

BEFORE THE STATE CORPORATION COMMISSION  
OF THE STATE OF KANSAS

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

**RESPONSE TO PETITION FOR RECONSIDERATION**

COMES NOW, the Citizens' Utility Ratepayer Board ("CURB") and responds to the petition for reconsideration filed by James Zakoura. In response, CURB states and alleges as follows:

1. On August 23, 2023, the Kansas Corporation Commission ("Commission") received a Kansas Open Records Act (KORA) request from James Zakoura pursuant to K.S.A. 45-215 et. seq.<sup>1</sup> Mr. Zakoura requested that certain redacted invoices related to the price of gas paid by Black Hills during Winter Storm Uri, be replaced with un-redacted copies of the same invoices. Mr. Zakoura stated that the un-redacted records would permit an examination of whether the payments made to Black Hills' suppliers were consistent with Kansas law.<sup>2</sup>

2. On August 29, 2023, Black Hills responded, alleging that the information request should not be granted because the information requested was considered a trade secret and that disclosure would cause substantial harm to the public by interfering with Black Hills' ability to acquire gas supplies and serve the public at a reasonable price.<sup>3</sup>

3. On October 12, 2023, the Commission denied Mr. Zakoura's KORA request on the basis of K.S.A. 45-221(a)(1) and K.S.A. 66-1220a<sup>4</sup>. These statutes provide, in principal part:

K.S.A. 45-221(a) Except to the extent disclosure is otherwise required by law, a public agency shall not be required to disclose:

---

<sup>1</sup> Kansas Open Records Request of Jim Zakoura. August 23, 2023.

<sup>2</sup> *Id.*

<sup>3</sup> Black Hills Response to Kansas Open Records Request, pg. 2. August 29, 2023.

<sup>4</sup> Order on KORA Request pgs. 2-4. October 12, 2023.

- (1) Records the disclosure of which is specifically prohibited or restricted by federal law, state statute or rule of the Kansas supreme court...or the disclosure of which is prohibited or restricted pursuant to specific authorization of federal law, state statute or rule of the Kansas supreme court....<sup>5</sup>

K.S.A. 66-1220a. 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...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.<sup>6</sup>

4. On October 16, 2023, Mr. Zakoura filed a Petition for Reconsideration alleging that in denying his KORA request, the Commission erred by misinterpreting KORA, K.S.A. 45-221, et. seq., and failing to determine the matter on substantial and competent evidence.<sup>7</sup>

5. On October 25, 2023, CURB filed a Petition to Intervene in order to file comments regarding the Petition for Reconsideration,<sup>8</sup> and the Commission granted the same on October 31, 2023.<sup>9</sup> KORA should be liberally construed to promote public transparency regarding Commission records. On the other hand, CURB acknowledges that KORA does not require the disclosure of confidential information that could harm a utility or the general public.

---

<sup>5</sup> Kansas Statutes Annotated 45-221(a).

<sup>6</sup> Kansas Statutes Annotated 66-1220(a).

<sup>7</sup> Petition for Reconsideration, pg. 1. October 16, 2023.

<sup>8</sup> Citizens' Utility Ratepayer Board Petition to Intervene. October 25, 2023.

<sup>9</sup> Order Granting CURB Petition to Intervene. October 31, 2023.

6. Therefore, CURB recognizes that the KORA request made by Mr. Zakoura requires the Commission to carefully weigh the interests of the public in having un-redacted access to the subject invoices against any harm to Black Hills and the public which could come about through such disclosure. Further, CURB acknowledges that the Commission has previously determined the subject invoices to be confidential information in connection with the Commission's functions in Docket No. 21-BHCG-334-GIE ("Docket 21-334"). However, the Commission issued a final order in that docket. This docket involves a KORA request made after a substantial amount of time has elapsed from the date of that order. Indeed, Black Hills concedes that the Commission could lift the confidentiality that it granted the subject invoices in Docket 21-334. Whether that confidentiality should now be lifted under KORA is the pertinent question.

7. No doubt, the Commission fully understands the importance of the KORA and the duties imposed upon Kansas governmental agencies to meet the letter and spirit of the act. Therefore, in CURB's view, the Commission's determination of Mr. Zakoura's request is important and requires careful consideration of the pertinent facts. CURB has not formed any opinion as to whether the subject invoices constitute confidential commercial information at this time. Rather, with due respect, CURB is concerned with the process by which this determination is made for purposes of compliance with KORA.

8. In Kansas, confidential business information has been defined as the commercial and financial information of a party (1) that is secret and (2) the disclosure of which could harm the business of that party.<sup>10</sup> In these regards, CURB takes note that Black Hills does not dispute that the confidentiality afforded to Black Hills' gas suppliers is confined to one year under its gas supplier

---

<sup>10</sup> See *Wolfe Electric, Inc. v. Duckworth*, 293 Kan. 375 (2011).

contracts. This is an important fact because it strongly indicates that there is no longer a contracted expectation for any party to keep these invoices secret. In fact, to CURB's knowledge, no supplier has intervened in this proceeding to protest disclosure of the subject invoices. Therefore, there is nothing in the record that proves that Black Hills or the subject gas suppliers are required to maintain the confidentiality of the prices paid for natural gas during Winter Storm Uri, approximately three years ago.

9. As CURB understands Black Hills' response to Mr. Zakoura's Petition for Reconsideration, the alleged potential harm is based upon speculation that disclosure could affect Black Hills' ability to compete for low-cost gas supplies in the future. It invites the conclusion that Black Hills' gas suppliers will no longer deal with Black Hills if disclosure of the subject invoices is required by the Commission. Yet the specific basis for that conclusion has not been made clear to CURB.

10. Indeed, CURB cannot ascribe such an intent upon gas suppliers merely based upon the allegations made to date. If the Commission were to require Black Hills to disclose that information, it should not reflect bad faith on behalf of Black Hills. Contracts calling for confidentiality of information generally recognize the authority of courts to disregard those confidentiality protections. In fact, Black Hills notes that the Commission does not have to continue the confidentiality that was granted in Docket 21-334 indefinitely. Finally, CURB cannot see a clear nexus between disclosure of the subject invoices and Black Hills' subsequent inability to secure low-cost gas supplies.

11. To reiterate, CURB does not take a position on the merits of this dispute. CURB fully understands the benefits of public disclosure which is inherent in KORA but also the need to protect

the ability of Black Hills to obtain reasonable gas supplies. Rather, in view of the importance of the goals of KORA, CURB merely suggests that the Commission may want to explore and determine the alleged harm to a greater extent based on a more expansive record.

12. Therefore, CURB believes that allowing an oral argument (or hearing) before ruling on the Petition for Reconsideration may provide a better record for the Commission's determination. Such a record may be beneficial to all parties if this matter is appealed. Indeed, the processes available under KORA and 66-1220a allow the Commission to explore those reasons for continued confidentiality of the subject invoices and evaluation of the potential harms of disclosure at this time. Based on the record as it currently stands, CURB queries whether there is a sufficient record about the potential harms that would come about by the Commission ordering the declassification of this information.

13. To be clear, CURB has no concern regarding Mr. Zakoura's potential use of the requested information, or his ability to obtain the information from other sources. The primary focus of this docket is whether Kansas citizens, including residential and small commercial ratepayers, have the right to know the details surrounding why their natural gas utility bills are as high as they are. That public "right to know" goes to the very heart of the public policy benefit inherent in KORA. It should not be discounted without the benefit of a full record in this case.

14. At a minimum, the circumstances in this KORA request warrant a reexamination of the facts underlying the decision not to un-redact the subjected documents. The determination of whether requested information constitutes protected trade secrets under K.S.A. 60-3320(4) is a question for the trier of fact, which in this situation is the Commission. The proponent of claims of trade secret protection has the burden of proof to show that such information meets the statutory

definition.<sup>11</sup> In its response to the Petition for Reconsideration in this docket, Black Hills relies upon the findings from other dockets in which the Commission designated documents as confidential and as trade secrets and reviewed the 66-1220a factors for disclosure in 2021.<sup>12</sup> CURB believes that the passage of time since the initial filing of the subject invoices and the specific terms of the confidentiality provision used by gas suppliers warrants a review by the Commission for whether that information still constitutes a trade secret under 60-3320a and whether the harm, if any, associated with that information today outweighs the public interest under the 66-1220a factors. Further, the Kansas Attorney General's Office has begun an investigation under Kansas Consumer Protection laws regarding the historic price spikes during Winter Storm Uri. Whether certain entities engaged in unconscionable business practices during Winter Storm Uri is being investigated by only a limited number of parties. CURB would submit that allowing interested stakeholders access to information through KORA requests to pursue those claims serves the public interest in light of the extraordinary circumstances of the historic price spikes during Winter Storm Uri.

15. Black Hills' suggestion that the gas supply pricing information provided in Docket 21-334 would remain confidential until the Commission determines otherwise, actually supports the need for a fully developed and detailed record to determine the appropriate course of action regarding confidentiality. Black Hills states that the Commission's previous ruling on a 2021 KORA request denying disclosure still holds true today.<sup>13</sup> In Docket No. 22-GIMX-171-MIS, the Commission denied disclosure from a KORA request and relied upon its ruling from an order in Docket No. 21-KGSG-332-GIG ("Docket 21-332") for a similar request to disclose confidential

---

<sup>11</sup> *Paradigm Alliance, Inc. v. Celeritas Technology, LLC*, 659-F.Supp.2d 1167, 1185 (U.S. D. Ct of Kan. 2009).

<sup>12</sup> See Black Hills Answer to Petition and Addendum for Reconsideration, pg. 3-4, ¶7-9. October 26, 2023.

<sup>13</sup> *Id.* at pgs. 4-5, ¶11.

information.<sup>14</sup> In turn, the order in Docket 21-332 agreed with Kansas Gas Service (“KGS”) in their evaluation of the 66-1220a factors. KGS, like Black Hills here, asserted that there could be harm with competitors finding out how much gas is being bid for or other information indicating the timing of the public utility’s need for gas.<sup>15</sup> In that argument, KGS concluded that the goal of providing a better public understanding of extraordinary costs was insufficient to support negating contract provisions.<sup>16</sup> While such concerns were certainly germane in 2021, CURB believes that the passage of time and expiration of those contract provisions, particularly the ones governing confidentiality, warrant a further examination in this docket to determine whether the same harms recognized in Docket 21-332 can still be associated with this data. The public would benefit greatly from a fuller analysis by the Commission as to whether the 2021 invoices accurately reflect bidding practices and gas supply needs of today and whether the harms alluded to by Black Hills are present.

16. As noted earlier, the notion that a gas supplier would substantially change its bidding process for Black Hills due to the Commission requiring the disclosure of three year old data compiled during a historic weather and pricing event does not seem to be well-documented in the record. CURB believes that the Commission could use this opportunity to hear from Black Hills to learn more about this possibility and how widespread it is in the industry to make a fully informed decision about the likelihood of this harm from disclosure. In these regards, the Commission could also ask the parties about how other public utility commissions are handling this information, either as confidential, non-confidential or somewhere in between, as this type of data is relevant and could be very informative. Simply taking the speculation at face value without more detail only serves to

---

14 Order On KORA Request, Docket No. 22-GIMX-171-MIS. December 12, 2021.

15 Objection of KGS to NGTCC Motion to Make Public KGS Response, Docket No. 21-KGSG-332-GIG, pgs. 6-7

¶21. August 23, 2021.

16 *Id.* at ¶20.

reinforce this exploitative situation with no transparency on the issue. If there is information that Black Hills has about such tactics from gas suppliers, the procedural protections afforded in this docket would seem to be a safe venue to receive that information.

17. Additionally, a party asserting trade secret protection must produce some evidence that the information alleged to be a “trade secret” meets the definition in K.S.A. 60-3320(4). The burden is not met by general allegations, but rather by describing “the subject matter of their trade secrets in sufficient detail to establish each element of a trade secret.”<sup>17</sup> CURB views this requirement as a threshold question to whether the information should continue to be protected under KORA and 66-1220a. At the time the records were submitted to the Commission in 2021, there were active dockets investigating the price spikes and operational performance of the utilities. A connection between the harm of disclosure and importance to those dockets existed in light of the uncertainty around gas prices and purchase practices. Since then, many utilities have taken steps to modify hedging plans and purchase strategies to account for such emergencies. Further, gas suppliers’ expectation of privacy for this information has passed the one-year mark indicated in their contracts. Questions as to how gas suppliers are treating this information after the one-year requirement, whether third parties are able to ascertain this information, and Black Hills’ efforts to maintain and protect such information since 2021 are relevant and have yet to be examined in this docket. In these regards, CURB cannot find a nexus between disclosure of information which is clearly allowed under the pertinent gas supplier contracts and some sort of relationship change taken by gas suppliers with respect to gas supply in the future based on the record. Certainly no gas supplier has stated as much. Black Hills has not articulated why a Commission-ordered disclosure is

---

<sup>17</sup> *Bradbury Co., Inc. v. Teissier-duCros*, 413 F.Supp.2d 1209, 1222 (U.S. D. ct. of KS 2006).

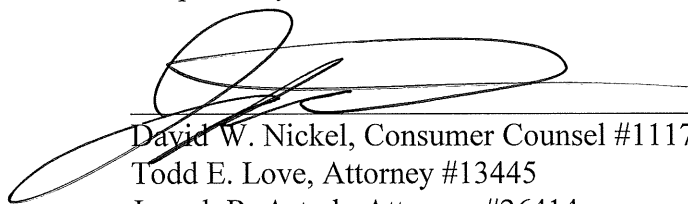


much more harmful than a disclosure from other sources, such as the gas suppliers themselves. The allegations of harm at this point appear to be speculative. CURB does not believe that the Commission should decide an information request under KORA upon the basis of speculation.

18. Therefore, CURB urges the Commission to grant Mr. Zakoura's Petition for Reconsideration in order to allow the parties to be heard on the pertinent factors of K.S.A. 66-1220a. CURB agrees that, if disclosure of the information requested would result in higher prices for gas supplies in the future, there is a public harm that must be considered. On the other hand, there is certainly a public benefit to transparency of the requested information under KORA. In short, CURB believes that this matter should not be treated summarily and that a hearing on the facts and issues is warranted before the Commission issues a final ruling which will be subject to appeal.

WHEREFORE, CURB respectfully requests the Commission grant the Petition for Reconsideration in this Docket to allow the parties to present arguments and evidence pertaining to the factors outlined under K.S.A. 66-1220a before a final determination of Mr. Zakoura's KORA request.

Respectfully submitted,



David W. Nickel, Consumer Counsel #11170  
Todd E. Love, Attorney #13445

Joseph R. Astrab, Attorney #26414

Citizens' Utility Ratepayer Board

1500 SW Arrowhead Road

Topeka, KS 66604

(785) 271-3200

[d.nickel@curb.kansas.gov](mailto:d.nickel@curb.kansas.gov)

[t.love@curb.kansas.gov](mailto:t.love@curb.kansas.gov)

[j.astrab@curb.kansas.gov](mailto:j.astrab@curb.kansas.gov)

## VERIFICATION

STATE OF KANSAS

)

SS:

COUNTY OF SHAWNEE

)

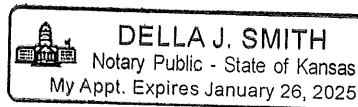
I, Joseph R. Astrab, of lawful age and being first duly sworn upon my oath, state that I am an attorney for the Citizens' Utility Ratepayer Board; that I have read and am familiar with the above and foregoing document and attest that the statements therein are true and correct to the best of my knowledge, information, and belief under the pains and penalties of perjury.

~~Joseph R. Astrab~~

SUBSCRIBED AND SWORN to before me this 2<sup>nd</sup> day of November, 2023.

Notary Public

My Commission expires: 01-26-2025.



**CERTIFICATE OF SERVICE**

24-GIMX-238-MIS

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was served by electronic service on this 2<sup>nd</sup> day of November, 2023, to the following:

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)

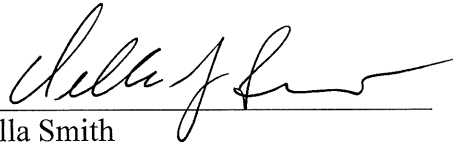
DOUGLAS LAW  
ASSOCIATE GENERAL COUNSEL  
BLACK HILLS/KANSAS GAS UTILITY  
COMPANY, LLC D/B/A BLACK HILLS  
ENERGY  
1731 WINDHOEK DRIVE  
LINCOLN, NE 68512  
[douglas.law@blackhillscorp.com](mailto:douglas.law@blackhillscorp.com)

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)

JAMES P. ZAKOURA, ATTORNEY  
FOULSTON SIEFKIN LLP  
7500 COLLEGE BOULEVARD, STE 1400  
OVERLAND PARK, KS 66201-4041  
[jzakoura@foulston.com](mailto:jzakoura@foulston.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)

  
\_\_\_\_\_  
Della Smith  
Senior Administrative Specialist