

1 COMMONWEALTH OF KENTUCKY
2 BEFORE THE PUBLIC SERVICE COMMISSION
3

4 In the Matter of:
5

ELECTRONIC APPLICATION OF)
BIG RIVERS ELECTRIC CORPORATION) Case No.
FOR ANNUAL REVIEW OF ITS MRSM) 2023-00038
CHARGE FOR CALENDAR YEAR 2022)

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10 **MOTION FOR CONFIDENTIAL TREATMENT**
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12 1. Big Rivers Electric Corporation (“*Big Rivers*”) hereby moves the
13 Kentucky Public Service Commission (the “*Commission*”), pursuant to 807 KAR
14 5:001 Section 13 and KRS 61.878, to grant confidential treatment of certain
15 information Big Rivers is providing in its Response to the Commission Staff’s
16 First Request for Information, dated March 22, 2023, 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 (1) customer specific usage
21 data and billing information and (2) negotiated terms of special contracts,
22 contained in the attachment to Big Rivers’ response to Item No. 1 of the
23 Commission Staff’s First Request for Information dated March 22, 2023 (“*PSC 1-*
24 *1*”). This attachment to PSC 1-1 was previously filed as an exhibit to the Direct

1 Testimony of Talina R. Mathews, and is now being provided in Excel spreadsheet
2 format as requested.

3 3. Pursuant to the Commission’s March 24, 2020, Order in *In the*
4 *Matter of Electronic Emergency Docket Related to the Novel Coronavirus COVID-*
5 *19*, Case No. 3 2020-00085 (“*Case No. 2020-00085*”), one (1) copy of the
6 Confidential Information highlighted with transparent ink, printed on yellow
7 paper, or otherwise marked “CONFIDENTIAL,” is being filed with this motion by
8 electronic mail.

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

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

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

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

6 8. The Confidential Information in the attachment to Big Rivers’
7 response to PSC 1-1 reveals the power usage and billing information of individual
8 large industrial retail customers on the Big Rivers system and negotiated terms of
9 special contracts. Because these customers and the counterparties to the
10 contracts are not parties to this proceeding, publicly revealing such information
11 would constitute a clearly unwarranted invasion of personal privacy.

12 9. Moreover on April 7, 2022, in Case No. 2022-00028, *In the Matter of:*
13 *Electronic Application of Big Rivers Electric Corporation for Annual Review of Its*
14 *MRSM Charge for Calendar Year 2021*, the Commission granted confidential
15 treatment for an indefinite period for substantially the same confidential
16 information, an Excel file attachment to Big Rivers’ response to the Staff’s First
17 Request for Information, Item 3. In the April 7, 2022 Order, the Commission
18 found that “the designated material is generally recognized as confidential or
19 proprietary, and of a personal nature, and that public disclosure would result in
20 an unwarranted invasion of personal privacy because it would make private usage
21 data public, and provide an unfair commercial advantage to BREC’s competitors

1 because it could adversely impact BREC’s ability to negotiate in the future for the
2 most favorable terms possible.”¹

3 10. Additionally on March 9, 2021, the Commission granted confidential
4 treatment to Nucor Corporation’s 2020 power usage data and billing information
5 for an indefinite period in Case No. 2021-00061, *In the Matter of: Electronic*
6 *Application of Big Rivers Electric for Annual Review of its MRSMS Charge for*
7 *Calendar Year 2020* (“Big Rivers 2020 MRSMS Case”), finding “the designated
8 material is generally recognized as private, confidential, or proprietary, it
9 therefore meets the criteria for confidential treatment and is exempted from
10 public disclosure pursuant to 807 KAR 5:001, Section 13, KRS 61.878(1), and KRS
11 61.878(1)(2)(1).”

12 11. As such, Big Rivers requests confidential treatment for the
13 customer-specific usage data and billing information and negotiated terms of
14 special contracts in order to protect the customer’s and counterparties’
15 proprietary, business-sensitive, or otherwise private information.

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

18 12. The Confidential Information is entitled to confidential treatment
19 based upon KRS 61.878(1)(c)(1), which protects “records confidentially disclosed to

¹ See, *In the Matter of: Electronic Application of Big Rivers Electric Corporation for Annual Review of Its MRSMS Charge for Calendar Year 2021*, Case No. 2022-00028, (Ky. PSC April 7, 2022) at pages 2-3.

1 an agency or required by an agency to be disclosed to it, generally recognized as
2 confidential or proprietary, which if openly disclosed would permit an unfair
3 commercial advantage to competitors of the entity that disclosed the records.”
4 807 KAR 5:001 Section 13(2)(a)(1).

5 13. In support for this ground of granting confidential treatment,
6 Subsection A infra describes how Big Rivers operates in competitive
7 environments; Subsection B infra explains that the Confidential Information is
8 generally recognized as confidential or proprietary; and Subsection C infra
9 demonstrates that public disclosure of the Confidential Information would permit
10 an unfair commercial advantage to Big Rivers’ competitors. As such, the
11 Commission should grant confidential treatment of the Confidential Information.

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

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

1 kilowatt hour or its business risk increases, its ability to sell that kilowatt hour in
2 competition with other utilities is adversely affected.

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

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

1 ***B. The Confidential Information is Generally Recognized***
2 ***as Confidential or Proprietary***

3 17. The Confidential Information for which Big Rivers seeks confidential
4 treatment under KRS 61.878(1)(c)(1) is generally recognized as confidential or
5 proprietary under Kentucky law.

6 18. As discussed below the Confidential Information relates to the inner
7 workings of Big Rivers' business. Information such as this which bears upon a
8 company's detailed inner workings is generally recognized as confidential or
9 proprietary. *See, e.g., Hoy v. Kentucky Indus. Revitalization Authority*, 907
10 S.W.2d 766, 768 (Ky. 1995) ("It does not take a degree in finance to recognize that
11 such information concerning the inner workings of a corporation is 'generally
12 recognized as confidential or proprietary'").

13 19. Moreover, KRS 278.160(3) specifically recognizes that terms of a
14 special contract are not required to be publicly disclosed if such terms are entitled
15 to treatment under KRS 61.878(1)(c)(1), and the Commission has previously
16 granted confidential treatment to similar information.² Additionally, the

² See *In the Matter of: Big Rivers Electric Corporation Filing of Wholesale Contracts Pursuant to KRS 278.180 and KAR 5:001 §13*, Order, Case No. 2014-00134, (Ky. PSC Sept. 10, 2014) (granting confidential treatment to the confidential terms of the Nebraska contracts for an indefinite time period); *In the Matter of: Filing of Agreement for the Purchase and Sale of Firm Capacity and Energy Between Big Rivers Electric Corporation and the Kentucky Municipal Energy Agency*, Order, Case No. 2016-00306, (Ky. PSC Jan. 2, 2019) (granting confidential treatment to the confidential terms of the KyMEA contract for an indefinite time period); *In the Matter of: Joint Application of Big Rivers Electric Corporation and Meade County Rural Electric Cooperative Cooperation for Approval of Contracts for Electric Service with Nucor Corporation*, Orders, Case No. 2019-00365, (Ky. PSC Jan. 22, 2020) (granting confidential treatment to the confidential terms of the Nucor contract for an indefinite time period).

1 Commission has recognized the confidentiality of customer information in
2 previous cases.³

3 20. 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 ***C. Disclosure of the Confidential Information Would Permit an Unfair***
9 ***Commercial Advantage to Big Rivers' Competitors***

10 21. Disclosure of the Confidential Information would afford Big Rivers'
11 competitors an unfair commercial advantage. As discussed above, Big Rivers
12 faces actual competition in the power markets and in the credit markets. It is
13 likely that Big Rivers would suffer an economic disadvantage in negotiating
14 future transactions and thus competitive injury if the Confidential Information
15 were publicly disclosed, and the information should therefore be subject to
16 confidential treatment.

³ See *In the Matter of: Electronic Application of Big Rivers Electric Corporation for Approval to Modify Its MRSM Tariff, Cease Deferring Depreciation Expenses, Establish Regulatory Assets, Amortize Regulatory Assets, and Other Appropriate Relief*, Order, Case No. 2020-00064, (Ky. PSC June 30, 2020) (granting Confidential Treatment of information related to individual customer names and usage in Big Rivers' responses to the Commission Staff's First Requests for Information, Attorney General's First Set of Data Requests and KIUC's First Set of Data Requests); *In the Matter of: Sanctuary of Church v. Louisville Gas and Electric Company*, Order, Case No. 2018-00181 (Ky. PSC January 8, 2019) (granting confidential treatment for an indefinite period to detailed account and usage information of a non-party); and *In the Matter of: Electronic Application of Big Rivers Electric Corporation for Annual Review of its MRSM Charge for Calendar Year 2021*, Order, Case No. 2022-00028 (Ky. PSC Mar. 16, 2022) (granting confidential treatment for an indefinite period to customer-specific power usage data and billing information).

1 22. In P.S.C. Case No. 2003-00054, the Commission implicitly accepted
2 the Union Light, Heat, and Power Company’s argument that the bidding
3 contractors would not want their bid information publicly disclosed, and that
4 disclosure would reduce the contractor pool available to ULH&P, which would
5 drive up ULH&P’s costs, hurting its ability to compete with other gas suppliers.
6 *In the Matter of Application of the Union Light, Heat and Power Company for*
7 *Confidential Treatment*, Order, P.S.C. Case No. 2003-00054 (August 4, 2003).
8 Similarly, in *Hoy v. Kentucky Indus. Revitalization Authority*, the Kentucky
9 Supreme Court found that without protection for confidential information
10 provided to a public agency, “companies would be reluctant to apply for
11 investment tax credits for fear the confidentiality of financial information would
12 be compromised. *Hoy v. Kentucky Indus. Revitalization Authority*, 907 S.W.2d
13 766, 769 (Ky. 1995). In Big Rivers’ case, if confidential treatment of the
14 Confidential Information is denied, potential counterparties on future special
15 contracts or future economic development prospects would know that their
16 confidential information would be publicly disclosed. Because many companies
17 would be reluctant to have such information disclosed, public disclosure of the
18 Confidential Information would likely reduce the pool of counterparties willing to
19 deal with Big Rivers, reducing Big Rivers’ ability to sell power and impairing its
20 ability to compete in the wholesale power and credit markets.

21 23. Disclosure of the Confidential Information could also unreasonably
22 and unnecessarily harm Big Rivers by giving interested third parties, potential

1 counterparties and competitors, an unfair commercial advantage through
2 knowledge of Big Rivers' energy purchase and sale history and insight into Big
3 Rivers' business operations and financial strategies.

4 24. Accordingly, the public disclosure of the Confidential Information
5 would provide competitors of Big Rivers with an unfair commercial advantage.

6 **III. Time Period**

7 25. Big Rivers requests that the Confidential Information remain
8 confidential indefinitely for the reasons stated above, and for the same reasons
9 the Commission granted indefinite confidential treatment to similar information
10 in Case No. 2022-00028.⁴ 807 KAR 5:001 Section 13(2)(a)(2).

11 **IV. Conclusion**

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

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⁴ *In the Matter of: Electronic Application of Big Rivers Electric Corporation for Annual Review of Its MRS M Charge for Calendar Year 2021*, Case No. 2022-00028, (Ky. PSC April 7, 2022)

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

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4 On this the 4th day of April 2023.

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Respectfully submitted,

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/s/ Senthia Santana

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