THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the Matter of the Application of Kansas City Power & Light Company for Approval of Its 2014 Energy Efficiency Rider for Program Costs Incurred January 1 Through December 31, 2013.	)))))	Docket No. 14-KCPE-442-TAR

CURB'S MOTIONS TO REMOVE CONFIDENTIAL DESIGNATIONS

The Citizens' Utility Ratepayer Board (CURB) and moves the Corporation Commission of the State of the Kansas (Commission or KCC) for an order removing the confidential designations of information provided by Kansas City Power & Light Company (KCPL) to the Commission Staff, which then redacted the information, along with public information adjacent to the allegedly confidential information, in its *Staff's Report and Recommendation* (R&R), which was filed with the Commission on May 13, 2014, and moves for related action described further, below. Because CURB's *Response to Staff's Report and Recommendation* had to be filed on May 23, 2014, prior to resolution of the dispute over the confidential designations, CURB redacted the designated items in the public version of its Response. CURB also moves that the Commission allow CURB to substitute in the record an unredacted public version of its Response.

In support of its motions, CURB states as follows:

I. Statement of the facts

1. Beginning in April 2014, KCPL responded to e-mails issued by Staff, requesting certain data regarding 2013 expenditures for KCPL's energy efficiency programs. In its responses,

KCPL designated the data and documents containing the data as "Confidential". The Commission Staff utilized information contained in those e-mail responses as the basis of its analysis of KCPL's application. Staff's Report and Recommendation (R&R) identified the actual expenditures for each of KCPL's energy-efficiency programs in Exhibit TSR-1. Staff designates Exhibit TSR-1 and all data contained in the exhibit as "Confidential" and redacted Exhibit TSR-1 entirely from its R & R. Apparently, Staff made no objection to the designation of the information as "Confidential."

2. On May 13, 2013, Staff filed its R&R in Docket No, 13-KCPE-584-TAR recommending approval of KCPL's 2013 Energy Efficiency Rider (EER). Staff's R & R identified the actual expenditures for each of KCPL's energy-efficiency programs in Exhibit KLF-1. Staff did not designate the program expenditures, or total amount of EER as Confidential. As such, the program expenditures are available publicly.

3. On May 23, 2012, Staff filed its R&R in Docket No, 12-KCPE-729-TAR recommending approval of KCPL's 2012 Energy Efficiency Rider (EER). Staff's R&R identified the actual expenditures for each of KCPL's energy-efficiency programs in Exhibit JTG-1. Staff did not designate the program expenditures, or total amount of EER as Confidential. As such, the program expenditures are available publicly.

4. On May 19, 2011, Staff filed its R&R in Docket No, 11-KCPE-665-TAR recommending approval of KCPL's 2011 Energy Efficiency Rider (EER). Staff's R&R identified the actual expenditures for each of KCPL's energy-efficiency programs in Exhibit KLF-1. Staff did not designate the program expenditures, or total amount of EER as Confidential. As such, the program expenditures are available publicly.

5. On May 19, 2014, counsel for CURB informally asked the Company via an email to respond to questions of CURB analyst Stacey Harden concerning the confidential designations. Having received no response, on May 21, 2014, counsel for CURB sent a second email to counsel for the Company reminding the company of its obligation to provide explanations of each confidential designation, and informed the company that CURB would be filing a motion objecting to the designations if the Company did not remove the designations or provide adequate explanations for the designations. In addition, CURB asked for an expedited response because the deadline for filing CURB's response was looming.

6. The Company responded that a response would be forthcoming by end of business on May 21, and indeed, CURB received a response later that day. Counsel for KCPL responded as follows:

> I have confirmed with KCP&L that we need to maintain confidentiality of both the Energy Optimizer contract data and the Home/Business Analyzer contract data. The information involves contract terms or specifics, or contract information that could be used by existing or future vendors to the disadvantage of KCP&L in future negotiations on such contracts. In addition to the Company's responsibility to maintain the information as confidential pursuant to the vendors' contract terms, the information shows the amounts paid or expected to be paid to KCP&L's current vendor. Knowing the other non-confidential information such as number of participants in the program would give a competing vendor information on the level of charges Honeywell has in its contract. This could be a disadvantage next time KCP&L bids this contract.

All program expenditures included in Staff Exhibit TSR-1 were deemed to be confidential, even the actual costs of programs that had not been confidential in previous dockets. In a follow-up inquiry, CURB asked for more clarification; the company's response follows each question (in bold type):

> 1) Is KCPL claiming that information that the company publicly disclosed in previous dockets must now be accorded confidential treatment in this docket? **No. If it was released before in error, we are not saying it has to be treated confidentially**

in this docket. We would hope that CURB would recognize the previous releases were accidental in determining how you present the data in this docket and going forward.

2) Please identify the harm, if any, that accrued to KCPL as a result of the disclosure of the actual cost information from 2011, 2012 and 2013 that the company claims should have been confidential. **Under the Commission's rules, showing actual harm in past situations is not required. KCP&L has explained the potential harm release of this type of information can cause. Previous erroneous releases of confidential information does not change the potential for harm in the future if additional disclosures occur.**

As a result of these responses, CURB honored KCPL's designations, and Ms. Harden's response to Staff's Report and Recommendation did not disclose the information deemed confidential by KCPL. However, CURB questions whether the potential harm alleged by KCPL from disclosure outweighs the public interest in seeing and understanding the costs of the various programs that are the subject of this docket. For a variety of policy reasons, the Commission should find that the information designated as confidential by KCPL should be made public.

II. Authorities

7. Kansas has a policy that favors transparency in government proceeding, as evidenced by the adoption of the Kansas Open Meetings Act and the Kansas Open Records Act. However, the state also has a policy that provides for protection from disclosure of certain types of information where disclosure would harm an identifiable interest. Where there is a conflict between the public's right to know and a party's interest in confidentiality, or a difference of opinion among the parties as to whether the information merits confidential treatment, the Commission balances the interests for and against disclosure, as described in K.S.A. 66-1220a:

> The state corporation commission shall not disclose to or allow inspection by anyone, including but not limited to parties to a regulatory proceeding before the commission, any

information which is a trade secret under the uniform trade secrets act (K.S.A. 60-3320 et seq. and amendments thereto) or any confidential commercial information of a corporation, partnership or individual proprietorship regulated by the commission unless the commission finds that disclosure is warranted after consideration of the following factors:

(1) Whether disclosure will significantly aid the commission in fulfilling its functions;

(2) the harm or benefit which disclosure will cause to the public interest;

(3) the harm which disclosure will cause to the corporation, partnership or sole proprietorship; and

(4) alternatives to disclosure that will serve the public interest and protect the corporation, partnership or sole proprietorship.

8. KCPL is a certificated electric public utility, subject to the regulatory jurisdiction of the Commission, pursuant to K.S.A. 2001 Supp. 66-101b and 66-104, K.S.A. 66-131. By accepting a certificate to provide electric services, KCPL has agreed to allow inspection of its books and records and to comply with the reporting requirements imposed by the statutes and regulations to ensure efficient and sufficient electric service at just and reasonable rates. See K.S.A. 66-101h and K.S.A. 2001 Supp. 66-123; *see also* No. 39, *Order on Motions Challenging Confidentiality Designation of Certain Matters,* at ¶19, June 27, 2002, KCC Docket No. 01-WSRE-949-GIE. As the Commission stated in the above-cited order, which denied a company's blanket claim of confidentiality of over 5000 documents,

> The Commission is also mindful that the general policy of the State of Kansas is that its public agencies operate in the open and not in secret. See Kansas Open Meeting Act, K.S.A. 75-4317 et seq., and Kansas Open Records Act, K.S.A. 45-215 et seq. The purpose of these statutes is to ensure public accountability. Public access to the Commission and information presented for its consideration makes the Commission accountable not only for the decision itself but also for the manner in which the decision was made.
>
> . . .
>
> The indiscriminate designation of confidentiality is an abuse of the discovery process …

. . .

> The Commission must maintain the integrity of its proceeding and will not allow WRI to abuse the discovery process through the improper designation of confidentiality. See in the Matter of the Application of American Restaurant Operations, 264 Kan. 518, 957 P. 473 (1998)(The Board of Tax Appeals properly imposed discovery sanctions in awarding costs to a taxpayer for the preparation of a motion to compel.).

No. 39, *Order on Motions Challenging Confidentiality Designation of Certain Matters,* at ¶19, ¶23, June 27, 2002, KCC Docket No. 01-WSRE-949-GIE.

9. The Commission, in that same docket, also said, "K.S.A. 66-1220a does not create a presumption that all information regarding a public utility's operation is presumed to be a trade secret or confidential commercial information. K.S.A. 66-1220a is narrow in scope and is applicable only to trade secret or confidential commercial information. The burden of proving the propriety of the confidential designation rests with the party asserting the confidential designation." *Id.,* at ¶11.

III. Legal and policy considerations favor disclosure

A. Lack of enforcement of the Protective Order is prejudicial to other parties

10. KCPL and most other utilities regularly violate the requirement to provide a written statement of the specific grounds for the confidential designation *at the time the designation is made.* CURB has had a continuing concern in this docket and in other dockets at the Commission with utilities failing to comply with this Commission regulation—which, by the way—is included in the Protective Orders issued in virtually every docket where it is likely that confidential information may be part of the evidence considered in a docket. The requirement is as follows:

> A party may designate as confidential any information that it believes, in good faith, to be a trade secret or other confidential commercial information. ***The party designating the information as confidential must provide a written statement of the specific grounds for the designation at the time the designation is made.***

K.A.R. 82-1-221a(a)(5); (emphasis added).; *Suspension Order, Discovery and Protective Order,* [Protective Order], Apr. 22, 2014, at ¶8. The party claiming confidentiality has the burden of proving the confidential status of the information. Designating information as confidential does not establish that the information will not be subject to disclosure after review by the Commission. *Id., see* K.S.A. 66-1220a. Unfortunately, it is rare that a utility complies with this requirement.

11. Further, it is rare that the Commission Staff objects to a utility's failure to comply with this provision, although it has supported CURB on occasions in the past when CURB has done so. CURB believes it would be appropriate for the Commission to direct its Staff to take corrective action whenever a utility provides information designated as confidential without simultaneously providing the written statement providing the specific grounds for the designation. There is no reason why CURB should bear the entire burden of insisting on enforcement of the Commission's rules and orders.

12. In expedited dockets and those not conducted on a 240-day schedule, the problem is exacerbated by the fact that response times are shorter. In a docket like this, where CURB is required to respond to a Staff Report and Recommendation (R&R) within ten days, CURB did not even discover there was any confidential information provided by KCPL until Staff filed its R&R, because rather than utilizing the typical data request process that is transparent to all parties, Staff and KCPL exchanged informal emails. When this happens, within those ten days (two of which are weekend days when most parties are generally unavailable):

- CURB must send data requests to Staff for the original sources of that information, if Staff did not provide them in the R&R.

- Then CURB must await a reply from Staff, which is generally delayed while Staff contacts the company before providing the information to CURB.
- Once CURB receives the original sources, then CURB must determine if the company's reasons for the confidential designations are legitimate—if the reasons were provided;
- If not, further requests must issue and CURB must await responses.
- If CURB disagrees with the designations, CURB then engages in informal negotiations with the utility as required by the Protective Order prior to filing any motions to compel. This may require more than one round of communications.
- If CURB disagrees with the utility's designations at that point, then and only then can CURB file a motion to compel disclosure.
- Any order issued by the Commission may take as long as ten days to be issued—longer if objections to CURB's motion are filed. Thus, resolution of the issue can only occur after CURB's response must be filed, forcing CURB to file two versions of its testimony, even if CURB ultimately prevails on the ruling on the motion.

All this in ten days—while CURB is also attempting to complete its analysis and prepare a substantive response to the R&R.

13. This is prejudicial to CURB, or any other party who must respond in ten days. CURB believes now that more and more of the dockets at the Commission are concluded in a shorter time frame than the statutory 240-day schedule provided for rate cases, the Commission Staff should be taking on the responsibility of ensuring that utilities comply with the Protective Order. While, in the majority of cases, given the tightness of the schedules, the utilities and Staff have been responsive to CURB's requests for expedited responses in our negotiations, it is still usually impossible to resolve

the informal phase of the negotiations in ten days, let alone get a Commission decision to resolve a dispute. This is unfair to CURB and other parties who subscribe to the state's policy of transparency in governmental affairs, and do not like to file redacted versions of public documents unless it is absolutely necessary. It hampers our ability to make our arguments and it takes the public out of the loop. It is especially unfortunate in cases where the Commission ultimately determines that the information should have been made public in the first place.

14. In this case, while CURB recognizes that KCPL has offered what is generally accepted as a legitimate reason for maintaining confidentiality of its vendor contract costs, it took several rounds of emails before CURB was given the company's justification. The reason wasn't obvious, because the same sort of information was public in three previous dockets. Further, the disclosures, which were apparently accidental, caused no harm. CURB asked KCPL: "Please identify the harm, if any, that accrued to KCPL as a result of the disclosure of the actual cost information from 2011, 2012 and 2013 that the company claims should have been confidential." KCPL replied, "Under the Commission's rules, showing actual harm in past situations is not required. KCP&L has explained the potential harm release of this type of information can cause. Previous erroneous releases of confidential information does not change the potential for harm in the future if additional disclosures occur." CURB recognizes that what KCPL says may be true, but does KCPL's interest in potential harm—after three consecutive years of no apparent harm from "erroneous" release of the same kind of information—outweigh the customers' interest in knowing where their money goes?

B. Staff's redactions include data that is not entitled to be treated confidentially

15. Unfortunately, Staff's unquestioning acceptance of KCPL's designations has resulted in redaction from Staff's filing of other information that is clearly not entitled to confidential treatment. Staff redacted entire pages of data, not just the specific items which KCPL claims are entitled to confidentiality, which interferes with the ability of CURB to present its arguments without also redacting the information which should be public. The designation of this information as confidential significantly hampers CURB's ability to explain to the customers it represents where this money went and whether it was well-spent. Staff has a responsibility to make an effort to present the information provided by KCPL in a way that does not redact non-confidential information to be made public.

C. Redaction of vendor costs deprives regulators and the public of data that is essential for making sound, informed economic decisions on energy-efficiency programs

16. The utilities' practice—it's not just KCPL's practice—of outsourcing energy-efficiency programs to third-party vendors, and then shielding the data and costs from public disclosure because they claim they must protect their private contracts from disclosure hampers informed public dialogue on the economic value of EE programs. How do regulators and the public judge the worthiness of offering EE programs through utilities if they have no basis for comparisons? How do they decide whether utilities are the appropriate providers of EE programs, whether a particular utility is doing a good job, or whether customers are receiving good value for the money they contribute to the efforts? There is great demand for data on the performance of these programs; for years, data from California was about the only data available. However, for a variety of reasons,

including climate, not all of California's data is useful to regulators in other states. A public database of the costs and performance of EE programs all across the country that is accessible to all concerned with these issues would be invaluable. Cloaking this data in secrecy, to be perused only by a select group of regulators, advocates and utility executives deprives regulators, customers and the public in general from accessing information that should be used to create a body of knowledge that will inform policy makers' decisions and enable them to make wise choices.

IV. Summary and requests for relief

17. CURB believes the concerns raised above are policy questions that deserve serious consideration by the Commission. Kansas has a policy favoring transparency in governmental affairs. To further that policy, the Commission should be enforcing its regulations and orders on all parties, including the utilities, and not presume that all confidential designations are legitimate until challenged by a party. The Commission should also recognize the prejudice that accrues to the parties in shorter, fast-paced dockets that do not provide enough time to resolve confidentiality disputes before the parties' responses are due.

18. When utilities fail to provide specific justification for confidential designations at the time the information is provided, it creates more work and difficulty for other parties. The Commission should direct its Staff to address the failure of utilities to provide written statements of the reasons for confidentiality at the time a utility submits information to Staff labelled "confidential." Further, when the protection of legitimately confidential information results in the redaction of information that is patently public in nature, the Commission should put the burden on the utility, not the challenging party, to facilitate the disclosure of the public information. The

Commission should discourage parties, including Staff, from wholesale redactions that result in the redaction of information that should have been disclosed.

19. Finally, when a party challenges the confidential designation, the Commission should weigh the factors for and against disclosure, and include among the factors favoring disclosure the state policy of transparency in governmental action. In this particular docket, the Commission should also recognize the great need nationwide for a body of accessible economic data on energy-efficiency programs that will enable more informed decisions by consumers, regulators and utilities. In balancing the utilities' interest in the secrecy of third-party vendor contract costs against the value of that information in contributing to a body of knowledge and data documenting the historical performance of specific programs nationwide, the Commission should consider not only the interests of KCPL's customers, but the public interest in having the benefit of access to such information.

20. Therefore, the Citizens' Utility Ratepayer Board moves the Commission to:

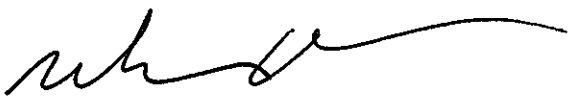
1) Order KCPL to remove the confidential designations on the information provided to Staff;

2) Order Staff to substitute in the record its redacted R&R with an unredacted version that makes public the data that was redacted in Staff's R&R, including the public information that was redacted in by Staff in its effort to protect the information that KCPL designated as confidential;

3) Allow CURB to substitute in the record an unredacted version of its Response; and

4) Adopt policies or take actions as are necessary to ensure timely enforcement of all provisions of the Protective Orders that are issued in Commission dockets.

Respectfully submitted,



David Springe, Consumer Counsel #15619
Niki Christopher #19311
Citizens' Utility Ratepayer Board
1500 SW Arrowhead Road
Topeka, KS 66604
(785) 271-3200
(785) 271-3116 Fax

VERIFICATION

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

I, Niki Christopher, of lawful age and being first duly sworn upon my oath, state that I am an attorney for the Citizens' Utility Ratepayer Board; that I have read and am familiar with the above and foregoing document and attest that the statements therein are true and correct to the best of my knowledge, information, and belief.

Niki Christopher

SUBSCRIBED AND SWORN to before me this 23rd day of May, 2014.

Notary Public

DELLA J. SMITH
Notary Public - State of Kansas
My Appt. Expires January 26, 2017

My Commission expires: 01-26-2017.

CERTIFICATE OF SERVICE

14-KCPE-442-TAR

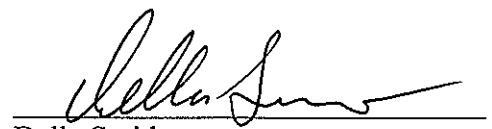
I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was served by electronic service on this 23rd day of May, 2014, to the following:

ANDREW FRENCH, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604-4027
a.french@kcc.ks.gov

MARY BRITT TURNER, DIRECTOR REGULATORY AFFAIR
KANSAS CITY POWER & LIGHT COMPANY
ONE KANSAS CITY PL, 1200 MAIN ST (64105)
PO BOX 418679
KANSAS CITY, MO 64141-9679
mary.turner@kcpl.com

NICOLE A. WEHRY, SENIOR PARALEGAL
KANSAS CITY POWER & LIGHT COMPANY
ONE KANSAS CITY PL, 1200 MAIN ST (64105)
PO BOX 418679
KANSAS CITY, MO 64141-9679
nicole.wehry@kcpl.com

ROGER W. STEINER, CORPORATE COUNSEL
KANSAS CITY POWER & LIGHT COMPANY
ONE KANSAS CITY PL, 1200 MAIN ST (64105)
PO BOX 418679
KANSAS CITY, MO 64141-9679
roger.steiner@kcpl.com



Della Smith
Administrative Specialist