THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: Shari Feist Albrecht, Chair
Jay Scott Emler
Dwight D. Keen

In the Matter of the Complaint Against Black Hills Energy by Oklahoma Energy Source, LLC.	)))	Docket No. 18-BHCG-103-COM

ORDER DENYING MOTION TO DISMISS; DESIGNATING PREHEARING OFFICER; PROTECTIVE AND DISCOVERY ORDERS AND SETTING PREHEARING CONFERENCE

The above-captioned matter comes before the State Corporation Commission of the State of Kansas (Commission). Having reviewed its files and records, and being fully advised in the premises, the Commission makes the following findings:

I. Background:

1. On August 31, 2017, Oklahoma Energy Source, LLC (Complainant) filed a Formal Complaint (Complaint) against Black Hills Energy. LLC (Black Hills). The Complainant alleged that Black Hills' credit requirements for third party shippers limits the Complainant's ability to compete for bids and the requirement is not included in Black Hills' tariff.[1] The Complainant "requests that Black Hills immediately eliminate this collateral requirement in order for all third parties to be on a level playing field and for immediate savings to customers behind Black Hills."[2]

2. On September 21, 2017, Commission Staff (Staff) filed its Legal Memorandum in this docket. Staff recommended the Commission find the Complaint satisfied the procedural requirements for formal complaints found in K.A.R. 82-1-220 and established a *prima facie* case

[1] Formal Complaint at Att. (Aug. 31, 2017).
[2] *Id.*

for action by the Commission, and further recommended the Complaint be served upon Black Hills for an answer. [3]

3. On December 7, 2017, the Commission issued an Order Accepting Formal Complaint and Adopting Staff's Memorandum.

II. Motion to Dismiss:

4. On December 11, 2017, Black Hills filed an Answer and Motion to Dismiss. Black Hills alleged that its Transportation Services tariff (TS tariff) requires suppliers to execute a Marketer Agreement which contains the credit requirement.[4] Black Hills alleged that the TS tariff, including the reference to the Marketer Agreement, was approved by the Commission in 1998 and has been subject to review in four rate cases.[5] Black Hills denied that the credit requirement creates any disadvantage.[6] Black Hills moved to dismiss the Complaint because the Complainant is an out-of-state company not registered to do business in Kansas and is therefore barred from bringing the current action.[7]

5. On December 22, 2018, Staff filed a Response to Black Hills Energy's Motion to Dismiss. Staff stated that out-of-state companies were generally allowed to cure non-registration after filing a suit in Kansas and that the Complainant had registered with the Kansas Secretary of State's office after Black Hills' motion.[8] Staff added that after conversation with Black Hills' Counsel on the subject that Black Hills agreed to continue with discovery.[9]

6. The Commission finds that Black Hills' Motion to Dismiss has been mooted by the Parties' subsequent actions and therefore denies the same.

[3] Memorandum at 2-3 (Sep. 21, 2017).
[4] Black Hills Energy's Answer and Motion to Dismiss at 4 (Dec. 11, 2018).
[5] *Id.* at 5.
[6] *Id.* at 7-8.
[7] *Id.* at 8.
[8] Staff's Response to Black Hills Energy's Motion to Dismiss at 2 (Dec. 21, 2017).
[9] Id.

III. Prehearing Officer Designation:

7. The Commission may designate a Prehearing Officer to address appropriate matters in Prehearing Conferences, including all items listed in K.S.A. 77-517(b) of the Kansas Administrative Procedure Act (KAPA). Accordingly, the Commission designates Dustin L. Kirk, Duenes, Deputy General Counsel, 1500 SW Arrowhead Road, Topeka, KS 66604-4027, telephone number (785) 271-3198, d.kirk@kcc.ks.gov, as Prehearing Officer in this proceeding.[10] The Commission may designate other Staff members to serve in this capacity. The Commission also finds that a prehearing conference should be scheduled in this matter.

IV. Protective Order:

8. K.S.A. 66-1220a and K.A.R. 82-1-221a set forth requirements for the designation and treatment of information deemed confidential in Commission proceedings. The Commission finds it appropriate to issue this Protective Order to establish procedures relating to confidential data and information.

9. K.S.A. 66-1220a limits disclosure of trade secrets or confidential commercial information of regulated utilities. Under K.S.A. 66-1220a(a)(4), the Commission is to consider alternatives to disclosure that will serve the public interest and protect the regulated entity. This Protective Order provides an interim procedure under K.S.A. 66-1220a(a)(4) to facilitate the prompt and orderly conduct of this case. This Protective Order will govern the treatment and handling of confidential information until further order of the Commission.

10. 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

[10] K.S.A. 77-514; K.S.A. 77-516; K.S.A. 77-551(c).

designation at the time the designation is made.[11] 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 be kept from disclosure after review by the Commission.[12]

11. This Protective Order applies to all parties in this proceeding, unless specifically stated otherwise. The provisions of the Protective Order apply to Commission Staff (Staff), except that Staff is not required to sign nondisclosure certificates or view voluminous materials on site and is not required to return or destroy confidential information upon request at the conclusion of a proceeding. Outside experts and consultants used by Staff shall have access to information and voluminous materials on the same basis as Staff, except that outside Staff experts and consultants are required to read this Protective Order and to sign nondisclosure certificates as contained in Appendix A. Parties who do not sign a nondisclosure certificate will not be granted access to confidential information filed in this docket.

12. The following definitions shall apply:

> **Information:** "Information" refers to all documents, data, including electronic data, studies and other materials furnished pursuant to requests for information or other modes of discovery, or any other information or documents that are otherwise a part of the Commission record.
>
> **Confidential Information:** "Confidential information" refers to information which, if disclosed, would likely result in harm to a party's economic or competitive interests or which would result in harm to the public interest, generally, and which is not otherwise available from public sources. "Confidential information" may include, but is not limited to: (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; (6) contract negotiations; and, (7) information concerning trade secrets, as well as private technical, financial, and business information.

[11] K.A.R. 82-1-221a(a)(5).
[12] *See* K.S.A. 66-1220a.

13. A party designating information as confidential shall make the confidential information available to parties seeking access or discovery under the restrictions in this Protective Order, if such disclosure is not otherwise privileged or objectionable on other evidentiary grounds. Disclosure of confidential information shall be made to attorneys of record and to authorized representatives, including outside experts, who are consulting with parties or intend to file testimony in this proceeding. Attorneys or authorized representatives seeking access to confidential information shall first read this Protective Order and sign a nondisclosure certificate as provided in Appendix A. In cases in which a utility's rates are being reviewed, attorneys and representatives of the utility whose rates are being reviewed are not required to sign nondisclosure certificates in order to receive copies of documents containing the utility's own confidential information. The nondisclosure certificate shall contain the signatory's name, permanent address, title or position, date signed, and an affirmation that the signer is acting on behalf of a party to this proceeding. The nondisclosure certificate shall be filed in the docket. The party claiming confidentiality shall provide legible copies of the confidential information to requesting parties by serving one copy upon counsel for the requesting party. The requesting party may copy the confidential information and make it available to its authorized representatives who have signed and filed nondisclosure certificates. If a response to a discovery request requires the duplication of voluminous material, or the material is not easily copied because of its binding or size, the furnishing party may require that the voluminous material be viewed on its own premises. If duplication of voluminous material can be accomplished without undue burden on the party disclosing the information, the voluminous material may be copied at the expense of the requesting party. Voluminous material shall include documents or materials comprised of 200 pages or more.

14. A party may designate pre-filed testimony and exhibits as confidential pursuant to this Protective Order. The specific grounds for the confidential designation shall be stated in

writing at the time the designation is made or the testimony filed. Any party obtaining confidential information may use or refer to such information in pre-filed or oral testimony provided that the confidentiality is maintained, unless otherwise ordered by the Commission.

15. If information to be disclosed in response to a data request contains confidential information designated by another party in this docket, the furnishing party shall maintain the confidential status by marking the information as confidential and only provide response to parties that have signed nondisclosure certificates. If information that a party intends to use in this proceeding or that would be disclosed in response to a data request contains confidential information obtained from a source outside of this proceeding, the party intending to use or provide the confidential information must notify the original source which claimed confidential status to allow that entity to decide whether to claim confidentiality in this proceeding.

16. When pleadings, pre-filed testimony, or exhibits include confidential information, the parties are to follow these procedures:

a. File seven[13] copies of the complete document, including all confidential information. The cover is to clearly state "CONFIDENTIAL VERSION." Confidential pages shall be stamped "CONFIDENTIAL," and the specific confidential information shall be identified by being underlined.

b. File one copy with the confidential portions redacted, for use as a public document. The cover is to clearly state "PUBLIC VERSION."

c. File one copy of the pages that contain confidential information in a separate envelope marked "CONFIDENTIAL." This filing will be maintained in the docket room file under seal. If there are multiple pages with confidential information and it is impracticable to separate the pages with the confidential information, the party may file instead one copy of the entire document that is stamped "CONFIDENTIAL."

17. Confidential testimony may be offered or subject to cross-examination at hearings. Parties have the right to object to the admissibility of confidential information on standard

[13] Only one copy must be submitted when a party utilizes electronic filing.

evidentiary grounds such as relevance. Confidential information that is received into evidence will be kept under seal. Confidential information shall be discussed only after the hearing is closed to all persons except the Commission, its Staff, hearing examiners, court reporters, attorneys of record and individuals to whom the designated information is available under the terms of this Protective Order. Parties shall make every effort at hearings to ask and answer questions in such a way as to preserve the confidentiality of the information without the need to close the hearing. The transcript of live testimony or oral argument disclosing confidential information shall be kept under seal and copies provided only to persons entitled to access to confidential information. Neither the parties nor their attorneys shall disclose or provide copies of the contents of such transcripts to anyone other than those who may have access to the designated information under the terms of this Protective Order.

18. If a party disagrees with a claim that information is confidential or should not be disclosed, the parties shall first attempt to resolve the dispute on an informal basis. If the parties cannot resolve the dispute informally, the party contesting the confidential treatment may file a motion with the Commission. Commission Staff should also be prepared to challenge a confidential designation when Staff believes the information does not meet the definition of confidential information. When a dispute concerning confidentiality is brought before the Commission, the Commission will review the matter to 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. 66-1220a. The contested information shall not be disclosed pending the Commission's ruling.

19. All persons who are afforded access to confidential information under the terms of this Protective Order shall neither use nor disclose such information for purposes of business or competition or any other purpose other than the purpose of preparation for and litigation of this

proceeding. During the course of this proceeding, parties shall keep confidential information secure in accordance with the purposes and intent of this order. At the conclusion of this proceeding, including judicial review, a party claiming that information was confidential may require that other persons in possession of its confidential information return or destroy all such confidential information and all notes, tapes, documents, and any other medium containing, summarizing, or otherwise embodying such confidential information. If the party claiming confidentiality requests destruction, the person destroying the information shall certify its destruction. Counsel shall be entitled to retain memoranda or pleadings including or embodying confidential information to the extent reasonably necessary to preserve a file on this proceeding.

V. Discovery Order

20. The Commission finds that formalizing discovery procedures and clarifying the obligations of the parties will help ensure a full and efficient investigation of the issues in this docket. This Discovery Order will govern the conduct of discovery until further order of the Commission. Parties may request modified or additional discovery procedures or may request that the Commission schedule a discovery pre-hearing conference.

21. General procedures. Discovery in Commission proceedings is limited to matters that are "clearly relevant."[14] After a docket is opened, any party may serve upon any other party written discovery or data requests. These data requests shall identify with reasonable particularity the information or documents sought. Data requests must be designed to elicit material facts within the knowledge of the parties. Data requests that require conclusions of law or answers to hypothetical questions are generally not permitted. Cross-examination through the use of data requests is not appropriate. Copies of data requests shall be served upon all other parties to the proceeding, unless a party requests otherwise. Data requests and responses may be served by

[14] K.A.R. 82-1-234a(a).

facsimile transmittal or electronic mail if agreed to by the parties. Data requests that are sent by a party after 5:00 p.m. shall be deemed to have been received the following business day.[15]

22. Data Request Responses. Responses to Staff data requests are due within seven days.[16] Responses to all other data requests are due within 10 days. In computing the period of time for responding, the day on which the data request was issued is not counted. Furthermore, for purposes of calculating all discovery-related deadlines, intermediate Saturdays, Sundays, and legal holidays shall be excluded.[17] Parties may agree to extensions or reductions of time in which to respond or object to a data request. Responses to data requests shall be verified and shall identify the person(s) who actually prepared the response and can answer additional questions relating to the response. Each data request shall be answered separately and preceded by the request to which the answer pertains. Responses shall be clearly identified and, if consisting of several pages, shall be labeled and organized in a manner that makes review of the pages convenient. Parties are under a continuing duty to supplement their discovery responses upon learning that the information disclosed is incomplete or incorrect in any material respect. If a response to a data request requires the duplication of voluminous material or of material that is not easily copied because of its binding or size, a party may require that any party other than Commission Staff review the voluminous material on its own premises. If duplication of voluminous material can be accomplished without undue burden, the voluminous material may be copied at the expense of the requesting party. Voluminous material is defined as documents comprised of 200 pages or more.

[15] *See* K.A.R. 82-1-205 (providing Commission Office Hours).
[16] Per K.A.R. 82-1-217, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday."
[17] This constitutes an explicit limited waiver of K.A.R. 82-1-217(a). This waiver is consistent with the Commission's precedential *Order Granting Petition for Reconsideration of Discovery Order*, issued November 10, 2016, in Docket No. 17-KPPE-092-COM.

23. Objections to Data Requests. If the parties have agreed to electronic service, and a party objects to answering a particular data request, the party shall object in writing to the party which issued the data request within five days of the data request.[18] If the parties have not agreed to electronic service, and a party objects to answering a particular data request, the objecting party shall object in writing to the issuing party within five days after service, plus three days if service is by mail. The written objection shall specifically explain all grounds relied upon for objecting to each data request. Any objections not provided at this time will be considered to be waived. If an objection pertains only to part of a question, that part shall be clearly identified and the responding party shall provide any non-objectionable information covered by the remainder of the data request. Parties shall negotiate in good faith to resolve discovery disputes. If resolution is not possible, the party seeking discovery may file a motion to compel with the Commission. Motions to compel must have the data request and response at issue attached. Motions to compel are required to be served by hand delivery, electronic mail, facsimile, or next-day delivery service. Responses to motions to compel are to be filed within three days after the motion is received.[19] The Commission may act immediately on motions to compel if necessitated by time constraints or the procedural schedule in the docket.

24. Limitations on Discovery. The Commission may limit discovery to protect a party against unreasonable, cumulative, or duplicative discovery requests; to prevent undue delay in the proceeding; to avoid unnecessary burden, expense, or harassment; or to otherwise maintain the orderly and efficient progress of the proceeding. Upon finding that a party has abused the discovery process, the Commission may deny the right to continue discovery.

[18] As noted above, intermediate Saturdays, Sundays, and legal holidays shall be excluded when calculating discovery-related deadlines, which constitutes a limited waiver of K.A.R. 82-1-217(a).
[19] *See* fn. 8 above.

25. Sanctions. A motion for sanctions for discovery violations may be filed at any time during the proceeding or may be initiated by the Commission. A motion is to contain sufficient factual allegations to detail the violation and must specify the relief requested. Motions for sanctions are required to be served by hand delivery, electronic mail, facsimile, or next-day delivery service. Responses to motions for sanctions are to be filed within 10 days.[20]

a. The Commission will consider any relevant factors when reviewing a motion for sanctions, including whether discovery has been conducted in bad faith or for an improper purpose such as causing unnecessary delay or needless increase in the cost of the proceeding; whether the discovery process has been abused in seeking or resisting discovery; and whether parties have failed to obey Commission Orders.

b. Sanctions imposed by the Commission may include limiting or disallowing further discovery; holding that designated facts be deemed admitted for purposes of the proceeding; refusing to allow a party to support or oppose a claim or defense or prohibiting the party from introducing designated matters in evidence; disallowing in whole or in part requests for relief by the offending party and excluding evidence in support of such requests; striking pleadings or testimony; staying further proceedings until an order is obeyed; disallowing a party's right to participate in the proceeding; dismissing the application or filing with or without prejudice; requiring the offending party to pay the reasonable expenses, including attorney's fees, incurred by other parties because of the sanctionable behavior; and imposing any other sanction or remedy available to the Commission by law.

THEREFORE, THE COMMISSION ORDERS:

A. Black Hills' Motion to Dismiss is denied.

B. Dustin Kirk is designated as Prehearing Officer in this proceeding.

C. A Prehearing Conference is scheduled for **Tuesday, June 5, 2018, at 9:00 a.m.** by telephone. The conference call information is: telephone number (866) 620-7326, Conference Code PIN: 7632914771#.

[20] *See* fn. 8 above.

D. The provisions of the Protective and Discovery Orders shall govern discovery procedures and the treatment and handling of confidential information in this docket.

E. At the Prehearing Conference, parties shall be prepared to discuss deadlines for filing testimony and briefs, discovery procedures, scheduling of a hearing with the Commission, and any other issues that will promote the orderly and prompt resolution of this proceeding.

F. At the Prehearing Conference, without further notice, this proceeding may be converted into a conference hearing or a summary proceeding for disposition of this matter as provided by the Kansas Administrative Procedure Act (KAPA). Any party that fails to attend or participate in the Prehearing Conference, hearing, or other stage of this proceeding may be held in default under the KAPA.

G. A corporation shall appear before the Commission by a Kansas licensed attorney.[21]

H. Any party may file and serve a petition for reconsideration pursuant to the requirements and time limits established by K.S.A. 77-529(a)(1).[22]

I. The Commission retains jurisdiction over the subject matter and parties for the purpose of entering such further orders, as necessary.

BY THE COMMISSION IT IS SO ORDERED.

Albrecht, Chair; Emler, Commissioner; Keen, Commissioner

Dated: 05/17/2018

Lynn M. Retz
Secretary to the Commission

DLK/sc

[21] K.S.A. 77-515(c); K.A.R. 82-1-228(d)(2).
[22] K.S.A. 66-118b; K.S.A. 77-503(c); K.S.A. 77-531(b).

APPENDIX A

Docket No. 18-BHCG-103-COM
THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS
NONDISCLOSURE CERTIFICATE

I, _____, have been presented a copy of the Protective Order issued in Docket No. 18-BHCG-103-COM on the _____day of _____, 2018.

I have requested review of confidential information produced in the above-mentioned docket on behalf of _____.

I hereby certify that I have read the above-mentioned Protective Order and agree to abide by its terms and conditions.

Dated this _____day of _____, 2018.

_____
Printed name and title

_____
Signature

_____
Party/Employer

_____
Address (City, State and ZIP)

_____
Telephone

_____
Email

CERTIFICATE OF SERVICE

18-BHCG-103-COM

I, the undersigned, certify that the true copy of the attached Order has been served to the following parties by means of electronic service on 05/17/2018.

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