

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

3   **In the Matter of:**

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5   **ELECTRONIC TARIFF FILING OF BIG RIVERS     )**            **Case No.**  
6   **ELECTRIC CORPORATION AND KENERGY        )**            **2023-00312**  
7   **CORP. TO REVISE THE LARGE INDUSTRIAL     )**  
8   **CUSTOMER STANDBY SERVICE TARIFF         )**  
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10                                   **MOTION FOR CONFIDENTIAL TREATMENT**

11           1.     Big Rivers Electric Corporation (“Big Rivers”), by counsel, hereby moves the  
12   Kentucky Public Service Commission (“Commission”), pursuant to 807 KAR 5:001 Section 13,  
13   KRS 61.878, and other applicable law, to grant confidential treatment to certain documents and  
14   information within its responses (filed jointly with Kenergy Corp.) to the First Requests for  
15   Information propounded herein by Commission Staff, Domtar Paper Company, LLC (“Domtar”),  
16   and Kimberly-Clark Corporation, LLC (“Kimberly-Clark”), respectively.

17           2.     The information for which Big Rivers seeks confidential treatment is hereinafter  
18   referred to as the “Confidential Information.” The Confidential Information includes:

19           a.     detailed, unit-specific fixed and variable expense data and power cost information  
20                   with respect to Big Rivers’ generation fleet (*see* Joint Response to Kimberly-  
21                   Clark’s First Request for Information, Attachment KCC 1-4), as well as unit-  
22                   specific MISO Seasonal Accredited Capacity information (*see* Joint Response to  
23                   Kimberly-Clark’s First Request for Information, Request Nos. 1-9 and 1-24);

24           b.     Communications and information exchanged between Big Rivers/Kenergy and  
25                   either or both Domtar and Kimberly-Clark in connection with the development and  
26                   expected implementation of the relevant proposed tariff, which includes sensitive  
27                   projected third party generator performance data, forecasted demand, preliminary

1 analysis and calculations (*see* Joint Response to Commission Staff’s First Request  
2 for Information, Request No. 1-1); and

3 c. Third party MISO registration and awarded capacity information (*see* Joint  
4 Response to Commission Staff’s First Request for Information, Request No. 1-7),  
5 as well as customer-specific usage data and billing information and identifying  
6 information relating to power purchases from, and sales to, specific counterparties  
7 (*see* Joint Response to Kimberly-Clark’s First Request for Information, Attachment  
8 KCC 1-4; Joint Response to Domtar’s First Request for Information, Request No.  
9 1-3).

10 3. Pursuant to the Commission’s March 24, 2020 Order in *In the Matter of: Electronic*  
11 *Emergency Docket Related to the Novel Coronavirus COVID-19*, Case No. 2020-00085 (“Case  
12 No. 2020-00085”), Big Rivers is submitting with this motion one (1) copy of the documents  
13 containing Confidential Information highlighted with transparent ink, printed on yellow paper, or  
14 otherwise marked “CONFIDENTIAL,” via electronic mail to PSCED@ky.gov. A copy of those  
15 pages, with the Confidential Information redacted, is being filed into public docket via the  
16 Commission’s Electronic Filing System.

17 4. If and to the extent the Confidential Information becomes generally available to the  
18 public, whether through filings required by other agencies or otherwise, Big Rivers will notify the  
19 Commission in writing. *See* 807 KAR 5:001, Section 13(10)(b).

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

1 **I. The Confidential Information is Entitled to Protection from Public Disclosure by**  
2 **KRS 61.878(1)(c)(1)**  
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4 6. KRS 61.878(1)(c)(1) protects “records confidentially disclosed to an agency or  
5 required by an agency to be disclosed to it, generally recognized as confidential or proprietary,  
6 which if openly disclosed would permit an unfair commercial advantage to competitors of the  
7 entity that disclosed the records.” Subsection A infra describes how Big Rivers operates in  
8 competitive environments in the wholesale power market and in the credit market; Subsection B  
9 infra explains that the Confidential Information is generally recognized as confidential or  
10 proprietary; and Subsection C infra demonstrates that public disclosure of the Confidential  
11 Information would permit an unfair commercial advantage to Big Rivers’ competitors.

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

13 7. Big Rivers must successfully compete in the wholesale power markets to sell  
14 energy it produces in excess of its members’ needs. Big Rivers’ ability to successfully compete in  
15 these markets is dependent upon a combination of its ability to: a) obtain the maximum price for  
16 the power it sells and secure the most favorable contract terms available, and b) keep its cost of  
17 production as low as possible. Fundamentally, if Big Rivers’ cost of producing a kilowatt hour of  
18 energy increases, its ability to sell that kilowatt hour in competition with other utilities is adversely  
19 affected.

20 8. Big Rivers also competes for reasonably-priced credit in the credit markets, and its  
21 ability to compete is directly impacted by its financial results. Lower revenues and any events that  
22 adversely affect Big Rivers’ margins will adversely affect its financial results and potentially  
23 impact the price it pays for credit. A competitor or potential counterparty armed with Big Rivers’  
24 proprietary and confidential information will be able to increase Big Rivers’ costs or decrease Big  
25 Rivers’ revenues, which could in turn affect Big Rivers’ creditworthiness. A utility the size of Big

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

5 9. Accordingly, Big Rivers has competitors in both the wholesale power and credit  
6 markets, and its Confidential Information should be protected to prevent the imposition of an unfair  
7 competitive advantage.

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

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

14 11. As described above, the Confidential Information includes detailed, proprietary  
15 information pertaining to discrete Big Rivers assets, including specific fixed and variable expense  
16 data with respect to its generation facilities and MISO accredited capacity information. This  
17 Confidential Information is critical to the effective execution of Big Rivers' business decisions  
18 and strategy and, if disclosed, would allow potential counterparties and competitors to gain an  
19 advantage over Big Rivers in the course of ongoing and future negotiations. Allowing  
20 counterparties and competitors access to detailed, internal expense information related to the  
21 operation of generation assets may impact Big Rivers' ability to secure the best pricing available  
22 in connection with future opportunities.

23 12. Additionally, the Confidential Information includes information reflecting  
24 preliminary negotiations with counterparties and potential counterparties, as well as proprietary or  
25 sensitive counterparty operations and usage information that is not available to the public. The

1 Confidential Information also includes the identities of counterparties to power purchase and sales  
2 agreements, which information can be utilized to ascertain data that is confidential to both Big  
3 Rivers and its counterparties. Because public disclosure of the Confidential Information would  
4 constitute an unwarranted invasion of a counterparty’s privacy, the Confidential Information  
5 should be granted confidential treatment. *See* Ky. Op. Atty. Gen. 96-ORD-176 (August 20, 1996)  
6 (holding Kroger Company’s utility bills exempt from disclosure under KRS 61.878(1)(a)); *In the*  
7 *Matter of: Application of Kentucky Utilities Company for an Adjustment of its Electric Rates*, Case  
8 No. 2012-00221 (Ky. P.S.C. July 25, 2013) (holding customer names, account numbers, and usage  
9 information exempt from disclosure under KRS 61.878(1)(a)). Moreover, to ensure that future  
10 opportunities are encouraged, it is imperative that Big Rivers be able to negotiate with third parties  
11 and accept and utilize third party proprietary information without risk of public disclosure.

12 13. Under Kentucky law, it is well-recognized that information about a company’s  
13 inner workings, such as the Confidential Information here, is generally recognized as confidential  
14 or proprietary. *See, e.g., Hoy v. Ky. Indus. Revitalization Auth.*, 907 S.W.2d 766, 768 (Ky. 1995)  
15 (“It does not take a degree in finance to recognize that such information concerning the inner  
16 workings of a corporation is ‘generally recognized as confidential or proprietary.’”); *Marina*  
17 *Management Servs. v. Cabinet for Tourism, Dep’t of Parks*, 906 S.W.2d 318 (Ky. 1995).  
18 Additionally, the Commission has previously granted confidential treatment to similar  
19 information. *See, e.g., In the Matter an Electronic Examination of the Application of the Fuel*  
20 *Adjustment Clause of Big Rivers Electric Corporation from November 1, 2021 through April 30,*  
21 *2022*, Case No. 2022-00268 (Ky. P.S.C. March 1, 2023), Order at 3 (“The terms of special  
22 contracts and other non-member sales should be granted confidential treatment because public  
23 disclosure of this information could harm BREC in negotiating future special contracts.”); *In the*

1 *Matter of: Joint Application of Big Rivers Electric Corporation and Meade County Rural Electric*  
2 *Cooperative Corporation for Approval of Contracts for Electric Service with Nucor Corporation,*  
3 *P.S.C. Case No. 2019-00365, Orders (Jan. 22, 2020); In the Matter of the Electronic Application*  
4 *of Big Rivers Electric Corporation for Annual Report on MRSM Credit, Case No. 2021-00061,*  
5 *Order (Ky. P.S.C. April 8, 2021) (granting confidential protection to materials consisting of*  
6 *“customer-specific usage data and billing information, power purchases from and sales to specific*  
7 *counterparties, and projected financial information.”).*

8           14.     The Confidential Information is not publicly available, is not disseminated within  
9 Big Rivers except to those employees and professionals with a legitimate business need to know  
10 and act upon the information, and is not disseminated to others without a legitimate need to know  
11 and act upon the information. As such, the Confidential Information is both recognized by Big  
12 Rivers and generally recognized as confidential and proprietary.

13           **C.     Disclosure of the Confidential Information Would Result in an Unfair**  
14           **Commercial Advantage to Big Rivers’ Competitors.**

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16           15.     Disclosure of the Confidential Information could unreasonably and unnecessarily  
17 harm Big Rivers by giving interested third parties an unfair commercial advantage through insight  
18 into Big Rivers’ business operations and strategies. As discussed *supra*, Big Rivers faces actual  
19 competition in both the short-and long-term wholesale power markets and in the credit markets,  
20 and the success of Big Rivers turns in large part on its ability to maximize the value of its assets.  
21 It is likely that Big Rivers’ ability to compete would be adversely affected if the Confidential  
22 Information were publicly disclosed, and Big Rivers seeks protection from such competitive  
23 injury.

24           16.     The Commission has consistently recognized that internal strategic financial  
25 planning information, certain sales information, and related proprietary materials are entitled to

1 confidential treatment, as these documents typically relate to the company’s economic status and  
2 business strategies. *See, e.g., Marina Management Servs., supra*, 906 S.W.2d at 319 (Ky. 1995)  
3 (unfair commercial advantage arises simply from “the ability to ascertain the economic status of  
4 the entities without the hurdles systemically associated with the acquisition of such information  
5 about privately owned organizations”); *In the Matter of: The Joint Application of Duke Energy  
6 Corp., Cinergy Corp., Duke Energy Ohio, Inc., Duke Energy Kentucky, Inc., Diamond Acquisition  
7 Corp., and Progress Energy Inc., for Approval of the Indirect Transfer of Control of Duke Energy  
8 Kentucky, Inc.*, Case No. 2011-00124, Order (Ky. P.S.C. Dec. 5, 2011).

9 17. If disclosed, certain of the Confidential Information would allow Big Rivers’  
10 competitors and potential counterparties to discover, and make use of, confidential information  
11 concerning Big Rivers’ assets and business strategies, to the unfair competitive disadvantage of  
12 Big Rivers.

13 **II. Time Period**

14 18. Pursuant to 807 KAR 5:001 Section 13(3)(a)(2), Big Rivers requests that the  
15 Confidential Information be granted confidential treatment for a period of ten (10) years, which  
16 should allow sufficient time for the information to become stale or inapplicable such that it no  
17 longer warrants confidential treatment. With respect to the Confidential Information consisting of  
18 customer-specific usage data and billing information and information concerning power purchases  
19 from and sales to specific counterparties, Big Rivers requests confidential treatment for an  
20 indefinite period, consistent with the Commission’s Order of April 8, 2021, in Case No. 2021-  
21 00061, *supra*, regarding substantially the same information. *See also In the Matter of: Riverside  
22 Generating 6 Company, LLC v. Kentucky Power Company*, Case No. 2017-00472, Order (Ky.

1 P.S.C. May 16, 2019) (granting confidential treatment to customer specific information relating to  
2 purchases and transmission of electricity for an indefinite period).

3 **III. Conclusion**

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

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

11 Dated this 27<sup>th</sup> day of October, 2023.

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Respectfully submitted,

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**Certification**

I hereby certify that a copy of this Motion for Confidential Treatment has been served electronically on all parties of record through the use of the Commission’s electronic filing system, and there are currently no parties that the Commission has excused from participation by electronic means. Pursuant to the Commission’s July 22, 2021 Order in Case No. 2020-00085, a paper copy of this filing has not been transmitted to the Commission.

/s/ Edward T. Depp  
*Counsel to Big Rivers Electric Corporation*

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