THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: Mark Sievers, Chairman
Thomas E. Wright
Shari Feist Albrecht

In the Matter of Kansas City Kansas Board of Public Utilities' Compliance with the Commission's Order in Docket No. 13-GIME-391-GIE.	))))	Docket No. 13-KCKE-468-CPL

ORDER DENYING CURB'S PETITION FOR RECONSIDERATION
OF THE COMMISSION'S FEBRUARY 13, 2013 ORDER

The above-captioned matter comes before the State Corporation Commission of the State of Kansas (Commission) for consideration and determination. Having examined its files and records and being fully advised in the premises, the Commission finds and concludes as follows:

I. Background

1. On December 13, 2012, the Commission opened a General Investigation of the Annual Determination for the Statewide Retail Rate Impact Resulting from Affected Utilities Meeting the Renewable Portfolio Requirement Pursuant to K.S.A. 2012 Supp. 66-1260 in Docket No. 13-GIME-391-GIE (391 Docket). The stated purpose of the 391 Docket was to "require submission of information related to a utility's portfolio requirement" so that the Commission can prepare its annual report to the Legislature, due on March 1, 2013.[1] As discussed in Staff's Report and Recommendation that served as the basis for opening the 391 Docket, the Legislature's 2012 amendments to K.S.A. 66-1260 would simply require utilities to submit volumetric sales data to update the information previously submitted for making the annual Renewable Energy Standard (RES) reports under K.A.R. 82-16-4. Staff's Report and

[1] Order Opening General Investigation Docket, (391 Docket) (Dec. 13, 2012), paragraph 1 (Dec. 13, 2012 Order, ¶ 1).

Recommendation further noted that "[m]uch of the individual revenue requirement and related information provided in prior RES reports are considered confidential by the utility."[2] On December 19, 2012, the Citizens' Utility Ratepayer Board (CURB) filed a Petition to Intervene in the 391 Docket and was granted intervention on January 2, 2013.[3]

2. On January 16, 2013, Staff filed a Notice of Filing of Confidential Report in Docket No. 13-KCKE-468-CPL (468 Docket) to file the confidential annual RES report of the Kansas City Kansas Board of Public Utilities (BPU) in compliance with the Commission's requirements in the 391 Docket and to maintain confidentiality of the report and future RES reports.[4]

3. On January 24, 2013, CURB filed a Petition to Intervene and Motion for Protective Order. On February 13, 2013, the Commission granted CURB limited intervention, finding CURB's "intervention should be limited to receiving notice of filings in this docket" and denying its motion for a protective order after finding "CURB will not be given access to confidential filings or allowed to file discovery motions, protests, or other litigious filings[.]"[5]

4. CURB filed its Petition for Reconsideration of the February 13, 2013, Order on March 1, 2013. In its Petition for Reconsideration, CURB asks the Commission to reconsider its findings in the February 13, 2013 Order and:

A) Determine whether this docket was appropriately opened by Staff; and if not, order the filings in this docket to be filed in the 391 Docket;

B) Find that the public's interest in open access to the filings made in this docket outweighs any harm that may result from disclosure; and

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[2] Report and Recommendation, (391 Docket) (Nov. 28, 2012).
[3] Petition to Intervene, (391 Docket) (Dec. 19, 2012); Order Granting Intervention to Citizens' Utility Ratepayer Board, (391 Docket) (Jan. 2, 2013).
[4] *See*, Notice of Filing of Confidential Report, (Jan. 16, 2013).
[5] Order on Petition to Intervene and Motion for Protective Order, (Feb. 13, 2013).

C) Order the filings in the docket to be made accessible to the parties and the public.

5. Commission Staff (Staff) filed its Reply to CURB's Petition for Reconsideration on March 11, 2013.[6] In its Reply, Staff argued:

A) CURB's interests in this compliance docket are minimal and peripheral at best, and K.S.A. 2012 Supp. 77-521(c) gives the Commission discretion in imposing conditions upon an intervenor's participation in a proceeding;

B) The Commission alone is required to make an annual report to the legislature pursuant to K.S.A. 2012 Supp. 66-1260, the Commission alone may enforce its orders, and it opened the compliance dockets to monitor certain utilities' compliance with such orders in the 391 Docket; CURB cannot enforce the Commission's orders, and as such the Commission's limitation on CURB's intervention and denial of its Motion for Protective Order are proper;

C) CURB has no legitimate need to review the information filed by the utilities in the compliance dockets, as CURB was granted unlimited intervention in the 391 Docket and is entitled to receive the 391 Docket's report and any other filings in that docket; as CURB is not directly affected by K.S.A. 2012 Supp. 66-1260, the Commission's limitation on CURB's intervention and denial of its Motion for Protective Order are proper;

D) It would be poor public policy to permit CURB to access information that was intended to permit the Commission alone to file a statutorily-required report to the legislature, and such access would have a chilling effect

[6] Staff's Reply to Citizens' Utility Ratepayer Board's Petition for Reconsideration, (Mar. 11, 2013).

upon utilities' willingness to comply with Commission orders in the future due to the market-sensitive nature of the information the utilities may be required to provide to the Commission; and

E) K.S.A. 45-221(a)(11) provides that a public agency shall not be required to disclose "Records of agencies involved in administrative adjudication or civil litigation, compiled in the process of detecting or investigating violations of civil law or administrative rules and regulations, if disclosure would interfere with a prospective administrative adjudication or civil litigation or reveal the identity of a confidential source or undercover agent."

II. Standard of Review

6. The purpose of requiring a party to ask for reconsideration is to provide this Commission an opportunity "to correct errors which are called to its attention and thus avoid judicial review and determination."[7] The Commission is one of three agencies in which the filing of a petition for reconsideration is a prerequisite for filing a petition for judicial review.[8] Generally, a party may not seek judicial review of an issue not presented to an agency for decision.[9] This proceeding is subject to the Kansas Administrative Procedure Act (KAPA).[10] Agency action taken by the Commission will be subject to review under the Kansas Judicial Review Act (KJRA),[11] which provides the exclusive means for seeking review of state agency action.[12] The Commission notes CURB's Petition for Reconsideration does not implicate any of the eight grounds for relief under K.S.A. 77-621(c).

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[7] *Graves Truck Line v. Kan. Corp. Comm'n*, 195 Kan. 82, 85, 402 P.2d 757 (1965); *Williams Nat. Gas Co. v. Kan. Corp. Comm'n*, 22 Kan. App. 2d 326, 332-33, 916 P.2d 52 (1996), *rev. denied* 260 Kan. ___ (July 25, 1996).
[8] K.S.A. 2012 Supp. 77-529(a)(1).
[9] K.S.A. 2012 Supp. 77-617.
[10] K.S.A. 2012 Supp. 77-501, *et seq.*; *See* K.S.A. 2012 Supp. 66-1,108b; K.S.A. 66-1,112j.
[11] K.S.A. 2012 Supp. 77-601, *et seq.*; *See* K.S.A. 2012 Supp. 77-603; K.S.A. 2012 Supp. 66-118c.
[12] K.S.A. 77-606.

III. Discussion

7. CURB first argues Staff unilaterally and inappropriately opened this compliance docket when the Commission had first ordered that the information be submitted in the 391 Docket. Essentially, CURB asserts the information submitted in this case should be filed in the 391 Docket because this compliance docket was not appropriately opened.

8. The Commission acknowledges that it ordered the parties in the 391 Docket to submit their information in that case and that the Order did not explicitly authorize Staff to open compliance dockets for each utility. However, the Commission approves of Staff's opening of this and the six other compliance dockets related to the 391 Docket to receive the required submissions of information with the express intent of protecting the confidentiality of the parties' information and to generally manage the RES information submitted to the Commission. As noted above, Staff's Report and Recommendation noted that the utilities considered certain information in prior RES reports to be confidential. The Commission finds the submissions' confidentiality in this case is paramount due to the highly competitive relationships of the utilities involved in the 391 Docket, and the use of compliance dockets furthers that goal.

9. CURB further argues the Commission should find that the public's interest in open access to the submissions of information made in this docket outweighs any harm that may result from their disclosure. As stated above, this proceeding was initiated precisely to permit BPU to comply with the Commission's requirements in the 391 Docket and maintain confidentiality of sensitive business information. To allow open access to the submissions of information in this case would be to negate Staff's very purpose in initiating the proceeding. Therefore the Commission finds in this case that the public's interest in open access does not outweigh any potential harm resulting from disclosure.

10. Finally, CURB argues generally that the submissions of information in this docket should be made accessible to the parties and the public. Again, this proceeding was initiated particularly to permit BPU to comply with the Commission's requirements in the 391 Docket and to maintain confidentiality of the information submitted. The Commission finds that the confidentiality of information in this case is of the utmost importance. Therefore the information filed in this docket should not be made accessible to the parties and the public but should remain confidential.

11. It is important to place CURB's dispute in context. The 391 Docket was opened to comply with legislative requirements that the Commission submit a report to the legislature regarding the statewide impact on retail rates of the renewable energy standard. A series of compliance dockets were opened to simply receive information submitted to the Commission for purposes of complying with this legislative requirement. For ease of administration, the Commission is adapting the compliance docket tool it has used in quasi-judicial proceedings to fulfill its reporting obligation to the legislature. The Commission will not make and has not made any decision in either the compliance dockets or the 391 Docket. As a result, there is no opportunity for representation or advocacy of the interests of residential and small business consumers.

12. As stated above, the information is considered confidential business information because it contains information about the prices utilities may have paid to vendors of renewable energy. From an economic standpoint, public disclosure of that information as CURB advocates could retard the normal operation of markets (*e.g.*, knowing what everyone else charges, no vendor would accept a price lower than another vendor so public disclosure could facilitate price fixing) and could also violate confidentiality agreements that utilities may have entered into with

their vendors. Ultimately, CURB does not explain how residential consumers or small business customers would either benefit or be harmed by public disclosure of the prices utilities might pay to vendors of renewable energy generation.

13. CURB's motives in seeking the data are unclear in its Petition for Reconsideration, and CURB has failed to articulate why it is appropriate that such data should be made available to CURB or to be made public.

14. The Commission agrees with the arguments in Staff's Reply that CURB's interests in this compliance docket are peripheral and that K.S.A. 2012 Supp. 77-521(c) gives the Commission discretion in imposing conditions upon an intervenor's participation in a proceeding. Furthermore, the Commission agrees with Staff that the Commission alone may enforce its orders, and has elected to monitor compliance with its order in the 391 Docket with compliance dockets. CURB's intervention in this compliance docket was properly limited, as CURB may not enforce Commission orders and its interest in the submissions of information in this docket is minimal.

15. The Commission finds the nature of this investigative proceeding is different from an adversarial, adjudicative proceeding before this Commission. The typical rights to apprisal, confrontation, and cross-examination are not applicable in an investigative compliance docket.[13] As such, CURB's intervention in this docket was properly limited, and its motion for protective order was properly denied.

16. The Commission concludes CURB's Petition for Reconsideration of the February 13, 2013 Order should be denied. CURB has provided no legal basis for revising its intervention status or reversing the Commission's decision to deny CURB's Motion for Protective Order.

[13] See *Atchison, Topeka & Santa Fe Railway Company v. Kansas Commission on Civil Rights*, 215 Kan. 911, 918, 529 P.2d 666 (1974).

Any CURB petitions for intervention and motions for a protective order in future compliance dockets will be reviewed on a case-by-case basis.

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:

A. CURB's Petition for Reconsideration of the Commission's February 13, 2013, Order is denied.

B. This order is intermediate and procedural, and constitutes non-final agency action. K.S.A. 77-607(b)(2).

C. To the extent that this Order constitutes final agency action that is subject to judicial review under K.S.A. 77-607(b)(1), the agency officer designated to receive service of any petition for judicial review is Patrice Petersen-Klein, Executive Director. K.S.A. 2012 Supp. 77-529(d).

D. The Commission retains jurisdiction over the subject matter and parties for the purpose of entering such further order, or orders, as it may deem necessary and proper.

BY THE COMMISSION IT IS SO ORDERED.

Sievers, Chairman; Wright, Commissioner; Albrecht, Commissioner

Dated: MAR 2 8 2013

ORDER MAILED MAR 2 8 2013

Patrice Petersen-Klein
Executive Director

JV

CERTIFICATE OF SERVICE

MAR 2 8 2013

13-KCKE-468-CPL

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing Order Denying CURB's Petition for Reconsideration of the Commission's February 13, 2013 Order was served by electronic mail this 28th day of March, 2013, to the following parties who have waived receipt of follow-up hard copies:

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