

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

RESPONSE OF REQUESTOR TO THE “RESPONSE TO PETITION FOR RECONSIDERATION” OF THE CITIZENS’ UTILITY RATEPAYER BOARD

COMES NOW Requestor, James P. Zakoura, and for his “RESPONSE OF REQUESTOR TO THE RESPONSE TO PETITION FOR RECONSIDERATION OF THE CITIZENS’ UTILITY RATEPAYER BOARD” (“CURB”) states to the State Corporation Commission of the State of Kansas (“Commission” or “KCC”) as follows:

BACKGROUND

1. The Request of Requestor was filed under Kansas statutes that declare that all “Public Records” are open for inspection by the public – unless exempted therefrom by Kansas statute. (K.S.A. 45-215). In considering the KORA release of “Public Records,” KORA is to be liberally construed in favor of the release of “Public Records.” (K.S.A. 45-216).
2. The requested “Public Records” were initially subject to a one-year “confidential” contractual provision (NAESB Contract – Section 15.10), which ended in March 2022 - - one year and eight months ago.
3. Black Hills requested the supplier invoices of February 2021 be designated as confidential in KCC Docket No. 21-BHCG-334-GIG.
4. KCC Docket No. 21-BHCG-334-GIG was closed by the Commission on January 27, 2022 – one year and nine months ago.

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

5. The KCC ordered (in KCC Docket No. 22-GIMX-171-MIS (the KORA Request of Max McCoy) that Black Hills “blanket” claim of confidential treatment of the supplier invoices of February 2021 was not lawful and ordered Black Hills to file “public” copies of the supplier invoices of February 2021.

6. Black Hills filed “public” copies of the supplier invoices of February 2021, on December 30, 2021, in KCC Docket No. 21-BHCG-334-GIG.

7. The “public” copies filed by Black Hills are 99.9% redacted and only disclose the name of the supplier of natural gas in February 2021.

8. The Commission did not rule on whether the “public” copies of the supplier invoices of February 2021 were in compliance with the Commission’s Order in KCC Docket No. 22-GIMX-171-MIS dated December 9, 2021.

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

THE POSITION OF BLACK HILLS ON REQUESTOR’S KORA REQUEST

9. Black Hills contends that the “Public Records” - - the natural gas supplier invoices to Black Hills for February 2021 that are in the books and records of the Commission - - requested by Requestor are “trade secrets” and are exempt from public disclosure.

10. The proponent of claims for trade secret protection has the burden of proof to show that such information meets the statutory definition. Paradigm Alliance Inc. v. Celeritas Technology, LLC, 659 F.Supp.2d 1167, 1185 (USDC of Kan. 2009).

11. “Burden of Proof” and “Burden of Persuasion” is defined by Kansas statute as follows at K.S.A. 60-401:

"Burden of proof" means the obligation of a party to meet the requirements of a rule of law that the fact be proven either by a preponderance of the evidence or by clear and convincing evidence or beyond a reasonable doubt, as the case may be. Burden of proof is synonymous with "burden of persuasion." (emphasis added)

"Burden of producing evidence" means the obligation of a party to introduce evidence when necessary to avoid the risk of a directed verdict or peremptory finding against him or her on a material issue of fact. (emphasis added)

12. In its “BLACK HILLS’ ANSWER TO PETITION AND ADDENDUM FOR CONSIDERATION,” filed on October 26, Black Hills presented a pleading filed by counsel for Black Hills. This pleading constitutes statements of counsel. It is not and cannot be evidence upon which the KCC can make its KORA determination.

13. Indeed, Black Hills provided no substantial competent evidence in KCC Docket No. 21-BHCG-334-GIG that disclosure of the supplier invoices of February 2021 would somehow affect Black Hills’ ability to compete for low-cost natural gas supplies in the future. Black Hills simply made the claim of trade secret, based only on the one-year contract period of confidential treatment.

14. No substantial competent evidence of any type has been presented by Black Hills in support of its claims of exemption from the statutory provisions of the Kansas Open Records Act (“KORA”). (K.S.A. 45-215 et. seq.)

CURB’s “RESPONSE TO PETITION FOR RECONSIDERATION”

15. CURB correctly points out at Paragraph No. 8, that Black Hills does not dispute that the confidentially afforded Black Hills’ gas suppliers is confined to one year under its gas-supplier contracts. “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.” (**CURB Response at Paragraph No. 8**).

16. Requestor agrees and supports this CURB statement.

17. Requestor agrees with and supports the CURB position as stated in Paragraph No. 8 that the lack of a contract provision for confidential treatment of more than a year, strongly indicates that there was no expectation between the contracting parties that confidential treatment be accorded to the supplier invoices for a term that extended beyond March 2022.

18. Importantly, since there is no contractual confidential treatment beyond March 2022, Requestor states that the Kansas Open Records Act (“KORA”) requires that the party (Black Hills) claiming an exemption from disclosure of “Public Records,” prove by substantial competent evidence, its entitlement to the claimed exemption from public disclosure.

19. The “burden of proof” is on the party (Black Hills) claiming an exemption for the KORA statutory requirement that all “Public Records” be available for inspection by the public (K.S.A. 45-215 et. seq.)

20. As noted in CURB’s Paragraph No. 9, Black Hills has designated the supplier invoices as “trade secrets” under Kansas law, and therefore exempt from public disclosure. Black Hills contends that disclosure of the supplier invoices of February 2021 would somehow affect Black Hills’ ability to compete for low-cost natural gas supplies in the future and that suppliers would refuse to contract with Black Hills if the suppliers’ invoices of February 2021 were made public.

21. CURB correctly points out that this alleged harm to Black Hills is based on speculation. Requestor agrees with this analysis of CURB.

22. As noted by CURB at Paragraphs No. 9 and 10, there are no specific facts to support the Black Hills' contention that disclosure of the supplier invoices of February 2021 would somehow affect Black Hills' ability to compete for low-cost natural gas supplies in the future:

“CURB cannot ascribe such an intent upon gas suppliers merely based upon allegations made to date.” **(CURB Response at Paragraph No. 10)**

“CURB cannot see a clear nexus between disclosure of the subject invoices and Black Hills' subsequent inability to secure low-cost gas supplies.” **(CURB Response at Paragraph No. 11.)**

23. Requestor supports the CURB position that without specific facts to support this contention of Black Hills – that company has failed to meet its burden of proof that would entitle it to an exemption from KORA.

24. CURB further states: “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 the information.” **CURB Response, at Paragraph No. 12.)**

25. Requestor is in full agreement with CURB. Requestor restates that the Commission's Order dated October 12, 2023, (i) misapplied the statutory requirements of KORA, (ii) was not supported by substantial competent evidence, and (iii) should be reconsidered and order the requested “Public Records” be promptly provided for public inspection in compliance with KORA.

Respectfully submitted,

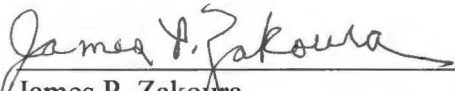
/s/ James P. Zakoura

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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 *Response of Requestor to the "Response to Petition for Reconsideration" of the Citizens' Utility Ratepayer Board*, 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 3rd day of November 2023.



Notary Public

My Appointment Expires:



CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of November 2023, the foregoing *Response of Requestor to the “Response to Petition for Reconsideration” of the Citizens’ Utility Ratepayer Board*, was electronically filed with the Kansas Corporation Commission and that one copy was delivered electronically to all parties on the service list as follows:

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