

**BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

In the Matter of the Application of Kansas Gas)
Service, a Division of One Gas, Inc. Regarding)
February 2021 Winter Weather Events, as) Docket No. 21-KGSG-332-GIG
Contemplated by Docket No. 21-GIMX-303-MIS)

**OBJECTION OF KANSAS GAS SERVICE TO
NATURAL GAS TRANSPORTATION CUSTOMER COALITION'S
MOTION TO MAKE PUBLIC A CONFIDENTIAL RESPONSE BY THE KANSAS GAS
SERVICE TO THE KANSAS CORPORATION COMMISSION STAFF**

1. Kansas Gas Service, a Division of One Gas, Inc. ("Kansas Gas Service" or "Company"), hereby objects to Natural Gas Transportation Customer Coalition's ("NGTCC") *Motion to Make Public a Confidential Response by the Kansas Gas Service to the Kansas Corporation Commission Staff* ("Motion") as follows:

I. BACKGROUND

2. The NGTCC has filed four (4) motions within the past two months attempting to narrow the scope of the Protective Order that the Commission issued in this docket.

3. On June 11, 2021, before NGTCC was even given permission to intervene, it filed its first Motion to Amend the Protective Order. On June 20, the Commission denied NGTCC's Motion.

4. On July 22, NGTCC filed a second motion in the form of a Petition for Reconsideration of the Commission's denial.

5. On August 2, NGTCC filed a third motion, referred to as Motion to Designate as Public Documents, the February 2021 Supplier Invoices Paid by Kansas Gas Service.

6. Kansas Gas Service objected to that Motion, which attempts to sidestep the Protective Order, by properly highlighting that the information NGTCC seeks is protected by Kan. Stat. Ann. § 66-1220a(a) and Kan. Stat. Ann. 60-3320 as confidential business information and

trade secrets. The Commission Staff also filed a Response to NGTCC's Motion to Designate and agreed with Kansas Gas Service that the information sought was confidential and that NGTCC had not demonstrated that any exceptions existed to overcome the Kansas' confidential protections. The Commission has yet to rule on that Motion.

7. On August 2, NGTCC's counsel sent an email requesting the confidential designation be removed from a response by Kansas Gas Service to a Commission Staff Information Request. The Commission Staff request was 21-322-KCC-030 and it was dated March 26, 2021. In that Information Request, the Commission Staff stated:

Please provide the following:

1. In January 2021, what was the estimated usage for Kansas Gas Service's sales customers (non-Transportation customers) for the month of February 2021? What was the actual usage for Kansas Gas Service's sales customers (non-Transportation customers) for the month of February 2021?

8. On August 12, Kansas Gas Service responded and informed NGTCC, that the confidential designation was proper because releasing the requested information could cause competitive harm to Kansas Gas Service customers.

9. On August 13, NGTCC filed its fourth Motion, which is the subject of Kansas Gas Service's instant objection. In this fourth motion, NGTCC is attempting to circumvent the Protective Order by arguing that the Kansas Gas Service's Response—and the information contained within—is a public record that will cause no economic harm whatsoever to Kansas Gas Service if it is made public.¹

10. NGTCC also argues that Kansas Gas Service's "confidential designation does not meet the standard of good faith included in the Protective Order" and therefore the Commission

¹ NGTCC's Motion at ¶ 14.

should subject the Company to a “nominal” and “symbolic” fee to pay for NGTCC’s counsel for legal time preparing the aforesaid Motion.² NGTCC’s attachment of Kansas Gas Service’s testimony relating to the legal fees that the Company is seeking to be reimbursed in this docket and its request for the Commission to impose a “nominal” and “symbolic” sanction fee on Kansas Gas Service has nothing to do with its request for “non-confidential” designation but is merely vexation litigation and should therefore be rejected.³

II. THE KANSAS GAS SERVICE RESPONSE TO THE COMMISSION STAFF’S INQUIRY IS TRADE SECRET AND PROPRIETARY COMMERCIAL INFORMATION THAT IS NOT SUBJECT TO DISCLOSURE.

11. Under Kan. Stat. Ann. § 66-1220a(a), the Commission has a duty not to “disclose 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 [Kan. Stat. Ann. 60-3320] . . . or any confidential commercial information of a corporation . . . regulated by the commission unless the commission finds that disclosure is warranted after consideration” of four factors. Those factors are: (1) “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;” and (4) “alternatives to disclosure that will serve the public interest and protect the corporation.”⁴

12. Both the U.S. Supreme Court and the Kansas Supreme Court also recognize the importance of maintaining the confidentiality of an entity’s commercial information and trade secrets. For instance, both courts have recognized “that the common-law right of public inspection must bow before the power of a court to insure that its records will not be used ‘to gratify private

² *Id.* at ¶ 15.

³ *Id.* NGTCC has filed a total of fourteen (14) pleadings, consisting of nine motions and five responses in the last two months.

⁴ *See* Kan. Stat. Ann. § 66-1220a(a).

spite['] . . . or [be used] as sources of business information that might harm a litigant's competitive standing.”⁵

13. The federal Freedom of Information Act (FOIA) similarly exempts “trade secrets and commercial or financial information” from its coverage.⁶

14. The Kansas Gas Service Response to the Commission Staff Inquiry regarding the estimated usage and actual usage for customers satisfy the definition of a “trade secret” as that term is defined by Kan. Stat. Ann. § 60-3320. “Trade secret” means “information, including a . . . compilation . . . that (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”⁷

15. The estimated usage and actual usage information that was confidential provided to the Commission Staff satisfy the first prong of a “trade secret” because that information has independent economic value from not being known to others. The natural gas commodity industry is an unregulated and highly competitive market. Thus, confidentiality provisions are commonplace within the industry to ensure equal bargaining positions for both natural gas suppliers (like marketers and producers) and natural gas purchasers (like Kansas Gas Service). If the details of how much gas is estimated for purchase and being purchased are required to be made public and others are not required to make a similar disclosure, then it places the parties to those public gas supply contracts at a competitive disadvantage compared to the parties that can maintain the confidentiality of their agreements and how much gas they are purchasing. In other words, if

⁵ See *Stephens v. Van Arsdale*, 227 Kan. 676, 688 (1980) (citing *Nixon v. Warner Comm’n, Inc.*, 435 U.S. 589, 598 (1978)).

⁶ See 5 U.S.C. § 552(b)(4).

⁷ See Kan. Stat. Ann. § 60-3320.

the Commission discloses the amount of gas estimated and purchased, then this information can be exploited by these or other natural gas suppliers in the future by giving them critical insights into how much gas Kansas Gas Service needs for a given window. In turn, this means higher gas supply costs for Kansas Gas Service's customers, which is contrary to the public interest.

16. The Kansas Gas Service Response to the Commission Staff Inquiry regarding the estimated usage and actual usage for customers also satisfy the second prong of the "trade secret" definition. This is because Kansas Gas Service has taken reasonable efforts under the circumstances to maintain the secrecy and confidentiality of these documents. More specifically, Kansas Gas Service provided this information under the designation of confidential and trade secret as safeguarded by the Protective Order, which was approved by the Commission on March 9, 2021. Kansas Gas Service also maintained the secrecy of these invoices when it re-asserted the protected confidential nature of this information in response to NGTCC's Information Requests and to NGTCC's efforts to restrict the confidential designation of information. Thus, Kansas Gas Service consistent actions and treatment of this information demonstrates that "trade secret" protection applies.

17. In addition to being a "trade secret," the Kansas Gas Service Response to the Commission Staff Inquiry regarding the estimated usage and actual usage for customers also qualify as proprietary commercial or financial information as set forth by the U.S. Supreme Court, the Kansas Supreme Court, and FOIA. That is because they set forth information that will allow gas suppliers to undercut Kansas Gas Service's buying leverage and place Kansas Gas Service at a significant competitive disadvantage with others in the market.

II. NGTCC FAILS TO DEMONSTRATE THAT THE SECTION 66-1220a(a) FACTORS COLLECTIVELY WEIGH IN FAVOR OF DISCLOSURE AND THUS, ITS MOTION MUST BE DENIED.

18. NGTCC has failed to meet its burden to assert facts that meet the four factors under Section 66-1220a(a) as needed to compel the Commission to release the “trade secret” and “confidential information” that it is required to protect.

19. First, NGTCC fails to assert any argument that disclosing the Kansas Gas Service Response to the Commission Staff Inquiry regarding the estimated usage and actual usage for customers will significantly aid the Commission in fulfilling its functions. Rather, it merely asserts that the public release of this information will aid the public in understanding the prolonged cold temperatures had on the public and the gas required to sustain them during the Winter Event.⁸ Such an argument provides no aide to the Commission.

20. Second, NGTCC fails to assert any persuasive argument regarding the benefit that the public will receive as a result of the disclosure other than the public will have better understanding of the “impact that the prolonged cold temperatures had on our state and the volumes of gas required to sustain Kansas families and businesses during February 2021.”⁹ NGTCC fails to consider the detriment that the public would be subject to should the usage total no longer be deemed “trade secrets” and “confidential.” The purported goal of simply providing a better public understanding of the “extraordinary costs” caused by the Winter Event is insufficient to support negating contractual provisions. Rather than assisting the public, NGTCC’s request to reveal competitively sensitive information will hurt the public interest.

21. As mentioned above, if the Kansas Gas Service is unable to maintain the confidentiality of its natural gas supply contracts and the amount of gas it purchased through those

⁸ NGTCC Motion at ¶ 14.

⁹ *Id.*

contracts, then the likely result would be higher natural gas supply costs for its customers due to its reduced bargaining position. For instance, if natural gas suppliers know how much gas Kansas Gas Service is competitively bidding for and consuming, or if the natural gas suppliers know that Kansas Gas Service is in real need for additional gas supplies in certain months, then Kansas Gas Service is at a distinct disadvantage in the bidding and awarding of lower natural gas prices from the suppliers, which again results in higher natural gas prices paid by Kansas Gas Service's sales customers.

22. Third, NGTCC has failed to assert any meaningful argument regarding the harm to the Company should Kansas Gas Service's data response and the usage totals be made public. NGTCC simply states that it "can see no harm that would be caused because to KGS but can clearly see [. . .] great benefits to the general public in Kansas."¹⁰ NGTCC's response is inadequate. The harm to KGS is competitive disadvantage and the potential higher rates for its customers. Releasing the information is unnecessary for purposes of the Commission's review.

23. The Commission can clearly meet its obligations of reviewing and auditing Kansas Gas Service's gas supply contracts, including those relating to the Winter Event, while not impeding Kansas Gas Service's and other gas utilities' abilities to competitively bid and award gas supply quantities and prices in the competitive natural gas supply market. The Commission agreed to this approach already when it entered the Protective Order and no facts (or law) have been asserted by NGTCC that require deviation from that path.

24. Fourth, alternatives to disclosure that will serve the public interest and protect the corporation are not needed. Under the existing Commission discovery procedures, NGTCC has complete access to all the data that it is seeking to make public. Thus, the so-called need to release

¹⁰ NGTCC Motion at ¶ 14.

Kansas Gas Service's "trade secret" and "confidential commercial information" to the public rings hollow. It is important to emphasize that NGTCC represents a coalition of "indirect" customers that are behind the Marketers on the Kansas Gas Service system, not the "general public" that it alludes to in its pleading. It is the Commission and CURB that represent the "public" in this action, not NGTCC. The Commission has had a long history of protecting the confidentiality of Kansas Gas Service "trade secrets" and "proprietary commercial information" because it is in the public interest. Therefore, the Commission should continue its course and protect the estimated and actual customer usages as the "trade secret" and "proprietary commercial information" that they are.

25. NGTCC has not carried its burden in any manner to demonstrate that this confidential information should be released. Again, it is important to emphasize that NGTCC cited no law whatsoever (other than the general public records law, which is subservient Kan. Stat. Ann. § 66-1220a(a)).

WHEREFORE, for the reasons set forth herein, Kansas Gas Service respectfully requests that the Commission find that NGTCC's basis for the Motion is unsupported by relevant facts, law or sound public policy and is therefore denied.

Respectfully submitted,

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VERIFICATION

STATE OF ARIZONA)
)
COUNTY OF MARICOPA)

I, Kelly A. Daly, verify under penalty of perjury that I have caused the foregoing pleading to be prepared; that I have read and reviewed the same; and that the contents thereof are true and correct to the best of my information, knowledge, and belief.



Affiant

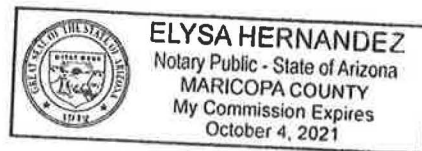
SUBSCRIBED AND SWORN to before me on 8/23/21.



Notary public

My Appointment Expires:

10-4-21



CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of August, 2021, a true and correct copy of the above and foregoing was sent electronically to the following:

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