

1 (c) terms of special contracts, contained in Big Rivers' responses to
2 Items 22 and 23.

3 3. Pursuant to the Commission's Emergency Orders in *In the Matter of:*
4 *Electronic Emergency Docket Related to the Novel Coronavirus Covid-19*, Case No.
5 2020-00085, one (1) copy of the Confidential Information highlighted in yellow or
6 otherwise marked "CONFIDENTIAL," is being filed with this motion via
7 electronic mail sent to PSCED@ky.gov. One (1) copy of the documents with the
8 Confidential Information redacted is also being electronically filed with this
9 request. 807 KAR 5:001 Section 13(2)(a)(3).

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(2)(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 and is being submitted confidentially under the purview of
19 KRS 278.160(3), KRS 61.878(1)(a) and KRS 61.878(1)(c)(1). 807 KAR 5:001
20 Section 13(2)(a)(1).

1 **I. The Confidential Information is entitled to confidential**
2 **treatment based upon KRS 278.160(3)**

3 7. Certain Confidential Information contained in Big Rivers’ responses
4 to Items 12, 22 and 23 is entitled to confidential protection based upon KRS
5 278.160(3), which shields from disclosure “a provision of a special contract that
6 contains rates and conditions of service not filed in a utility’s general schedule if
7 such provision would otherwise be entitled to be excluded from the application of
8 KRS 61.870 to 61.884 under the provisions of KRS 61.878(1)(c)(1).”

9 8. The special contracts in question relate to Big Rivers’ power sales
10 contracts with the Kentucky Municipal Energy Agency (“*KyMEA*”) and a special
11 contract between Meade County Rural Electric Cooperative Corporation
12 (“*Meade*”) and Nucor Corporation (“*Nucor*”), which Big Rivers concurred with a
13 letter agreement. The Commission has already found that the confidential terms
14 of the contracts are entitled to confidential treatment under KRS 61.878(1)(c)(1),¹
15 and the confidential terms of these special contracts should again be granted
16 confidential treatment.

¹ See *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*, P.S.C. Case No. 2016-00306, Order (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 Corporation for Approval of Contracts for Electric Service with Nucor Corporation*, P.S.C. Case No. 2019-00365, Order (Jan. 22, 2020) (granting confidential treatment to the confidential terms of the *Nucor* contract for an indefinite time period).

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

3 9. Certain Confidential Information contained in Big Rivers’ response
4 to Item 12 and the attachment to its response to Item13 is entitled to confidential
5 treatment based upon KRS 61.878(1)(a), which explicitly protects “[p]ublic records
6 containing information of a personal nature where the public disclosure thereof
7 would constitute a clearly unwarranted invasion of personal privacy.”

8 10. Big Rivers’ response to Item 12 reveals purchases and sales to non-
9 members. The attachment to Big Rivers’ response to Item 13 reveals the power
10 usage of individual large industrial retail customers on the Big Rivers system and
11 sales to non-members. Because the individual customers and non-members
12 identified in the response and attachment are not parties to this proceeding,
13 publicly revealing such information would constitute a clearly unwarranted
14 invasion of their privacy. Moreover, the Commission has previously granted
15 confidential treatment to similar retail information under the purview of KRS
16 61.878(1)(a).²

17 11. As such, Big Rivers requests confidential treatment for the identity
18 of these entities in order to protect their private information.

² See, e.g., *In the Matter of: Sanctuary Church v. Louisville Gas and Electric Company*, Order, P.S.C. Case No. 2018-00181 (Jan. 8, 2019) (granting confidential treatment pursuant to KRS 61.878(1)(a) for an indefinite period to a retail customer’s account and usage information); *In the Matter of: Application of Kentucky Utilities Company for an Adjustment of its Electric Rates*, Order, P.S.C. Case No. 2012-00221 (July 25, 2013) (holding customer names, account numbers and usage information exempt from disclosure under KRS 61.878(1)(a)); see also *In the Matter of: An Electronic Examination of the Application of the Fuel Adjustment Clause of Big Rivers Electric Corporation From May 1, 2019 Through October 31, 2019*, P.S.C. Case No. 2020-00009, Order (April 13, 2020).

1 **III. Certain Confidential Information is also entitled to**
2 **confidential treatment based upon KRS 61.878(1)(c)(1)**

3 12. 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.” *See* KRS
8 61.878(1)(c)(1). Public disclosure of the Confidential Information would permit
9 such a result as discussed fully below.

10 13. Therefore, the Confidential Information is entitled to confidential
11 protection based upon KRS 61.878(1)(c)(1). In support for this ground of granting
12 confidential protection, Subsection A *infra* describes how Big Rivers operates in
13 competitive environments; Subsection B *infra* explains that the Confidential
14 Information is generally recognized as confidential or proprietary; and Subsection
15 C *infra* demonstrates that public disclosure of the Confidential Information would
16 permit an unfair commercial advantage to Big Rivers’ competitors.

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

18 14. Big Rivers must successfully compete in the wholesale power market
19 in order to sell excess energy to meet its members’ needs, including competition
20 in: term bilateral energy markets, day-ahead and real-time energy and ancillary
21 services markets, the annual capacity market, and forward bilateral long-term
22 wholesale agreements with utilities and industrial customers. Big Rivers’ ability

1 to successfully compete in these wholesale power markets is dependent upon an
2 effective combination of a) obtaining the maximum price for the power it sells and
3 the best contract terms, and b) keeping its cost of production as low as possible.
4 Fundamentally, if Big Rivers' cost of producing a kilowatt hour or its business
5 risk increases, its ability to sell that kilowatt hour in competition with other
6 utilities is adversely affected.

7 15. Big Rivers also competes for reasonably-priced credit in the credit
8 markets, and its ability to compete is directly impacted by its financial results.
9 Lower revenues and any events that adversely affect Big Rivers' margins will
10 adversely affect its financial results and potentially impact the price it pays for
11 credit. A competitor armed with Big Rivers' proprietary and confidential
12 information will be able to increase Big Rivers' costs or decrease Big Rivers'
13 revenues, which could in turn affect Big Rivers' apparent creditworthiness. A
14 utility the size of Big Rivers that operates generation and transmission facilities
15 will always have periodic cash and borrowing requirements for both anticipated
16 and unanticipated needs. Big Rivers expects to be in the credit markets on a
17 regular basis in the future, and it is imperative that Big Rivers improve and
18 maintain its credit profile.

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

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

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

6 18. As noted above, the Confidential Information protected under KRS
7 61.878(1)(c)(1) consists of or reveals information about confidential terms of
8 special contracts, private usage data of individual retail customers and purchases
9 and sales to non-members. The Confidential Information is precisely the sort of
10 information meant to be protected by KRS 61.878(1)(c)(1).

11 19. Public disclosure of the Confidential Information would cause
12 competitive harm to Big Rivers, giving Big Rivers’ suppliers, buyers and
13 competitors insight into prices and other terms at which it is willing to sell and
14 buy power. Kentucky courts have held that information about a company’s
15 detailed inner workings is generally recognized as confidential or proprietary. In
16 *Hoy v. Kentucky Industrial Revitalization Authority*, the Kentucky Supreme Court
17 held that financial information submitted by General Electric Company with its
18 application for investment tax credits was not subject to disclosure simply
19 because it had been filed with a state agency. 907 S.W.2d 766, 4 (Ky. 1995). The
20 Court applied the plain meaning rule to KRS 61.878(1)(c)(1), and reasoned: “[i]t
21 does not take a degree in finance to recognize that such information concerning
22 the inner workings of a corporation is ‘generally recognized as confidential or
23 proprietary.’” *Id.* at 768. Similarly, in *Marina Management Services, Inc. v.*

1 *Commonwealth Cabinet for Tourism*, the Court held: “[t]hese are records of
2 privately owned marina operators, disclosure of which would unfairly advantage
3 competing operators. The most obvious disadvantage may be the ability to
4 ascertain the economic status of the entities without the hurdles systematically
5 associated with acquisition of such information about privately owned
6 organizations.” 906 S.W.2d 318, 319 (Ky. 1995).

7 20. In Big Rivers’ case, Big Rivers is currently in negotiations with
8 potential counterparties and expects to continue to engage in negotiations with
9 counterparties for power sales agreements. If confidential treatment of the
10 Confidential Information is denied, potential counterparties would know that the
11 confidential terms of their contracts, agreements, and their private usage
12 information could be publicly disclosed, which could reveal information to their
13 competitors about their competitiveness. Because many companies would be
14 reluctant to have such information disclosed, public disclosure of the Confidential
15 Information would likely reduce the pool of counterparties willing to negotiate
16 with Big Rivers, reducing Big Rivers’ ability to sell power and impairing its ability
17 to compete in the wholesale power and credit markets.

18 21. In sum, the Confidential Information is not publicly available, is not
19 disseminated within Big Rivers except to those employees and professionals with
20 a legitimate business need to know and act upon the information, and is not
21 disseminated to others without a legitimate need to know and act upon the

1 information. As such, the Confidential Information details the “inner workings”
2 of Big Rivers’ and is generally recognized as confidential and proprietary.

3 ***C. Disclosure of the Confidential Information Would Permit***
4 ***an Unfair Commercial Advantage to Big Rivers’ Competitors***

5 22. Disclosure of the Confidential Information that is protected under
6 KRS 61.878(1)(c)(1) would permit an unfair commercial advantage to Big Rivers’
7 competitors. As discussed above, Big Rivers faces actual competition in the
8 wholesale power market and in the credit markets, and it is likely that Big Rivers
9 would suffer competitive injury if the Confidential Information were publicly
10 disclosed.

11 23. Given the nature of the Confidential Information, its disclosure
12 would provide other market participants, suppliers, buyers and competitors
13 insight into the prices and terms at which Big Rivers is willing to buy and sell
14 power. In turn, the Confidential Information could be used to manipulate the
15 bidding process, leading to higher costs and/or lower revenues for Big Rivers,
16 thereby impairing its ability to compete in the wholesale power markets.
17 Furthermore, any competitive pressure that adversely affects Big Rivers’ revenue
18 and/or margins could make Big Rivers appear less creditworthy and impair its
19 ability to compete in the credit markets.

20 24. Accordingly, public disclosure of the information that Big Rivers
21 seeks to protect pursuant to KRS 61.878(1)(c)(1) would provide Big Rivers’
22 competitors with an unfair commercial advantage.

1 **IV. Time Period**

2 25. Big Rivers requests that the Confidential Information remain
3 confidential indefinitely for the reasons stated above. 807 KAR 5:001 Section
4 13(2)(a)(2).

5 **V. Conclusion**

6 26. Based on the foregoing, the Confidential Information is entitled to
7 confidential treatment, pursuant to KRS 278.160(3); 807 KAR 5:001 Section 13;
8 and KRS 61.878. If the Commission disagrees that Big Rivers' Confidential
9 Information is entitled to confidential treatment, due process requires the
10 Commission to hold an evidentiary hearing. *See Utility Regulatory Comm'n v.*
11 *Kentucky Water Serv. Co., Inc.*, 642 S.W.2d 591 (Ky. App. 1982).

12

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

1 On this the 26th day of August, 2024.

2 Respectfully submitted,

3
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