

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the Matter of the Application of Kansas)
Gas and Electric Company for Approval of)
the Amendment to the Energy Supply) Docket 18-KG&E-303-CON
Agreement Between Kansas Gas and)
Electric Company and Occidental Chemical)
Corporation.)

MEMORANDUM IN OPPOSITION TO
MOTION FOR PROTECTIVE ORDER
FILED BY OCCIDENTAL CHEMICAL CORPORATION

COMES NOW, the Citizens' Utility Ratepayer Board ("CURB") and requests the Commission to deny Occidental's Motion for Protective Order. In support thereof, CURB states and alleges as follows:

1. On January 16, 2018, Kansas Gas and Electric Company, d/b/a Westar Energy ("Westar") and Occidental Chemical Corporation ("Occidental") filed a Joint Application requesting approval of an Energy Supply Agreement ("ESA" or "Agreement") between Kansas Gas and Electric Company and Occidental Chemical Corporation.¹

2. On March 22, 2018, the Citizens' Utility Ratepayers Board (CURB) filed a Petition to Intervene and Motion for Protective Order and Discovery Order and Motion for Procedural Schedule.² CURB requested intervention in this docket upon the basis of its statutory authority to represent the interests of Kansas residential and small commercial ratepayers and to "function as an official intervenor in cases filed with the state corporation commission."³ CURB

¹ Docket No. 18-KG&E-303-CON, Joint Application (January 16, 2018).

² Docket No. 18-KG&E-303-CON, Petition to Intervene and Motion for Protective Order and Discovery Order and Motion for Procedural Schedule (March 22, 2018).

³ *Id.* at pp.1-3.

stated “the rates paid and services received by residential and small commercial customers will or may be affected by any Commission order or activity in this proceeding.”⁴

3. On April 12, 2018, Occidental filed a Motion for Protective Order, pursuant to K.S.A. 77-522(a).⁵ Occidental’s motion is predicated upon the following three assertions:

- A. “No protective order has been issued in this proceeding.”⁶
- B. “The Commission's standard protective order, which relies upon K.S.A. 66-1220a for its statutory authority, will not sufficiently ensure nondisclosure of Occidental's confidential information.”⁷
- C. “Unintentional disclosures [of confidential information] do occur.”⁸

3. On April 17, 2018, the Commission issued an Order Designating Prehearing Officer; Granting Intervention to The Citizens’ Utility Ratepayer Board; and Protective and Discovery Order (“Order”), in which the Commission found and concluded that CURB has met the requirements of K.A.R. 82-1-225 and K.S.A. 77-521 and should be granted intervention in this Docket.”⁹ The Commission also issued a Protective and Discovery Order, applying to all parties in this docket.¹⁰

4. Essentially, Occidental moves the Commission for an order restricting information, which Occidental designates as confidential, to examination by only the

⁴ *Id.* at p. 2.

⁵ Docket No. 18-KG&E-303-CON, Motion for Protective Order (April 17, 2018).

⁶ *Id.* at p. 3.

⁷ *Id.* at p. 3.

⁸ *Id.* at p. 4.

⁹ Docket No. 18-KG&E-303-CON, Order Designating Prehearing Officer; Granting Intervention To The Citizens’ Utility Ratepayer Board; And Protective And Discovery Order (April 17, 2018).

¹⁰ *Id.*

Commission Staff. CURB urges the Commission to deny Occidental's Motion for Discovery

Order upon the following grounds:

- A. The Protective Order requested by Occidental, if granted, would prohibit CURB from being able to adequately represent residential and small commercial ratepayers in this docket, violating due process.
- B. The Commission has now issued a Protective and Discovery Order that governs discovery and protection of confidential information; therefore, the Protective Order requested by Occidental is not required by the absence of any protective order in this docket.
- C. The Commission's Protective and Discovery Order sufficiently protects Occidental's confidential information.
- D. Occidental's assertion that "unintentional disclosures [of confidential information] do occur" is conjectural at best; it doesn't form the basis for the need for a more stringent protection order than the Commission has provided in its Protective and Discovery Order.

CURB discusses these grounds below.

A. The Protective Order requested by Occidental, if granted, would violate CURB's due process rights, by prohibiting CURB from adequately representing Kansas residential and small commercial ratepayers in this docket.

5. As noted in CURB's Petition to Intervene and Motion for Protective Order and Discovery Order and Motion for Procedural Schedule, "CURB has a substantial and vital interest in the outcome of this proceeding which cannot be adequately represented by any other party."¹¹ CURB's ability to represent residential and small commercial ratepayers in this docket is clearly dependent upon its ability to review, comprehend and respond to the data forming the basis upon which Occidental seeks relief in this docket. As pointed out by Commission Staff in its Motion to Compel Response to Staff's Data Request No. 10, "the justification provided by the Joint Applicants

¹¹ Docket No. 18-KG&E-303-CON, Petition to Intervene and Motion for Protective Order and Discovery Order and Motion for Procedural Schedule, p. 3 (March 22, 2018).

for the necessity of the special contract is that it provides the incentives needed to keep [Occidental] as a large, viable customer on [Westar's] electric system.”¹² CURB's ability to obtain information that forms the basis of the Commission's order is essential to due process. The commercial information which CURB may request Occidental to produce, may be asserted by Occidental to be “confidential” information; however, it will certainly be relevant to the issues involved herein. Therefore, the ability of CURB to obtain this “confidential” information is essential to the representation of residential and small commercial ratepayers in this docket.

6. Indeed, CURB is substantially affected by the Commission's decision in this docket, for, as Commission Staff points out, if Occidental were “to leave Kansas, the result in the next full rate case would be a socialization of the remaining fixed costs paid by Occidental to all customers,” including residential and small commercial ratepayers.¹³ Therefore, in order for CURB to represent residential and small commercial ratepayers in this docket, CURB must be able to evaluate the necessity of the special contract, which may include review and analysis of certain information deemed confidential by Occidental. However, as CURB understands the Protective Order requested by Occidental, all such “confidential” information will be provided only to Staff. Thus, the Protective Order requested by Occidental would violate the due process rights of CURB and the residential and small commercial ratepayers it specifically represents.

7. Occidental may contend that the relief it seeks in this docket is to merely extend the Energy Supply Agreement (“ESA”) granted earlier such that the data underlying that grant of authority is not particularly relevant. However, CURB was not a party to that proceeding, is not bound thereby, and now needs to see the commercial data relevant to the ESA to be able to determine

¹² Docket No. 17-KG&E-352-CON, Motion to Compel Response to Staff's Data Request No. 10, p. 1 (April 13, 2018).

¹³ *Id.* at p. 2; *See also* Notice of Filing of Staff's Report and Recommendation (Public Version), p. 5, Docket No. 17-KG&E-352-CON (June 13, 2017) (17-352 R&R).

whether or not the relief sought by the Joint Applicants significantly affects or could reasonably affect residential and small commercial ratepayers. CURB cannot make that determination if Occidental's proposed protective order results in CURB's failure to be able to obtain relevant information. In short, Occidental's proposed protective order is overbroad and should be denied.

B. The Commission has now issued a Protective and Discovery Order that governs discovery and protection of confidential information; therefore, the Protective Order requested by Occidental is not required by the absence of any protective order in this docket.

8. On April 17, 2018, the Commission issued a Protective and Discovery Order in this docket.¹⁴ Thus, the Commission's Protective and Discovery Order obviates the premise of Occidental's argument that the lack of any protective order requires its proposed protective order. Indeed, the Commission's Protective and Discovery Order is clearly sufficient for the purposes of protecting the confidential information of Occidental. Therefore, Occidental's motion cannot now be sustained upon the basis of any pretended lack of a protective order in this docket.

9. Importantly, the Commission's Protective and Discovery Order applies to all confidential information from all parties, not just to confidential information furnished by utilities and other regulated entities under K.S.A. 66-1220a. Contrary to the assertions of Occidental, the Commission clearly intended its Protective and Discovery Order to apply to all parties in this docket. The Commission's Protective and Discovery Order provides:

“This Protective Order applies to all parties in this proceeding, unless specifically stated otherwise.”¹⁵

Moreover, the Commission did not limit the designation of information as confidential to utilities or regulated entities. The Commission's Protective and Discovery Order provides:

¹⁴ Docket No. 18-KG&E-303-CON, Order Designating Prehearing Officer; Granting Intervention To The Citizens' Utility Ratepayer Board; And Protective And Discovery Order (April 17, 2018).

¹⁵ *Id.* p. 4.

“A party may designate as confidential any information that it believes, in good faith, to be a trade secret or other confidential commercial information.”¹⁶

While the Protective and Discovery Order references K.S.A. 66-1220a, the Commission’s authority to issue the Protective and Discovery Order also stems from K.S.A. 77-522 with its reference to the Kansas rules of civil procedure.¹⁷ In short, the Commission’s Protective and Discovery Order implements its authority under the Kansas rules of civil procedure to protect the confidentiality rights of all parties before the Commission in a reasonable manner. Occidental’s argument that it needs a special discovery order due to the limitations of K.S.A. 66-1220a has no merit.

C. The Commission’s Protective and Discovery Order protects Occidental’s confidential information.

10. The Protective and Discovery Order reasonably protects the confidentiality of Occidental’s information. Among other matters, the Protective and Discovery Order provides:

“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.”¹⁸

Nothing in Occidental’s Motion for Protective Order alleges that these protections are ordinarily inadequate or unfair.

¹⁶ Id. p. 5.

¹⁷ K.S.A. 77-522.

¹⁸ Id., p. 8.

11. To the contrary, the Commission's Protective and Discovery Order fairly balances the interests of all parties to discover relevant information in order to prosecute their cases while protecting the confidentiality rights of Occidental and other parties.

Indeed, it has been noted by the Commission:

“...the Commission has developed a standard protective order that provides an alternative to public disclosure of information while serving the public interest and protecting the corporation from disclosure of trade secrets or any confidential commercial information. This Protective Order sets out procedures for parties to use in dealing with confidential information. These procedures were developed based upon case law discussing confidentiality and an evaluation of the statutory provisions adopted by the Legislature.”¹⁹

12. The Commission has issued several protection and discovery orders, in several dockets, pursuant to its statutory and administrative authority. To CURB's knowledge and belief there has not even been one instance where these standards have failed to protect the confidentiality of discovered information. Certainly, Occidental has not pointed to any such occurrence.

13. To be sure, Occidental is free to ask for special treatment of any information that it deems to be especially sensitive. Examples of dockets in which parties have asked for special treatment of information that they have considered “highly confidential” include Docket No. 11-KCPE-581-PRE and Docket No. 16-KCPE-593-ACQ. In these regards, the Commission has stated that in deciding whether a claim of confidentiality is appropriate, it must review each pertinent document individually.²⁰ Therefore, under the Commission's Protective and Discovery Order, there is flexibility to

¹⁹ Docket No. 11-KCPE-581-PRE. Order Denying KCP&L Motion for Two-Tier Protective Order, p. 3. (March 25, 2011).

²⁰ Docket No. 02-UTGG-701-GIG, Order on Motions Challenging Confidential Designations, p.14. (July 12, 2005).

address specific concerns of Occidental regarding information to be disclosed through discovery.

14. Yet, Occidental bears the burden of proving the need for such protection.

In fact, the Protective and Discovery Order requires the party seeking confidentiality to do the following:

“...provide a written statement of the specific grounds for the designation at the time the designation is made. 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.”²¹

Occidental bears the burden of proving the confidentiality of the questioned document.

Occidental understood these standard requirements before it filed its Joint Application.

Now, however, Occidental wishes the Commission to waive these requirements and simply determine that all information, which Occidental may in its discretion hereafter designate as confidential, shall be furnished only to the Commission Staff.

15. Occidental does not indicate what harm could occur if this information is furnished to CURB. Nor could Occidental earnestly assert that CURB’s review of proprietary or confidential information would significantly harm Occidental. CURB is not engaged in any business which competes with Occidental. CURB, like the Commission Staff, is a governmental agency charged with the statutory responsibility to protect the rights of ratepayers in utility dockets. In order to afford due process, the Commission has elected to and should continue to treat CURB no differently than the Commission Staff in this docket other than to require the filing of non-disclosure agreements (as is required in

21 Docket No. 18-KG&E-303-CON, Order Designating Prehearing Officer; Granting Intervention To The Citizens’ Utility Ratepayer Board; And Protective And Discovery Order, p. 8 (April 17, 2018).

the Commission's Protective and Discovery Order).²²

16. In sum, Occidental has not shown the nature of confidential information for which it seeks to keep CURB from obtaining. It has not shown how its providing confidential information to CURB would harm or potentially harm Occidental. It has not shown how the Commission's Protective and Discovery Order is insufficient to protect the rights that Occidental has in its information. Therefore, Occidental has not proven any need for a discovery order with very limiting disclosure requirements that differ from the standard Protective and Discovery Order. Occidental's motion should be denied.

D. Occidental's assertion that "unintentional disclosures [of confidential information] do occur" is conjectural at best; it doesn't form the basis for the need for a more stringent protection order than the Commission has provided in its Protective and Discovery Order.


17. Occidental attempts to rationalize its "protective order" on the basis that "unintentional disclosures do occur."²³ In short, Occidental would have the Commission disable CURB's ability to represent its residential and small commercial ratepayers and violate CURB's due process rights, based simply upon the conjecture that mistakes occasionally happen. In fact, Occidental's argument is the equivalent of stating that it believes that CURB is incapable of protecting confidential information. It is a ridiculous and offensive argument. Occidental's Motion for Protective Order should be denied.

²² Docket No. 18-KG&E-303-CON, Order Designating Prehearing Officer; Granting Intervention To The Citizens' Utility Ratepayer Board; And Protective And Discovery Order, p. 4. (April 17, 2018).

²³ Docket No. 18-KG&E-303-CON, Motion for Protective Order, p. 4 (April 17, 2018).

Wherefore, upon the bases set out above, CURB requests that the Commission deny Occidental's motion for a protective order, and for such further relief as the Commission deems just and appropriate.

Respectfully submitted,



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CERTIFICATE OF SERVICE

18-KG&E-303-CON

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was served by electronic service on this 19th day of April, 2018, to the following:

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