



1 c. Communications and information exchanged between Big Rivers/Kenergy and  
2 either or both Domtar and Kimberly-Clark in connection with the development and  
3 expected implementation of the relevant proposed tariff, which includes sensitive  
4 projected customer generator performance data, forecasted demand, preliminary  
5 analysis and calculations (*see* Joint Response to Commission Staff’s First Request  
6 for Information, Request No. 1-1), as well as customer MISO registration and  
7 awarded capacity information (*see* Joint Response to Commission Staff’s First  
8 Request for Information, Request No. 1-7).

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

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

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

21 **I. Certain of the Confidential Information is Entitled to Protection**  
22 **from Public Disclosure by KRS 61.878(1)(c)(1)**

23 6. KRS 61.878(1)(c)(1) protects “records confidentially disclosed to an agency or  
24 required by an agency to be disclosed to it, generally recognized as confidential or proprietary,

1 which if openly disclosed would permit an unfair commercial advantage to competitors of the  
2 entity that disclosed the records.” Subsection A infra describes how Big Rivers operates in  
3 competitive environments in the wholesale power market and in the credit market; Subsection B  
4 infra explains that the Confidential Information is generally recognized as confidential or  
5 proprietary; and Subsection C infra demonstrates that public disclosure of the Confidential  
6 Information would permit an unfair commercial advantage to Big Rivers’ competitors.

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

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

15 8. Big Rivers also competes for reasonably-priced credit in the credit markets, and its  
16 ability to compete is directly impacted by its financial results. Lower revenues and any events that  
17 adversely affect Big Rivers’ margins will adversely affect its financial results and potentially  
18 impact the price it pays for credit. A competitor or potential counterparty armed with Big Rivers’  
19 proprietary and confidential information will be able to increase Big Rivers’ costs or decrease Big  
20 Rivers’ revenues, which could in turn affect Big Rivers’ creditworthiness. A utility the size of Big  
21 Rivers that operates generation and transmission facilities will always have periodic cash and  
22 borrowing requirements for both anticipated and unanticipated needs. Big Rivers expects to be in

1 the credit markets in the future, and it is imperative that Big Rivers improve and maintain its credit  
2 profile.

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

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

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

12 11. As described above, the Confidential Information includes detailed, proprietary  
13 information pertaining to discrete Big Rivers assets, including specific fixed and variable expense  
14 data with respect to its generation facilities and MISO accredited capacity information. This  
15 Confidential Information is critical to the effective execution of Big Rivers' business decisions  
16 and strategy and, if disclosed, would allow potential counterparties and competitors to gain an  
17 advantage over Big Rivers in the course of ongoing and future negotiations, potentially affecting  
18 the ultimate pricing obtained by Big Rivers in connection with the operation, maintenance, and  
19 potential sale of its assets.

20 12. Additionally, the Confidential Information includes information reflecting  
21 preliminary negotiations with counterparties and potential counterparties, as well as proprietary or  
22 sensitive counterparty operations information that is not available to the public. The Confidential  
23 Information also includes the identities of counterparties to power purchase and sales agreements,  
24 which information can be utilized to ascertain data that is confidential to both Big Rivers and its  
25 counterparties. To ensure that future opportunities and negotiations are encouraged, it is

1 imperative that Big Rivers be able to negotiate with third parties and accept and utilize third party  
2 proprietary information without risk of public disclosure.

3           13. Under Kentucky law, it is well-recognized that information about a company’s  
4 inner workings, such as the Confidential Information here, is generally recognized as confidential  
5 or proprietary. *See, e.g., Hoy v. Ky. Indus. Revitalization Auth.*, 907 S.W.2d 766, 768 (Ky. 1995)  
6 (“It does not take a degree in finance to recognize that such information concerning the inner  
7 workings of a corporation is ‘generally recognized as confidential or proprietary.’”); *Marina*  
8 *Management Servs. v. Cabinet for Tourism, Dep’t of Parks*, 906 S.W.2d 318 (Ky. 1995).  
9 Additionally, the Commission has previously granted confidential treatment to similar  
10 information. *See, e.g., In the Matter an Electronic Examination of the Application of the Fuel*  
11 *Adjustment Clause of Big Rivers Electric Corporation from November 1, 2021 through April 30,*  
12 *2022*, Case No. 2022-00268 (Ky. P.S.C. March 1, 2023), Order at 3 (“The terms of special  
13 contracts and other non-member sales should be granted confidential treatment because public  
14 disclosure of this information could harm BREC in negotiating future special contracts.”); *In the*  
15 *Matter of: Joint Application of Big Rivers Electric Corporation and Meade County Rural Electric*  
16 *Cooperative Corporation for Approval of Contracts for Electric Service with Nucor Corporation,*  
17 P.S.C. Case No. 2019-00365, Orders (Jan. 22, 2020).

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

1           **C. Disclosure of the Confidential Information Would Result in an Unfair**  
2           **Commercial Advantage to Big Rivers' Competitors.**

3  
4           15. Disclosure of the Confidential Information could unreasonably and unnecessarily  
5 harm Big Rivers by giving interested third parties an unfair commercial advantage through insight  
6 into Big Rivers' business operations and strategies. As discussed *supra*, Big Rivers faces actual  
7 competition in both the short-and long-term wholesale power markets and in the credit markets,  
8 and the success of Big Rivers turns in large part on its ability to maximize the value of its assets.  
9 It is likely that Big Rivers' ability to compete would be adversely affected if the Confidential  
10 Information were publicly disclosed, and Big Rivers seeks protection from such competitive  
11 injury.

12           16. The Commission has consistently recognized that internal strategic financial  
13 planning information, certain sales information, and related proprietary materials are entitled to  
14 confidential treatment, as these documents typically relate to the company's economic status and  
15 business strategies. *See, e.g., Marina Management Servs., supra*, 906 S.W.2d at 319 (Ky. 1995)  
16 (unfair commercial advantage arises simply from "the ability to ascertain the economic status of  
17 the entities without the hurdles systemically associated with the acquisition of such information  
18 about privately owned organizations"); *In the Matter of: The Joint Application of Duke Energy*  
19 *Corp., Cinergy Corp., Duke Energy Ohio, Inc., Duke Energy Kentucky, Inc., Diamond Acquisition*  
20 *Corp., and Progress Energy Inc., for Approval of the Indirect Transfer of Control of Duke Energy*  
21 *Kentucky, Inc.*, Case No. 2011-00124, Order (Ky. P.S.C. Dec. 5, 2011).

22           17. If disclosed, certain of the Confidential Information would allow Big Rivers'  
23 competitors and potential counterparties to discover, and make use of, confidential information  
24 concerning Big Rivers' assets and business strategies, to the unfair competitive disadvantage of  
25 Big Rivers.

1 **II. Time Period**

2 18. Pursuant to 807 KAR 5:001 Section 13(3)(a)(2), Big Rivers requests that the  
3 Confidential Information be granted confidential treatment for a period of ten (10) years, which  
4 should allow sufficient time for the information to become stale or inapplicable such that it no  
5 longer warrants confidential treatment.

6 **IV. Conclusion**

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

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

14 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*