
2 Motion for Confidential Treatment in this proceeding, which was filed on October  
3 20, 2023. *See* 807 KAR 5:001 Section 13(4) (“Pending action by the commission on  
4 a motion for confidential treatment or by its executive director on a request for  
5 confidential treatment, the material specifically identified shall be accorded  
6 confidential treatment”).

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

15 5. A copy of this motion with the Confidential Information redacted has  
16 been served on all parties to this proceeding through the use of electronic filing.  
17 *See* 807 KAR 5:001 Section 13(b).

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

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

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

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

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

19           9.           Big Rivers must successfully compete in the wholesale power  
20 market in order to sell excess energy to meet its members’ needs, including  
21 competition in: term bilateral energy markets, day-ahead and real-time energy  
22 and ancillary services markets, the annual capacity market, and forward bilateral  
23 long-term wholesale agreements with utilities and industrial customers. Big

1 Rivers' ability to successfully compete in these wholesale power markets is  
2 dependent upon a combination of a) obtaining the maximum price for power it  
3 sells and the best contract terms, and b) keeping its cost of production as low as  
4 possible. Fundamentally, if Big Rivers' cost of producing a kilowatt hour of  
5 energy increases, its ability to sell that kilowatt hour in competition with other  
6 utilities is adversely affected.

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

21       11.     Finally, the ability to negotiate the most advantageous power  
22 purchase agreements and then to offer competitive prices to Big Rivers' Members,

1 companies interested in expanding in Kentucky, and potential new Members, is  
2 fundamental to Big Rivers' continued success.

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

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

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

12 14. As described above, the Confidential Information consists of a  
13 detailed description of Big Rivers' future plans and specific business strategies.  
14 Public disclosure of the Confidential Information would allow potential  
15 counterparties and competitors to gain an advantage over Big Rivers in the course  
16 of ongoing and future negotiations. Allowing counterparties and competitors  
17 access to details of Big Rivers' future plans and specific business strategies may  
18 impact Big Rivers' ability to secure the best pricing available in connection with  
19 future opportunities.

20 15. Under Kentucky law, it is well-recognized that that information  
21 about a company's inner workings, such as the Confidential Information here, is  
22 generally recognized as confidential or proprietary. In *Hoy v. Kentucky Industrial*  
23 *Revitalization Authority*, the Kentucky Supreme Court held that financial

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

14       16.     Additionally, the Commission has granted confidential treatment to  
15 information similar to the Confidential Information.<sup>1</sup>

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

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<sup>1</sup> 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) (granting confidential treatment for Big Rivers’ capacity position, projection of fuel and operating and maintenance costs, and energy and capacity price projections).

1 information. The Confidential Information is precisely the sort of information  
2 meant to be protected by KRS 61.878(1)(c)(1). As such, the Confidential  
3 Information details the “inner workings” of Big Rivers’ and is generally  
4 recognized as confidential and proprietary under Kentucky law.

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

7 18. Disclosure of the Confidential Information could unreasonably and  
8 unnecessarily harm Big Rivers by giving interested third parties an unfair  
9 commercial advantage through insight into Big Rivers’ business operations and  
10 strategies. As discussed *supra*, Big Rivers faces actual competition in the wholesale  
11 power market and in the credit market. It is likely that Big Rivers’ ability to  
12 compete would be adversely affected if the Confidential Information were publicly  
13 disclosed, and Big Rivers seeks protection from such competitive injury.

14 19. Given the nature of the Confidential Information, its disclosure  
15 would provide other market participants, suppliers, buyers, and competitors  
16 insight into Big Rivers’ business strategies and specific future plans. In turn, the  
17 Confidential Information could be used to manipulate the bidding process, leading  
18 to higher costs and/or lower revenues for Big Rivers, thereby impairing its ability  
19 to compete in the wholesale power markets. Furthermore, any competitive  
20 pressure that adversely affects Big Rivers’ revenue and/or margins could make  
21 Big Rivers appear less creditworthy and impair its ability to compete in the credit  
22 market.

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

4 **II.     Time Period**

5           21.     Big Rivers requests that the Confidential Information remain  
6 confidential for a period of ten (10) years from the date of this motion, which  
7 should allow sufficient time for the information to become stale or inapplicable  
8 such that its disclosure no longer create a competitive risk to Big Rivers. *See* 807  
9 KAR 5:001 Section 13(2)(a)(2).

10 **III.    Conclusion**

11           22.     Based on the foregoing, the Confidential Information is entitled to  
12 confidential treatment. If the Commission disagrees, then the Commission  
13 should hold an evidentiary hearing to protect Big Rivers' due process rights and  
14 to supply the Commission with a complete record to enable it to reach a decision  
15 with regard to this matter. *See Util. Regulatory Comm'n v. Ky. Water Serv. Co.,*  
16 *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.

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4 Dated this 16<sup>th</sup> day of November, 2023.

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Respectfully submitted,

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/s/ Senthia Santana

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