

1 COMMONWEALTH OF KENTUCKY
2 BEFORE THE PUBLIC SERVICE COMMISSION
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4 In the Matter of:
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ELECTRONIC APPLICATION OF)
BIG RIVERS ELECTRIC CORPORATION) Case No.
FOR ANNUAL REVIEW OF ITS MRSM) 2023-000038
CHARGE FOR CALENDAR YEAR 2022)

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10 **MOTION OF BIG RIVERS ELECTRIC CORPORATION**
11 **FOR CONFIDENTIAL PROTECTION**
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13 1. Big Rivers Electric Corporation (“*Big Rivers*”) hereby moves the
14 Kentucky Public Service Commission (the “*Commission*”), pursuant to 807 KAR
15 5:001 Section 13 and KRS 61.878, to grant confidential protection to certain
16 information Big Rivers is providing in its Application submitted
17 contemporaneously herewith in the above-styled matter. The information for
18 which Big Rivers seeks confidential treatment is hereinafter referred to as the
19 “*Confidential Information.*”

20 2. The Confidential Information consists of customer specific usage
21 data and billing information, contained in the Direct Testimony of Talina R.
22 Mathews attached as Exhibit B to the Application and information related to
23 confidential decommissioning bids to Big Rivers and its analysis of those bids,
24 contained in Exhibit Berry-2 attached to the Direct Testimony of Nathaniel A.
25 Berry, Exhibit C to the Application.

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, one (1) copy of the Confidential Information highlighted with transparent
4 ink, printed on yellow paper, or otherwise marked “CONFIDENTIAL,” is being
5 filed with this motion by electronic mail to PSCED@ky.gov.

6 4. A copy of this motion with the Confidential Information redacted has
7 been served on all parties to this proceeding through the use of electronic filing.
8 807 KAR 5:001, Section 13(b).

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

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

16 **A. The Confidential Information is entitled to confidential treatment**
17 **under KRS 61.878(1)(a)**

18 7. KRS 61.878(1)(a) protects “[p]ublic records containing information of
19 a personal nature where the public disclosure thereof would constitute a clearly
20 unwarranted invasion of personal privacy.”

21 8. The Confidential Information in the Direct Testimony of Talina R.
22 Mathews reveals the power usage and billing information of an individual large

1 industrial retail customer on the Big Rivers system, Nucor Corporation (“Nucor”).
2 Because this customer is not a party to this proceeding, publicly revealing such
3 information would constitute a clearly unwarranted invasion of personal privacy.
4 Moreover, the Commission granted confidential treatment to Nucor’s power usage
5 data and billing information for an indefinite period in the two prior cases
6 reviewing Big Rivers’ MRSMS credit, Case No. 2021-00061¹ and Case No. 2022-
7 00028.² As such, Big Rivers requests confidential treatment for the customer-
8 specific usage data and billing information in order to protect Nucor’s private
9 usage information.

10 **B. The Confidential Information is also entitled to confidential**
11 **treatment under KRS 61.878(1)(c)(1)**

12 9. Under the Kentucky Open Records Act, the Commission is entitled
13 to withhold from public disclosure “records confidentially disclosed to an agency
14 or required by an agency to be disclosed to it, generally recognized as confidential
15 or proprietary, which if openly disclosed would permit an unfair commercial
16 advantage to competitors of the entity that disclosed the records.” KRS
17 61.878(1)(c)(1). Public disclosure of the Confidential Information would permit
18 such a result as discussed fully below.

¹ *In the Matter of: Electronic Application of Big Rivers Electronic for Annual Review of its MRSMS Charge for Calendar Year 2020*, P.S.C. Case No. 2021-00061, Order (March 9, 2021) (finding “the designated material is generally recognized as private, confidential, or proprietary, it therefore meets the criteria for confidential treatment and is exempted from public disclosure pursuant to 807 KAR 5:001, Section 13, KRS 61,878(1), and KRS 61.878(1)(2)(1)”).

² *In the Matter of: Electronic Application of Big Rivers Electronic for Annual Review of its MRSMS Charge for Calendar Year 2021*, P.S.C. Case No. 2022-00028, Order (April 7, 2022)

1 10. The Confidential Information is also entitled to confidential
2 protection based upon KRS 61.878(1)(c)(1), which protects “records confidentially
3 disclosed to an agency or required by an agency to be disclosed to it, generally
4 recognized as confidential or proprietary, which if openly disclosed would permit
5 an unfair commercial advantage to competitors of the entity that disclosed the
6 records.” *See* 807 KAR 5:001 Section 13(3)(a)(1). In support for this ground of
7 granting confidential protection, Subsection I *infra* describes how Big Rivers
8 operates in competitive environments; Subsection II *infra* explains that the
9 Confidential Information is generally recognized as confidential or proprietary;
10 and Subsection III *infra* demonstrates that public disclosure of the Confidential
11 Information would permit an unfair commercial advantage to Big Rivers’
12 competitors. As such, the Commission should grant confidential treatment to the
13 Confidential Information.

14 **SECTION I**

15 **Big Rivers Faces Actual Competition**

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

1 the best contract terms, and b) keeping its cost of production as low as possible.
2 Fundamentally, if Big Rivers' cost of producing a kilowatt hour or its business
3 risk increases, its ability to sell that kilowatt hour in competition with other
4 utilities is adversely affected.

5 12. Big Rivers also competes for reasonably-priced credit in the credit
6 markets, and its ability to compete is directly impacted by the financial results it
7 obtains and the business risks it assumes. Any event that adversely affects Big
8 Rivers' financial results or increases its business risks may adversely affect the
9 price it pays for credit. A competitor 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 improve and maintain its credit profile.

18 13. Accordingly, Big Rivers faces competition in the wholesale power and
19 capital markets, and the Confidential Information should be afforded confidential
20 treatment to prevent the imposition of an unfair competitive advantage to those
21 competitors.

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SECTION II

The Confidential Information is Generally Recognized as Confidential or Proprietary

14. The Confidential Information for which Big Rivers seeks confidential treatment under KRS 61.878 is generally recognized as confidential or proprietary under Kentucky law.

15. As noted above, the Confidential Information includes power usage data and billing information of an individual large industrial retail customer on the Big Rivers system and is contained in the Direct Testimony of Dr. Mathews. Big Rivers and Nucor operate in competitive markets and the public disclosure of such information could cause both an economic disadvantage in negotiating future transactions, as their competitors and potential counterparties would have insight into their power needs or the prices at which they are willing to buy or sell power.

16. Information such as this which bears upon a company’s detailed inner workings is generally recognized as confidential or proprietary. *See, e.g., Hoy v. Kentucky Indus. Revitalization Authority*, 907 S.W.2d 766, 768 (Ky. 1995) (“It does not take a degree in finance to recognize that such information concerning the inner workings of a corporation is ‘generally recognized as confidential or proprietary’”); *Marina Management Services, Inc. v. Commonwealth, Cabinet for Tourism*, 906 S.W.2d 318, 319 (Ky. 1995) (“These are records of privately owned marina operators, disclosure of which would unfairly

1 advantage competing operators. The most obvious disadvantage may be the
2 ability to ascertain the economic status of the entities without the hurdles
3 systematically associated with acquisition of such information about privately
4 owned organizations”).

5 17. As noted above, the Confidential Information also includes
6 information related to confidential decommissioning bids to Big Rivers and its
7 analysis of those bids, contained in Exhibit Berry-2.

8 18. The Commission has often found that information similar to the
9 Confidential Information contained in Exhibit Berry-2, relating to competitive
10 bidding is generally recognized as confidential and proprietary. *See, e.g., In the*
11 *Matter of Application of Union Light, Heat and Power Company for Confidential*
12 *Treatment*, P.S.C. Case No. 2003-00054, Order (August 4, 2003).³ In fact, the
13 Commission has routinely granted confidential treatment to the bid tabulation
14 sheets that Big Rivers files in reviews of its fuel adjustment clause. *See, e.g.,*

³ In P.S.C. Case No. 2003-00054, the Commission additionally implicitly accepted ULH&P's argument that the bidding contractors would not want their bid information publicly disclosed, and that disclosure would reduce the contractor pool available to ULH&P, which would drive up ULH&P's costs, hurting its ability to compete with other gas suppliers. *In the Matter of Application of the Union Light, Heat and Power Company for Confidential Treatment*, P.S.C. Case No. 2003-00054, Order (Aug. 4, 2003). Similarly, in *Hoy v. Kentucky Indus. Revitalization Authority*, the Kentucky Supreme Court found that without protection for confidential information provided to a public agency, “companies would be reluctant to apply for investment tax credits for fear the confidentiality of financial information would be compromised.” *Hoy v. Kentucky Indus. Revitalization Authority*, 907 S.W.2d 766, 769 (Ky. 1995).

1 letter from the Commission dated September 22, 2010, in P.S.C. Case No. 2010-
2 00269 and more recently in P.S.C. Case No. 2019-00231.⁴

3 19. The Confidential Information is not publicly available, is not
4 disseminated within Big Rivers except to those employees and professionals with
5 a legitimate business need to know and act upon the information, and is not
6 disseminated to the others without a legitimate need to know and act upon the
7 information.

8 20. Based on the foregoing, the Confidential Information is generally
9 recognized as confidential or proprietary under Kentucky law.

10 SECTION III

11 Disclosure of the Confidential Information Would Permit an Unfair 12 Commercial Advantage to Big Rivers' Competitors

13 21. Public disclosure of the Confidential Information will adversely
14 affect Big Rivers in several respects.

15 22. Disclosure of the Confidential Information would afford Big Rivers'
16 competitors an unfair commercial advantage. As discussed above, Big Rivers
17 faces actual competition in the power markets and in the credit markets. It is
18 likely that Big Rivers would suffer an economic disadvantage in negotiating
19 future transactions and thus competitive injury if the Confidential Information

⁴ *In the Matter of: An Electronic Examination of the Application of the Fuel Adjustment Clause of Big Rivers Electric Corporation from November 1, 2018 through April 30, 2019*, P.S.C. Case No. 2019-00231, Order (April 2, 2020) (granting confidential treatment for fuel supply bids and Big Rivers' analysis of the bids, terms of future off-system sales and private usage information of individual retail customers).

1 were publicly disclosed, and the information should therefore be subject to
2 confidential treatment.

3 23. The Confidential Information contained in Exhibit Berry-2 could be
4 used to manipulate the bidding process, leading to higher costs for future Big
5 Rivers construction or decommissioning projects. Also, disclosure of the
6 Confidential Information could discourage contractors from offering bids to Big
7 Rivers, reducing its contractor pool for future construction and decommissioning
8 projects. In P.S.C. Case No. 2003-00054, the Commission implicitly accepted the
9 Union Light, Heat, and Power Company's argument that the bidding contractors
10 would not want their bid information publicly disclosed, and that disclosure would
11 reduce the contractor pool available to ULH&P, which would drive up ULH&P's
12 costs, hurting its ability to compete with other gas suppliers. *In the Matter of*
13 *Application of the Union Light, Heat and Power Company for Confidential*
14 *Treatment*, Order, P.S.C. Case No. 2003-00054 (August 4, 2003).

15 24. Similarly, if confidential treatment of the Nucor's confidential power
16 usage data and billing information is denied, potential counterparties on future
17 special contracts or future economic development prospects would know that their
18 confidential information would be publicly disclosed. Because many companies
19 would be reluctant to have such information disclosed, public disclosure of the
20 Confidential Information would likely reduce the pool of counterparties willing to
21 negotiate with Big Rivers, reducing Big Rivers' ability to sell power and impairing
22 its ability to compete in the wholesale power and credit markets. In *Hoy v. Kentucky*

1 *Indus. Revitalization Authority*, the Kentucky Supreme Court found that without
2 protection for confidential information provided to a public agency, “companies
3 would be reluctant to apply for investment tax credits for fear the confidentiality of
4 financial information would be compromised. *Hoy v. Kentucky Indus.*
5 *Revitalization Authority*, 907 S.W.2d 766, 769 (Ky. 1995).

6 25. Given the nature of the Confidential Information, it could be used to
7 manipulate the bidding or contract negotiating process, leading to higher costs
8 and/or lower revenues for Big Rivers, thereby impairing its ability to compete in
9 the wholesale power markets. Furthermore, any competitive pressure that
10 adversely affects Big Rivers’ revenue and/or margins could make Big Rivers
11 appear less creditworthy and impair its ability to compete in the credit markets.

12 26. Accordingly, the public disclosure of the Confidential Information
13 would provide Big Rivers’ competitors with an unfair commercial advantage.

14 **C. Time Period**

15 27. Big Rivers requests that the Confidential Information remain
16 confidential indefinitely for the above discussed reasons. 807 KAR 5:001 Section
17 13(2)(a)(2).

18 **D. Conclusion**

19 28. Based on the foregoing, the Confidential Information is entitled to
20 confidential protection. If the Commission disagrees, then the Commission
21 should hold an evidentiary hearing to protect to Big Rivers’ due process rights
22 and to supply the Commission with a complete record to enable it to reach a

1 decision with regard to this matter. *See Util. Reg. Comm'n v. Ky. Water Serv. Co.,*
2 *Inc.* 642 S.W.2d 591 (Ky. App. 1982).

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4 WHEREFORE, Big Rivers respectfully requests that the Commission
5 classify and protect as confidential the Confidential Information.

6 On this the 28th day of February 2023.

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Respectfully submitted,

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/s/ Senthia Santana

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