

1 COMMONWEALTH OF KENTUCKY
2 BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY
3
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)

7
8
9 MOTION OF BIG RIVERS ELECTRIC CORPORATION FOR
10 CONFIDENTIAL TREATMENT
11

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 5,
16 and 6 of the Commission Staff’s Second Request for Information dated September
17 10, 2024 (“PSC 2-5” and “PSC 2-6” respectively). The information for which Big
18 Rivers seeks confidential treatment is hereinafter referred to as the “*Confidential*
19 *Information.*”

20 2. The Confidential Information consists of confidential negotiated
21 terms of special contracts and the identity of individual large industrial retail
22 customers on the Big Rivers system which, as discussed below, indirectly discloses
23 private billing and usage data of those customers.

24 3. Pursuant to the Commission’s Emergency Orders in *In the Matter of:*
25 *Electronic Emergency Docket Related to the Novel Coronavirus Covid-19*, Case No.

1 2020-00085, one (1) copy of the Confidential Information highlighted in yellow or
2 otherwise marked “CONFIDENTIAL,” is being filed with this motion via
3 electronic mail sent to PSCED@ky.gov. One (1) copy of the documents with the
4 Confidential Information redacted is also being electronically filed with this
5 request. 807 KAR 5:001 Section 13(2)(a)(3).

6 4. A copy of this motion with the Confidential Information redacted has
7 been served on all parties to this proceeding through the use of electronic filing.
8 807 KAR 5:001 Section 13(2)(b).

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

13 6. The attachment to Big Rivers’ response to Item 13 of the
14 Commission Staff’s First Request for Information (“PSC 1-13”) provided detailed
15 billing information of individual large industrial retail customers on the Big
16 Rivers system, including usage data. Each row of data in the attachment pertains
17 to a certain customer. To protect the confidential and proprietary information
18 contained in this attachment, the customers’ names were redacted from the
19 publicly filed version of Big Rivers’ Response to the Commission Staff’s First
20 Request for Information. Big Rivers filed the unredacted confidential version of

1 the attachment to PSC 1-13, under a motion for confidential treatment.¹ While
2 the motion is pending, PSC 1-13 is a request that is routinely part of the Staff's
3 initial request for information in Fuel Adjustment Clause review proceedings and
4 the Commission has historically granted confidential treatment to Big Rivers'
5 attachment provided in response to the prior requests.²

6 7. Both PSC 2-5 and PSC 2-6 reference specific rows of data in the
7 attachment to Big Rivers' response to PSC 1-13. In turn, Big Rivers' response to
8 PSC 2-5 and PSC 2-6, identify the individual large industrial retail customers
9 whose billing and usage information is disclosed in those referenced rows. With
10 this disclosure, the public could easily find the customers' private and confidential
11 billing information and usage data in the attachment to Big Rivers' response to
12 PSC 1-13.

13 8. As discussed below, the Confidential Information is entitled to
14 confidential treatment and is being submitted confidentially under the purview of
15 KRS 278.160(3), KRS 61.878(1)(a) and KRS 61.878(1)(c)(1). 807 KAR 5:001
16 Section 13(2)(a)(1).

17

¹ See Motion of Big Rivers Electric Corporation for Confidential Treatment filed August 26, 2024, in the matter.

² See eg, *In the Matter of: An Electronic Examination of the Application of the Fuel Adjustment Clause of Big Rivers Electric Corporation from November 1, 2020 Through October 31, 2022*, Case No. 2023-00013, Order (Jan. 29, 2024); *In the Matter of: An Electronic Examination of the Application of the Fuel Adjustment Clause of Big Rivers Electric Corporation from November 1, 2021 Through April 30, 2022*, Case No. 2022-00268, Order (Mar. 1, 2023); *In the Matter of: An Electronic Examination of the Application of the Fuel Adjustment Clause of Big Rivers Electric Corporation from May 1, 2021 Through October 31, 2021*, Case No. 2022-00041, Order (Jan. 10, 2023).

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

3 9. Certain Confidential Information contained in Big Rivers’ responses
4 to PSC 2-5 and PSC 2-6 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 10. The special contracts terms in question relate to special contracts
10 between Big Rivers’ Member-Owners and large industrial customers, which Big
11 Rivers concurred with a letter agreement. The Commission has already found
12 that confidential terms of similar contracts are entitled to confidential treatment
13 under KRS 61.878(1)(c)(1).³

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

16 11. Certain Confidential Information contained in Big Rivers’ response
17 to PSC 2- 5 and PSC 2-6 is also entitled to confidential treatment based upon KRS
18 61.878(1)(a), which explicitly protects “[p]ublic records containing information of a
19 personal nature where the public disclosure thereof would constitute a clearly
20 unwarranted invasion of personal privacy.”

³ *Id.*

1 12. As discussed above, Big Rivers’ responses to PSC 2-5 and PSC 2-6
2 identify certain individual large industrial retail customers referenced in the
3 confidential attachment to Big Rivers’ response to PSC 1-13, which provides those
4 customers’ confidential and proprietary billing information and usage data.
5 Because the individual customers identified in Big Rivers’ response to PSC 2-5
6 and PSC 2-6 are not parties to this proceeding, publicly revealing such
7 information would constitute a clearly unwarranted invasion of their privacy.

8 13. Moreover, the Commission has previously granted confidential
9 treatment to similar retail information under the purview of KRS 61.878(1)(a).⁴

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

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

14 15. Under the Kentucky Open Records Act, the Commission is entitled
15 to withhold from public disclosure “records confidentially disclosed to an agency
16 or required by an agency to be disclosed to it, generally recognized as confidential
17 or proprietary, which if openly disclosed would permit an unfair commercial

⁴ 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 advantage to competitors of the entity that disclosed the records.” See KRS
2 61.878(1)(c)(1). Public disclosure of the Confidential Information would permit
3 such a result as discussed fully below.

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

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

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

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

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

17 ***B. The Confidential Information is Generally Recognized as***
18 ***Confidential or Proprietary***

19 20. The Confidential Information for which Big Rivers seeks confidential
20 treatment under KRS 61.878 is generally recognized as confidential or
21 proprietary under Kentucky law.

1 21. As noted above, the Confidential Information protected under KRS
2 61.878(1)(c)(1) consists of or reveals information about confidential terms of
3 special contracts and private usage data of individual retail customers. The
4 Confidential Information is precisely the sort of information meant to be protected
5 by KRS 61.878(1)(c)(1).

6 22. Public disclosure of the Confidential Information would cause
7 competitive harm to Big Rivers, giving Big Rivers’ suppliers, buyers and
8 competitors insight into prices and other terms at which it is willing to sell and
9 buy power. Kentucky courts have held that information about a company’s
10 detailed inner workings is generally recognized as confidential or proprietary. In
11 *Hoy v. Kentucky Industrial Revitalization Authority*, the Kentucky Supreme Court
12 held that financial information submitted by General Electric Company with its
13 application for investment tax credits was not subject to disclosure simply
14 because it had been filed with a state agency. 907 S.W.2d 766, 4 (Ky. 1995). The
15 Court applied the plain meaning rule to KRS 61.878(1)(c)(1), and reasoned: “[i]t
16 does not take a degree in finance to recognize that such information concerning
17 the inner workings of a corporation is ‘generally recognized as confidential or
18 proprietary.’” *Id.* at 768. Similarly, in *Marina Management Services, Inc. v.*
19 *Commonwealth Cabinet for Tourism*, the Court held: “[t]hese are records of
20 privately owned marina operators, disclosure of which would unfairly advantage
21 competing operators. The most obvious disadvantage may be the ability to
22 ascertain the economic status of the entities without the hurdles systematically

1 associated with acquisition of such information about privately owned
2 organizations.” 906 S.W.2d 318, 319 (Ky. 1995).

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

14 24. In sum, the Confidential Information is not publicly available, is not
15 disseminated within Big Rivers except to those employees and professionals with
16 a legitimate business need to know and act upon the information, and is not
17 disseminated to others without a legitimate need to know and act upon the
18 information. As such, the Confidential Information details the “inner workings”
19 of Big Rivers’ and is generally recognized as confidential and proprietary.

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

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

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

18 27. Accordingly, public disclosure of the information that Big Rivers
19 seeks to protect pursuant to KRS 61.878(1)(c)(1) would provide Big Rivers'
20 competitors with an unfair commercial advantage.

1 **IV. Time Period**

2 28. 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 29. 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 23rd day of September, 2024.

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19

Respectfully submitted,

/s/ Senthia Santana

Senthia Santana
Tyson Kamuf
Whitney Kegley
Big Rivers Electric Corporation
710 W. Second Street
Owensboro, Ky 42301
Phone: (270) 827-2561
Facsimile: (270) 844-6417
senthia.santana@bigrivers.com
tyson.kamuf@bigrivers.com
whitney.kegley@bigrivers.com

Counsel for Big Rivers Electric
Corporation