

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

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

PETITION FOR RECONSIDERATION

COMES NOW James P. Zakoura (“Petitioner”) and does herein file this Petition for Reconsideration (“PFR”) of the “ORDER ON KORA REQUEST” (“ORDER”) of the State Corporation Commission of the State of Kansas (“Commission” or “KCC”), dated October 12, 2023, in this Docket. Petitioner states and alleges as follows:

1. This PFR is filed pursuant to K.S.A. 66-118a, 66-118b, 77-529, 77-621, and K.A.R. 82-1-235.

2. Petitioner states that the KCC Order is arbitrary and capricious, unreasonable, and in violation of Kansas law (K.S.A. 77-621) in that:

- the KCC has erroneously interpreted and applied the Kansas Open Records Act (“KORA”), K.S.A. 45-217 et seq.
- the KCC action is based on a determination of fact, made or implied by the KCC, that is not supported by evidence that is substantial when viewed in light of the record as a whole; and
- the KCC action directly contravenes the open government and public transparency that is required of all state agencies of Kansas.

The ORDER Violates the Provisions of KORA

A. Factual Synopsis

3. The Commission is an Agency of the state of Kansas, subject to the provisions of the Kansas Open Records Act. (K.S.A. 45-215 and 45-217 (k)(1).)

4. It is the public policy of the state of Kansas that public records of state agencies, including the KCC, be open for inspection by any person unless otherwise provided by this Act, and

that the Kansas Open Records Act shall be liberally construed and applied to promote such policy.

“Public records are records made, maintained, created or possessed by a public agency - that is to say some branch of the state or local government. “Open Government” “Frequently asked questions about the Kansas Open Records Act.” Kris W. Kobach, Kansas Attorney General.

[https://ag.ks.gov/open-government/kora-faq#:~:text=What%20is%20the%20purpose%20of,45%2D216\(a\).](https://ag.ks.gov/open-government/kora-faq#:~:text=What%20is%20the%20purpose%20of,45%2D216(a).)

“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.”

5. On August 23, 2023, Petitioner filed a Request under K.S.A. requesting:

“that the redacted invoices listed ... in Docket No. 21-BHCG-334-GIG ... dated 12/31/2021, be replaced with un-redacted copies of those same invoices . . . [or] in the alternative . . . un-redacted copies of those invoices be made available to me . . . The invoices requested relate to the price of gas paid by Black Hills during Winter Storm Uri.” (ORDER at p.1.)

6. The documents requested by Petitioner are listed on the KCC website for KCC

Docket No. 21-BHCG-334-GIG <https://estar.kcc.ks.gov/estar/ViewFile.aspx/S202106161547494682.pdf?Id=0ca58986-8824-4db7-a3a4-faf4be9aa5f4>, and as such are public records in the possession of the KCC, pursuant to K.S.A. 45-217, and are subject to public disclosure under the Kansas Open Records Act (K.S.A. 45-215.)

7. Each contract of Black Hills with gas suppliers during Winter Storm Uri was entered pursuant upon the standard Form Contract of the North American Energy Standards Board (“NAESB”) which includes a one-year term for “confidential” treatment of any transaction during Winter Storm Uri, to wit:

“Section 15.10 – The terms of any transaction hereunder shall be kept confidential by the parties hereto for one year from the expiration of the transaction.”

Black Hills/Kansas Gas Utility Company, Inc. Compliance Filing for KORA Request 1, at page 23.

<https://estar.kcc.ks.gov/estar/ViewFile.aspx/S202112301413497204.pdf?Id=439cabd6-903e-4b5e-80b7-39de65854512>

8. The execution of natural gas supply contracts by Black Hills that included the 1-year term for confidentiality of documents (Invoices included) is uncontroverted evidence that Black Hills did at no time after one year, consider the subject invoices as confidential business information or trade secrets.

9. Black Hills does not dispute that there is no contractual provision that addresses “confidential” treatment of documents that would bar public record release, for any period after March 1, 2022 – 1 year and 7 months ago.

10. Black Hills has not presented any evidence of any type whatsoever indicating that the requested KCC public records, except a totally speculative contention that if almost 3 year old invoices are released to the public, it would somehow affect the ability of Black Hills to acquire natural gas supplies. Black Hills has failed to support its claim of a “trade secret” exemption from public disclosure with evidence that is “substantial and competent.” Substantial competent evidence “possesses something of substance and relevant consequence, which furnishes **a substantial basis of fact**” to reasonably resolve the issues. *Farmland Indus. Inc. v. Kansas Corp. Comm 'n.*, 25 Kan.App.2d 849, 852 (1999). (Emphasis added.)

11. These described public records were first requested on September 22, 2021, by Max McCoy, a columnist for the Kansas Reflector, pursuant to K.S.A. 45- 215 et. seq. in KCC Docket No. 22-GIMX-171-MIS. The Commission issued an “ORDER ON KORA REQUEST,” on

December 9, 2021. <https://estar.kcc.ks.gov/estar/ViewFile.aspx/20211209102117.pdf?Id=2a2510eb-71b8-4022-b292-62d9b72c69ca>

12. The KCC denied the KORA Request (at page 4) pursuant to K.S.A. 45-221(a)(1) in KCC Docket Nos. 22-GIMX-171-MIS (Max McCoy) and 21-BHCG-334-GIG:

“K.S.A. 45-221. Certain records not required to be open; separation of open and closed information required; disclosure of statistical information; records over 70 years old open. (a) Except to the extent disclosure is otherwise required by law, a public agency shall not be required to disclose:

(1) Records the disclosure of which is specifically prohibited or restricted by federal law, state statute or rule of the Kansas supreme court or rule of the senate committee on confirmation oversight relating to information submitted to the committee pursuant to K.S.A. 75-4315d, and amendments thereto, 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 or rule of the senate committee on confirmation oversight relating to information submitted to the committee pursuant to K.S.A. 75-4315d, and amendments thereto, to restrict or prohibit disclosure.” (Emphasis Added.)

13. The Commission did, however, order Black Hills (at page 4) as follows:

“Black Hills shall file public versions of all its supplier contracts and invoices relevant to the winter weather event period in this docket within 10 days of the date of this Order.”

14. On December 30, 2021, Black Hills filed its “cover letter” and the “public versions” of the supplier contracts and invoices – **which were 99.9% redacted**, and which **provided zero information on volumes purchased, or the price of such natural gas. The Black Hills “public version” of the ordered documents is in fact, nonresponsive.**

<https://estar.kcc.ks.gov/estar/ViewFile.aspx/S202112301005341777.pdf?Id=bdc5b427-a08c-4dee-be01-52064d814cc2>

- Black Hills Response to KORA Request No. 1 – December 30, 2021 – 75 pages: <https://estar.kcc.ks.gov/estar/ViewFile.aspx/S202112301300033885.pdf?Id=69cbe705-1b3d-40ab-a041-7aa520fde277>
- Black Hills Response to KORA Request No. 2 – December 30, 2021 – 75 pages:

<https://estar.kcc.ks.gov/estar/ViewFile.aspx/S202112301310405719.pdf?Id=f9d570c3-82b4-4028-860e-5a75c870e2fc>

- Black Hills Response to KORA Request No. 3 – December 30, 2021 – 75 pages:
<https://estar.kcc.ks.gov/estar/ViewFile.aspx/S202112301244358940.pdf?Id=aad56ada-028a-4b4c-86a5-c9e54346d8ed>
- Black Hills Response to KORA Request No. 4 – December 30, 2021 – 75 pages:
<https://estar.kcc.ks.gov/estar/ViewFile.aspx/S202112301246184729.pdf?Id=ee47d86f-6134-48fd-a36b-50b8309508fb>
- Black Hills Response to KORA Request No. 5 – December 30, 2021 – 75 pages:
<https://estar.kcc.ks.gov/estar/ViewFile.aspx/S202112301246184729.pdf?Id=ee47d86f-6134-48fd-a36b-50b8309508fb>
- Black Hills Response to KORA Request No. 6 – December 30, 2021 – 75 pages:
<https://estar.kcc.ks.gov/estar/ViewFile.aspx/S202112301253481223.pdf?Id=bd92eef1-de73-455f-a27e-f0bd4273f401>
- Black Hills Response to KORA Request No. 7 – December 30, 2021 – 75 pages:
<https://estar.kcc.ks.gov/estar/ViewFile.aspx/S202112301257077835.pdf?Id=befb2538-d4aa-49a2-8136-534a3b8301ff>
- Black Hills Response to KORA Request No. 8 – December 30, 2021 – 75 pages:
<https://estar.kcc.ks.gov/estar/ViewFile.aspx/S202112301302214515.pdf?Id=6557c32c-6b43-4dec-a663-3cff971ead11>
- Black Hills Response to KORA Request No. 9 – December 30, 2021 – 75 pages:
<https://estar.kcc.ks.gov/estar/ViewFile.aspx/S202112301304125639.pdf?Id=ac11981e-61d4-4b4e-8bff-009d7b5419db>
- Black Hills Response to KORA Request No. 10 – December 30, 2021 – 75 pages:
<https://estar.kcc.ks.gov/estar/ViewFile.aspx/S202112301306161091.pdf?Id=7ecf99f7-0af8-4258-b822-3a864cc9be12>
- Black Hills Response to KORA Request No. 11 – December 30, 2021 – 75 pages:
<https://estar.kcc.ks.gov/estar/ViewFile.aspx/S202112301308232657.pdf?Id=10dee253-7aeb-4628-8a8d-0ef2f215633e>
- Black Hills Response to KORA Request No. 12 – December 30, 2021 – 75 pages:
<https://estar.kcc.ks.gov/estar/ViewFile.aspx/S202112301335255030.pdf?Id=9be6f9d5-c5b6-4034-a7c3-6d26f3ae7839>
- Black Hills Response to KORA Request No. 13 – December 30, 2021 – 75 pages:
<https://estar.kcc.ks.gov/estar/ViewFile.aspx/S202112301500426457-13.pdf?Id=61741f85-bd20-4b5a-b935-26be730281c9>
- Black Hills Response to KORA Request No. 14 – December 30, 2021 – 66 pages:
https://estar.kcc.ks.gov/estar/ViewFile.aspx/S202112301502445843_14.pdf?Id=c3bdb96a-8ce3-4d9b-8c3a-5b74f60524ed

15. Black Hills serves about 117,000 retail ratepayers with natural gas service in 65

Kansas communities and 48 Kansas Counties – including the cities of Lawrence, Wichita, Liberal, and Dodge City, Kansas.

16. Winter Storm Uri occurred in February 2021 – 2 years and 7 months ago. The “additional gas costs” related to Winter Storm Uri were incurred in the period February 13 through February 17, 2021.

17. Two years and 7 months after invoices for Winter Storm Uri were issued – not 1 page of the invoices that form the basis for an additional charge of \$87.9 million to retail ratepayers, has been made public.

18. On January 27, 2022, the KCC issued an Order permitting Black Hills to recover from its retail ratepayers, \$87.9 million over a 5-year period – which equates to a \$11.47 per month increase for residential ratepayers. <https://www.kcc.ks.gov/news-1-27-22>
<https://estar.kcc.ks.gov/estar/ViewFile.aspx/20220127103623.pdf?Id=2abc529b-8c9e-4d97-947a-0c785730690e>

19. Retail ratepayers of Black Hills have been paying the \$87.9 million of additional natural gas costs ordered by the KCC since February 2022.

20. The Commission based its determination that Black Hills was entitled to recover \$87.9 million, based on:

- A presentation of Black Hills Winter Storm Uri supplier invoices by Black Hills (Direct Testimony of Robert W. Daniel, dated June 16, 2021 <https://estar.kcc.ks.gov/estar/ViewFile.aspx/S202106161631452455.pdf?Id=2becefab-29fd-4444-b115-ce9d65f2983f> and
- A presentation of Black Hills Winter Storm Uri supplier invoices by KCC Staff (Direct Testimony of Robert W. Daniel, dated November 22, 2021 - <https://estar.kcc.ks.gov/estar/ViewFile.aspx/S202111221511547798.pdf?Id=d21a637c-da8b-407c-870e-4d4f1dce1e47>

B. The KCC Has Erroneously Interpreted and Applied Kansas Law

21. The KCC ORDER makes a critical error of law at the outset. The KCC ORDER solely relies on speculation – the affect that public release of documents “might” have on future natural gas contracting of Black Hills - - and fails to require Black Hills to demonstrate by

substantial component evidence that the requested information (invoices) is confidential business information that is entitled to be exempt from disclosure. Because of the public policy favoring public disclosure and the expressed legislative directive that the Kansas Open Records Act be “liberally construed,” the “substantial competent evidence” standard must be strictly followed. In any event, Black Hills has provided no credible evidence of any type, instead providing only “speculation” that competitive harm “might” occur.

- The Kansas Open Records Act presumes that documents contained in public files are open records to the public, unless by substantial competent evidence it is demonstrated that an exemption applies.
- "The burden of proving an exemption from disclosure is on the agency not disclosing the information." *State Dept. of SRS v. Public Employee Relations Board*, 249 Kan. 163, 170 (1991); *Green v. Unified Gov. of Wyandotte County*, 54 Kan. App. 2d 118, Syl.2 (2017).
- Black Hills has no right to have documents (invoices) deemed exempt from disclosure, it must instead prove by substantial competent evidence that it is statutorily entitled to exempt public records from disclosure.
- **There is no substantial competent evidence in the record that the documents are trade secrets.**
- Instead of requiring Black Hills to prove its statutory right to an exemption of public records, the Commission misapplied the burden of proof, granting the trade secret exemption to Black Hills based on no substantial competent evidence in the record.
- In the ORDER, the Commission placed no burden of proof on Black Hills to demonstrate by substantial competent evidence that an exemption to public disclosure applied. It instead relied on non-evidence – rank speculation by counsel that if the invoices were disclosed, the natural gas contracting of Black Hills would be adversely affected.
- Not only is the contention of counsel for Black Hills rank speculation – counsel is not a natural gas supply executive but is an attorney with no stated experience or expertise on the record that he is in any way qualified in natural gas contracting.
- The Commission noted that the requested information was made available to Petitioner subject to a Commission Protective Order that bars public disclosure. A Commission Protective Order is entirely inapplicable to a KORA request – the

essence of which is a determination of what documents held in a state agency's files, are open to the public.

- K.S.A. 45-221 (55)(d) provides that the Commission must provide public disclosure of portions of documents that are not otherwise exempt, and the Commission has not complied with KORA by not undertaking an examination of the documents (invoices) requested:

(d) If a public record contains material that is not subject to disclosure pursuant to this act, the public agency shall separate or delete such material and make available to the requester that material in the public record that is subject to disclosure pursuant to this act. If a public record is not subject to disclosure because it pertains to an identifiable individual, the public agency shall delete the identifying portions of the record and make available to the requester any remaining portions that are subject to disclosure pursuant to this act, unless the request is for a record pertaining to a specific individual or to such a limited group of individuals that the individuals' identities are reasonably ascertainable, the public agency shall not be required to disclose those portions of the record that pertain to such individual or individuals.

C. The KCC Action is Based on a Determination of Fact, Made or Implied by the KCC, that is Not Supported by Evidence that is Substantial When Viewed in Light of the Record as a Whole

22. There is no creditable evidence in the record in this KORA Docket that Black Hills is entitled to an exemption that would be the basis for non-public disclosure of the requested invoices. In fact, the entirety of the evidence in this KORA Docket is that Black Hills is not entitled to such exemption.

- Black Hills contended that the requested invoices were trade secrets. The Commission failed to require substantial competent evidence that demonstrated the documents (invoices) were trade secrets.
- To qualify for exemption from disclosure from KORA, pursuant to K.S.A. 66-1220a and K.S.A. 60-3320(C)(4)(i) and (ii), the Commission is required to base its ruling on substantial competent evidence to meet the Kansas statutory definition of "Trade secret:"

"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.

- There is no substantial competent evidence in the record in this Docket that the requested documents (invoices) “have economic value from not being generally known” or that Black Hills made “efforts that are reasonable under the circumstances to maintain its secrecy. In fact, the opposite is the case.
- **There is no substantial competent evidence that the documents (invoices) are trade secrets.**
 - Black Hills entered into multiple contracts with natural gas suppliers, pursuant to the industry standard NAESB contract, that included a 1-year term for the confidential treatment of documents (including invoices) that are subject to the NAESB contract. Black Hills argues that a defined 1-year term on confidentiality did not mean that a longer term might not be excluded – but again that is rank speculation and is not substantial competent evidence in the record.
 - The NAESB Form contract contains a provision entitled “SPECIAL PROVISIONS TO BASE CONTRACT FOR SALE AND PURCHASE OF NATURAL GAS.” If Black Hills had elected to bargain for an extended term for confidential treatment of documents beyond the NAESB 1-year term, it could have done so. It elected not to do so. There was no intent evidenced by Black Hills that confidential treatment of the requested invoices extends beyond 1-year term.

Black Hills/Kansas Gas Utility Company, Inc. Compliance Filing for KORA Request 1 at page 26.

<https://estarc.kcc.ks.gov/estarc/ViewFile.aspx/S202112301413497204.pdf?Id=439cabd6-903e-4b5e-80b7-39de65854512>

D. The KCC ORDER Directly Contravenes the Open Government and Public Transparency That Is Required of All State Agencies of Kansas

23. The KCC has an ongoing responsibility to assure as much as is reasonably possible, that its records are open to the public consistent with KORA. This KCC responsibility is entirely independent from any specific KORA request.

24. The Kansas Open Records Act is to be liberally construed. Instead, the Commission’s ORDER simply dismissed the request for open records, with no examination of the

requested documents (invoices) to assure that any portion thereof that should be made public – is made public - and without requiring Black Hills to provide any evidence of support of its contention that all parts of the invoices are exempt from public exposure.

25. The Commission’s ORDER does not provide the history of attempts to obtain public disclosure of these very documents (invoices), and the fact that the disclosure that was provided by Black Hills in December 2021 was 99.9% redacted. Essentially, the Commission’s ORDER continues to preclude public disclosure.

26. Two years and 8 months after Winter Storm Uri, and one year and 8 months after the KCC Ordered 117,000 retail ratepayers of Black Hills to pay \$11.47 dollars for each of the next 60 months - \$87.9 million in total additional costs, retail ratepayers of Black Hills in 65 Kansas communities have not had public access to even one page of the 1041 pages of contracts and invoices that evidence:

- The names of the suppliers that sold the additional supplies of high-priced natural gas.
- The volumes of high-priced natural gas sold.
- The prices of sales transaction of the high-priced natural gas that was sold.
- That support the Commission’s \$87.9 million additional natural gas costs placed on the retail ratepayers of Black Hills.

27. What is the evidence that the Commission relied upon in its Order to support the position of Black Hills that invoices that are almost 3 years old are “trade secrets,” and not subject to public disclosure? The answer – no evidence whatsoever, only rank speculation of Black Hills, that somehow future acquisition of competitive natural gas supplies would be affected by the release of 3 year old invoices.

28. It is instructive to note that the only utility specific exemptions from KORA disclosure are (1) records of a utility pertaining to individually identifiable residential customers

(K.S.A. 45-221(B)(26) and (2) records of a utility about cyber security threats. (K.S.A. 45-221(D)(53.)

29. KORA exemption in the bidding and contracting area – in contrast to the expansive interpretation of Black Hills – provide as follows:

- Specifications for competitive bidding, until the specifications are officially approved by the public agency. (emphasis added) (K.S.A. 45-221(B)(27)
- Sealed bids and related documents, until a bid is accepted, or all bids rejected. (emphasis added) (K.S.A. 45-221(B)(28)

30. **In its 2023 Report to the Kansas Legislature, the Kansas Corporation Commission sets forth the enormous impact - - \$807,831,944 - - of KCC Ordered payments by retail ratepayers in the state of Kansas for additional natural gas costs during 5 days of Winter Storm Uri – February 13 – February 17, 2021.**

2023 KCC Report to the Kansas Legislature, at page 2.

https://www.kcc.ks.gov/images/PDFs/legislative-reports/2023_Utility_and_Common_Carriers_Report.pdf

- 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.

- In addition, the State of Kansas provided low interest loans to municipal utilities to pay Winter Storm Uri costs in the amount of \$78,409,646.79 (total loans at January 2023)

- **This brings the Kansas economic impact to \$886,241,590 for 5 days “additional costs” of Winter Storm Uri.**

31. The enormity - - \$807,831,944 - - of the KCC ordered payments by retail ratepayers throughout the state, to be paid over the next 5 – 15 years by more than 2 million natural gas and

electric consumers in Kansas, evidences a strong public interest and the public's right to know – (a) the identities, volumes, and prices of natural gas suppliers that sold natural gas during Winter Storm Uri at prices often ranging from \$329.59 per MMBtu to \$622.78 per MMBtu during February 13 – February 17, 2021; (b) when the identical natural gas commodity sold for \$2.54 per MMBtu on February 1, 2021. Any balancing of the public interest strongly favors public disclosure of the documents (invoices) requested by Petitioner.

32. Petitioner respectfully requests that the Commission look at the totality of the law and evidence in this Docket, and to Reconsider the ORDER, and order the requested documents be released to the Petitioner as public documents.

Respectfully submitted,

/s/ James P. Zakoura

James P. Zakoura, KS 07644
FOULSTON SIEFKIN, LLP
7500 College Boulevard, Suite 1400
Overland Park, KS 66210
Telephone: 913-253-2142
Email: jzakoura@foulston.com
Attorney for Petitioner

