Citizens' Utility Ratepayer Board

State of Kansas
Sam Brownback, Governor

David Springe, Consumer Counsel
1500 S.W. Arrowhead Road
Topeka, Kansas 66604-4027
Phone: (785) 271-3200
Fax: (785) 271-3116
http://curb.kansas.gov

November 21, 2011

Ms. Patrice Petersen-Klein
Executive Director
Kansas Corporation Commission
1500 S.W. Arrowhead Road
Topeka, KS 66604

Re: 11-EPDE-856-RTS

Dear Ms. Petersen-Klein:

Please accept this corrected public version of "CURB's Motion to Remove Confidential Designations in Paragraph 16 of the Stipulation and Agreement" that was filed on November 18, 2011, in Docket No. 11-EPDE-856-RTS. The version filed contains typographical errors and is missing paragraph numbers.

Sincerely,

Della Smith
Administrative Specialist

Received
on

NOV 2 1 2011

by
State Corporation Commission
of Kansas

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the Matter of the Application of The Empire District Electric Company for Approval to Make Certain Changes in Its Charges for Electric Service.	))))	Docket No. 11-EPDE-856-RTS

REDACTED VERSION

CURB's MOTION TO REMOVE CONFIDENTIAL DESIGNATIONS

IN PARAGRAPH 16 OF THE STIPULATION AND AGREEMENT

The Citizens' Utility Ratepayer Board (CURB) herein moves the Kansas Corporation Commission (KCC or Commission) to disclose information redacted at the request of Kansas City Power & Light (KCPL) from the Stipulation and Agreement (S&A) filed jointly by Empire District Electric Company (Empire), the Staff of the Commission, and CURB. KCPL is not a party to this docket, having been denied intervention, but claims an interest in confidentiality of a settlement agreement reached with Empire concerning a matter that became an issue in the settlement agreement, as described in paragraph 16 of the S&A. CURB and Empire have negotiated informally on this matter together and with KCPL, but failed to reach a consensus with KCPL on how much information in paragraph 16 of the S & A merits confidential treatment. Staff did not participate in the negotiations. At this juncture, Staff and Empire have acquiesced in KCPL's redactions, but CURB herein makes the argument that only six words in the paragraph must be redacted to protect the interest of KCPL in keeping the information from public view, and that the rest of the redacted information is already available from public sources and should not be redacted.

I. **Facts regarding the informal negotiations concerning the redaction of paragraph 16**

1. Staff, CURB and Empire reached a settlement agreement on its rate case and had substantially agreed to the terms of the agreement the afternoon after the prehearing conference on November 8. Over the next two days, the parties exchanged drafts and reached unanimous agreement to the language of the stipulation by 11:51 a.m. on November 10. The parties had agreed to Empire's request to redact five words in paragraph 16 that would have revealed the outcome of a confidential arbitration settlement agreement between Empire and Kansas City Power & Light. Since Empire and KCPL had agreed to keep the outcome confidential, Empire said that it wanted KCPL to review the language of paragraph 16 before we filed the agreement to see if would meet KCPL's concerns about confidentiality.

2. The parties were under pressure to get the stipulation and their joint motion to cancel the evidentiary hearing filed by end of day on November 10, 2011, before the Veterans Day holiday on November 11, to provide the Commission time to consider the motion and give the public notice that the evidentiary hearing would be cancelled if the motion was granted.

3. At 2:30 p.m. on November 10, the language was finalized and we were simply waiting for KCPL's approval of the redactions in paragraph 16. At 4:23 p.m., counsel for Staff forwarded to CURB a draft of the stipulation with KCPL's proposed redaction of the entire paragraph, except for the heading. A telephone conversation with Staff counsel revealed that Staff intended to make no objection to this redaction.

4. With only 30 minutes left to file, CURB faced a dilemma: object to the redaction and refuse to sign off on the stipulation until we negotiated more appropriate

redactions, which would have had the effect of leaving our motion to cancel the evidentiary hearing unsupported by the evidence of that a stipulation and agreement had been reached. If we waited to file our motion until we agreed on more appropriate redactions to the stipulation, it would be too late for the Commission to give proper notice of cancelling the evidentiary hearing if it was willing to grant our motion. Given that there were no substantive differences remaining among the parties, it seemed rash to risk scuttling the settlement over this matter. The only other option was for CURB to sign off on it and seek further negotiations with KCPL over the redactions. CURB chose that option. Counsel for Empire assured CURB that it would work with KCPL further on the redactions in paragraph 16.

5. On November 14, Empire filed a letter with the Commission presenting KCPL's concessions concerning the redactions, releasing some of the paragraph to public view. CURB immediately objected to the redactions remaining. There was no attempt by KCPL, Empire or Staff to address CURB's concerns with the extent of the redactions, which had made the entire paragraph unreadable and meaningless.

6. CURB, in an effort to honor KCPL's concerns as well as CURB's, redrafted paragraph 16 to accommodate KCPL's concerns about confidentiality by redacting information that would have revealed outcome of the arbitration settlement, but provided a much more readable paragraph, and which also explained that the redactions herein were requested by KCPL, and that CURB and Staff did not concur with the redactions but agreed to them to settle the case. CURB cited the need for public proceedings to be as public and as possible, noted that much of the information that KCPL redacted was already in the public record of this case, and asked the parties to agree to file the new language as a substitute for the language of paragraph 16 in the

Stipulation. The substance of the agreement concerning the matter was not altered by the substitute language. Empire offered a few minor revisions, to which CURB agreed, and we then contacted Staff to see if Staff would agree to make a joint filing to substitute the new paragraph 16 for the old one.

7. Staff refused to agree to file the substitute language, even though it would have been unanimous and did not change the substance of the agreement. CURB viewed the joint effort of Empire and CURB as a honest effort to protect KCPL's confidentiality interest while also serving the public interest by rewording the paragraph so that there weren't such huge gaps in it that it was rendered meaningless. Staff told CURB that its only remedy would be to file an objection to the confidential designations with the Commission.

II. Standard of Review and Burden of Proof

8. Under state and federal law, a publicly regulated utility has little expectation of privacy in its financial matters. The public interest in fair and reasonable rates demands heightened scrutiny of the financial records of a utility.

9. Obviously, resolution of complex issues and hammering out differences of opinion will be much facilitated for the Commission if free and open discussion is permitted. Decision-making will be, if not simple, at least easier if confidential treatment of the identified information is unnecessary. Furthermore, deliberations behind closed doors are frowned upon under Kansas law, and should be conducted only under circumstances that clearly justify secrecy. (*See* K.S.A. 45-215 – 223, known as the Kansas Open Records Act).

10. It is essential that the public have confidence in the wisdom of the Commission's final determinations. Confidence in the outcome can only be assured if

the public has the opportunity to weigh the evidence and exercise its own judgment on the issues. Without transparency, the trust of the public concerning government activities is eroded. While there are legitimate reasons for protecting the privacy interests of individuals and businesses in their interactions with governmental entities, it is essential that governmental actors, in drawing a cloak of secrecy over confidential matters, do not also draw that cloak of secrecy over matters that are of legitimate public interest. Where parties make a legitimate claim to the privilege of confidentiality, the Commission should narrowly tailor its accommodation of the party's interest so that it does not intrude on the public's right to know. And where a party makes a claim to the privilege of confidentiality that is frivolous, unwarranted, or too broadly intrusive on the public interest in transparency of governmental action, the government must not hesitate to reject the claim and rule in favor of disclosure.

11. The Commission has developed a procedure for handling claims of confidentiality. The Commission must first determine if the information is truly "confidential." According to the Protective Order issued in this docket, confidential information may include:

> (1) material or documents that contain information relating directly to specific customers; (2) employee sensitive information; (3) marketing analyses or other market-specific information relating to services offered in competition with others; (4) reports, work papers or other documentation related to work produced by internal or external auditors or consultants; (5) strategies employed, to be employed, or under consideration in contract negotiations; and (6) information concerning trade secrets, as well as private technical, financial and business information.

Protective Order, at 2-3.

12. The party claiming confidentiality has the burden of proving the document is confidential. *Protective Order,* at 2. Utilities sometimes operate as if simply not wanting to release the information makes it private, and therefore, confidential. However, as a Kansas court operating under similar federal rules has said,

> "Business documents as a category do not qualify as intrinsically confidential and personal. Their disclosure does not necessarily cause a clearly defined and serious injury. Some documents may be confidential or personal. The party seeking to protect them, however, bears the burden to show that."

Dahdal v. Thorn Americas, Inc., 1997 WL 599614 (D. Kan.), at 2. The court went on to say that, "The movant must do more than simply state that such documents are proprietary and confidential." *Id.* This principle is reiterated in the protective order, where the Commission said, "Designating information as confidential does not establish that the information will not be subject to disclosure after review by the Commission." *Protective Order,* at 2.

13. Further, this order provides that "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). Confidentiality alone will not justify denying the public access to the information. Under the Protective Order, the party claiming confidentiality has the burden to establish that disclosure of the information "would likely result in harm to a party's economic or competitive interest or which would result in harm to the public interest generally and which is not otherwise available from public sources [emphasis added]." *Protective Order,* at 2.

14. In addition, K.S.A. 66-1220a requires the Commission to balance several factors in considering whether to disclose a trade secret or confidential commercial information. Among them is "whether disclosure will significantly aid the commission in

fulfilling its functions." K.S.A. 66-1220a(a)(1). The Commission also must consider the harm or benefit to the public interest of disclosure, as well as considering the harm that disclosure will cause to the utility. K.S.A. 66-122a(a)(2) – (4). Alternatives to disclosure that would serve the public interest while protecting the utility should be considered. K.S.A. 66-1220a(a)(4).

15. If there is a disagreement about whether information is confidential or should not be disclosed, the protective order provides that the parties shall first attempt to resolve the dispute on an informal basis. *Protective Order*, at 5. "Staff should also be prepared to challenge a confidential designation when Staff believes that the information does not meet the definition of confidential information." *Id.* "If the parties cannot resolve the dispute informally, the party contesting the confidential treatment may file a motion with the Commission." *Id.* The review by the Commission of the motion will determine (1) if the party claiming confidentiality has met its burden of establishing the confidential designation is proper, and (2) whether disclosure is warranted under K.S.A. 2010 Supp. 66-122a.

III. Information that has already been disclosed to the public in this docket.

16. The following information is public, having been filed by Empire in its Application:

A. From the Direct Testimony of Blake Mertens, beginning at Line 5, page 16:

Q: PLEASE DESCRIBE SCHIFF HARDIN'S ROLE IN THE IATAN PROJECTS.

A: It is my understanding that Schiff Hardin LLC provided legal services for the Iatan projects to KCPL.

Q: HAS EMPIRE ENTERED INTO A DEMAND FOR ARBITRATION CONCERNING SCHIFF HARDIN MATTERS?

A: Yes.

Q: WHY?

A: KCP&L entered into an agreement with Schiff Hardin LLC to provide legal services. Provisions within the agreement between KCP&L and Schiff Hardin state the legal services "are intended for the sole benefit of KCP&L"; however, KCP&L has invoiced Empire for Schiff Hardin legal expenses based upon Empire's ownership share of Iatan. Empire was not and to this date has not been given full access to Schiff Hardin reports, work product and legal counsel.

Q: WHAT ARE THE RESULTS OF THIS ARBITRATION?
A: The arbitration proceeding is still in the early stages with the arbitration panel only recently being selected and legal briefs introducing the issues recently submitted. The results of the arbitration are not likely to be known for several months.

Q: IF THE RESULTS OF THE ARBITRATION ARE NOT YET KNOWN, WHY IS THIS ISSUE OF RELEVANCE?

A: This arbitration process initiated by Empire management is yet another example of Empire's diligence and prudence in assuring that the Company and its customers are paying only their proper share of Iatan costs.

B. From the Rebuttal Testimony of Blake Mertens, beginning at Line 4, page 6:

Q: HAVE YOU REVIEWED THE CURB AND STAFF TESTIMONY REGARDING SCHIFF HARDIN COSTS ASSOCIATED WITH THE IATAN PROJECTS?

A: Yes. I have reviewed the testimony of CURB witness Crane and Staff witness Bowman.

Q: The CURB witness Crane proposes an adjustment to reduce Empire's project investment as of August 31, 2011 for Empire's portion of the Schiff Hardin costs. Staff proposes no specific adjustment as part of its case, but recommends Empire reflect any benefit from the arbitration in its next rate case.

Q: WHAT ARBITRATION IS STAFF WITNESS BOWMAN REFERRING TO?

A: This is the arbitration I described in my direct testimony associated with certain legal fees charged to Empire as part of the Iatan projects. As of the time of my direct testimony and only until recently this was an unsettled dispute between Empire and KCPL.

Q; WHAT AMOUNT DOES CURB WITNESS CRANE PROPOSE TO DISALLOW?

A: She proposes to disallow the Kansas jurisdictional share of $2,515,526 which is Empire's 12% of all Schiff Hardin costs KCPL has charged Empire through August 31, 2011.

Q: DOES EMPIRE AGREE WITH CURB'S PROPOSED DISALLOWANCE?

A: No.

Q: WHY?

A: CURB's adjustment to eliminate Empire's share of the Schiff Hardin costs associated with Iatan 1 and 2, is inconsistent with the previous KCC decision in the 415 Docket relating to prudency [sic] of the costs of the Iatan 1 and Iatan 2 projects. In the 415 Docket the KCC did not find any Schiff Hardin costs to be imprudent. If those costs were not found to be imprudent project costs in that case, there is no basis provided by CURB to disallow those costs in Empire's case.

Q: IF THESE COSTS ARE NOT IMPRUDENT, WHY DID EMPIRE TAKE KCPL TO ARBITRATION OVER THE ISSUE?

A: In Empire's arbitration, we did not contend the costs were imprudent; rather, we contended we did not receive access to some of the Schiff Hardin work product, and therefore, we could not determine if Empire and its customers benefitted from that work product.

Q: DO YOU HAVE AN UPDATE TO THE ARBITRATION PROCEEDINGS?

A: Yes. On September 30, 2011 Empire and KCPL executed a settlement agreement to settle this matter. A copy of this settlement agreement is attached to my testimony as Rebuttal Exhibit BAM-1. The settlement agreement has been marked confidential pursuant to the agreement between Empire and KCPL.

Q: CAN YOU SUMMARIZE THIS SETTLEMENT AGREEMENT?

A: Yes. [Mr. Martens' remarks summarizing the agreement are redacted as confidential].

17. Therefore, none of the information above is "confidential" under the protective order issued in this case, or under the standards set by K.S.A. 66-1220a.

IV. The redaction agreed to by the parties.

18. NOTE: The original redactions discussed herein are *within a single set of asterisks and underlined*. The redactions of the author of this motion to protect information that KCPL has deemed confidential are denoted by ***BEGIN CONFIDENTIAL* and *END CONFIDENTIAL***.

19. The agreed-upon language addressing the Schiff Hardin matter in paragraph 16 of the settlement agreement of Empire, CURB, and Staff is as follows:

E. SCHIFF-HARDIN ARBITRATION SETTLEMENT

***BEGIN CONFIDENTIAL*

*END CONFIDENTIAL***

Counsel for Empire drafted this paragraph, to which Staff and CURB assented, and noted in the email sent to Staff and CURB on November 8 at 10:21 a.m., "I am in the process of contacting KCPL to see if we can remove the confidentiality portions of the Stipulation

that relate to the Schiff Hardin matter so we don't have to file a confidential and a public version." Clearly, the counsel for Empire felt the paragraph that he had drafted, with only five words redacted, would maintain the requirement of confidentiality of the outcome of the arbitration settlement agreement with KCPL, and counsel took a step further in trying to get KCPL to agree to making those five redacted words public. Staff made no comments on the draft to CURB, but apparently assented to the language of the paragraph and the redactions, because it made no objections.

V. The first KCPL redaction.

20. As noted previously, on November 10 at 4:23 p.m., 37 minutes prior to the deadline for filing this document (if it was to be considered in conjunction with a motion to cancel the evidentiary hearing), counsel for Staff sent CURB the redacted version of the paragraph that KCPL wanted in the stipulation. It looked like this:

E. SCHIFF-HARDIN ARBITRATION SETTLEMENT

16. *

*

This redaction was not accompanied by any explanation justifying the redaction of the entire paragraph. CURB, after going ahead and signing the S&A so that it would not be accused of scuttling the settlement over this matter, sent an email to counsel for Empire and copied the parties, asking him to pass along to KCPL CURB's strong objections to the wholesale redaction of the entire paragraph, and asking for specific explanations as to why KCPL was asking for redaction of such public information as the existence of the dispute, the names of the parties, and the fact that an arbitration settlement agreement had been reached. If Staff had any objections, it did not express them to CURB.

VI. KCPL's second redaction.

21. On Monday, November 14, without consulting with the parties, Empire filed a letter addressed to the executive director of the KCC, along with a copy of paragraph 16 with a new set of redactions approved by KCPL. The new set of redactions looked like this:

E. SCHIFF-HARDIN ARBITRATION SETTLEMENT

16. The *

*** relating to certain work conducted by Schiff Hardin relating to Iatan 1 AQCS and Iatan 2, as reflected on page 8, line 3 of Mr. Merten's rebuttal testimony, and page 2 of Rebuttal Exhibit BAM-1, shall be**

*** Empire agrees the Commission Staff may initiate a compliance filing in the future to verify that the ***

*** in compliance with this Stipulation.**

22. CURB was not satisfied with these redactions, either. Public information was still redacted, and the blanks in the paragraph succeeded in making the paragraph unreadable, meaningless, and confusing. It concealed the nature of the action to be taken by Staff, which is inconsistent with maintaining transparency in government action.

VII. Revision proposed by CURB and Empire

23. Keeping in mind the statute on confidentiality, which states "Alternatives to disclosure that would serve the public interest while protecting the utility should be considered." K.S.A. 66-1220a(a)(4), CURB decided to try another attempt to resolve the matter. Rather than try to negotiate further on the redaction of the paragraph, counsel for CURB proposed to rewrite the paragraph. The goals were to retain the substance of the agreement, to honor KCPL's legitimate concerns about the confidentiality of the substance of the arbitration settlement agreement, and to address CURB's concerns about maintaining transparency in government action. Counsel for Empire responded by suggesting a couple of revisions to the language. With Empire's revisions, the new proposed paragraph looked like this:

E. SCHIFF-HARDIN ARBITRATION SETTLEMENT

16.*BEGIN CONFIDENTIAL*.*

****END CONFIDENTIAL*****

Every sentence in this proposed revision is true, and with the redaction, discloses nothing that is not already available in public filings. It properly protects the information that is not public, and ensures that no one could deduce whether the agreement will impact rates negatively or positively in the next rate case and therefore deduce the outcome of the arbitration. It is straight-forward, and explains why the impact on rates is not being disclosed. The paragraph is not confusing, and does not obfuscate, conceal or alter the agreement made among the parties. It also does not conceal the action that Staff would take to ensure compliance with this portion of the S&A.

24. Counsel for Empire agreed that if CURB and Staff agreed to Empire's revisions to CURB's proposed paragraph, then the parties should file a joint motion with the Commission to substitute this new paragraph 16 for the original paragraph 16 in the S&A. CURB agreed to accept Empire's revisions, but Staff refused to agree to join a motion to revise the language of paragraph 16. Stating that further negotiations were a waste of time and resources and would set a bad precedent for settlements in the future, Staff told CURB to file a motion with the Commission to object to KCPL's redactions.

25. In CURB's view, instead of spending a considerable amount of time preparing this filing, it would have been a more efficient use of resources for the parties to have simply agreed to a revision of the language of the S&A, especially considering that Empire and CURB were in agreement on a proposed revision and Staff had not expressed any opinion about the redactions.

III. Arguments in favor of disclosure.

26. CURB does not contend that there is no legitimate debate concerning the confidentiality of the arbitration settlement, but CURB disagrees that the winner of the debate should be KCPL over the interests of the public. CURB concedes that KCPL and Empire made an agreement that they agreed would be confidential. CURB understands that Empire has an obligation to KCPL to comply with the terms of its agreement with KCPL. However, CURB is not convinced that two public utilities have the right to execute agreements with each other, and by agreeing to conceal their agreement from the public, thereby bind the Commission to conceal the agreement's effect on rates from the ratepayers and from the public in general. This has the effect of also concealing it from regulators in other states where Empire and KCPL operate. The Commission must determine for itself whether it intends to acquiesce in concealing this information.

27. CURB finds it troubling that Staff thinks that striving for transparency in the regulatory process is a waste of time and resources, or that it sets a bad precedent to reword a paragraph that has generated so much disagreement about how it should be redacted. Given that our statute on confidentiality says that "Alternatives to disclosure that would serve the public interest while protecting the utility should be considered." K.S.A. 66-1220a(a)(4), CURB does not think it is a waste of time to attempt to resolve

this issue by redrafting the paragraph to meet the needs of all the parties involved and accept language revisions and redactions that Empire found acceptable. Apparently, Empire does not think so, either.

28. Staff is correct that a party to an S&A cannot back out of it once it is signed and filed. However, CURB and Staff and utilities have always worked closely together. CURB had no reason to believe, when it signed at the 11th hour, that there wouldn't be a good faith effort to resolve the issue through further negotiations. CURB understands that the redaction issue is not intrinsic to the settlement agreement itself. But CURB does not agree that a unanimous revision of an S&A to improve its clarity and transparency to the public, while maintaining confidentiality of specific information sets a bad precedent or is a waste of time. Indeed, CURB thinks serving the public interest sets a very good precedent, and is the essence of what public service is all about.

29. Regardless of whether Staff liked the language of CURB and Empire's last proposal, the fact remains that the parties unanimously agreed to redact five words in the original S&A to be filed, not the whole paragraph, not every verb, noun and preposition. While Staff is entitled, of course, to have its own opinion about whether the substance of the arbitration agreement should be kept confidential, and to what extent the language we used in describing the parties' agreement on the Schiff Hardin matter might or might not indirectly allow a reader to deduce the substance of the arbitration agreement, but CURB cannot understand why Staff is satisfied with KCPL's designation of its own name and Empire's as "confidential", why Staff was satisfied when KCPL designated the existence of an arbitration agreement, which had been discussed by Empire in public testimony, as "confidential", or why Staff would allow KCPL to designate the fact that Staff would ensure compliance with our agreement in the next rate

case as "confidential". The protective order is clear on this issue: the party claiming confidentiality has the burden to show that disclosure would likely result in harm to a party's economic or competitive interest or which would result in harm to the public interest generally and which is not otherwise available from public sources. In other words, information that is public does not merit confidential treatment.

30. CURB respectfully requests that the Commission consider the following analysis as its argument that the original redaction proposed by the parties, with one more word redacted, is sufficient to protect KCPL's interest. The first redaction of KCPL is as follows.

KCPL REDACTION:***BEGIN CONFIDENTIAL*

*END CONFIDENTIAL***

31. Now, consider the following information that has been disclosed to the public:

PUBLIC INFORMATION: "KCP&L entered into an agreement with Schiff Hardin LLC to provide legal services. Provisions within the agreement between KCP&L and Schiff Hardin state the legal services "are intended for the sole benefit of KCP&L"; however, KCP&L has invoiced Empire for Schiff Hardin legal expenses based upon Empire's ownership share of Iatan. Empire was not and to this date has not been given full access to Schiff Hardin reports, work product and legal counsel." (Mertens, Direct Testimony, at 16).

PUBLIC INFORMATION: "This arbitration process initiated by Empire management is yet another example of Empire's diligence and prudence in assuring that the Company and its customers are paying only their proper share of Iatan costs." (Mertens, Direct Testimony, at 17).

PUBLIC INFORMATION: "The CURB witness Crane proposes an adjustment to reduce Empire's project investment as of August 31, 2011 for Empire's portion of the Schiff Hardin costs. Staff proposes no specific adjustment as part of its case, but recommends Empire reflect any benefit from the arbitration in its next rate case." (Mertens, Rebuttal Testimony, at 6).

32. Please also note that in both versions of KCPL's proposed redactions, it made no redaction or objection to the heading of paragraph 16, which read: "**E. SCHIFF-HARDIN ARBITRATION SETTLEMENT** ". When you consider the public information above, the fact that KCPL was involved in the Schiff Hardin arbitration settlement with Empire is entirely public. That their dispute was over the fact that KCPL had not allowed Empire full access to the "reports, work product and legal counsel" (i.e.,*****BEGIN CONFIDENTIAL* *END CONFIDENTIAL***)** is public. The fact that Empire objects to paying the full bill that KCPL presented to Empire is public.

33. Further, KCPL made no objection to the mention of the "Schiff Hardin Arbitration Settlement" in leaving the paragraph's heading intact. Anyone with average deductive powers could conclude that if the outcome of Schiff Hardin arbitration settlement is significant enough to merit a mention in the settlement agreement, it must affect the revenue requirement, given that all three parties had expressed opinions about how the costs should be treated in rates. The only words in this redaction that address a subject that remains confidential are the words*****BEGIN CONFIDENTIAL* *,END CONFIDENTIAL*****, which is the specific information, if the Commission deems it properly confidential, that KCPL has a right to ask remain confidential. However, if you factor in Merkens' non-confidential discussion of Ms. Crane's proposed adjustment, which makes it clear that Schiff Hardin costs were "project costs", then it is really no secret that whatever adjustment to rates to be made as a result of the outcome of arbitration outcome would be made *****BEGIN CONFIDENTIAL* *END CONFIDENTIAL*****. Therefore, the only word really

deserving of confidential treatment in the redaction is the word ***BEGIN CONFIDENTIAL* *END CONFIDENTIAL***. But CURB is willing to allow the original five-word redaction agreed to by the parties to stand, in order to protect KCPL's secret.

34. Let us now consider the second KCPL redaction, which is as follows:

KCPL REDACTION: ***BEGIN CONFIDENTIAL*

*END CONFIDENTIAL***

35. Again, referring to the information above that has already been disclosed, it is public information that the costs at issue in the arbitration were related to the Iatan project. It is public that Staff's position was that if the arbitration reduced Empire's project costs as presented in this case, it wanted Empire to reflect that reduction in its next rate case. Again, anyone with average deductive powers could figure out that the only reason why KCPL would want to conceal the outcome of the arbitration from ratepayers, other state's regulators and the public is if it ***BEGIN CONFIDENTIAL* *END CONFIDENTIAL*** the arbitration. And if so, the obvious outcome at the KCC would be that Empire would be required to ***BEGIN CONFIDENTIAL* *END CONFIDENTIAL***. However, assuming that KCPL may be permitted its illusion that no one interested in this matter could figure this out if it was redacted, one must note that this redaction conceals the entire substance of the agreement on this matter that was reached by Empire, CURB and Staff. CURB will concede, in the spirit of cooperation, that the word ***BEGIN CONFIDENTIAL* *END CONFIDENTIAL*** be redacted, in order to protect KCPL's interest in keeping the arbitration outcome secret,

but CURB cannot agree to conceal the substance of the action that will be taken by Staff in response to the settlement agreement. KCPL has no right to prevent disclosure of the planned action of a public agency in assuring compliance of another utility with a settlement agreement. That Staff has passively assented to this redaction is an abandonment of its duty to protect the public interest and the integrity of the agency it serves.

36. **CURB therefore moves**, on behalf of the ratepayers of this state and the general public, that this Commission order disclosure of all information contained in paragraph 16 of the S&A, except for the two redactions, totaling five words, described on page 9 above, and, additionally, CURB would concede, for purposes of protecting KCPL's secret, that the word ***BEGIN CONFIDENTIAL* *END CONFIDENTIAL*** should also be redacted from paragraph 16. The grounds for this motion are, as demonstrated above, (1) the remaining information in paragraph 16 is already available from public filings in this docket and (2) it is not in the public interest to conceal from ratepayers, other state regulators and the general public the fact that this settlement ***BEGIN CONFIDENTIAL*

*END CONFIDENTIAL*** and (3) under the Protective Order, the party claiming confidentiality has the burden to establish that disclosure of the information "would likely result in harm to a party's economic or competitive interest or which would result in harm to the public interest generally and which is not otherwise available from public sources," and KCPL has failed to meet that burden. *Protective Order,* at 2.

37. **In the alternative, if CURB's motion is not granted, CURB moves** that the Commission order the revision and redaction of paragraph 16 as proposed by CURB, because it accurately states the substance of the agreement of the parties to the S&A, conceals only the information that KCPL has a legitimate claim to confidentiality, and provides the transparency to government action that our state requires.

Respectfully submitted,

David Springe #15619
Niki Christopher #19311
C. Steven Rarrick #13127
Citizens' Utility Ratepayer Board
1500 SW Arrowhead Road
Topeka, KS 66604
(785) 271-3200
(785) 271-3116 Fax

VERIFICATION

STATE OF KANSAS)

COUNTY OF SHAWNEE) ss:

I, Niki Christopher, of lawful age, being first duly sworn upon her oath states:

That she is an attorney for the Citizens' Utility Ratepayer Board, that she has read the above and foregoing document, and, upon information and belief, states that the matters therein appearing are true and correct.

Niki Christopher

SUBSCRIBED AND SWORN to before me this 18th day of November, 2011.

DELLA J. SMITH
Notary Public - State of Kansas
My Appt. Expires January 26, 2013

Notary Public

My Commission expires: 01-26-2013.

CERTIFICATE OF SERVICE

11-EPDE-856-RTS

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was placed in the United States mail, postage prepaid, electronic service, or hand-delivered this 18th day of November, 2011, to the following:

JAMES G. FLAHERTY, ATTORNEY
ANDERSON & BYRD, L.L.P.
216 SOUTH HICKORY
PO BOX 17
OTTAWA, KS 66067

ANGELA CLOVEN
EMPIRE DISTRICT ELECTRIC COMPANY
PO BOX 127
602 S JOPLIN AVENUE
JOPLIN, MO 64802-0127

W. SCOTT KEITH, DIRECTOR OF PLANNING AND REGULATORY
EMPIRE DISTRICT ELECTRIC COMPANY
602 S JOPLIN AVE (64801)
PO BOX 127
JOPLIN, MO 64802

KELLY S. WALTERS, REGULATORY & GENERAL SERVICES
EMPIRE DISTRICT ELECTRIC COMPANY
PO BOX 127
JOPLIN, MO 64802

MATTHEW SPURGIN, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD ROAD
TOPEKA, KS 66604-4027
Hand Delivered

JUDY JEWSOME, LITIGATION COUNSEL
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Della Smith
Administrative Specialist