

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

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

**FILING OF CORRESPONDENCE DATED OCTOBER 27, 2023**

COMES NOW the Requestor and files the attached correspondence as previously served on the parties dated October 27, 2023 (Attachment A). The correspondence was copied to all parties of record herein, but it was not electronically filed and did not therein include a required Certificate of Service for this Docket.

Respectfully submitted,

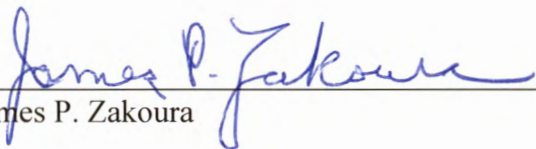
/s/ James P. Zakoura

James P. Zakoura, KS 7644  
FOULSTON SIEFKIN LLP  
7500 College Blvd., Suite 1400  
Overland Park, KS 66210  
Telephone: 913-498-2100  
Email: [jzakoura@foulston.com](mailto:jzakoura@foulston.com)  
*Requestor*

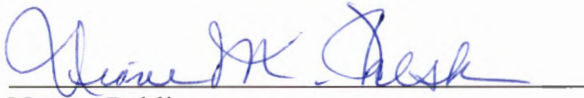
**VERIFICATION**

STATE OF KANSAS            )  
  ) ss:  
COUNTY OF JOHNSON    )

James P. Zakoura, being duly sworn upon his oath, deposes and states that he has read and is familiar with the foregoing *Filing of Correspondence dated October 27, 2023*, and the statements therein are true to the best of his knowledge, information, and belief.

  
James P. Zakoura

SUBSCRIBED AND SWORN to before me this 1st day of November 2023.

  
Notary Public

My Appointment Expires:



**CERTIFICATE OF SERVICE**

I hereby certify that on this 1st day of November 2023, the foregoing *Filing of Correspondence dated October 27, 2023*, was electronically filed with the Kansas Corporation Commission and that one copy was delivered electronically to all parties on the service list as follows:

NICK SMITH, MANAGER -  
REGULATORY & FINANCE  
BLACK HILLS/KANSAS GAS UTILITY  
COMPANY LLC  
D/B/A Black Hills Energy  
601 NORTH IOWA STREET  
LAWRENCE, KS 66044  
[nick.smith@blackhillscorp.com](mailto:nick.smith@blackhillscorp.com)

ROB DANIEL, DIRECTOR REGULATORY  
& FINANCE  
BLACK HILLS/KANSAS GAS UTILITY  
COMPANY, LLC  
D/B/A BLACK HILLS ENERGY  
655 EAST MILLSAP DRIVE, STE. 104  
PO BOX 13288  
FAYETTEVILLE, AR 72703-1002  
[rob.daniel@blackhillscorp.com](mailto:rob.daniel@blackhillscorp.com)

DOUGLAS LAW, ASSOCIATE GENERAL  
COUNSEL  
BLACK HILLS/KANSAS GAS UTILITY  
COMPANY, LLC  
D/B/A BLACK HILLS ENERGY  
1731 WINDHOEK DRIVE  
LINCOLN, NE 68512  
[douglas.law@blackhillscorp.com](mailto:douglas.law@blackhillscorp.com)

ANN STICHLER, SR. ANALYST -  
REGULATORY & FINANCE  
BLACK HILLS/KANSAS GAS UTILITY  
COMPANY, LLC  
D/B/A BLACK HILLS ENERGY  
2287 COLLEGE ROAD  
COUNCIL BLUFFS, IA 51503  
[ann.stichler@blackhillscorp.com](mailto:ann.stichler@blackhillscorp.com)

DAVID COHEN, ASSISTANT GENERAL  
COUNSEL  
KANSAS CORPORATION COMMISSION  
1500 SW ARROWHEAD RD  
TOPEKA, KS 66604  
[d.cohen@kcc.ks.gov](mailto:d.cohen@kcc.ks.gov)

CARLY MASENTHIN, LITIGATION  
COUNSEL  
KANSAS CORPORATION COMMISSION  
1500 SW ARROWHEAD RD  
TOPEKA, KS 66604  
[c.masenthin@kcc.ks.gov](mailto:c.masenthin@kcc.ks.gov)

/s/ James P. Zakoura  
James P. Zakoura, KS 07644  
*Requestor*

# FOULSTON

ATTORNEYS AT LAW

James P. Zakoura

jzakoura@foulston.com  
Phone: 913.254.2142

7500 COLLEGE BOULEVARD, SUITE 1400  
OVERLAND PARK, KS 66210-4041

October 27, 2023

## **Executive Summary in Response to the KORA “Exemption” Contentions of Kansas Gas Service, and also to the Contentions of Black Hills and Atmos Energy**

1. K.S.A. 45-215 et. seq. – the Kansas Open Records Act governs this Request for the “Records” (supplier invoices of February 2021).
2. The requested records are presumed to be “public” unless otherwise provided by statute, and the Kansas Open Records Act is to be liberally construed to advance the state public policy that public records are to be open for inspection “by any person.”

K.S.A. 45-216. Public policy that records be open. (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.

3. The burden of proof is on the entity seeking exemption – in this case(s), Kansas Gas Service, Black Hills, and Atmos Energy.
4. Under applicable Kansas law, any Commission decision on KORA matters must be supported by substantial competitive evidence.
5. This KORA request is not in any way limited by KCC Dockets or Protective Orders issued therein. Those cases are concluded, the Commission has entered an Order on the merits of each case – the Protective Orders issued therein have no force and effect. This Request is solely governed by KORA.

KCC Docket No. 21-BHCG-334-GIG – Black Hills – KCC Docket concluded by KCC Order dated January 27, 2022.

<https://estar.kcc.ks.gov/estar/ViewFile.aspx/20220127103623.pdf?Id=2abc529b-8c9e-4d97-947a-0c785730690e>

KCC Docket No. 21-KGSG-332-GIG – Kansas Gas Service – KCC Docket concluded by KCC Order dated March 3, 2022.

<https://estar.kcc.ks.gov/estar/ViewFile.aspx/20220303103425.pdf?Id=6378bf46-4736-4fc7-bbfh-47a48bba916d>

KCC Docket No. 21-ATMG-333-GIG – Atmos Energy – KCC Docket concluded by KCC Order dated March 24, 2022.

[https://estar.kcc.ks.gov/estar/ViewFile.aspx/20220324102715.pdf?Id=a5b88cfd-87b2-4f84-8f1a-1753cf72b2f8&utm\\_medium=email&utm\\_source=govdelivery](https://estar.kcc.ks.gov/estar/ViewFile.aspx/20220324102715.pdf?Id=a5b88cfd-87b2-4f84-8f1a-1753cf72b2f8&utm_medium=email&utm_source=govdelivery)

**ATTACHMENT A**

6. K.S.A. 66-1220a provides as follows:

66-1220a. Disclosure of trade secrets and confidential information, when. (a) The state corporation commission shall not disclose to 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 (K.S.A. [60-3320](#) et seq., and amendments thereto) or any confidential commercial information of a corporation, partnership or individual proprietorship regulated by the commission unless the commission finds that disclosure is warranted after consideration of the following factors:

- (1) Whether 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, partnership or sole proprietorship; and
  - (4) Alternatives to disclosure that will serve the public interest and protect the corporation, partnership or sole proprietorship.
- (b) If the state corporation commission finds that disclosure is warranted pursuant to subsection (a), the commission shall give the corporation, partnership or individual proprietorship notice before disclosing the trade secret or confidential commercial information.

7. The KCC Winter Storm Uri Dockets are completed, and K.S.A. 66-1220a (1) has no application. In the event it does, the Commissions work is enhanced by making documents public that form the basis for possible retail ratepayer's recoveries in legal proceedings.

8. In making its KORA determination, the Commission must rely on substantial competent evidence. No such substantial evidence to support an exemption from public disclosure was offered by either Kansas Gas Service, Black Hilld, or Atmos Energy.

9. Only Atmos Energy offered an Affidavit in support of an exemption from public disclosure— which has been discredited – both Kansas Gas Service and Black Hills only offered letters that purported to state what only qualified and experienced gas supply managers would be required to state under oath.

10. It speaks volumes that no one from either Kansas Gas Service or Black Hills filed a sworn affidavit in support of a claimed exemption.

11. No creditable gas supply manager can testify that:

- (a) supplier invoices that are 2 years and 8 months old (from February 2021);
- (b) reflect public Index prices;
- (c) which were extensively spread on the record in the KCC – Winter Storm Uri Dockets;
- (d) pursuant to contract, confidential treatment expired in March 2022; and
- (e) are in any manner either trade secrets or confidential documents that are exempt from public disclosure.

12. The consideration of whether the requested documents are Confidential and Exempt from disclosure, is an entirely different analysis by the Commission on October 27, 2023, than before the Black Hills, Kansas Gas Service, or Black Hilld Dockets were concluded at the KCC. On its face, the contentions that one-time, one-month supplier invoices are confidential is preposterous.

#### **Presentation of Facts and Legal Argument**

13. The chain of events that have befallen retail ratepayers of natural gas utility companies in Kansas since Winter Storm URI, is almost unimaginably horrific.
14. The Kansas Corporation Commission determined that jurisdictional natural gas companies implemented each of the companies' "Gas Supply Plans" and thus prudently incurred what has come to be known in regulatory parlance as "Additional Gas Costs."
15. The KCC Staff reviewed and approved as consistent with prior KCC gas acquisition orders, the gas distribution companies "Gas Supply Plans" in June 2020, a time prior to Winter Storm Uri in February 2020.

Q. Is KGS required to file an annual Gas Purchase Plan and Hedging Plan with the Commission?

Yes. The Commission's June 21, 2001, Order in Docket No. 106,850 (106,850 8 Docket Order) requires KGS (and other local gas distribution utilities) to file an annual Gas Purchase and Hedging Plan with the Commission. Additionally, KGS is required to meet with Staff to discuss the contents of its plan, review the results from the previous year, and discuss any concerns Staff have with the plan. This requirement is restated from the Commission Order as follows:

An essential part of Commission oversight will be a meeting that each utility must have with Staff at least once a year. The Commission will require an annual meeting to review and discuss the utility's gas portfolio, contracts and purchasing practices. At the option of Staff, such meetings may be required for a utility more frequently than once a year. The substance of these meetings should be comprehensive and should include review of the next year's plans for gas purchases, transportation, storage, capacity release, and risk management. Other areas of concern may also be covered at the meeting. At least 14 days prior to the meeting, the utility is to file a written document which details its current situation, states its plans for the next 12 months, and evaluates the manner in which its plans for the prior year were followed or modified. The primary purpose of the meetings is to discuss the utility's plans for the future year. Evaluation of activities and plans of the previous year is to provide a basis for considering whether changes might be appropriate. The filings are to be made in formal utility-specific dockets, and may be designated as confidential. After reviewing the proposed plan and meeting with the utility, Staff is to file a memo with the Commission.

Direct Testimony and Testimony in Support of settlement Agreement dated November 30, 2021, in KCC Docket No. 21-KGSG-332-GIG.

<https://estarc.kcc.ks.gov/estarc/ViewFile.aspx/S202111301630588291.pdf?Id=e2aa450e-92f7-4926-a35c-da77b98c3855>

16. In plain terms, the KCC generally held in each of eight cases decided by the KCC, the KCC held that the Index prices paid by Kansas jurisdictional utilities during Winter Storm Uri were unanticipated and unavoidable, and that if the KCC jurisdictional companies followed their “Gas Supply Plans” they would be permitted by KCC Orders to recover from retail ratepayers the “Additional Costs” related to Winter Storm Uri.
17. Therefore, Kansas Gas Service, Black Hills, Atmos Energy and other Kansas KCC jurisdictional utilities were not responsible to pay even one cent of the \$807 million of “Additional Gas Costs,” that were incurred during 5 days of February 2021 - February 13, 14, 15, 16, and 17, 2021.
18. On the other hand, the KCC ordered that retail ratepayers - pay \$807,831,944 of “Additional Gas Costs” over the next 10 years, for five days of natural gas to heat their homes during the deadly frigid temperatures of February 2021.
19. In total, the KCC ordered that \$807,831,944 of “Additional Natural Gas Costs” be collected from about 900,000 residential natural gas customers and about 750,000 electric customers in the State of Kansas. There is compelling public interest for the liberal interpretation of the Kansas Open Records Act, and for maximum transparency by the Commission of its books and records.
  - American Energies - \$317,914 – paid over 5 years.
  - Atmos Energy - \$92.7 million (Total with securitization financing costs - \$118,514,030 – paid over 10 years.)
  - Black Hills Energy - \$87.9 million – paid over 5 years.
  - City of Eskridge - \$1,1 million – paid over 10 years.
  - Evergy Central - \$122.2 million – paid over 2 years.
  - Kansas Gas Service - \$366 million (Total with securitization financing costs - \$450,000,000 – paid over 10 years.)
  - Southern Pioneer - \$17 million – paid over 3 years.
  - Empire - \$10.8 million – paid over 15 years.

2023 KCC Report to the Kansas Legislature, dated January 2023, at Page 2.

[https://www.kcc.ks.gov/images/PDFs/legislative-reports/2023\\_Uilities\\_and\\_Common\\_Carriers\\_Report.pdf](https://www.kcc.ks.gov/images/PDFs/legislative-reports/2023_Uilities_and_Common_Carriers_Report.pdf)

20. On the KGS system, 80% of the \$460 million of “Additional Gas Costs” will be paid by about 600,000 residential ratepayer customers of KGS over the next 10 years.

21. On the systems of Black Hills and Atmos Energy - the percentage of these “Additional Gas Costs” to be paid by residential ratepayer customers in Kansas, exceeds 90% of about \$180 million of “Additional Gas Costs.”
22. In each KCC Order that permitted recovery from ratepayers of the described \$807 million, the KCC included a provision that if any court or regulatory proceeding later held that prices charged during February 2021 were in violation of state or federal law, that any amounts recovered would be credited to retail ratepayers to reduce the \$807,831,944 amount that would otherwise be recovered from retail ratepayers in Kansas pursuant to KCC orders.
23. On February 14, 2021, Governor Kelly declared an Emergency in Kansas because of the frigid temperatures of Winter Storm Uri.
24. This Emergency declaration, by Kansas statute, invoked all protections of the Kansas Consumer Protection Act (KCPA.”).
25. The KCPA as applicable, prevents unconscionable sales practices, price gouging, and profiteering during a declared Emergency.
26. The anti-profiteering sections of the KCPA generally provide that during a declared Emergency, a supplier may not charge more than 25% more than the business day prior to the day of declared Emergency.
27. On February 12, 2021 - the business day prior to the day of the declared Emergency, the prevailing gas Index price was about \$40 per unit, and on February 13 - 16, the Index price was \$329 per unit, and on February 17, 2021, the Index Price was \$681 per unit. Much of the KCC ordered \$807 million of Additional Costs was based of the Index price of \$681 per unit, with lesser amounts at \$329 per unit.
28. To prove an entitlement to possible recovery under the KCPA it is necessary to evidence:
  - (1) the identity of the seller during a declared Emergency;
  - (2) the sale price per unit of sale; and
  - (3) the number of units sold at the specified price, and the total thereof.
29. Not only is the anti-profiteering portion of the KCPA at issue, but also, it’s “unconscionable pricing” provisions as well.
30. On February 1, 2021, the Index price per unit of natural gas was \$2.54 per unit and on February 17, 2021, the Index price was \$681 per unit.
31. The requested documents in my KORA request provide the critical fact investigation that is necessary for prosecuting claims for recovery of funds for retail ratepayers as may be deemed consistent with state and federal law.



32. Neither KGS, nor Black Hills nor Atmos Energy have initiated any legal actions to possibly recover funds for retail ratepayers in Kansas.
33. Those companies have been 100% shielded by KCC Orders from any financial harm related to Winter Storm URI costs - they have “no skin in the game” and the KCC has not required these jurisdictional gas companies to investigate and report to the KCC as to any possible cause of legal action that may lead to recovery of funds to reduce ratepayer costs.
34. Instead, 100% of the \$807,831,944 of financial exposure for the “Additional Costs” related to Winter Storm Uri gas supplies, is on retail ratepayers in Kansas.
35. Kansas Gas Service, Black Hills, and Atmos, with reliance of KCC orders on the exemption from disclosure of public records, have actively impeded any attempts to recover funds for retail ratepayers, while all the while being shielded from financial harm by KCC orders.
36. The response of Atmos Energy to the KORA request is simply in bad faith. In the face of two orders of the KCC that provided for limited public disclosure in 2021 - two years ago - Atmos Energy provided not even one letter or one work of public disclosure of supplier invoices from February 2021. Atmos Energy takes this position that, even though retail ratepayers were ordered to pay about \$92.7 million of “Additional Costs” and that retail ratepayer funding will form the collateral and funding for securitization bonds - no public disclosure will be made of the underlying invoices from February 2021.
37. The Black Hills response to the KORA request is only slightly better than the response of Atmos Energy. In the case of Black Hills, it has disclosed only the names of the suppliers, with no information on price, units of sale, or total payments to any supplier. This is the case even though the KCC ordered retail ratepayers of Black Hills to pay \$87.9 million of “Additional Gas Costs” over a 5-year period.
38. KGS has disclosed the supplier names and total amount paid to suppliers – but KGS has not disclosed prices per unit of sale, or units sold - facts that would be necessary for prosecuting an action for recovery of funds on behalf of retail ratepayers.

**The Contentions for Exemption from Public Disclosure as Advanced by Kansas Gas Service Are Not Substantial Competent Evidence and Are Wholly Unconvincing**

39. The arguments against public disclosure of supplier invoices for February 2021, advanced by KGS, Black Hills, and Atmos Energy are ludicrous on their face.
40. Kansas Gas Service argues that its supplier invoices are “trade secrets,” pursuant to K.S.A. 60-3320. This argument of KGS lacks substance and strains even creditability. The gas acquisition practices of KGS have been fully vetted in the KCC – KGS Winter Storm Uri Docket.

41. Further, the requested supplier invoices are not Confidential and there was no expected confidential treatment beyond March 2022 either by KGS or the supplier invoices.
42. K.S.A. 60-3320 defines “trade secrets 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 or use, and
    - (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.
43. There is no “formula, pattern, compilation, program, device, method, technique, or process” by which KGS acquires natural gas supplies. It acquires natural gas supplies just like every other natural gas utility in Kansas. It bids to the market with a Request for Proposal (“RFP”) and selects therefrom the winning bidders. The contractual arrangement is confirmed on an NAESB form contract, and pricing provisions therein are to reference to published and public Index prices. I attach hereto the published and public Index prices on 11 pipelines for 23 years – between 2001 and 2023.
44. In addition, I reference herein the Testimony of matt L. Robbins in KCC Docket No. 21-KGSG-332-GIG , dated December 1, 2021, that sets forth in detail in the public portions of his Testimony:
  - (a) the contract types, contract lengths, and pricing terms of the KGS gas supply (pages 4 through 7);
  - (b) the potential sources of KGS gas supply (pages 7 through 10);
  - (c) KGS purchasing decisions during Winter Storm Uri (pages 14 through 17); and
  - (d) Exhibit MLR-1 that lists by day in February 2021, the volume purchased of total dollar amount of “Callable Gas” and the total volume and total dollar amount of “Spot Gas.”

<https://estar.kcc.ks.gov/estar/ViewFile.aspx/S202112011400353153.pdf?Id=0b2d31a6-2a7a-48f6-a663-1381b5da791f>

See also, Testimony of Matt L. Robbins, dated July 30, 2021, in KCC Docket No. 21-KGSG-332-GIG which provides great detail of the KGS gas acquisition strategy and the results therefrom for February 2021.

<https://estar.kcc.ks.gov/estar/ViewFile.aspx/S202107301401527761.pdf?Id=ff0a9cea-1923-43f5-acd3-10703259353e>

45. There is no “trade secret” of any kind - these companies, including KGS, as they have testified in their specific KCC “Additional Costs” recovery Dockets - purchase “base load” historically required supplies, at the “First of Month (FOM) Index Price. Additional needed supplies are purchased at the Index price on the day of purchase of these needed additional supplies. The record in KCC Dockets is replete with evidence that this is the case.
46. There is no trade secret or pattern or process that is entitled to protection - the gas acquisition process is entirely public, the Index prices are public, are and the purchase prices for natural gas change every month as the Index prices change.
47. In February 2021 - and for every month over at least the last decade - KGS, Black Hills, and Atmos Energy - contracted for literally 100% of needed supplies of natural gas pursuant to the form of contract developed by the North American Energy Standards Board (“NAESB”). The NAESB form of contract contained at Article 15.10, a term limit of “one year” for “Confidential” treatment of both the Contract and associated documents such as Volume Nominations and contract Confirmation documentation documents.
48. There is no dispute as to the facts that KGS, Black Hills, and Atmos Energy used the NAESB form of contract, and there could be no expectation of confidential treatment of the requested documents) beyond March 31, 2022 - - one year and 8 months ago.
49. These companies - Kansas Gas Service, Black Hills, and Atmos Energy - did not negotiate specific contract prices, but instead the contract prices included as the contract price, a reference to an Index Price of 11 interstate pipelines that is available to the public and is published each day. Again, there is no dispute that the prices paid by these companies were based on public and published index prices.

Respectfully submitted,

FOULSTON SIEFKIN LLP

Jim Zakoura