

1 COMMONWEALTH OF KENTUCKY  
2 BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY  
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4

5 *In the Matter of:*  
6

AN ELECTRONIC EXAMINATION OF THE )  
APPLICATION OF THE FUEL ADJUSTMENT ) Case No.  
CLAUSE OF BIG RIVERS ELECTRIC ) 2024-00149  
CORPORATION FROM MAY 1, 2023 )  
THROUGH OCTOBER 31, 2023 )

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8  
9 MOTION OF BIG RIVERS ELECTRIC CORPORATION FOR  
10 CONFIDENTIAL TREATMENT  
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12 1. Big Rivers Electric Corporation (“*Big Rivers*”) hereby moves the  
13 Public Service Commission of Kentucky ( the “*Commission*”), pursuant to 807  
14 KAR 5:001 Section 13, KRS 61.878 and KRS 278.160(3) to grant confidential  
15 treatment to certain information contained in Big Rivers’ responses to Items 12,  
16 13, 22 and 23 of the Commission Staff’s First Request for Information in  
17 Appendix B of the Commission’s August 2, 2024, Order.

18 2. The information for which Big Rivers seeks confidential treatment is  
19 hereinafter referred to as the “*Confidential Information.*” The Confidential  
20 Information consists of:

- 21 (a) terms of special contracts and other non-member sales and  
22 purchases, contained in Big Rivers’ response to Item 12;
- 23 (b) private usage data of individual retail customers and sales to  
24 non-members, contained in the attachment Big Rivers’ response  
25 to Item 13; and

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](mailto: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),<sup>1</sup>  
15 and the confidential terms of these special contracts should again be granted  
16 confidential treatment.

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<sup>1</sup> 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).<sup>2</sup>

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

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<sup>2</sup> 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).

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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,

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4 */s/ Senthia Santana*

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