

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the Matter of the Joint Application of)
Great Plains Energy Incorporated, Kansas)
City Power & Light Company and Westar) Docket No. 16-KCPE-593-ACQ
Energy, Inc. for approval of the Acquisition)
of Westar Energy, Inc. by Great Plains)
Energy Incorporated.)

**STAFF'S REPLY TO JOINT APPLICANTS' RESPONSE TO STAFF'S MOTION TO
DECLASSIFY; MOTION FOR LEAVE TO REPLY**

The Staff of the Kansas Corporation Commission (Staff and Commission or KCC, respectively) hereby submits the following reply to the *Joint Applicants' Response to Staff's Motion to Declassify All Staff Testimony and Exhibits* (JA Response), and to the extent not contemplated by the procedural schedule, respectfully moves for leave to file such reply:

I. Applicable Law

A. Trade Secrets and Confidential Commercial Information

1. Confidential protection in a Commission proceeding extends to two mandatory categories under K.S.A. 66-1220a: 1) trade secrets; and 2) confidential commercial information.¹

2. Trade secret is defined as follows:

(4) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process 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 and use, and
(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.²

3. To clarify the "independent economic value" requirement to establish a trade secret: a "trade secret must have sufficient value in the owner's operation of its enterprise such

¹K.S.A. 66-1220a

²K.S.A. 60-3320(4)(i),(ii).

that it provides an actual or potential advantage over others who do not possess the information.”³

4. Additionally, “information related to a single, ephemeral event in the conduct of a business does not meet the requirement that a trade secret be a ‘process or device for continuous use in the operation of the business.’⁴

5. “Confidential commercial information” is not defined under the Kansas statutes. However, federal bankruptcy courts have adopted the following definition of commercial information: “[c]ommercial information has been defined as information which would cause ‘an unfair advantage to competitors by providing them information as to the commercial operations of the debtors.’”⁵ Adding in the word “confidential” would imply that the holder of such information must also take reasonable steps to maintain its secrecy, similar to a trade secret.

B. Privileges

6. The Commission is also generally bound to recognize privileges under the rules of evidence.⁶ Of relevance to this proceeding, the state of Kansas recognizes the attorney-client privilege and the trade-secret privilege.⁷

7. Kansas recognizes what is known as the “attorney work product limitation.”⁸ However, such limitation is not a privilege, but rather a limitation on discovery.⁹

8. Furthermore:

The attorney work product doctrine does not offer a per se exemption for all records prepared by or for an attorney. The work product doctrine only applies to those documents and tangible things prepared in anticipation of litigation, and in order for the

³Religious Tech. Ctr. V. Netcom On-Line Commc’n Servs., Inc., 923 F. Supp. 1231, 1252-53 (N.D. Cal. 1995).

⁴State ex rel. The Plain Dealer v. Ohio Dep’t of Ins., 687 N.E. 2d 661, 673 (Ohio 1997).

⁵In re Orion Pictures Corp., 21 F.3d 24, 27-28 (2d Cir. 1994).

⁶See K.A.R. 82-1-230(a).

⁷K.S.A. 60-426; K.S.A. 60-432.

⁸Wichita Eagle and Beacon Pub. Co., Inc. v. Simmons, 274 Kan. 194, 218 (2002); K.S.A. 60-426a(f)(2).

⁹Wichita Eagle and Beacon Pub. Co., Inc. v. Simmons, 274 Kan. 194, 218 (2002).

discovery limitation to apply, there must be a substantial probability that litigation will ensue. “Certainly by implication the... rule precludes any idea of extending the work product doctrine to reports or statements, even if written, obtained by the client or his investigators which are not prepared ‘under the supervision of an attorney in preparation for trial.’” (Internal citations omitted).¹⁰

9. There is no privilege recognized by the Kansas statutes for communications between “financial analysts” or “consultants,” nor is there any privilege regarding disclosure of information that a party agreed with someone to keep secret. The U.S. Supreme Court has cited to the following: “In general, then, the mere fact that a communication was made in express confidence, or in the implied confidence of a confidential relation, does not create a privilege... No pledge of privacy nor oath of secrecy can avail itself against demand for the truth in a court of justice.”¹¹

10. Finally, the Kansas Supreme Court has stated that “[p]rivileges in the law are not favored because they operate to deny the factfinder access to relevant information.”¹²

C. Common Law Right to Inspect Public Records and Documents; Public Policy

11. The United States Supreme Court has identified a common law right of the public to inspect and copy public records and documents.

12. This common law right has been explained in *Nixon v. Warner Communications, Inc.*:¹³

It is clear that the courts of this country recognize a general right to inspect and copy record and documents, including judicial records and documents. In contrast to the English practice... American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit. The interest necessary to support the

¹⁰Wichita Eagle and Beacon Pub. Co., Inc. v. Simmons, 274 Kan. 194, 219 (2002).

¹¹Branzburg v. Hayes, 408 U.S. 665, fn 21 (1972).

¹²Id.

¹³435 U.S. 589

issuance of a writ compelling access has been found, for example, in a citizens desire to keep a watchful eye on the workings of public agencies, and in the newspaper publisher's intention to publish information concerning the operation of government.

It is uncontested, however, that the right to inspect copy judicial records is not absolute. Every court has supervisory power over its own record and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not "used to gratify private spite or promote public scandal" through the publication of "the painful and sometimes disgusting details of a divorce case." Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption, or as sources of business information that might harm a litigant's *competitive standing*. (Internal citations omitted and emphasis added).¹⁴

13. There is a strong presumption against sealing court documents:

Particularly important is transparency in our judicial branch. Its power depends upon the people's confidence. That confidence is founded on the fact that the material judges rely on for decision is available to the public—decisions by which judges' work is judged. See *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir.1995) ("*Amodeo II* ") ("Where access is for the purpose of reporting news ... those interested in monitoring the courts may well learn of, and use, the information whatever the motive of the reporting journalist."). Thus, the presumption against sealing of documents in court files is a strong one.¹⁵

14. The State of Kansas has adopted the following policy under K.S.A. 45-216(a):

"(a) It is declared to be the public policy of the state that public records shall be open for inspection by any person unless otherwise provided by this act, and this act shall be liberally construed and applied to promote such policy."

15. Finally, the Kansas Supreme Court explained:

It is a well established principle that the public has a right to every man's evidence. Any exceptions to the demand for every man's evidence are not lightly created nor expansively construed since

¹⁴Id. at 598.

¹⁵U.S. v. Huntley, 943 F. Supp. 2d 383, 385-87 (E.D. New York 2013).

they are in derogation of the search for truth. (Internal citations omitted).¹⁶

II. Argument

A. In General – Lack of Competitive Harm

16. At the outset, it is important to point an important issue with respect to this proceeding and the Joint Applicants.

17. K.S.A. 66-1220a refers specifically to trade secrets and confidential commercial information. Trade secrets and commercial information derive their value from not being generally known to competitors.¹⁷ The Joint Applicants have not identified their competitors in the sale of electricity. The Joint Applicants operate as regulated electric monopolies.¹⁸ Their rates are set by regulatory bodies.

18. Joint Applicants make claims of harm that could befall numerous individuals in their Response including employees, customers, communities, shareholders, Board of Directors, regulators, and other stakeholders.¹⁹ These entities/individuals are not the focus of trade secret or confidential commercial information protection laws. The harm must come from information that can be used by competitors to achieve some sort of competitive/commercial advantage over the company. Once trade secret or confidential commercial information has actually been established, the Commission should consider the harm to these other individuals under K.S.A. 66-1220a(a)(2). However, the threshold question of whether the information qualifies as a trade secret or confidential information must still be answered, and the establishment of these types of information relies upon competitive harm.

¹⁶Kansas Gas & Elec. v. Eye, 246 Kan. 419, 427 (1990).

¹⁷See Religious Tech. Ctr. V. Netcom On-Line Commc'n Servs., Inc., 923 F. Supp. 1231, 1252-53 (N.D. Cal. 1995); In re Orion Pictures Corp., 21 F.3d 24, 27-28 (2d Cir. 1994).

¹⁸See K.S.A. 66-1,170 et seq.

¹⁹Joint Applicants' Response to Staff's Motion to Declassify all Staff Testimony and Exhibits, Attachment 1 p. 2. (Jan. 20, 2017) (JA Response).

B. Specific Categories Identified by the Joint Applicants

19. The Joint Applicants identify seven (7) categories of information that they argue warrant confidential protection.²⁰ Staff will explain each category and why such categories are not subject to protection under either K.S.A. 66-1220a or a privilege recognized under Kansas law.

20. The first category identified is: (1) Confidential financial information/budget projections, the disclosure of which could affect the Companies' standing in the capital markets, affect the Companies' stock prices, facilitate insider trading violations of the Securities Exchange Commission ("SEC") rules and/or disadvantage the Companies in their contract negotiations.²¹

21. The targeted information is "financial information/budget projections." As referenced in Staff's initial Motion to Declassify, this is simply boilerplate language that does not explain or identify with particularity the information that is a trade secret or confidential commercial information. As the Joint Applicants have the burden of proof in this regard, it is incumbent upon them to identify the specific information at issue that constitutes a trade secret or provides some sort of competitive advantage. They must also explain the steps they took to maintain the secrecy of the information to determine whether it was reasonable under the circumstances. Using the example of DR 7, Staff asked for analysis prepared by Mr. Kemp to support his estimated transactions savings.²² He provided a spreadsheet in response that contains capital expenditures, operations and maintenance (including employee reductions), and supply chain savings projections. The Joint Applicants assert in their Response that there are "proprietary methods (i.e., financial models) developed and owned by the company, or others on

²⁰See JA Response pp. 2-3.

²¹JA Response at 2.

²²JA Response, Attachment 1, p. 2-3.

behalf of the company, used to evaluate this Transaction.” This is not specific. Does it refer to all models in Kemp’s response? How are the numbers themselves derived from the models confidential? Why do such models provide a competitive advantage? How are such financial models not already generally known in the industry? How did Kemp maintain trade secret status after so many other people have now seen the information? These are the types of things that have to be explained and are absent. The confidential nature has not been proven.

22. With respect to the harm for (1), the Joint Applicants stated that disclosure could “affect the Companies’ standing in the capital markets, affect the Companies’ stock prices, facilitate insider trading violations of the Securities Exchange Commission (“SEC”) rules and/or disadvantage the Companies in their contract negotiations.” First, this type of harm would be related to the “public interest” under K.S.A. 66-1220a(a)(2), but it is not related to competitive harm. Second, the Joint Applicants make bald assertions of SEC, FERC, and NERC violations that could occur. They have not identified with particularity what statutes are at issue making it impossible to verify the claims.

23. The Joint Applicants identified (2), (3), and (4) as potential confidential information, but did not label any of Staff’s evidence as such, therefore, Staff will not address these in its response.

24. The fifth category is: (5) Trade secret or commercially sensitive information, the disclosure of which would harm the Companies competitively and/or prevent the Companies from protecting such information as allowed under Kansas law. This is the only category covered by K.S.A. 66-1220a.

25. Consider DR 36, which asked how much of Kemp's estimated savings were achieved by reductions in labor (salary and benefit) costs.²³ The JA Response indicates that the "specific functional savings estimates represent the Company's strategy to achieve savings." Again, this does not meet the burden of proof. How are "savings estimates" a process or device for continuous use in the operation of a business? Are all identified estimates trade secrets? How do they derive independent economic value, and how would a competitor use them to their advantage? What steps has the company taken to maintain the secrecy of the estimates? How many of these estimates have already been publically disclosed? Without answers to these types of questions, there is insufficient proof that the information qualifies as trade secrets or confidential commercial information.

26. Looking at the harm explained in response to DR 36, the Joint Applicants state that "disclosing such details could jeopardize the Company's ability to achieve the estimated savings as some are predicated on negotiations with vendors." Again, this would only become relevant if a trade secret or confidential commercial information had been established. Tipping off a vendor could lead to an increase in prices that could affect the public interest under K.S.A. 66-1220a(a)(2). But this type of harm may not be used to establish a trade secret or confidential commercial information actually exists.

27. The sixth category is: (6) Information the Companies are contractually obligated to be kept private, in which the failure to do so could open the Companies to damages. This is not a trade secret or confidential commercial information. The Joint Applicants have cited no authority that would allow the Commission to seal such information. "Kansas administrative agencies have no common-law powers. Any authority claimed by an agency or board must be conferred in the authorizing statutes either expressly or by clear implication from the express

²³JA Response, Attachment 1, p. 8.

powers granted.”²⁴ The Joint Applicants may be relying upon some other authority to seal this information, but it has not been identified. Case precedent indicates “[t]he mere fact that the production of records may lead to a litigant’s embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records.”²⁵

28. The final category is: (7) Critical infrastructure information that poses a security risk if made public. This is also not a trade secret or confidential commercial information. Additionally, no citation for authority to seal this information is provided by the Joint Applicants. This could harm the public interest under K.S.A. 66-1220a(a)(2), but trade secret or confidential commercial information must first be established. Further, in the *Kansas Gas & Electric v. Eye*²⁶ case, it was stated that:

Nevertheless, we believe the public has an overriding interest in the dissemination of information related to costs, construction, and safety practices of nuclear power plants... The United States Supreme Court has stated that society has a strong interest in the free flow of commercial information. (Internal citations omitted).

If the public’s interest in information on the construction and safety practices of nuclear power plants can supersede a utility’s confidentiality interest, surely it can supersede the company’s interest in keeping the condition assessment reports for its transformers, breakers, and underground distribution lines confidential, as claimed in DR 47, 50, and 52, respectively.²⁷

C. Balancing Test Under K.S.A. 66-1220a

29. Assuming, *arguendo*, that upon review of all explanations provided by the Joint Applicants in their Response, the Commission concludes that the Joint Applicants have met their burden to prove that the information claimed confidential actually constitutes trade secrets or

²⁴Fort Hays State Univ. v. Fort Hays State Univ. Chapter, Am. Assoc. of Univ. Professors, 290 Kan. 446, 455 (2010).

²⁵Kamakana v. City and County of Honolulu, 447 F.3d 1172, 1179 (9th Cir. 2006).

²⁶246 Kan. 419 (1990).

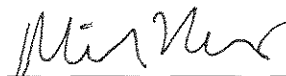
²⁷See JA Response, Attachment 1, p. 9, 11, 13.

confidential commercial information, the balancing test under K.S.A. 66-1220a still weighs in favor of public disclosure.

30. Staff has cited above to several quotes that explain how important it is to have open judicial documents and proceedings. Staff has also pointed out how insufficiently the Joint Applicants have explained the harm from disclosure. The potential impact on Kansas' economy as a result of this case is enormous, and the public has a right to see Staff's evidence. This case involves the largest public utility in the state being acquired by the holding company of the second largest and affects roughly 950,000 Kansas residents, or 33% of the Kansas population. It is a \$12.2 billion transaction. If this case does not rise to the level of public import sufficient to justify an open proceeding, nothing will.

WHEREFORE, Staff respectfully submits its reply, moves for permission to file such reply, and requests that the Commission grant its *Motion to Declassify All Staff Testimony and Exhibits* filed January 10, 2017.

Respectfully Submitted,

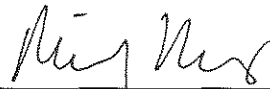


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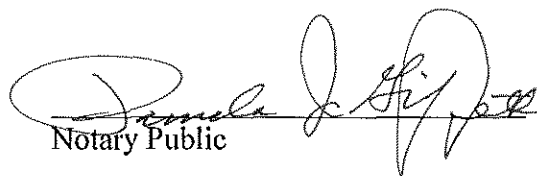
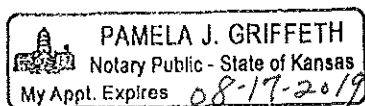
VERIFICATION

Michael Neeley, being duly sworn upon his oath deposes and states that he is Litigation Counsel for the State Corporation Commission of the State of Kansas, that he has read and is familiar with the foregoing *Staff's Reply to Joint Applicants' Response to Staff's Motion to Declassify; Motion for Leave to Reply* and that the statements contained therein are true and correct to the best of his knowledge, information and belief.



Michael Neeley # 25027
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Subscribed and sworn to before me this 23rd day of January, 2017.


Notary Public

My Appointment Expires: August 17, 2019

CERTIFICATE OF SERVICE

16-KCPE-593-ACQ

I, the undersigned, certify that a true and correct copy of the above and foregoing Staff's Reply to Joint Applicants' Response to Staff's Motion to Declassify; Motion For Leave to Reply was served by electronic service on this 23rd day of January, 2017, to the following:

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