

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

In the Matter of the Opens Records Act Request)
Dated August 23, 2023, by James Zakoura) Docket No. 24-GIMX-238-MIS

**BLACK HILLS' ANSWER TO PETITION AND
ADDENDUM FOR CONSIDERATION**

COMES NOW, Black Hills/Kansas Gas Utility Company, LLC, d/b/a Black Hills Energy (“Black Hills”) and does herein file an Answer to the Petition for Reconsideration filed by Mr. James P. Zakoura (“Petitioner”) in this proceeding on October 16, 2023, and to the Addendum to Petition for Reconsideration filed by Petitioner on the 20th of October 2023 (“PFR”).

Mr. Zakoura also requested to submit an additional Addendum dated October 25, 2023, via email, in this proceeding. Petitioner’s October 25, 2023 Addendum also related to a separate Kansas Open Records Act¹ (“KORA”) request made by Petitioner for confidential information from Atmos Energy.

Petitioner seeks reconsideration of the ORDER ON KORA REQUEST (“KORA Order”) dated October 12, 2023 of the State Corporation Commission (“KCC” or “Commission”) in the above-captioned proceeding.

In support of its Answer, Black Hills states as follows:

1. This Answer is filed pursuant to K.S. A. 66-118a, K.S.A. 66-118b, 77-529, 77-621, and K.A.R. 82-1-235.
2. Black Hills contends that the Commission should deny Petitioner’s PFR. The Commission’s KORA Order is supported by sufficient competent evidence, applies reasoned decision-making, and is not erroneous, arbitrary, or capricious.

¹ K.S.A. 45-215 et. seq.

3. Alternatively, Petitioner's arguments in support of reconsideration of the KORA Order are incorrect, inaccurate, and contrary to administrative and judicial efficiency.
4. In its PFR, Petitioner repeats many of the same arguments that Petitioner provided in Petitioner's initial KORA request in this proceeding. The Commission can rightfully reject those arguments again in response to Petitioner's PFR.
5. The Commission fully considered Petitioner's arguments, acknowledged contrary evidence and argument provided by Black Hills, and correctly applied applicable law and precedent. The Commission rightfully rejected Petitioner's KORA request and would be on solid legal grounds in rejecting Petitioner's PFR.
6. Petitioner's PFR incorrectly presents Black Hills's argument regarding confidentiality of gas supply pricing invoices under the North American Energy Standards Board ("NAESB") agreement subject to the Petitioner's KORA request.² Black Hills previously stated and repeats again here that simply because the NAESB agreement contains a confidentiality provision that provides for required confidentiality for one-year does not mean that the parties to those agreements are unable or unwilling to continue that provision beyond one-year. The confidentiality provision in a NAESB agreement does not automatically render the confidential information as public information over the mutual consent of parties to those agreements. If it does, then the parties to those agreements will most likely make future gas supply transactions subject to a significantly longer-term confidential provision. Black Hills agrees with the Commission's correct application of Kansas

² PFR at p. 3.

law in finding that disclosure of the gas supply pricing may affect Black Hills' ability to compete for low-cost gas supplies in the future, and that disclosure could cause harm to both Black Hills and the public.³

7. Petitioner also fails to adequately acknowledge that the NAESB invoices subject to the KORA request were not provided voluntarily by either party to the NAESB contract. The KCC obligated Black Hills to submit that confidential information to the Commission under KCC data requests as part of the Commission's gas cost investigation in KCC Docket No. 21-BHCG-334-GIG (334 Docket). The confidential information requested was submitted as "Confidential" under a Commission-approved Protective Order. Black Hills submitted the information as "Confidential" with the understanding and claim that information was and would be protected from public disclosure. There was no time limit established by the Commission as to how long the confidential information would be protected.
8. Petitioner's PFR ignores the Commission's well-established factors for determining what information is considered as confidential or a trade secret.⁴ Those factors are as follows:
 - (a) Whether disclosure will significantly aid the commission in fulfilling its functions;
 - (b) the harm or benefit which disclosure will cause to the public interest;
 - (c) the harm which disclosure will cause to the corporation, partnership, or sole proprietorship; and,

³ KORA Order at p.2.

⁴ KORA Order at p.3.

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

9. Petitioner invests a lot of the argument into claiming that there is insufficient evidence in the record in this proceeding to continue protection of the Confidential information submitted in the 334 Docket. However, this KORA proceeding is inextricably intertwined with the 334 Docket. Petitioner cannot ignore that the gas supply pricing information provided at the time was submitted as, and would remain, confidential. This designation was accepted by the parties to that proceeding, including Mr. Zakoura and his clients.
10. Petitioner fully recognizes that the recovery of the Storm Uri costs will continue for the full five-year period approved by the Commission. Black Hills does not contend that confidential information submitted to the Commission should remain confidential forever. Instead, Black Hills understands that the Commission, in its own judgment, is fully and solely capable of determining whether confidential information in its possession should remain confidential by applying the aforementioned factors that it has established for that purpose. The Commission's judgment to retain confidential treatment for the information under Petitioner's KORA request should be upheld.
11. Petitioner's claim that the Commission has never ruled on (a) the issue of whether Black Hills documents **at the time of the filing** were properly designated as confidential or whether any designation with specificity was ever made, or (b) whether the redacted and filed public copies were consistent with Kansas law is incorrect. In fact, Black Hills received a KORA request on September 21, 2021

from Max McCoy seeking all of Black Hills' supplier contracts for natural gas, including the names of suppliers and rates, including rates based on spot prices, for February 2021. In response to that KORA request, Black Hills objected to the KORA request on the grounds that the information is a trade secret. Thus, the Commission has determined that the NAESB agreement and their rates are a trade secret. The Commission KORA Order does not need to be reconsidered based on that argument.

12. Petitioner's claim that Black Hills lacks evidence either at the time the information was provided to the Commission or afterwards to support a claim that the information is a "trade secret" under KORA is untrue. As noted above, Black Hills properly designated the information as confidential at the time of its submission to the Commission. In addition, the NAESB agreement, the KCC's protective order, KCC precedent, and the parties to Black Hills's Storm Uri proceeding recognized the confidential nature of the information.
13. Moreover, Mr. Zakoura did not object to or otherwise challenge, either himself or on behalf of any clients (a) the designation of the information submitted by Black Hills as confidential, (b) the sufficiency of the evidence related to the confidentiality designation, or (c) the period after which confidential information may no longer be confidential. Black Hills did not provide volumes of additional evidence in response to Mr. Zakoura's KORA request because the KCC had previously declared that specific information as confidential and qualifying as a trade secret. The KCC made that ruling in several other proceedings.⁵ The KCC's

⁵ See, e.g., Docket No. 21-KGSG-332-GIG. See also, *See, Stephens v. Van Arsdale*, 227 Kan. 676, 688(1980) (citing *Nixon v. Warner Comm'n, Inc.*, 435 U.S. 589, 598 (1978)).

sound judgment and application of its confidentiality factors were proper in this proceeding. Thus, Petitioner's PFR can be denied as it attempts to circumvent Commission action, analysis, determinations, and decisions that are well within the KCC authority to make.

14. Petitioner's PFR appears to request to substitute Petitioner's judgment of information that the Commission should deem as confidential or a trade secret for that of the Commission. There is no violation or misinterpretation of KORA in this proceeding or the underlying Black Hills' Storm Uri docket. The Commission is fully capable of reviewing the confidential information in its possession and can easily make a determination by applying its confidentiality factors. The Commission is fully capable and possesses requisite jurisdiction to determine whether disclosure of confidential information will be detrimental to Black Hills and/or the public. The Commission is not relying on speculation, "rank" or otherwise, in continuing to designate Black Hills's Storm Uri gas supply contracts, its gas suppliers, and the invoices as confidential.
15. Petitioner appears to also substitute Petitioner's judgment for that of the Commission by claiming that the public must have access to Black Hills's confidential information because the public is reimbursing Black Hills for the \$87.9 million Storm Uri gas costs over a five-year period as approved by the Commission. Black Hills cooperated with the Commission and other parties in its Storm Uri proceeding to settle on the amount of recovery, the method of recovery, and the term of the recovery period. That proceeding was efficient under the belief that confidential information provided in the proceeding would be protected. The

Commission Staff, Citizens Utility Ratepayer Board (“CURB”), and other parties, including those represented by Mr. Zakoura, and the Commissioners all had and have access to the confidential information submitted in that proceeding. The public is and was represented by the Commission, CURB, and individual legal counsel. The Storm Uri gas prices were thoroughly reviewed, and the total amount correctly calculated by the Commission. There is no independent public analysis that is needed to determine if the Storm Uri total amount is correct. The statutes contained in KORA do not permit an individual member of the public to interpret, apply, and substitute its own judgment of what information should be deemed or remain confidential or not. The KCC has the authority and ability to make each of those decisions, and they each comply with Kansas law. The KCC and other parties validated the total amount of gas supply costs to be recovered by Black Hills. Disclosing one or more contracts will not further that calculation.

16. Petitioner also argues that the Commission’s KORA Order was in error because KORA establishes a public right to know exactly who Black Hills’ Storm Uri suppliers were and how much each of those gas suppliers charged Black Hills during Storm Uri. Black Hills disagrees. The public is represented by the Commission, its Staff, CURB, and individual legal representatives, like Mr. Zakoura. Representatives from each of those parties had access to the confidential information subject to confidentiality. Any member of the public could have intervened and gained access to the information if there was a qualified interest in viewing that specific information. Using KORA to circumvent the process and decision established by the KCC is improper.

17. In addition, the Attorney General of Kansas has stated that its office intends on pursuing actions against any gas suppliers or marketers who violated Kansas law during the Storm Uri period. Thus, beyond the Storm Uri surcharges approved by the Commission, the public is protected from unlawful gas supply prices by the Kansas Attorney General.⁶
18. As to how long the Commission should retain confidentiality, the Commission is able to apply its confidentiality factors to determine the correct period to retain confidential protection. While the Commission may have closed the Storm Uri docket establishing the level of charges, there is still an ongoing Storm Uri recovery period of five-years that will occur. The Commission correctly applied its precedence and KORA in this proceeding. The KCC can reevaluate its decision in the future if deemed appropriate or necessary.
19. Moreover, if the Commission adopts the Petitioner's argument in this proceeding, then all gas supply prices over one-year old could be subject to KORA disclosure. One does not need to be a qualified gas supply expert or to engage in speculation to understand that the public would be harmed by that policy and practice.

Conclusion

The Commission should deny Petitioner's PFR for all the reasons and arguments provided above. The disclosure of this confidential information was properly and lawfully determined to be confidential and a trade secret within any reasonable interpretation of KORA. The Commission was well within its authority and its KORA Order in this proceeding was not in error, was not arbitrary or capricious, and based on reasoned decision.

⁶ The KCC has shared Black Hills's NAESBs and other confidential information with the Kansas Attorney General.

CERTIFICATE OF SERVICE

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I, the undersigned certify that a true and correct copy of the foregoing was served via electronic service this 26th day of October, 2023 to the following:

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