

1 COMMONWEALTH OF KENTUCKY
2 BEFORE THE PUBLIC SERVICE COMMISSION
3

4 In the Matter of:
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ELECTRONIC APPLICATION OF)
BIG RIVERS ELECTRIC CORPORATION) Case No.
FOR ANNUAL REVIEW OF ITS MRSM) 2024-000031
CHARGE FOR CALENDAR YEAR 2023)

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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; information related to Big
23 Rivers’ and information related to confidential decommissioning bids to Big
24 Rivers and its analysis of those bids, contained in Exhibits Berry-2(a) and Berry-

1 2(b) attached to the Direct Testimony of Nathaniel A. Berry, Exhibit C to the
2 Application.

3 3. Pursuant to the Commission’s Orders in *In the Matter of: Electronic*
4 *Emergency Docket Related to the Novel Coronavirus Covid-19*, Case No. 2020-
5 00085, one (1) copy of the Confidential Information highlighted with transparent
6 ink, printed on yellow paper, or otherwise marked “CONFIDENTIAL,” is being
7 filed with this motion by electronic mail to PSCED@ky.gov. A copy of those pages,
8 with the Confidential Information redacted, is being electronically filed into the
9 public docket with the data request responses accompanying this motion.

10 4. A copy of this motion with the Confidential Information redacted has
11 been served on all parties to this proceeding through the use of electronic filing.
12 807 KAR 5:001, Section 13(b).

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

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

1 **A. The Confidential Information is entitled to confidential treatment**
2 **under 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 Direct Testimony of Talina R.
7 Mathews reveals the power usage and billing information of an individual large
8 industrial retail customer on the Big Rivers system, Nucor Corporation (“Nucor”).
9 Because this customer is not a party to this proceeding, publicly revealing such
10 information would constitute a clearly unwarranted invasion of personal privacy.
11 Moreover, the Commission granted confidential treatment to Nucor’s power usage
12 data and billing information for an indefinite period in the three prior cases
13 reviewing Big Rivers’ MRSMS credit, Case No. 2021-00061;¹ Case No. 2022-00028;²
14 and Case No. 2023-00038.³ As such, Big Rivers requests confidential treatment
15 for the customer-specific usage data and billing information in order to protect
16 Nucor’s private usage information.

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).

³ *In the Matter of: Electronic Application of Big Rivers Electronic for Annual Review of its MRSMS Charge for Calendar Year 2022*, P.S.C. Case No. 2023-00038, Order (Sept. 19, 2023).

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

3 9. Under the Kentucky Open Records Act, the Commission is entitled
4 to withhold from public disclosure “records confidentially disclosed to an agency
5 or required by an agency to be disclosed to it, generally recognized as confidential
6 or proprietary, which if openly disclosed would permit an unfair commercial
7 advantage to competitors of the entity that disclosed the records.” KRS
8 61.878(1)(c)(1). Public disclosure of the Confidential Information would permit
9 such a result as discussed fully below.

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

1 SECTION I

2 Big Rivers Faces Actual Competition

3 11. Big Rivers must successfully compete in the wholesale power market
4 in order to sell excess energy to meet its members' needs, including competition
5 in: term bilateral energy markets, day-ahead and real-time energy and ancillary
6 services markets, the annual capacity market, and forward bilateral long-term
7 wholesale agreements with utilities and industrial customers. Big Rivers' ability
8 to successfully compete in these wholesale power markets is dependent upon an
9 effective combination of a) obtaining the maximum price for the power it sells and
10 the best contract terms, and b) keeping its cost of production as low as possible.
11 Fundamentally, if Big Rivers' cost of producing a kilowatt hour or its business
12 risk increases, its ability to sell that kilowatt hour in competition with other
13 utilities is adversely affected.

14 12. Big Rivers also competes for reasonably-priced credit in the credit
15 markets, and its ability to compete is directly impacted by the financial results it
16 obtains and the business risks it assumes. Any event that adversely affects Big
17 Rivers' financial results or increases its business risks may adversely affect the
18 price it pays for credit. A competitor armed with Big Rivers' proprietary and
19 confidential information will be able to increase Big Rivers' costs or decrease Big
20 Rivers' revenues, which could in turn affect Big Rivers' apparent
21 creditworthiness. Impediments to Big Rivers' obtaining the best contract terms
22 could likewise affect its apparent creditworthiness. A utility the size of Big Rivers

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

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

9 **SECTION II**

10 **The Confidential Information is Generally Recognized as**
11 **Confidential or Proprietary**

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

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

1 16. Information such as this which bears upon a company’s detailed
2 inner workings is generally recognized as confidential or proprietary. *See, e.g.,*
3 *Hoy v. Kentucky Indus. Revitalization Authority*, 907 S.W.2d 766, 768 (Ky. 1995)
4 (“It does not take a degree in finance to recognize that such information
5 concerning the inner workings of a corporation is ‘generally recognized as
6 confidential or proprietary’”); *Marina Management Services, Inc. v.*
7 *Commonwealth, Cabinet for Tourism*, 906 S.W.2d 318, 319 (Ky. 1995) (“These are
8 records of privately owned marina operators, disclosure of which would unfairly
9 advantage competing operators. The most obvious disadvantage may be the
10 ability to ascertain the economic status of the entities without the hurdles
11 systematically associated with acquisition of such information about privately
12 owned organizations”).

13 17. As noted above, the Confidential Information also includes
14 information related to confidential decommissioning bids to Big Rivers and its
15 analysis of those bids, contained in Exhibits Berry-2(a) and Berry-2(b).

16 18. The Commission has often found that information similar to the
17 Confidential Information contained in Exhibits Berry-2(a) and Berry-2(b),
18 relating to competitive bidding is generally recognized as confidential and
19 proprietary. *See, In the Matter of: Electronic Application of Big Rivers Electronic*
20 *for Annual Review of its MRSM Charge for Calendar Year 2022*, P.S.C. Case No.
21 2023-00038, Order (Sept. 19, 2023) (granting confidential treatment of
22 substantially similar bidding information for an indefinite period); *See, e.g., In the*

1 *Matter of Application of Union Light, Heat and Power Company for Confidential*
2 *Treatment*, P.S.C. Case No. 2003-00054, Order (August 4, 2003).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

⁴ 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 likely that Big Rivers would suffer an economic disadvantage in negotiating
2 future transactions and thus competitive injury if the Confidential Information
3 were publicly disclosed, and the information should therefore be subject to
4 confidential treatment.

5 23. The Confidential Information contained in Exhibits Berry-2(a) and
6 Berry-2(b). could be used to manipulate the bidding process, leading to higher
7 costs for future Big Rivers construction or decommissioning projects. Also,
8 disclosure of the Confidential Information could discourage contractors from
9 offering bids to Big Rivers, reducing its contractor pool for future construction and
10 decommissioning projects. In P.S.C. Case No. 2003-00054, the Commission
11 implicitly accepted the Union Light, Heat, and Power Company's argument that
12 the bidding contractors would not want their bid information publicly disclosed,
13 and that disclosure would reduce the contractor pool available to ULH&P, which
14 would drive up ULH&P's costs, hurting its ability to compete with other gas
15 suppliers. *In the Matter of Application of the Union Light, Heat and Power*
16 *Company for Confidential Treatment*, Order, P.S.C. Case No. 2003-00054 (August
17 4, 2003).

18 24. Similarly, if confidential treatment of the Nucor's confidential power
19 usage data and billing information is denied, potential counterparties on future
20 special contracts or future economic development prospects would know that their
21 confidential information would be publicly disclosed. Because many companies
22 would be reluctant to have such information disclosed, public disclosure of the

1 **D. Conclusion**

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

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

11 On this the 28th day of February 2024.

12 Respectfully submitted,

13 /s/ *Sentia Santana*
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