THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the Matter of Sunflower Electric Cooperative, Inc.'s Compliance with the Commission's Order in Docket No. 13-GIME-391-GIE.	)))	Docket No. 13-SEPE-467-CPL

Petition for Reconsideration

The Citizens' Utility Ratepayer Board (CURB) files this petition for reconsideration of the Commission's *Order on Petition to Intervene and Motion for Protective Order* that was issued in the above-captioned docket on February 13, 2013. CURB respectfully requests that the Commission reconsider its denial of CURB's motion for a protective order, and reconsider its decision to deny CURB access to the filings made in this docket.

I. Background

1. On December 13, 2012, the Commission issued an order opening a general investigation docket, KCC Docket No. 13-GIME-391-GIE (391 Docket), for the purpose of gathering the information necessary to comply with legislation that, in part, requires the Commission to "provide a report to the legislature, on or before March 1 of each year, on the statewide retail rate impact related to the Renewable Energy Standard." (Para. 1, *Order Opening General Investigation Docket*). In the order, the Commission specifically stated that "In the new general investigation docket, the following utilities are ordered to file an updated version of the August 2012 RES report no later than January 16, 2013" and then named the six electric utilities to which the order applied. [Ordering para. (C)]. Given the Commission's lack of authority to issue orders to the non-jurisdictional Board of Utilities (BPU) of Kansas City, Kansas, the Commission simply requested that the BPU file an update. (*Id.*)

2. CURB petitioned to intervene in the 391 Docket, and the Commission granted the intervention petition, without limitations on its participation, by an order issued on January 2, 2013.

3. On or before January 16, 2013, the seven utilities filed the requested reports and updates with the Commission. On January 16, 2013, the Commission Staff unilaterally opened seven "compliance dockets" and filed each of the utilities' RES reports and the updates that were ordered to be filed in the 391 Docket in a separate compliance docket for each utility.[1] Staff stated in a "Notice of Filing of Confidential Report" accompanying each filing that the compliance dockets are "related to the 391 Docket" and were created "in order to maintain the confidentiality" of the reports made by the utilities.

4. On January 24, 2013, CURB filed a petition to intervene in this and the other compliance dockets related to the 391 Docket and moved for a protective order in each docket. In this docket and the other compliance dockets on February 13, 2013, the Commission granted CURB's motion to intervene in each compliance docket, but imposed limitations on its participation. The Commission stated that CURB's participation "should be limited to receiving notice of filings in this docket. CURB will not be given access to confidential filings or allowed to file discovery motions, protests or other litigious filings, and as such, CURB's Motion for Protective Order is denied." (See, e.g., *Order on Petition to Intervene and Motion for Protective Order*, Feb. 13, 2013, at the second paragraph numbered para. 4 on p. 3 of the filing)

1 The seven compliance dockets are: KCC Docket Nos. 13-KEPE-462-GIE (Kansas Electric Power Cooperative), 13-KCPE-463-CPL (Kansas City Power & Light), 13-WSEE-464-CPL (Westar Energy), 13-EDPE-465-CPL (Empire District Electric),13-MDWE-466-CPL (Midwest Energy), 13- SEPE-467-CPL (Sunflower Electric Cooperative) and 13-KCKE-468-CPL (Board of Public Utilities, Kansas City, Kansas).

5. CURB presents below its arguments that the Commission should grant its motion for a protective order in this docket, and allow CURB access to the filings made in this docket, including confidential filings.

6. In the alternative, if the Commission declines to reconsider its denial of a protective order, CURB requests that the Commission revise its limitations on CURB's participation in the docket to allow CURB access to redacted versions of confidential filings made in the docket.

7. It should be noted that CURB has not requested, and is not requesting here, for permission to conduct discovery or to make litigious filings or protests in the compliance dockets. This petition is not a protest or an attempt to complicate this docket with litigious filings. CURB has a strong interest, discussed further below, in the subject matter of the 391 Docket. Unfortunately, the evidence pertaining to the subject matter of the 391 Docket has been cloaked in secrecy by Staff's decision to file that evidence in this and the other compliance dockets. Given that the Commission's rules provide parties to a proceeding the right to petition for reconsideration of orders issued by the Commission, CURB is simply exercising its right to request the Commission to reconsider and modify the limitations imposed on CURB's participation in this docket.

8. Finally, CURB would not be seeking access to documents in the compliance dockets at all if the updates had been filed in the 391 Docket and served on the parties per the Commission's order opening the 391 Docket. CURB's motions for a protective order and a discovery order were filed in the 391 Docket on February 20, 2013. The Commission has yet to rule on these motions.

II. Facts relevant to CURB's petition

9. According to the Commission's website for this docket, Sunflower Electric Power Corporation, Inc.'s (Sunflower) RES report was filed at the Commission on January 15, 2013. Staff's "Notice of Filing of Confidential Report," dated January 16, 11:33 am, explained that Sunflower's RES filing was being filed in this "compliance docket" that was unilaterally opened by Staff. The notice requested that the Commission "accept Sunflower Electric Power Corporation, Inc.'s confidential annual RES report and such other and further relief as the Commission deems just and proper." CURB was not served with either filing. Any cover letter or caption that may have accompanied the filing made on January 15 is not accessible on the Commission's website for the docket, so it's unclear whether these are two separate filings, or two entries on the website for the same filing.

10. It is clear, however, since Staff did not open this docket until January 16, that the document filed by Sunflower on January 15 was filed in the 391 Docket. It was apparently "unfiled" the next day by Staff and re-filed instead in this docket. The update itself was not served on CURB, and it cannot be accessed on the Commission's website.

III. Arguments

11. Staff's actions in "unfiling" documents from the 391 Docket exceeded Staff's authority and impeded on the rights of the parties to the 391 Docket to receive service of pleadings, communications and correspondence.

12. Further, Staff exceeded its authority when it unilaterally opened this docket and labeled it a "compliance" docket, and its action is inconsistent with the Commission's own regulations. K.S.A. 82-1-212 states that "Each matter coming before the commission and requiring a

decision by the commission shall be known as a docket and shall receive a docket number and a descriptive title." K.S.A. 82-1-214 states that "A proceeding shall be commenced either by the filing of an application, a complaint, or a petition, or by the issuance of an order of the commission initiating a proceeding on its own motion." In this docket, Staff unilaterally opened a compliance docket without the filing of an application, a complaint or a petition, and without issuance of an order of the commission.

13. The Commission's order opening the 391 Docket was unambiguous: "**In the new general investigation docket**, the following utilities are **ordered to file** an updated version of the August 2012 RES Report..." (emphasis added). *Order Opening General Investigation Docket,* Dec. 13, 2012, Ordering para. (C), KCC Docket No. 13-GIME-391-GIE. The Commission did not include any language in the order or any subsequent order issued in the docket that directed a compliance docket or dockets be opened to accept the filings. The Commission's language is clear. The updates were to be filed in the 391 Docket. Staff unilaterally acted to ensure that they were not.

14. Staff has no special power or authority to "unfile" a document that was duly filed a docket. Staff has no special power to refile that document in another docket. Staff has no special power or authority to open a docket or proceeding absent direction from the Commission, which it did not receive. Further, labeling the docket as a "compliance" docket, absent direction from the Commission, does not change the basic procedures to be followed in proceedings at the KCC.

15. In support of this argument, a recent disagreement among the parties in a recent KCC docket resulted in an order that illuminates the Commission's view of what a compliance docket is and whether CURB has a right to intervene and have access to information filed in a compliance docket. In KCC Docket 11-KCPE-581-PRE, an investigation into the costs of a proposed

environmental upgrade at the LaCygne generation plant, the KCC directed that a sub-docket be opened to accept reports filed by KCPL in response to the Commission's orders in the docket. Later, the Commission issued a subsequent order that modified its earlier order. It contained the following language:

> In the August 19, 2011 Order, para. 93, the Commission directed KCP&L to submit its monthly and quarterly reports "in a sub-docket of this proceeding using compliance Docket No. 11-KCPE-581-PRE-CPL-1." The Commission has changed its method for handling compliance filings and corrects its instructions regarding KCP&L's filing of its reports. The Commission orders the language that is quoted from paragraph 93 stricken and replaced by the following sentences: For purposes of compatibility with the Commission's current computer system, KCP&L shall file all future reports as discussed in the August 19, 2011 Order, para. 93, in a new Compliance Docket, captioned "In the Matter of Kansas City Power & Light Co.'s Compliance Filings as Required by Commission Order in Docket No. 11-KCPE-581-PRE." To the extent any such filing or portion thereof is confidential, KCP&L shall adhere to K.A.R. 82-1-1221a.

Order on Petitions for Reconsideration and Order Nunc Pro Tunc, Oct. 5, 2011, at para. 64; Ordering Clauses (B) and (C). (Note: the Commission later issued another order correcting this directive to clarify that quarterly reports were not required.)

16. Thus, KCC Docket No. 12-KCPE-258-CPL was opened as a compliance docket per the Commission's order, and CURB sought to intervene. Staff objected to CURB's petition for intervention on the grounds that a compliance docket was "not a proceeding." In its order granting intervention to CURB, the Commission stated,

> 19. . . . **This docket was opened and assigned a number like any other proceeding at this agency.** Language of the CURB Act is plain and unambiguous. Under the CURB Act, Consumer Counsel is allowed to represent "residential and small commercial ratepayers" before the Commission, and **this is a Commission proceeding.** The Legislature has established that it is the public policy in this state to allow CURB, acting through Consumer Counsel, to

represent the residential and small business ratepayers of Kansas before this Commission and to pick and choose those cases in which CURB will participate. CURB's Petition to Intervene is granted.

(*Order on Petitions for Reconsideration and Order Nunc Pro Tunc*, Oct. 5, 2011, at paras. 19 and 20, KCC Docket No. 12-KCPE-258-CPL; emphasis added).

17. The Commission, however, limited CURB's participation in the compliance docket as follows:

20. While CURB may choose those Commission proceedings in which it will intervene, the Commission has authority to limit participation of all intervenors. CURB has not sought access to information identified as Confidential in KCP&L's Monthly Reports. Nor has CURB asked to use discovery or other procedures that might interfere with the orderly and prompt conduct of Staff's review of KCP&L's Reports. The Commission limits CURB's intervention in this proceeding to representing interests of residential and small commercial ratepayers. In addition, at this time the Commission limits CURB's access to confidential information contained in the Reports and will not allow it to use discovery until a Discovery Order is issued. Counsel listed at the end of CURB's Petition, as well as Shonda Smith and Della Smith as listed in paragraph 5 of CURB's Petition, will be added to the service list to receive all electronic notices, pleadings, and correspondence regarding this proceeding.

(*Id.*, at para. 20).

18. Thus, although the Commission limited CURB's participation to receiving access to non-confidential information filed in the docket, it did recognize CURB's interest in following up on the outcome of the project that was the subject from the docket. As a result, redacted versions of filings in the docket were made available to CURB and members of the general public through the Commission's website.

19. The difference in the KCPL 258 compliance docket and this one is that the 258 Docket was not used to gather evidence to aid the Commission's initial investigation into the need for and the potential costs of the LaCygne project, but was used instead to accept reports that KCPL

was ordered to make concerning the progress of the project **after the final order had been issued in the investigative docket.** Compliance dockets utilized in this manner resolve the ambiguity inherent in continuing to accept filings in a docket that was procedurally terminated by a final order. This compliance docket is an entirely different proceeding than the typical compliance docket. In this circumstance, the 391 Docket was opened so that the Commission could gather evidence from the utilities it needed to complete a report mandated by the Kansas Legislature on the impact of the state renewable energy standards on retail electric rates. The information the utilities filed in the 391 Docket was then diverted by Staff to compliance dockets opened by Staff absent any direction from the Commission. Yes, the regulated utilities were "complying" with the Commission's order to file the information, but that doesn't make this a typical compliance docket. The Commission has not filed a final order in this docket requiring additional reporting after the docket is closed. The Commission is in the process of gathering evidence, not ensuring compliance or monitoring progress after the main proceeding has ended. The Commission has recognized that the current way compliance dockets are handled is a result of limitations in the Commission's new computer system, not a result of some fundamental difference between a compliance docket and other proceedings. But the Staff is essentially using this and the other compliance dockets to evade the requirement that the pleadings and correspondence filed with the Commission in the 391 Docket be served on all the parties to the docket.

20. Treating this docket and the other related "compliance" dockets differently than normal proceedings circumvents the policy embodied in the Kansas Open Records Act that all public records shall be open for inspection unless otherwise provided by the Act. K.S.A. 45-216 *et seq.* Exceptions to this policy are provided in the statute to protect private confidential information, and

the Commission has the duty and power to order parties to protect confidential information obtained through participation in its proceedings. But it is the burden of the party claiming confidentiality to establish the legitimacy of its claim. It is the job of Staff to devise methods of protecting confidential information, not to devise methods that totally deprive parties to a docket access to the non-confidential portions of filings.

21. As it is, the Commission's grant of intervention with limited participation to CURB gives CURB the same access to information and level of participation in this docket as any member of the general public who did not bother to intervene at all. An order granting intervention that allows the intervenor no more participation in the docket than the general public may exercise is an illusory grant of intervention. Had the Commission denied CURB's motion to intervene, CURB would have the identical level of access that it has under the Commission's order "granting" intervention. Whether or not it is couched as a "granted" motion or a "denied" motion, the results are the same for CURB.

22. The Commission has repeatedly recognized that CURB has a statutory mission that provides CURB the discretion to intervene in any Commission proceeding that the Consumer Counsel deems of interest to our consumer clients. Our duty, however, also extends to protecting the procedural rights of our clients as parties to proceedings. The legislature did not create CURB with the purpose of being a mere observer of notices filed by Staff. The legislature did not authorize CURB to intervene in Commission proceedings with the intent of CURB having no more rights of participation than members of the public in general who did not intervene. To limit CURB's participation as a party in a docket to having no more rights of participation than that of a non-party

is to effectively deny intervention, and to deny CURB's statutory mission to act on behalf of consumers.

23. Furthermore, there is no evidence that the utilities will be harmed by allowing CURB to receive the filings in this docket. As an intervenor, one assumes certain privileges and duties. One of those privileges is to be served with filings in the docket. One of those duties is to protect the confidentiality of confidential information. CURB has never violated its ethical duty or its legal duty to protect claims of confidentiality, even in the instances where CURB challenged the legitimacy of the claims. There is no foundation whatsoever for assuming that allowing CURB access to all of the information filed in this docket creates a risk of harm to the utility.

24. Further, requiring the utility to provide redacted copies is not burdensome to Staff or the Commission. The burden is on the utilities to redact their confidential filings, not on the Commission or Staff. Production of these documents will not impose unreasonable administrative duties on the Commission or its Staff.

25. CURB acknowledges that the Commission has a legitimate concern in limiting litigation and discovery in true compliance dockets, where the issues have been litigated or resolved by a final order. But when compliance dockets are used to gather evidence on a matter of public interest that will be the foundation of a report made to the Kansas Legislature, they are no different substantively from any other investigative proceeding at the Commission. There is no justification for a different set of rules for "compliance" dockets that are functioning as investigative dockets. Further, it is not being "litigious" to act in the interest of a client who, as a party to a docket has accepted all the duties that attend intervention, but is being denied any of the privileges. It is fulfilling an ethical and statutory duty and exercising a procedural right.

26. The Commission has recognized CURB's legitimate interest in these dockets. CURB believes there is a greater public interest beyond CURB's specific interests in the dockets. To further explain CURB's interest, CURB is interested not only in the KCC's conclusions in its report to be filed with the legislature about the impact of the Renewable Energy Standards on state retail electric rates, but believes it is a matter of public interest whether the impact has been stronger or weaker on some utilities' rates than others. It's no secret that meeting RES standards has imposed costs that have increased retail electric rates. However, identifying those utilities that have achieved compliance with the RES standards with the least impact on retail electric rates may provide valuable information to CURB and the public generally on how to best achieve integration of renewable generation resources with conventional generation at the lowest possible cost to customers. Conversely, if evidence indicates that the customers of one or more utilities have borne greater-than-average impacts on their retail electric rates, then this information may prove useful in identifying the least cost-effective ways of achieving RES compliance. Further, whether or not the state continues to enforce RES standards, the necessity of complying with federal clean air rules is going to create continued incentives to add renewable generation to the generation mix. Finding ways to do so in the most cost-effective way possible is in the interest of every Kansan, and is of particular interest to the members of the CURB board. The Commission's conclusions concerning the data presented will no doubt be illuminating, but CURB, in representing the interests of its clients, prefers to make its own conclusions concerning the data.

27. Thus, this information is of great public interest as well as interest to CURB's clients, and without having seen any of it, CURB has legitimate questions whether any of the claims to confidentiality outweigh the public interest in this information. The information to be reported to the

legislature concerns retail electric rates. The vast majority of evidence filed in rate cases is not confidential. Retail rate tariffs are not confidential. CURB has participated in the vast majority of rate cases that have been filed at the Commission since CURB's creation, most of which required CURB to protect confidential information. CURB has met its duties to protect the confidential information in every case. However, the elements of the cost of service that make up a utility's revenue requirement, with a few exceptions, are not considered confidential information. Only specific elements of the cost of service are deemed to be confidential, and it is the utility's burden under K.S.A. 82-1-221a to provide a legitimate reason the information qualifies as confidential if no statutory exception provides one, and to specify the harm that would result from disclosure. The Commission is obligated to balance these countervailing interests and make a determination that is as protective of the public interest in access as the Commission can devise.

28. Retail electric rates, and the impact of renewable generation on retail electric rates is legitimately a matter of great public interest. It is certainly a matter of great interest to the legislators who have mandated KCC reporting on this issue, and is definitely a matter of great interest to the customers who pay the bills.

29. Further, modifications have been proposed during this legislative session to the RES statute. Newspaper articles have discussed the views of proponents and opponents of the legislation. The information being filed in this docket is directly relevant to the legislation and will be useful for decision makers to help them make informed decisions. The public interest in the information outweighs a utility's claim of harm from disclosure. And, where demonstrable harm would result from disclosure, there is an effective tool available—the protective order—specifically designed to provide assurance of nondisclosure of legitimately confidential information.

30. In summary, the matters under consideration in this docket and in the related 391 Docket are of considerable public interest that merits reconsideration of the Commission order denying disclosure of the contents of the filings in this docket. This docket is not functionally a compliance docket, but is being used to gather evidence for the investigation in the 391 Docket. If the Commission finds that Staff has the authority to unilaterally open this docket, and to divert filings made in the 391 Docket to this docket, then this proceeding should be governed in the same manner that other investigative dockets are governed. Parties should be allowed the normal level of participation that the Commission generally allows in investigative dockets. The Commission should allow the parties and the public access to the filings made in this docket. If there are legitimate claims of confidentiality to information contained in the filings, then a protective order should be issued that will ensure that the parties to the protective order will have access. At the very minimum, the parties and the public should have access to the non-confidential information filed in this docket.

IV. Summary of petition for reconsideration

31. For all the reasons above, CURB respectfully requests that

(a) the Commission reconsider its February 13 order and determine whether this docket was appropriately opened by Staff; and if not, order the filings in this docket to be filed in the 391 Docket;

(b) find that the public's interest in open access to the filings made in this docket outweighs any harm that may result from disclosure; and

(c) order the filings in the docket to be made accessible to the parties and the public.

(d) In the alternative, if the Commission finds that the utility's interest in confidentiality outweighs the public's interest in disclosure, then CURB respectfully requests that the Commission

issue a protective order allowing the parties access to the complete filings in this docket and directing the utility to make redacted copies available to the public.

(e) At the very minimum, if the Commission declines to do any of the above, CURB respectfully requests that the Commission modify its order to direct the utilities to make available to the public and the parties copies of their filings with redactions of the confidential information contained within.

Respectfully submitted,

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VERIFICATION

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

I, Niki Christopher, of lawful age, being first duly sworn upon her oath states:

That she is an attorney for the above named petitioner; that she has read the above and foregoing document, and, upon information and belief, states that the matters therein appearing are true and correct.

Niki Christopher

SUBSCRIBED AND SWORN to before me this 1st day of March, 2013.

DELLA J. SMITH
Notary Public - State of Kansas
My Appt. Expires January 26, 2017

Notary Public

My Commission expires: 01-26-2017.

CERTIFICATE OF SERVICE

13-SEPE-467-CPL

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was served by electronic service this 1st day of March, 2013, to the following parties who have waived receipt of follow-up hard copies:

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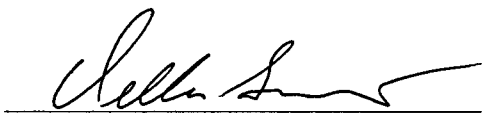

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